

so as to find a reasonable field of operation which preserves the force and effect of each statute, it seems clear that a reposessor licensed pursuant to §§493.01-493.27, *supra*, must first receive authorization from the legal owner or mortgagee of the property before proceeding to repossess said property. Upon obtaining such authorization, the reposessor should comply with the statutory requirements for obtaining a writ of replevin (§§78.01-78.21, *supra*).

073-286—August 15, 1973

### PAWNBROKERS

#### RECOVERY OF STOLEN PROPERTY

To: K. C. Alvarez, Chief of Police, Ocala

Prepared by: A. S. Johnston, Assistant Attorney General

#### QUESTIONS:

1. Is a pawnbroker a "buyer in the ordinary course of business" within the meaning of §671.201, F. S., of the Uniform Commercial Code?
2. How may §705.06, F. S., apply to the recovery of property from pawnbrokers?
3. May §§671.201(9) and 705.06, F. S., confer upon a police department the power to seize stolen personal property from a pawnbroker?
4. What legal process is required to seize stolen property from a pawn shop whenever it is not necessary to enter a suit for said property?
5. What legal process is required to seize stolen property from another county or state from the pawn shop and return it to the law enforcement agency handling the theft of said property in the other county or state?
6. To whom is the property returned after the trial is over or after the case is closed if the seized stolen property is not used as evidence in court or if the case is not prosecuted: the pawn shop or the person from whom it was stolen?
7. Does the owner of a pawn shop have any legal right to withhold possession of stolen property from the rightful owner and to demand as a condition to delivery of possession that the rightful owner pay the pawn broker's pledge for the amount advanced to the pledgor?
8. Does the owner of a pawn shop have any legal recourse against any person other than the person who wrongfully pawned the stolen property when the property is lawfully seized by a law enforcement agency?

#### SUMMARY:

Seizure of stolen property found in the hands of a pawnbroker who is to be charged with a crime must be pursuant to the law of search and seizure as it now exists in this state. Property in the hands of pawnbrokers which has been stolen by a third party and either sold or pledged to the pawnbroker in the ordinary course of his business and without his knowledge that the property was either stolen or embezzled can only be lawfully seized through lawful court process. Seized property in the hands of a trial court, used or in use as evidence in the trial, should be returned to the true owner by the trial court under such procedure or processes as determined by the trial court.

## AS TO QUESTIONS 1, 2, AND 3:

Pawnbrokers are specifically excluded as "buyers in the ordinary course of business" within the meaning of the Uniform Commercial Code by §671.201, F. S.

Section 705.06, F. S., specifically includes not only the property subject to Ch. 705, F. S., but also the property which is the subject of Chs. 706 and 707, F. S. Chapter 705 specifically relates to wrecked derelict goods, abandoned motor vehicles, or other personal property; Ch. 706 relates to wrecked cotton, lumber adrift, or boats and vessels adrift; Ch. 707 relates to stray animals. While there are no specific cases in Florida relating directly to this point, I am of the opinion that there is nothing in these three enumerated chapters which would relate or cause the operation of these chapters to become effective in the recovery of property wrongfully in the hands of the pawnbroker.

Responding specifically to your question as to whether these identified sections of the Florida Statutes (§§671.201(9) and 705.06) confer upon the police department the authority to seize stolen personal property from a pawn shop, I must answer in the negative. The authority for a law enforcement officer to seize stolen property, wrongfully in the hands of a person other than the rightful owners thereof, is derived from the general and statutory law of this state relating to searches and seizures.

## AS TO QUESTION 4:

In responding to this question, it is necessary to first establish whether or not the pawnbroker is being charged with a crime. In the event the pawnbroker is to be criminally charged, then the seizure of such property must take place under the law of search and seizure as it now exists in this state. In the event the pawnbroker is not to be charged with such crime but is in the lawful possession of property that is determined to have been stolen by a third party and either sold or pledged to the pawnbroker in the ordinary course of business and without the knowledge of the pawnbroker that said property was either stolen or embezzled, then such property can only be lawfully seized through court process. It has been held by the courts of our state that the licensing and the regulation of the business of pawn brokering is an exercise of a constitutional police power. [See] 24 Fla. Jur. *Pawnbrokers and Money Lenders* §§3 and 4. Pawnbrokers were required to keep a complete and true record of all transactions and make monthly reports to the sheriff of these business operations by §§205.434 and 205.442, F. S., until April 21, 1972. These sections of the Florida Statutes were repealed on that date by Ch. 72-306, Laws of Florida. It was the purpose of Ch. 72-306 to confer on local government the regulation and taxation of occupations, professions and businesses. Due to the repeal of §§205.434 and 205.442, there is now no state regulation requiring a complete record of all transactions by pawnbrokers or the right of the police or peace officer to inspect the same unless such regulation or right of inspection is now conferred by city or county ordinances.

## AS TO QUESTION 5:

Stolen property found in the hands of an innocent, bona fide purchaser for value should only be reached and seized by sufficient legal process, such process to vary in each case as required by law.

## AS TO QUESTION 6:

In response to this question, your attention is directed to the provisions of §811.201, F. S., which relates to the return of property to the rightful owners of stolen items. This statute, in a strict interpretation, is limited to stolen money or motor vehicles being held as evidence. I must take notice, however, of the recent statement of the Supreme Court in *Garmire v. Red Lake* 265 So.2d 2 (Fla. 1972), wherein the court said at p. 5:

We take note of F. S. Section 811.201, F.S.A., which provides certain

procedures for the disposition of money or a motor vehicle that is "being held by state, county or municipal officials as evidence." While unfortunately *F. S. Section 811.201, F.S.A.*, is not sufficiently broad to cover all situations where items of evidence are held in custodia legis and are sought to be recovered by the true owner, it does serve as an example of procedures which the criminal courts may fashion within their inherent powers to provide necessary procedures and processes for the recovery of evidentiary items held by them. (Emphasis supplied.)

Following this direction of the court, I advise you that it is within the inherent power of the trial court to provide the necessary procedure and process for the return of evidentiary items held by them. A former attorney general has responded to the procedure required under §811.201 in AGO 058-277 (copy attached), and while this opinion was written prior to *Garmire* I find no reason to recede from the statements contained therein except as the opinion might be amended by the language of the Supreme Court in *Garmire*.

#### AS TO QUESTIONS 7 AND 8:

Both of these questions are too general in nature—void of sufficient facts—to permit a reasonable research and determination of the question of law involved. They both relate to the rights of persons claiming a right of ownership or possession to personal property. The ultimate determination of such questions can only be determined in a proper adversary proceeding in a court of law upon presentation and determination of the facts as they exist in each respective case. I therefore must decline to express an opinion thereon.

073-287—August 15, 1973

#### PUBLIC DEFENDER

#### REPRESENTATION OF INDIGENT—COMMITMENT AS ALCOHOLIC

To: Jack O. Johnson, Public Defender, Bartow

Prepared by: Enoch J. Whitney, Assistant Attorney General

#### QUESTION:

May the public defender be appointed to represent an indigent person whose involuntary commitment as an alcoholic is being adjudicated pursuant to §396.102, F. S.?

#### SUMMARY:

In the absence of statutory provisions to the contrary, a public defender is without authority to accept an appointment to represent a person whose involuntary commitment as an alcoholic is being adjudicated under §396.102, F. S.

Section 396.102, F. S., provides for involuntary commitment of alcoholics. Section 396.102(9), provides, in pertinent part:

The person whose commitment or recommitment is sought shall be informed of his right to contest the application, to be represented by counsel at every stage of any and all proceedings relating to his commitment and recommitment, and to have counsel appointed for him by the court or provided for him by the court, if he wants the assistance of counsel and is financially unable to obtain counsel. If the court believes that the person needs the assistance of counsel, the court shall appoint counsel for him regardless of his wishes. . . .