

Police Dep't v. Martinez

OATH Index No. 2118/11, mem. dec. (May 3, 2011)

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

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
POLICE DEPARTMENT
Petitioner
- against -
SOLIBER MARTINEZ
Respondent

MEMORANDUM DECISION

INGRID M. ADDISON, *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. Respondent, Soliber Martinez, who was operating the vehicle at the time of its seizure, is the vehicle's titled and registered owner (Pet. Exs. 1, 2, 3, 5, 6). This proceeding is mandated by *Krimstock v. Kelly*, 2007 U.S. Dist. LEXIS 82612 (S.D.N.Y. Sept. 27, 2007) (the "*Krimstock* Order"). *See generally Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002); *County of Nassau v. Canavan*, 1 N.Y.3d 134 (2003).

Petitioner seized respondent's vehicle, a 2008 Dodge Suburban, voucher number B331989, upon her arrest on October 31, 2010, for operating a motor vehicle while under the influence of alcohol or drugs, reckless driving and resisting arrest (Pet. Exs. 1, 2, 3). Following receipt of the respondent's demand for a hearing on April 1, 2011, the Department scheduled a hearing for April 11. At respondent's request, the hearing was adjourned to April 29, because her attorney was unavailable.

At the hearing, respondent testified on her own behalf and sought dismissal of the proceeding on grounds that the Department failed to serve timely notice of her right to this retention hearing in person and by mail. The Department relied on documentary evidence and

respondent's testimony. At the Department's request and with no objection from respondent, I kept the record open until the close of business on April 29, for it to submit proof that respondent was timely served with notice of her right to this hearing. Petitioner submitted the Vehicle Retention Form and a copy of the file jacket for this matter. I marked them as petitioner's exhibits 9 and 10, respectively.

As set forth below, I find that the Department failed to prove that it served respondent with notice as required by the *Krimstock* Order. Therefore, the petition is dismissed and the vehicle is ordered released.

PRELIMINARY MATTER

As an initial matter, respondent contended that she was not served with notice of her right to a retention hearing at the time of her arrest but provided no details as to the circumstances surrounding the arrest. Respondent testified only that she had had a fight with her ex-boyfriend, went to a bar in the Bronx and had a "couple" of drinks which she later qualified to be "four" to "five" beers within a short space of time. On her way back home, she was arrested. The criminal court complaint indicated that she was arraigned on charges of driving while under the influence of alcohol and reckless driving, and said to the arresting officer: "I drink a lot," but refused to submit to a chemical analysis (Pet. Ex. 3).

Respondent admitted that this was her second arrest for similar charges. The first occurred in August 2009, after she had been out with friends. Petitioner submitted the online complaint report for the August 2009 arrest. It indicated that on that occasion, respondent submitted to a chemical test which revealed a blood alcohol level of .191, more than twice the legal limit (Pet. Ex. 8). For both arrests, respondent was convicted upon pleading guilty to operating a motor vehicle while under the influence of alcohol, and driving while intoxicated, on February 7 and March 11, 2011, respectively. Respondent also admitted that her vehicle was seized for the previous arrest and it was eventually released to her in accordance with a stipulation that she executed with the Department.

The *Krimstock* Order sets forth detailed requirements regarding the place, subject matter, and timing of a retention hearing. If challenged, the Department bears the burden of demonstrating its compliance with those requirements. *Police Dep't v. Blyden*, OATH Index No.

2398/07, mem. dec. at 2 (July 25, 2007); *Police Dep't v. Sica*, OATH Index No. 1139/06, mem. dec., at 4 (Jan. 26, 2006). The Order includes the following unambiguous notice requirements:

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 which 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.

We have consistently held that “[p]roviding timely notice is not optional.” *Police Dep't v. Amaro*, OATH Index No. 317/08, mem. dec. at 2 (Aug. 21, 2007). “The purpose of the *Krimstock* hearings is to afford car owners rapid, truncated, preliminary, administrative hearings concerning the retention of their vehicles by the police pending the outcome of a more plenary civil forfeiture action.” *Police Dep't v. Williams*, OATH Index. No. 1759/07, mem. dec. at 5 (Apr. 12, 2007). “We have consistently held that the Department must meet its strict obligations to serve notices timely under the *Krimstock* Order.” *Amaro*, OATH 317/08 at 2; *See also Police Dep't v. Castro*, OATH Index No. 2719/10, mem. dec. (July 13, 2010) (proceeding dismissed where petitioner failed to serve notice at time of arrest); *Police Dep't v. Ogando*, OATH Index No. 1747/07, mem. dec. (May 16, 2007) (dismissal granted where the Department failed to prove that it served the *Krimstock* notices).

I find the documents submitted by the Department as proof that it timely served respondent with notice of her right to a retention hearing to be inadequate. First, the Vehicle Retention Form (Pet. Ex. 9) identifies respondent, the arresting officer, the date of the arrest, and a description of the vehicle seized. It contains a verification of service section that reads, “The undersigned verifies that on 10/31/2010 at 1841 hrs., I served the within NOTICE OF A RIGHT TO A RETENTION HEARING, on the defendant SOLIBER MARTINEZ, personally.” The arresting officer, Geceila Carrasquillo, did not sign the document. Below Officer Carrasquillo’s name is a box for a supervising or desk officer signature to verify service. That too was blank. Given these omissions, I find the Department’s proof that the arresting officer served respondent with notice of her right to a retention hearing as required by the *Krimstock* Order to be unconvincing. *See Police Dep't v. Lara*, OATH Index No. 886/10, mem. dec. at 4 (Oct. 14, 2009); *Police Dep't v. Figueroa*, OATH Index No. 1525/08, mem. dec. at 3 (Feb. 15, 2008).

Besides service of the notice at the time of arrest, the *Krimstock* Order obligates the Department to serve the titled or registered owner by mail within five business days after seizure of the vehicle. *Krimstock* Order, ¶ 4.

Respondent testified that she never received notice by mail. Rather, she received notice in March 2011, from her attorney. The notice that petitioner submitted into evidence indicated that the Department faxed the form to respondent's attorney's office on March 29, 2011, and received the completed request for a hearing three days later.

The Department submitted a file jacket as proof that it mailed respondent the notice within five business days (Pet. Ex. 10). The folder bore the voucher retention number for respondent's vehicle. It also contained the initials "JC" against most of the notations, and "JS" against the notation for "DATE NRTH MAILED." Presumably, this refers to the "Notice of Right to a Hearing." Otherwise, there was nothing to indicate how the notice was sent, to whom it was addressed, or the address to which it was directed.

This tribunal has previously noted that the case folder and its notations may be acceptable as a business record. See *Police Dep't v. Feliciano*, OATH Index No. 694/10, mem. dec. at 3 (Sept. 24, 2009); *Police Dep't v. Lord*, OATH Index No. 942/08, mem. dec. at 4, n. 2 (Dec. 6, 2007); *Police Dep't v. Figueroa*, OATH Index No. 391/08, mem. dec. at 3-4 (Oct. 2, 2007); *Police Dep't v. Amaro*, OATH Index No. 317/08, mem. dec. at 4 (Aug. 21, 2007). Notably in those cases, the focus was satisfaction of the dual notice requirement after it had been found that respondents had received actual notice through personal service at the time of arrest.

Acceptance of the file folder is not without concern, however. In *Lord*, then Chief Administrative Law Judge Roberto Velez recommended that the Department produce at the hearing affidavits of service created at the time of mailing, documenting the mailing of the second notice, in order to properly respond to procedural challenges on service. OATH 942/08 at 4. As such, in *Feliciano*, where the Department produced the file folder at trial and later submitted an affidavit of service by the administrative aide who had mailed the notice, as indicated on the file jacket, the notations on the jacket were corroborative. *Feliciano*, OATH 694/10 at 3. No such affidavit was presented here and I am disinclined to find that the presumption of regularity attaches and that the Department mailed respondent the notice within five business days after it seized her vehicle. However, that does not end the inquiry into service of the notice.

This tribunal has recognized very narrow exceptions to the dual notice requirement of the Order. In *Police Department v. Tripp*, OATH Index No. 148/06, mem. dec. (July 19, 2005), where the Department failed to prove that it had served respondent either at the time of arrest or by mail within five days, respondent's motion to dismiss was still denied. Because a hearing had been requested and completed within ten days of the arrest, Judge Donna Merris found that respondent had suffered no prejudice and deemed the Department's failure "harmless." It is indisputable that given the seizure of respondent's vehicle upon her arrest in October 2010, this hearing does not fall within the timeframe contemplated by the *Krimstock* Order. Thus, the Department's proof with respect to notice is insufficient.

The Department's failure to prove that it complied with the notice requirements of the *Krimstock* Order is regrettable because I find that respondent's track record of drinking and driving makes her a heightened risk to public safety and warrants retention of her vehicle.

Nevertheless, the *Krimstock* Order mandates dismissal of the petition where, as here, the Department fails to establish compliance with the notice requirements. See *Police Dep't v. House*, OATH Index No. 587/07, mem. dec. (Sept. 27, 2006) (dismissal granted where petitioner failed to serve respondent with timely notice of her right to a retention hearing at the time of her arrest and by mail within five days of her arrest); *Police Dep't v. Montes*, OATH Index No. 1372/06, mem. dec. (Mar. 14, 2006) (motion to dismiss granted where petitioner failed to serve respondent with notice at the time of the seizure and by mail within five business days thereafter).

This petition is therefore dismissed.

ORDER

The Department is ordered to release respondent's vehicle, forthwith.

Ingrid M. Addison
Administrative Law Judge

May 3, 2011

APPEARANCES:

BRIAN DERR, ESQ.

Attorney for Petitioner

MICHAEL DISCIOARRO, ESQ.

Attorney for Respondent