

OP. NO. 05-047

GAME, INLAND FISHERIES AND BOATING: WILDLIFE AND FISH LAWS – HUNTING AND TRAPPING.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – DANGEROUS USE OF FIREARMS OR OTHER WEAPONS.

Game laws establish procedure used to forfeit firearm used by person convicted of shooting firearm in or across road or street. Court convicting such violator may declare forfeiture of firearm used in crime. Commonwealth's attorney of county or city wherein forfeiture was incurred must file an information to enforce forfeiture in his circuit court.

The Honorable Phillip C. Steele
Commonwealth's Attorney for Giles County
August 19, 2005

Issues Presented

You ask what statute is applicable to the forfeiture of a firearm subsequent to a conviction under § 18.2-286, which prohibits shooting in or across a road or a street. In particular, you ask whether a court may enter an order disposing of the firearm pursuant to § 19.2-386.29, which applies generally to criminal offenses, or § 29.1-521.2(A), which applies specifically to violations of § 18.2-286. Should § 29.1-521.2(A) be the applicable statute, you ask whether you must file an information pursuant to Chapter 22 of Title 19.2, which governs the enforcement of forfeiture. Finally, if so, you ask in which court should such proceeding be initiated.

Response

It is my opinion that § 29.1-521.2(A), with very rare possible exceptions, establishes the procedure to be used in forfeiting a firearm used by a person convicted of violating § 18.2-286. It is further my opinion that the court convicting the violator has the discretion to declare a forfeiture of the firearm used in the crime. Finally, it is my opinion that the Commonwealth's attorney of the county or city wherein the forfeiture was incurred must file an information to enforce that forfeiture in the circuit court of his county or city.

Applicable Law and Discussion

Section 29.1-521.2(A) provides that:

Any firearm, crossbow or bow and arrow used by any person to hunt any game bird or game animal in a manner which violates § 18.2-286 may, upon conviction of such person violating § 18.2-286, be forfeited to the Commonwealth by order of the court trying the case. The forfeiture shall be enforced as provided in Chapter 22 (§ 19.2-369 et seq.) of Title 19.2. The officer or other

person seizing the property shall immediately give notice to the attorney for the Commonwealth. [Emphasis added.]

Section 19.2-386.29 provides that:

All pistols, shotguns, rifles, dirks, bowie knives, switchblade knives, ballistic knives, razors, slingshots, brass or metal knucks, blackjacks, stun weapons and tasers, and other weapons used by any person in the commission of a criminal offense, *shall, upon conviction of such person, be forfeited to the Commonwealth by order of the court trying the case.* The court shall dispose of such weapons as it deems proper by entry of an order of record. Such disposition may include the destruction of the weapons or, subject to any registration requirements of federal law, sale of the firearms to a licensed dealer in such firearms in accordance with the provisions of Chapter 22 (§ 19.2-369 et seq.) of this title regarding sale of property forfeited to the Commonwealth. [Emphasis added.]

Chapter 22 of Title 19.2, §§ 19.2-369 through 19.2-386, governs the enforcement of forfeitures. Section 19.2-369 authorizes a Commonwealth's attorney "for the county or city wherein the forfeiture was incurred [to] file in the clerk's office of the circuit court of his county or city an information in the name of the Commonwealth against" any property or money seized as forfeited for a violation of any provision of the *Code*. Additionally, § 19.2-369 states that this process shall apply when a "different mode of enforcing the forfeiture is not prescribed."

As you indicate in your request,¹ a 1989 opinion of the Attorney General (the "1989 Opinion") construing § 29.1-524 has concluded that the mandatory forfeiture of weapons and vehicles used in spotlighting deer must be accomplished through condemnation under Chapter 22.² The material difference between § 29.1-524 and § 29.1-521.2(A) is that under § 29.1-524, weapons "shall" be forfeited; while § 29.1-521.2(A) states that any firearm used in violating § 18.2-286 "may" be forfeited. I see no reason why the general reasoning of the 1989 Opinion should not be applicable to your inquiry. As here, the question involves a choice between the application of a specific statutory remedy and a general one.

"It is firmly established that, 'when one statute speaks to a subject generally and another deals with an element of that subject specifically, the statutes will be harmonized, if possible, and if they conflict, the more specific statute prevails.'³ Thus, when faced with a choice between a specific and a general statute, the former is controlling.⁴ When statutes provide different procedures on the same subject matter, the general gives way to the more specific.⁵ Given the history of the recodification described in the 1989 Opinion, it is my opinion that the procedures in § 29.1-521.2(A) regarding forfeitures of firearms used in violating § 18.2-286 must be followed. Under the plain language of § 29.1-521.2(A), the use of the word "may" indicates that the forfeiture of any firearm is discretionary with the convicting court. If such a forfeiture is ordered, however, the forfeiture is enforced pursuant to Chapter 22.⁶

You indicate that cases brought under § 29.1-521.2 generally are tried in general district court. I find no provision in Chapter 22 or any other authorizing the transfer of forfeiture proceedings from circuit court to general district court. Thus,

jurisdiction for the filing of such proceedings remains in the circuit court where the conviction occurred.⁷

Conclusion

Accordingly, it is my opinion that § 29.1-521.2(A), with very rare possible exceptions, establishes the procedure to be used in forfeiting a firearm used by a person convicted of violating § 18.2-286. It is further my opinion that the court convicting the violator has the discretion to declare a forfeiture of the firearm used in the crime. Finally, it is my opinion that the Commonwealth's attorney of the county or city wherein the forfeiture was incurred must file an information to enforce that forfeiture in the circuit court of his county or city.

¹A request by a Commonwealth's attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." Va. Code Ann. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).

²See 1989 Op. Va. Att'y Gen. 187, 188-89.

³Gas Mart Corp. v. Bd. of Supvrs., 269 Va. 334, 350, 611 S.E.2d 340, 348 (2005) (quoting Commonwealth *ex rel.* Dep't of Corr. v. Brown, 259 Va. 697, 706, 529 S.E.2d 96, 101 (2000)).

⁴2001 Op. Va. Att'y Gen. 59, 60

⁵2000 Op. Va. Att'y Gen. 94, 95

⁶You suggest that "firearm" as used in § 29.1-521.2(A) may not be inclusive of all weapons that may be used to commit violations of the statute. Section 29.1-100 defines the term "firearm" for purposes of Title 29.1 to mean "any weapon that will or is designed to or may readily be converted to expel single or multiple projectiles by the action of an explosion of a combustible material." In the unlikely event that a weapon does not meet this broad statutory definition, the forfeiture provisions of § 29.1-521.2(A) would not apply to violations thereof. In that event, the general automatic forfeiture provision of § 19.2-386.29 could be invoked, and the court trying the case would enter an order of disposition. See 1982-1983 Op. Va. Att'y Gen. 174, 174-75 (interpreting § 18.2-310, predecessor to § 19.2-386.29).

⁷This may be at least in part because Chapter 22 applies to proceedings for the condemnation of various types of property such as motor vehicles. It also provides for trial by jury. See Va. Code Ann. § 19.2-380 (LexisNexis Repl. Vol. 2004). Jury trials are not available in general district courts. See 1977-1978 Op. Va. Att'y Gen. 281, 282.

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