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September 6, 1989

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ATTORNEY GENERAL OPINION NO. 89- 111

Robert J. Watson
Overland Park City Attorney
City Hall
8500 Santa Fe Drive
Overland Park, Kansas 66212

Re: Constitution of the United States--Amendment
Fourteen--Due Process Clause

Synopsis: Property seized from a pawnbroker and held by law enforcement officials for use as evidence in a criminal proceeding is regarded as being in custodia legis and subject to the court's order as to the disposition thereof in the same proceeding. If the property is identified as being stolen, it is the duty of the court and the state to see that the property is restored to its rightful owner at the earliest opportunity. However, the due process rights of the pawnbroker must be respected, Wolfenbarger v. Williams, 774 F.2d 358 (10th Cir. 1985), and the Court should provide the pawnbroker with notice and opportunity to be heard before releasing property to the apparent owner. Cited herein: K.S.A. 1988 Supp. 22-2512.

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Dear Mr. Watson:

You request an opinion as to what extent a city must provide due process to a pawnbroker once the city's police department has legally seized stolen property from the pawnbroker. You

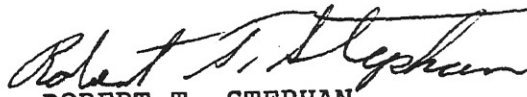
ask that we assume, in responding to your question, that the seized property is identified as stolen property; used as evidence to convict the thief; and is no longer needed for evidentiary purposes.

While K.S.A. 1988 Supp. 22-2512 controls the disposition of property seized from an accused, State v. Winter, 238 Kan. 530, 532 (1986), there is no statute which relates to disposition of property seized from a pawnbroker. Under such circumstances, the following rule set forth in State v. Gunzelman, 200 Kan. 12, 13 (1967), appears to be applicable:

"While the matter of disposing of property taken or detained as evidence in a criminal case is governed by statute in most states, there is authority that even where there is no statute, the court before which the action was brought, or is pending, has inherent power to direct that such property be returned to the owner, delivered up to his order, or otherwise disposed of when it is no longer required for the purposes of justice. It has been held that property or money lawfully in the hands of law enforcement officials for use as evidence in a criminal proceeding is regarded as being in custodia legis and subject to the court's order as to disposition thereof in the same proceeding, rather than in a separate action."

Under the above-quoted rule, the Court before which the criminal action is heard should return stolen property used as evidence to the apparent owner as soon as possible. However, in our judgment the due process rights of the pawnbroker must be respected, Wolfenbarger v. Williams, 774 F.2d 385 (10th Cir. 1985), and the Court should provide the pawnbroker with notice and an opportunity to be heard before releasing property to the apparent owner.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

Written testimony of the Kansas Pawnbrokers Association regarding Senate Bill No. 46 2019 Session concerning recovery of misappropriated property in the possession of a pawnbroker.

The Kansas Pawnbrokers Association does not support Senate Bill 46 due to the following reasons:

The proposed legislation fails to protect **all parties** and could harm other customers and businesses. The Attorney General's opinion dated September 6, 1989 #89-111 deals with determining property ownership in possession of a pawnbroker.

What is a Pawn Transaction?

A "pawn" is another word for a loan. Customers present an item to borrow money against and wish to return later to retrieve the item and pay a small service fee after repaying the loan. Customers presenting items sign the ticket indicating that they are the owner of the property or are authorized by the owner. Pawnbrokers do not actually get a clear title to an item in pawn until the pawn is a total of three months delinquent. Until then, the title of the property belongs to the pawn customer. However, the pawnbroker is responsible to maintain possession and condition of the property unless and until title passes.

Specific language causing concern:

1. *"contains a particularized description of the property"*
 - a. Description alone can be ambiguous. In most weeks, a normal pawn shop can see anywhere from 10-30 of the identical game system, and a scratched up Xbox One looks like any other scratched up Xbox One. This law doesn't necessarily require a serial number.
 - b. An average pawn shop can see 50-300 and even more pieces of jewelry each week. I have had customers swear that a ring in the case is theirs only to find out that it was in our possession long before the theft occurred.
 - c. We see countless numbers of identical DeWalt Tools and the like.
 - d. A description alone doesn't always mean that the item in question belongs to a victim. This should not be put in the hands of a business to deal with in the presence of an already upset customer threatening court action and disrupting the entire business on a situation that requires some form of due diligence before action is taken.
 - e. This requires a business owner/manager to stop what they are doing to investigate the situation and determine if the request is "reasonable".
2. *"the claimant is the true owner of the property"*
 - a. Claiming to be the "true owner" and being the "true owner" is something that should only be decided by a court after all interested and affected parties have been notified and given the opportunity to state their claim.
 - b. Affected parties can include: 1) a victim 2) the original customer loaning or pawning the item 3) the pawnbroker 4) an insurance company 5) a rental company 6) a person known by the seller who sent them in to dispose of the property, etc.
 - i. Example: Homeowner/business file claims with an insurance company, house cleaning company, health care provider. Insurer or responsible business pays

the claim. Later discovers that we had the item. Now comes after a pawnbroker to reclaim property that is no longer in our possession because it was “determined” wrongly who the “true owner” was.

3. **Current law already provides a method for determining who the true owner of an item is.**
 - a. When a case is prosecuted, the prosecuting attorney can request the judge order the property to be returned to the rightful owner and providing all parties an opportunity to be heard, or an order of restitution.
 - b. Prior to prosecution, **the District or Prosecuting Attorney can request a “Property Hearing” allowing all interested parties to be heard.**
4. Different jurisdictions prefer to handle property claims differently.
 - a. Some jurisdictions prefer but don’t require the pawnshop to be reimbursed so to avoid a lengthy list of victims for restitution.
 - b. Some jurisdictions prefer that the property be placed “On Hold” until the case is settled, and time has been allowed for all claimants to come forward.
 - c. Some jurisdictions prefer that the property be “Confiscated” until the case is settled, and time has been allowed for all claimants to come forward.
 - d. Requiring all jurisdictions to operate in a procedural manner may not be convenient for the entire State of Kansas and all cities, towns, counties.
 - e. Creating a Statute on the basis of “convenient” versus one that is Constitutionally consistent are not always synonymous.
5. Permitting a Pawnbroker under threat of court action to relinquish their property or someone else’s property is bad policy.
 - a. This would require pawnbrokers under threat of court action to turn over not only their property, but 1) possibly someone else’s family heirloom, 2) someone’s laptop containing personal information, 3) someone’s cell phone with private conversations. These are unintended consequences that should be considered.
6. Copying language from a law from another State doesn’t mean that their law is Constitutional or right for the State of Kansas.
 - a. The lack of foresight of one State shouldn’t determine State Law for another State.

Kansas Pawnbrokers

1. Require identification on all property sold or pawned.
2. Upload or report transactions as required by local ordinances.
3. Precious Metals transactions are held in an unaltered state for at least 10 days.
4. Most pawnbrokers capture video of their transactions aiding in prosecution.
5. Pawnbrokers willingly cooperate with law enforcement when needed and requested.
6. 80% of pawn transactions are redeemed by the person who pawned the item.
7. Less than 1% of items that pass through a pawnshop are ever subject of misappropriated property.

For these reasons, we respectfully request that Senate Bill 46 be rejected. Thank you for your consideration.