

# ***Police Dep't v. Thompson***

OATH Index No. 356/10, mem. dec. (Sept. 3, 2009)

Petitioner proved its entitlement to retain 2006 Nissan pending the outcome of a civil forfeiture proceeding. Vehicle ordered retained.

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## **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**POLICE DEPARTMENT**

*Petitioner*

*- against -*

**JASON THOMPSON and JOSEPH N. WATERMAN**

*Respondents*

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### **MEMORANDUM DECISION**

**JOAN R. SALZMAN**, *Administrative Law Judge*

Petitioner, the Police Department (“Department”), brought this proceeding to determine its right to retain a vehicle seized as the alleged instrumentality of a crime pursuant to section 14-140 of the Administrative Code. Respondent Jason Thompson is the registered owner of the vehicle (Pet. Ex. 7), which was seized following his arrest and that of Robert Robinson and Anton Fredericks. This proceeding is mandated by *Krimstock v. Kelly*, 99 Civ. 12041 (HB), third amended order and judgment (S.D.N.Y. Sept. 27, 2007) (“the *Krimstock* Order”). *See generally Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), *cert. denied sub nom. Kelly v. Krimstock*, 539 U.S. 969 (2003); *County of Nassau v. Canavan*, 1 N.Y.3d 134 (2003).

Joseph N. Waterman, Mr. Thompson’s father, and the holder of title to the vehicle (Pet. Ex. 7), did not appear at the hearing. Mr. Thompson appeared as the sole claimant and was represented by counsel, who stated on the record that he also represents Mr. Waterman and filed a notice of appearance on behalf of both men. Their attorney submitted the hearing demand form and listed his law firm as the person accepting the hearing; Mr. Waterman signed for receipt of the form as claimant, and Mr. Thompson was also listed on the form as the defendant (Pet. Ex. 1). There was no dispute that Mr. Thompson has standing under the *Krimstock* Order, paragraph 6, as the registered owner, named party, and now the sole claimant.

The vehicle in issue is a 2006 white Nissan Pathfinder SUV, Property Clerk Voucher No. B212371V, which was seized by the Department following Mr. Thompson's arrest for criminal possession of a loaded firearm in the second degree, criminal possession of a defaced weapon in the third degree, and for criminal possession of marijuana in the fifth degree (Penal Law §§ 265.03(1)(b), 265.02(3) and 221.10(1))(Pet. Exs. 1, 4-5, 8), and Mr. Fredericks' arrest on similar felony and misdemeanor charges (Pet. Ex. 9). The Department received the demand for the hearing on July 29, 2009, and trial was originally scheduled for August 20, 2009 (after Mr. Waterman excluded August 1-19, 2009) (Pet. Exs. 1, 2). The matter was twice adjourned on consent, and was rescheduled to August 31, 2009, at which time the hearing went forward. The Department relied on documentary evidence and upon testimony from respondent. Respondent's counsel argued, among other defenses, that the search of the vehicle was illegal and that the Department's documentation was inadequate to meet its burden of proof. Respondent testified, both upon being called as a witness by the Department and on his own behalf. For the reasons set forth below, I find that the Department is entitled to retain the vehicle.

### ANALYSIS

The Department seeks to retain the seized vehicle as the instrumentality of a crime pending the outcome of its civil forfeiture action. To do so, the Department bears the burden of proving three elements by a preponderance of the evidence: (i) that probable cause existed for the arrest of the vehicle operator; (ii) that it is likely that the Department will prevail in a civil action for forfeiture of the vehicle; and (iii) that it is necessary that the vehicle remain impounded to ensure its availability for forfeiture and to protect the public safety. *Krimstock* Order ¶ 3; *Canavan*, 1 N.Y.3d at 144-45. The due process rights at issue here require an "initial testing of the merits of the City's case," not "exhaustive evidentiary battles that might threaten to duplicate the eventual forfeiture hearing." *Krimstock*, 306 F.3d at 69-70; *see Canavan*, 1 N.Y.3d at 144-45 n.3 (hearing is intended to establish "the validity, or at least the probable validity, of the underlying claim") (citation omitted). The Department has met its burden.

There was no objection to the admission of the documentary exhibits in this case, and I have included Petitioner's Exhibits 1-9 and Respondent's Exhibits A and B in the record. According to the Department's Omniform arrest and complaint reports, respondent and Messrs. Robinson and Fredericks were arrested at 1:30 a.m. on July 8, 2009. Those reports state that at

the time and place of the arrest, on Saint Johns Place in Brooklyn, “pursuant to a M/V [motor vehicle] stop, Def. [Thompson] was found to be in possession of a loaded defaced firearm, w/a quantity of marijuana” (Pet. Exs. 4 and 5). The Criminal Court complaint contains more detail. Arresting Officer Arnold B. Murphy swore in the complaint:

The Deponent is informed by Police Officer Matthew T Granahan Shield No. 26635, of 077 Command, that, at the above time an[d] place, which was public, the informant observed the defendant in possession of a quantity of marihuana that was visible to passers-by in that the informant did recover said quantity of marihuana from center console of defendant’s vehicle and from the defendant’s person.

The Deponent is further informed by the informant that by the defendant’s own admission the defendant said that the vehicle was the defendant’s vehicle.

Deponent is further informed by the informant that the informant has had professional training as a police officer in the identification of marihuana, has previously made arrests for the criminal possession of marihuana, has previously seized marihuana, which was determined to be such by a chemical analysis by the Police Department laboratory, and the substance in this case possesses the same physical characteristics as such previously chemically identified substance and by professional training and experience as a police officer, is familiar with common methods of packaging marihuana and the ziplock bag used to package the substance in this case is a commonly used method of packaging such substance.

Based on the foregoing, in informant’s opinion, the substance in this case is marihuana.

The deponent is further informed by the informant that the defendant had constructive possession of .380 Beretta semi-automatic pistol, which was loaded with 7 rounds in the magazine, in that the informant recovered the said pistol from the glove-box of the defendant’s vehicle.

(Pet. Ex. 8). The same arresting officer swore to a similar Criminal Court complaint, duplicating all but the second quoted paragraph above and the allegation of drugs found on respondent’s person. The Criminal Court complaint against Mr. Fredericks differed from the complaint against respondent in that it did not say he owned the car; rather, it specified that Mr. Fredericks was driving the vehicle in which the marijuana was in plain view in the car he was driving, and that he was also in possession of the loaded gun recovered from the glove box. In that complaint, Officer Murphy stated in addition that the same informant, Officer Granahan,

informed him that: “the informant observed the defendant [Fredericks] drive a motor vehicle in the wrong direction on a roadway with signs posted for one-way traffic” (Pet. Ex. 9).

Hearsay is admissible in this proceeding pursuant to paragraph 3 of the *Krimstock* Order (ALJ may consider “such hearsay and other evidence as that judge may consider reliable”), and section 1-46 of OATH’s rules of practice. I find the Department’s documentation reliable and credible.

Respondent testified that he was not in the car at the time of the arrest, and it was undisputed that his father, Mr. Waterman, who holds the title to this vehicle, was not involved in the arrest and was not with respondent or his friends on July 8<sup>th</sup>. Respondent had to move out of his apartment and is staying with friends and family, including his father. On the night of July 8<sup>th</sup>, respondent testified, he was at Club 95, a bar on Franklin Avenue in Brooklyn. He said he walked to Club 95. He described his white Nissan as a Pathfinder, which he said he had parked on Park Place. He and his friends left the bar, lingered “for a little while” outside the bar, talked and “had a few laughs.” “Some of the guys wanted to go to Club Essence.” Respondent had met a “young lady” inside the bar and he wanted “to stay and hang out with her.” At this point, respondent’s friend of 15 years, Robert Robinson, asked if he could borrow respondent’s car. Respondent and Mr. Robinson, his auto mechanic, have become “a lot closer” in the last seven years. Respondent gave Mr. Robinson the spare keys to the Nissan and Robinson and “they” (implying Robinson and some other fellow(s)) went to get the car. Respondent testified that the car was parked within walking distance of Club 95. His friends left. Respondent stayed with the woman he had met and began walking with her down St. Johns Place, making a left from Franklin Avenue. They had walked three-quarters of the block when respondent noticed his car was coming towards him, and police were behind his car and were pulling it over. He walked over and told a police officer his name and said, “This is my vehicle.” The officer asked him for identification, and respondent said he had none, but the officer could “check me.” The officer “ran” his name. Messrs. Fredericks and Robinson exited the vehicle according to police directions and the officer told the three men to wait while the officer did a “quick check” of the vehicle. The officer found respondent’s wallet in the vehicle. Respondent admitted that he had marijuana on him when he was arrested. The next thing he knew, the three men were under arrest, all in handcuffs. He claimed he was not told why he was arrested until he got to the police station.

Respondent stated at the hearing, “definitely, definitely, without a question,” that he was not in the vehicle at the time of the arrest. Asked by Department counsel if he owned the weapon found in the vehicle, respondent pleaded the Fifth Amendment. On questioning by his attorney, respondent testified that he could not fit in the vehicle; that there was no room for any passengers in the back seat because he had moved out on July 1<sup>st</sup>; that he was in the process of moving; and that he had “a lot of” his personal items in the car, like a shopping cart, a car seat and “two big bags of clothes.” He could not recall what else was in the car (“a few other items”), but he did see a police inventory of the contents of the car. According to respondent, there was room only for the driver and the passenger. Respondent testified that he observed that night that Mr. Fredericks was driving and Mr. Robinson was sitting in the passenger seat. Respondent made a point of stating that he retained his set of keys to his car, yet he did not keep his wallet on his person when he was in the bar. Notably, he testified that police found his wallet in the car. This statement cast some doubt on his assertion that he was not in the car that night. Respondent testified that he did not give permission to police to search the car, and that he and his two friends were outside the car, according to police directions, at the rear of the vehicle by the trunk during the search.

Respondent denied knowing, before allowing his friends to use his car, whether they had any contraband in their possession. He described the console in the Nissan as “a big round square box,” an armrest about 10 to 12 inches deep inside, with a cover that opens by use of a button lock. Comparing it to an 8½ x 11-inch piece of paper, respondent testified that the console was about a foot long and about 8 inches wide. He indicated that he could rest his arm on it.

With respect to the first prong of the *Krimstock* Order, I find that the Department has established probable cause for the arrest of the driver, Mr. Fredericks. The “probable cause” inquiry includes an examination of both reasonable suspicion for the initial stop and probable cause for the arrest. *Police Dep’t v. Burnett*, OATH Index No. 1363/04, mem. dec. (Mar. 11, 2004), *aff’d*, *Property Clerk v. Burnett*, Index No. 04/400955, NYLJ, May 19, 2005 (N.Y. Sup. Ct. July 19, 2004), *aff’d*, 22 A.D.3d 201 (1st Dep’t 2005); *Police Dep’t v. Haskell*, OATH Index No. 484/08, mem. dec. (Oct. 4, 2007) (as part of the Department’s burden of proving probable cause for the arrest, it is required to establish how the arresting officers “lawfully came to learn of the vehicle’s illegal contents”) (citing *Burnett*, Index No. 04/400955, NYLJ, May 19, 2005,

at 4, 10-11). A police officer may stop and approach an automobile pursuant to a routine traffic check “to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime.” *People v. Robinson*, 97 N.Y.2d 341, 351 (2001) (citation omitted).

It is clear that the police properly stopped Mr. Fredericks for driving the wrong way on a one-way street. *See, e.g., People v. Rodriguez*, 167 A.D.2d 122 (1<sup>st</sup> Dep’t 1990) (initial stop for serious traffic violation of driving the wrong way down a one-way street; officers properly asked occupants to exit the vehicle and officer saw a sword-like knife on the seat; upon observing the knife, officers had the right to make inquiry and detain defendant for purposes of identification); *Police Dep’t v. Thomas*, OATH Index No. 1447/08, mem. dec. at 5-6 (Jan. 24, 2008); *Police Dep’t v. Johnson*, OATH Index No. 2211/04, mem. dec. at 4 (July 15, 2004). I find that there was probable cause for the arrest of Mr. Fredericks, the driver, based upon the marijuana Officer Granahan observed in plain view, and that there was probable cause to support the initial seizure of the car. “The presence of a controlled substance in an automobile ... is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found.” Penal Law § 220.25(1); *Boyd v. Constantine*, 81 N.Y.2d 189, 196 (1993). The same is true for the arrest of Mr. Fredericks for felony criminal possession of a weapon in the second and third degrees, under Penal Law sections 265.03(2) and 265.02(1) (Pet. Ex. 9). As noted below, I find that the search of the vehicle was legal, and Mr. Fredericks had presumptive possession, under Penal Law sections 220.25(1) and 265.15(3), of the contraband, the illegal drugs and the loaded gun, as an occupant of the car. The traffic stop having been lawful and the drugs having been in plain view, the search yielding the gun was justified, and there was probable cause for Mr. Fredericks’ arrest. *See generally People v. Carter*, 60 A.D.3d 1103 (3d Dep’t 2009).

Although respondent challenged the police documentation as contradictory and unclear, I find that there is not necessarily an inconsistency between Officer Murphy’s statement in the Omniform arrest and complaint documents that respondent was “in possession” of the gun and his statements in the Criminal Court complaints that respondent had “constructive possession” of the gun and Mr. Fredericks had “possession” of it. “Constructive possession” can be understood as a more precise or legalistic description than “possession.” I find further that Officer Murphy’s description of the visibility of the marijuana plausibly and adequately shows for purposes of this

preliminary inquiry that Officer Granahan could see and was trained to identify marijuana, that he approached the vehicle because he had properly stopped the driver for driving the wrong way on a one-way street, and that when he approached, the marijuana was visible to passers-by and likely was on the console. Respondent described the console as about 12 inches by 8 inches, and stated that it could function as an arm rest. While respondent's attorney challenged the word "from" in the description of Officer Granahan's recovery of a quantity of marijuana "from [the] center console," by arguing that "from" could only mean from *inside* the console, I find that a more likely and natural a reading of this paragraph of the Criminal Court complaint is as follows: Officer Granahan stopped the SUV for a traffic violation and approached the vehicle, where he observed a quantity of marijuana in plain view *on* the console.

Respondent's counsel argued that there was no probable cause for the arrest because respondent was not in the car. However, for purposes of this civil administrative proceeding, even assuming I credit his testimony (which is not free from doubt) on that score, whether respondent owner was in the car or not is not by itself dispositive in this *Krimstock* interim retention hearing because there was ample probable cause for the arrest of the driver, Mr. Fredericks, and that arrest alone supports seizure and interim retention of the vehicle under the *Krimstock* Order, paragraph 3. The Department has proved the first prong of *Krimstock*, probable cause for the arrest of the operator of the vehicle.

As for the second element, likelihood of success in a civil forfeiture action, I find that the Department has shown that the car was "used as a means of committing crime or employed in aid or in furtherance of crime." Admin. Code § 14-140(e)(1). To establish the second element of the *Krimstock* Order, petitioner must show that it is likely to prevail at a civil forfeiture proceeding. The purpose of this element is to ensure that those punished are wrongdoers, not innocent parties. *Property Clerk v. Pagano*, 170 A.D.2d 30, 35 (1st Dep't 1991) ("The courts have long held that a statute which holds a person liable for having permitted or suffered a certain activity may only be enforced against one who knew, or should have known, that the activity would take place"). Where the vehicle's owner is different from the driver who was arrested and from whom the vehicle was seized, as is the situation here, the owner can assert an "innocent owner" defense. Thereafter, the Department would bear the burden of proving that the vehicle's owner is not an innocent owner. *Id.* To meet this burden, the Department would have to show that the owner "permitted or suffered" the illegal use of the property; that is, that he

knew, or should have known, that his vehicle would be used in furtherance of a crime. *Id.* at 34-36 (owner was innocent where there was no evidence that driver had previously engaged in criminal behavior involving a vehicle, despite driver's non-criminal traffic violations).

Respondent's counsel did not argue specifically that respondent was an innocent owner, but he did ask respondent whether he knew what his friend, Mr. Robinson, carried with him into respondent's car when he borrowed it. Respondent denied knowing whether Mr. Robinson or Mr. Fredericks had contraband before loaning Mr. Robinson the car. Based on the record adduced here, I find that respondent did not squarely raise the innocent owner defense. *Property Clerk v. Pagano*, 170 A.D.2d 30, 36 (1<sup>st</sup> Dep't 1991); *Police Dep't v. Mason*, OATH Index No. 166/10, mem. dec. at 5 (July 28, 2009). Nonetheless, to the extent that it could fairly be said that respondent was invoking that defense, however, I find that the Department successfully met its burden under *Pagano* to disprove that respondent is an innocent owner, *Police Dep't v. Romero*, OATH Index No. 3255/09, mem. dec. at 4-5 (June 3, 2009), in that respondent took the Fifth Amendment when asked by Department counsel whether he owned the gun that was found in the glove compartment of his car. The Department requested that I draw a negative inference against respondent for his refusal to answer this question. Based upon precedents, I draw that inference and find that it is more likely than not that the gun did belong to respondent and that he knew the loaded gun was in his car when he allowed his friend to drive his car from bar to bar on the night of July 8<sup>th</sup> in Brooklyn. As noted by Judge Alessandra Zoragniotti:

We have drawn negative inferences against respondents who elect not to testify in retention proceedings. *See Police Dep't v. Mendoza*, OATH Index No. 1829/08, mem. dec. at 3 (Mar. 12, 2008); *Police Dep't v. Shim*, OATH Index No. 145/06, mem. dec. at 3 (Aug. 5, 2005). A pending criminal case is not a constitutional bar to the conduct of a civil or administrative proceeding based on the same underlying facts. *Police Dep't v. Lord*, OATH Index No. 942/08, mem. dec. at 5 (Dec. 6, 2007); *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"). Hence, in this proceeding, where respondent initiated the hearing and had control over its timing, yet sought to remain silent regarding the events surrounding his arrest, I am left to draw a negative inference from such silence, and accept the evidence presented in the light most favorable to petitioner. *Lord*, OATH 942/08 at 5; *Police Dep't v. Chan*, OATH Index No. 197/08, mem. dec. (Aug. 14, 2007).

*Police Dep't v. Sama*, OATH Index No. 2316/09, mem. dec. at 3-4 (Feb. 20, 2009); Prince, *Richardson on Evidence* § 5-102 (Lexis 2008) (“in a civil action an unfavorable inference may be drawn from a party’s assertion of the privilege against self-incrimination”). As noted by Judge Richard in *Mason*, “This is a civil proceeding to determine the Department’s right to retain the vehicle; it is not a criminal action in which the defendant has a right to remain silent. While the burden of proof remains with the Department, the owner has some burden to produce a factual assertion of innocence.” *Mason*, OATH 166/10, mem. dec. at 5.

Respondent’s claim that he was not in the car at the time of arrest, that he loaned the car to friends and walked to and from the bar, only to happen upon them driving his car, with the police behind them (the car “was coming towards us”) a block from the bar as police were pulling his friends over, was not entirely plausible in light of his testimony that he had been in the bar, but did not have his wallet or identification on him when police asked him to identify himself. He testified that police found his wallet and I.D. inside his car. In addition to his wallet’s location in his car, the fact that respondent was charged with constructive possession in the Criminal Court complaint tends to show that he was an occupant of the car at the time of the arrest, given that all the occupants of an automobile are presumed under the law to possess any firearm present in the auto at the time such weapon is found. Penal Law § 265.15(3); *Police Dep't v. Chase*, OATH Index No. 185/08, mem. dec. at 4-5 (July 23, 2007). There is no explicit indication in the police records of whether respondent was in the car or walked over to it. It is possible that he was not in the car and that the events unfolded as he said they did. Giving him the benefit of the doubt in the absence of any rebuttal of his testimony by the Department, and assuming I credit his testimony for purposes of this truncated proceeding, he and Mr. Fredericks are charged with felony possession of a loaded gun in his car, which respondent readily identified to police as a vehicle he owns. Based upon the record here, I find it more likely than not that respondent knowingly permitted his car to be used to transport his own loaded weapon.<sup>1</sup> Thus, he is not an innocent owner.

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<sup>1</sup> It is of no consequence here that Mr. Fredericks wound up driving the car respondent had loaned to Robinson and Fredericks, and possibly others, for their use by handing the keys to Mr. Robinson. He clearly knew Mr. Fredericks and called him Anton during the hearing. His testimony was that “some of the guys” who were with him at Club 95 wanted to go to Club Essence with Mr. Robinson; respondent knew they were going to move the car and its contents, and he let them use it to go to another club. He knew that Mr. Robinson was not alone and could easily have passed the keys to Mr. Fredericks.

Respondent's counsel moved orally at the hearing at the close of the Department's case to dismiss the Petition, challenging the search of the vehicle. He sought to exclude the evidence of the gun, relying upon the recent Supreme Court decision in *Arizona v. Gant*, 129 S. Ct. 1710 (Apr. 21, 2009). I reserved decision on the motion, and upon full consideration of the record and the precedents, hereby deny the motion to dismiss. The Court in *Gant* ruled, in a case involving an arrest for driving with a suspended license, that a warrantless search of an automobile is permissible incident to a recent occupant's arrest "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 1723-24. The Court reasoned that "after the arrestee has been secured and cannot access the interior of the vehicle," he or she does not jeopardize the officers' safety or have the ability to destroy evidence. Where, as here, there is no issue about reaching distance, there remains a category of permissible search: "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Id.* at 1714; *Mason*, OATH 116/10, mem. dec. at 7; *Police Dep't v. Morton*, OATH Index No. 3260/09, mem. dec. at 7 (July 6, 2009). The Court in *Gant* held that the second type of search, where evidence of the offense for which the defendant was arrested might be found, may include the search of the vehicle "and any containers therein." 129 S. Ct. at 1719.

*Gant* has been interpreted in recent Federal District Court decisions in the Second Circuit. The "automobile exception" to the Fourth Amendment warrant requirement, enabling police to search a vehicle based on evidence of the offense underlying the arrest, appears to be undisturbed by *Gant*. *United States v. Almaraz*, Slip Op., No. 09 Cr. 159 (SAS), 2009 U.S. Dist. LEXIS 54138 (S.D.N.Y. June 26, 2009). Under that exception, police may conduct a warrantless search of a car, which is "readily mobile," if there is probable cause to believe the vehicle contains contraband or other evidence of a crime. *Id.* at \*4-\*5 (officers acted on a tip and saw what appeared to be drugs in plain view around and being moved between a tractor-trailer and car; *Gant* did not alter conclusion that search of tractor and car did not violate the Fourth Amendment). "*Gant* does not alter the broader automobile exception to the warrant requirement." *Id.* at \*6. *Accord United States v. Kennedy*, Slip Op., No. 3:09-cr-00055 (VLB), 2009 U.S. Dist. LEXIS 69665 (D. Conn. Aug. 10, 2009), at \*8 (under *Gant*, an officer may search a vehicle when the arrestee is within reaching distance of the vehicle *or* when it is

reasonable to believe the vehicle contains evidence of the offense of arrest); *United States v. Parker*, Slip Op., No. 8:09-CR-0162 (GTS), 2009 U.S. Dist. LEXIS 69056 (N.D.N.Y. Aug. 7, 2009), at \*23-\*27 (under *Gant*, because defendants were arrested for drug offenses, there was an evidentiary basis for searching the vehicle). The search of the glove compartment here was justified under the automobile exception. *People v. Cruz*, 7 A.D.3d 335 (1<sup>st</sup> Dep't 2004) (after observing marijuana in plain view on floor behind driver's seat, officers clearly had reason to believe automobile might contain other drugs and were justified in searching the car, including the glove compartment, where they found and removed a loaded gun); *Police Dep't v. Baker*, OATH Index No. 1258/07, mem. dec. (Mar. 7, 2007) (warrantless search was found lawful in *Krimstock* case where driver ran a stop sign, officer smelled strong odor of marijuana in car, and recovered a loaded firearm from the armrest).

The two recent cases where this tribunal excluded a gun found during the search of an automobile post-*Gant*, *Mason* and *Morton*, are distinguishable from this case because in both those cases there was nothing in plain view that would have shown a criminal offense that might have supported search of the vehicles. In *Mason*, as in *Gant*, the driver was arrested for driving with a suspended license. In *Gant*, police searched the car and found cocaine in the pocket of the driver's jacket in the back seat. He was out of the car and handcuffed and could not reach inside the vehicle for a weapon that would endanger police. The Court excluded the cocaine. Judge Richard in *Mason* applied the same reasoning to find that there was no reason for police to believe they would find further evidence of the crime for which the driver was arrested, driving with a suspended licence. The search of the vehicle was held to be illegal. In *Morton*, there was no indication in the Department's arrest and complaint reports or in the Criminal Court complaint as to why police had even stopped the respondent. This case is different. The police in this case saw the marijuana in plain view and it was reasonable to believe under *Gant* that evidence of the offense of drug possession might be found in the vehicle. The search here was legal under the second prong of *Gant*.<sup>2</sup>

Respondent's counsel argued that the related criminal case against his client is pending in Criminal Court in Kings County, that it is on the felony dismissal calendar for December 30, 2009, and that respondent is excused from appearing on that date. These facts were not disputed

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<sup>2</sup> There was no showing that the officers were in danger from the defendants, who, according to the only testimony, from respondent, were cooperating and assembled at the rear of the vehicle at the request of the officers.

and the status of the case from “Webcrims,” the electronic court data available online from the official New York State Courts website, was stipulated into the record (Resp. Exs. A and B). However, the fact that the felony charges in the pending criminal matter might be dismissed in December has no bearing on the outcome of this proceeding. Even if the criminal charges were dismissed, “the outcome of the underlying criminal charges is irrelevant to the outcome of the civil forfeiture proceeding.” *Property Clerk v. Ferris*, 77 N.Y.2d 428, 430 (1991). “Because of the differing degree of proof, even acquittal would not necessarily prevent a subsequent forfeiture under the [Administrative] Code’s provisions.” *Id.* at 431.

Given the failure of any innocent owner defense embedded in respondent’s testimony here, I find that the record established the use of respondent’s car as the instrumentality of the crimes of criminal possession of a weapon (felony charges) and criminal possession of marijuana in a public place in the fifth degree (a misdemeanor).<sup>3</sup> Petitioner has therefore established the second prong, that it is likely to prevail at a civil forfeiture proceeding.

Finally, petitioner must establish that the return of the vehicle would pose a heightened risk to the public safety. *See, e.g., Police Dep’t v. McFarland*, OATH Index No. 1124/04, mem. dec. at 2-3 (Feb. 24, 2004) (citing *Canavan*, 1 N.Y.3d at 144). This tribunal has held repeatedly that possession of a loaded firearm in a vehicle is the type of crime that poses a heightened risk to the public and justifies retention of the vehicle. *See Police Dep’t v. Smith*, OATH Index No. 539/08, mem. dec. (Nov. 7, 2007) (finding heightened risk to public safety where respondent was charged with possession of a weapon in the second degree); *Police Dep’t v. Chan*, OATH Index No. 197/08, mem. dec. (Aug. 14, 2007) (possession of loaded firearm in a vehicle is sufficient evidence of threat to public safety to justify retention of the vehicle); *Police Dep’t v. Van Rossum*, OATH Index No. 2115/07, mem. dec. (June 12, 2007) (finding heightened risk to public safety where respondent was charged with possession of loaded weapon); *Police Dep’t v. Balseca*, OATH Index No. 103/07, mem. dec. (July 25, 2006) (finding a heightened risk to public safety where respondent, who had no criminal history and was gainfully employed, pleaded guilty to a felony firearm charge); *Police Dep’t v. Cruz*, OATH Index No. 1643/06,

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<sup>3</sup> Respondent argued that the Department failed to prove that the gun was operable. This is only a preliminary hearing about the interim retention of the car under the *Krimstock* Order, and is not meant to duplicate the full forfeiture hearing in Supreme Court or the criminal trial. This issue of the condition of the gun and its operability is more appropriately left to a plenary hearing in the courts. I decline to find in this challenge a basis to release this vehicle at this juncture.

mem. dec. (Apr. 25, 2006) (retaining vehicle based upon plea of guilty to criminal possession of a loaded weapon in the fourth degree).

Respondent's loaning his car to his close friend with a loaded firearm inside, for purposes of traveling from bar to bar in the middle of the night, in the circumstances here -- that another friend along for the ride took the wheel and drove it the wrong way down a one-way road -- was extremely reckless. The presence of illegal drugs in the car and on respondent's person presents an aggravating consideration. I find that returning this vehicle to respondent would pose a heightened risk to the public safety.

The Department has established the third prong of the *Krimstock* Order.

**ORDER**

The Department is entitled to retain the vehicle *pendente lite*.

Joan R. Salzman  
Administrative Law Judge

September 3, 2009

APPEARANCES:

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