

Police Dep't v. Byrd

OATH Index No. 648/10, mem. dec. (Sept. 23, 2009)

Petitioner not entitled to retain vehicle where it failed to serve owner with timely notice of his right to a hearing as required by the *Krimstock* Order.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
POLICE DEPARTMENT
Petitioner
- against -
ELVIS BYRD
Respondent

MEMORANDUM DECISION

FAYE LEWIS, *Administrative Law Judge*

Petitioner, the Police 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. The respondent, Elvis Byrd, owns the seized vehicle (Pet. Ex. 6). His son, Elvis A. Byrd, Jr., was driving the vehicle when it was seized (Pet. Ex. 5). 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).

The vehicle, a 2002 Infiniti (property clerk voucher B200707V), was seized by the Department on July 2, 2009, in connection with the arrest of Mr. Byrd, Jr., for criminal possession of a controlled substance in the third degree, with intent to sell (Pet. Exs. 1, 2, 4). Following receipt of respondent’s demand for a hearing on September 1, 2009, the Department scheduled a hearing for September 21, 2009. The late September hearing date was in accordance with respondent’s statement that he would not be available for hearing earlier in the month (Pet. Ex. 7e).

Respondent seeks dismissal of this proceeding on the basis that the Department failed to serve timely notice of his right to this retention hearing in person and by mail, as required by the *Krimstock* Order. For the reasons set forth below, the petition is dismissed and the vehicle ordered released.

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 by a preponderance of the evidence that: (i) probable cause existed for the arrest pursuant to which the vehicle was seized; (ii) it is likely that the Department will prevail in a civil action for forfeiture of the vehicle; and (iii) it is necessary that the vehicle remain impounded either to protect the public safety or to ensure its availability for a judgment of forfeiture. *Krimstock* Order, ¶ 3; *Canavan*, 1 N.Y.3d at 144-45. Although respondent contended that the Department failed to establish these elements, I need not reach the issue, because the Department has failed to show that it complied with the notice requirements of the *Krimstock* Order.

The *Krimstock* Order requires the Department to provide notice of the right to a retention hearing in two distinct ways:

Notice of the right to a hearing will be provided at the time of seizure by attaching to the voucher already provided to the person from whom a vehicle is seized a notice, in English and Spanish, as set forth below. A copy of such notice will also be sent by mail to the registered and/or titled owner of the vehicle within five business days after the seizure.

Krimstock Order, ¶ 4. The Order itself provides the form which the Department is required to serve upon the driver and owner. The form, captioned “Notice of Right to Retention Hearing,” explains that “you are entitled to request a hearing to determine whether it is valid for the Property Clerk to retain the vehicle seized in connection with an arrest,” indicates that the form may be mailed to the Legal Bureau of the Police Department to request a hearing, and otherwise provides important information about the place, subject matter, and timing of the hearing. Order, ¶ 4.

We have held, consistently, that the notice requirement in the *Krimstock* Order is not “an empty formality” and “obligates the Department to provide dual notice - once at the time of arrest and again by mail.” *Police Dep’t v. Ruiz*, OATH Index No. 1440/07, mem. dec. at 3 (Mar. 27, 2007); *Police Dep’t v. Lugo*, OATH Index No. 2402/07, mem. dec. (July 31, 2007). The dual notice provision “does not afford the Department an either/or option.” *Police Dep’t v. Blyden*, OATH Index No. 2398/07, mem. dec. at 3 (July 25, 2007); *Police Dep’t v. Velez*, OATH Index No. 2076/07, mem. dec. (May 29, 2007); *Police Dep’t v. Caban*, OATH No. 107/07, mem. dec. at 3 (July 14, 2006).

The Southern District has declined to shift to the Police Department the *initial* burden of proof to show service of the notice of right to retention hearing (“the notice” or “the vehicle seizure form”), stating that it is the respondent’s obligation to raise the affirmative defense of lack of notice, *see Krimstock v. Kelly*, 506 F. Supp. 2d 249, 257-58 (S.D.N.Y. 2007). However, in so doing, federal judge Harold S. Baer, Jr., noted that the claimants’ “procedural rights are safeguarded . . . by their ability to raise a lack of notice defense in a *Krimstock* proceeding,” 506 F. Supp. 2d at 258, and that this tribunal has strictly construed the *Krimstock* notice requirements (citing *Police Dep’t v. Sica*, OATH Index No. 1139/06, at 5 (Jan. 26, 2006)). Following Judge Baer’s decision, we have held, “consistent with the federal court’s pronouncement, that once challenged, the Department must show that it did meet its service obligations.” *Police Dep’t v. Lee*, OATH Index No. 778/08, mem. dec. at 11-12 (Oct. 31, 2007) (noting need for the Department to “keep detailed records proving the two required types of service of notice of the driver’s and owner’s hearing rights”). *See also Police Dep’t v. Thomas*, OATH Index No. 1447/08, mem. dec. at 3 (Jan. 24, 2008) (in construing Judge Baer’s decision, noting that “the Police Department should be cognizant of the regularity with which challenges to service are made, and should come prepared to rebut such challenges, if necessary”); *Police Dep’t v. Williams*, OATH Index No. 3495/09, mem. dec. at 8-9 (July 6, 2009) (same); *Police Dep’t v. Velez*, OATH Index No. 2076/07, mem. dec. at 6 (May 29, 2007) (“When service is challenged, the Department bears the burden of proving its compliance with the notice requirements of the *Krimstock* Order”).

In this case, the driver, Mr. Byrd, Jr., did not testify at the hearing. Respondent testified credibly that he was in Florida at the time of his son’s arrest. He did not testify as to whether or not his son ever received the vehicle seizure form. Respondent did, however, testify that he

never received the requisite notice from the Police Department. He explained that about five weeks ago, he retained an attorney. At my request, petitioner presented the “notice of right to retention hearing” form that respondent submitted, in an envelope from his attorney’s office (Pet. Ex. 7a). On the top portion of the form, in the box for “acknowledgment of service,” the words, “This form was not served at seizure,” are typed. Although the top portion of the form provides, “For Police Department Use Only,” the form does not contain the signature, name, or identification number of the arresting officer, nor the voucher number, as also required by the form. It was apparent, therefore, that this form was not prepared by the Police Department, but completed by respondent with assistance from his attorney’s office.

It is questionable whether the mere submission of a form with the sentence, “This form was not served at seizure,” is sufficient to raise the affirmative defense that the vehicle seizure form was not served at the time of seizure. Usually, some type of testimony would be required in order to assert the affirmative defense. In any event, however, petitioner presented sufficient, albeit minimal evidence, it served the requisite notice upon Mr. Byrd, Jr. Specifically, petitioner presented a copy of the vehicle seizure form, which contains an acknowledgment of service section for the defendant/driver to acknowledge that he received the written notice of right to a retention hearing. The acknowledgement of service is filled out with the date, and time (July 2, 2009, at 1945 hours), and Mr. Byrd’s name is written in the space for “defendant’s name.” Although Mr. Byrd’s signature is not on the form, on the next line below, the box next to “defendant refused signature,” is checked (Pet. Ex. 7a). In the absence of credible, reliable testimony to the contrary, this is sufficient proof of service of the form upon Mr. Byrd, Jr., the driver.

The critical issue as to notice is whether petitioner mailed the vehicle seizure form to respondent, the owner of the vehicle, as also required by the *Krimstock* Order. Respondent denied ever seeing the notice until he retained an attorney in mid-August to recover his vehicle. Although undated, this form was not received by the Police Department until September 1, 2009, almost three months after respondent’s son’s arrest. I credited respondent’s assertion that he never received a vehicle seizure notice in the mail, which was consistent with his delay in requesting a hearing to get his car back. Petitioner stressed that the property clerk’s invoice (Pet. Ex. 5) contains notations that the registered owner received some type of notification of the seizure. The form contains a box with the pre-printed words “Registered Owner Notified By.”

In the box is typed "PO Raggi," who was the arresting officer. Officer Raggi's rank, shield number, precinct, and the date and time are also typed on the form. The form also contains a box with the pre-printed words, "How Notified." The box for "letter" is checked. The form is signed by the arresting/assigned officer. The signature is hard to read, so it is unclear whether it was made by Officer Raggi, or some other officer. Respondent testified that he never received this form. Petitioner argued that respondent must have received this form, because the form indicates that there was notification, and that it stands to reason that he must also have received the vehicle seizure form notifying him of his right to a retention hearing.

There are several difficulties with the petitioner's argument. First, the invoice itself refers to notification being made to the owner by "letter." It is unclear what precisely this letter said, and whether the invoice itself was mailed to the owner. Second, and more fundamentally, whether or not respondent received the invoice or a letter from the Property Clerk, petitioner presented absolutely no evidence that it ever mailed the "notice of right to a retention hearing" to respondent. It is the service of this *particular* form which is mandatory under the *Krimstock* Order. Petitioner acknowledged candidly that it lacked such proof. It did not present a copy of the vehicle seizure form that purportedly was mailed to the respondent. Nor did it present an affidavit of service indicating that such vehicle seizure form was timely mailed by the Police Department to the respondent. The vehicle seizure form which respondent submitted was a form which clearly was not prepared by the Police Department.

This tribunal has held that the Department must meet its strict obligations to serve timely notices under the *Krimstock* Order or face dismissal of its petition. *Williams*, 3495/09, mem. dec. at 8; *Ruiz*, 1440/07, mem. dec. at 3; *Lugo*, 2402/07 mem. dec. at 5; *Caban*, OATH 107/07, mem. dec (granting motion to dismiss for failure to serve notice of right to a retention hearing at the time of seizure); *Police Dep't v. Murray*, OATH Index No. 1631/06, mem. dec. (Apr. 25, 2006) (granting motion to dismiss where petitioner failed to serve timely notice by mail). Here, because the petitioner has failed to prove timely service by mail of the vehicle seizure form after respondent raised service as an affirmative defense, the vehicle must be released to respondent.

Since challenges to service are frequently made, the Department would do well to heed the admonition of Judge Salzman in *Lee*, OATH 778/08, mem. dec. at 11, that this case "highlights once again the need for the Department to routinize its recordkeeping with respect to service of the *Krimstock* notices." As Judge Salzman noted, this may include having form

affidavits of service ready to be completed at the time of seizure by the arresting officer, as well as having form affidavits of service by mail ready to be completed documenting service of the requisite notice by mail. *Id.*

ORDER

The petition is dismissed and the Department is ordered to release the vehicle.

Faye Lewis
Administrative Law Judge

September 23, 2009

APPEARANCES:

VASILIOS KOVOROS, ESQ.
MATTHEW RUSSO, ESQ.
Attorneys for Petitioner

DUANE C. FELTON, ESQ.
Attorney for Respondent