Police Dep't v. Davis

OATH Index No. 1297/15, mem. dec. (Dec. 26, 2014)

Respondent's motion to dismiss petition granted where petitioner failed to serve respondent with notice of right to request retention hearing at the time of the vehicle seizure as required. Vehicle ordered released.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
POLICE DEPARTMENT
Petitioner
- against -
DANA DAVIS
Respondent

MEMORANDUM DECISION

RAYMOND E. KRAMER, *Administrative Law Judge*

The petitioner, the Police Department, brought this proceeding to determine its right to retain a vehicle, a 2005 Ford Explorer (Property Clerk Invoice No. 2000354143, VIN No. 1FMZU73E85ZA69500), seized as the alleged instrumentality of a crime pursuant to section 14-140 of the Administrative Code (ALJ Ex. 1; Pet. Ex. 5A). Respondent, Dana Davis, is the titled and registered owner of the vehicle (Pet. Ex. 6) and was the driver at the time it was seized. 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), *cert. denied sub nom. Kelly v. Krimstock*, 539 U.S. 969 (2003); *County of Nassau v. Canavan*, 1 N.Y.3d 134 (2003).

Petitioner seized respondent's vehicle on August 28, 2014, in connection with her arrest for operating a motor vehicle while under the influence of alcohol (ALJ Ex. 1; Pet. Ex. 5A). Following receipt of respondent's demand for a hearing, petitioner scheduled the instant proceeding for December 23, 2014. Respondent, represented by counsel, appeared at the hearing and challenged petitioner's right to retain the vehicle until such time as a civil forfeiture hearing is commenced.

PRELIMINARY ISSUE

At the outset of the hearing, respondent moved to dismiss the proceeding and for an order directing petitioner to immediately return the car because petitioner failed to properly serve her with a notice of her right to request a retention hearing at the time the vehicle was seized or by mail thereafter, as required by the *Krimstock* Order.[1] Paragraph four of the Order is very specific about the notice requirements that petitioner must comply with upon seizing a defendant's vehicle. That paragraph provides that:

> 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, para. 4. Thus, the *Krimstock* Order imposes a dual notice requirement which we have held is not "an empty formality." *Police Dep't v. Ruiz*, OATH Index No. 1440/07, mem. dec. at 3 (Mar. 27, 2007); *see also Police Dep't v. Carino*, OATH Index No. 541/12, mem. dec. at 2 (Oct. 6, 2011). Rather, the notice requirement is designed "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). "When challenged, the Department must show that it strictly complied with its notice obligations." *Police Dep't v. Brooks*, OATH Index No. 1745/13, mem. dec. at 2 (Mar. 29, 2013) (citing *Police Dep't v. Harris*, OATH Index No. 1607/13, mem. dec. at 3 (Mar. 14, 2013).

The Order specifies the minimum contents of that notice, which must include a form which a respondent can submit to petitioner demanding a hearing seeking return of his vehicle, which hearing must then be scheduled within ten business days of receipt of the demand. *Krimstock* Order, para. 4. Petitioner has created the form, entitled "Notice of Right to Retention Hearing" (formerly entitled "Vehicle Seizure Form") (PD 571-1218), which contains in its upper

[1] Respondent's counsel moved to dismiss this matter at the close of petitioner's case, arguing that it was incumbent on petitioner to show compliance with the *Krimstock* notice requirements as an element of its direct case. Respondent's motion was denied at that time because "failure to provide notice in compliance with the *Krimstock* Order is an affirmative defense," on which respondent bears the burden. *Police Dep't v. Harris*, OATH Index No. 1607/13, mem. dec. at 3 (Mar. 14, 2013) (citations omitted); *see also Krimstock v. Kelly*, 506 F. Supp.2d 249, 257-58 (S.D.N.Y. 2007).

half the required notice, and in the bottom half, the form that a driver or owner can submit to demand a hearing. In addition to serving respondent with the Notice of Right to Retention Hearing at the time the vehicle is seized, the *Krimstock* Order requires petitioner to mail the form to the registered and/or titled owner of the vehicle within five business days of the seizure.

Respondent testified that she was not served with the Notice of Right to a Retention Hearing either in person or by mail. Respondent testified that she was placed in custody at the time of her arrest, at approximately 1:40 p.m. on August 28, 2014, and held until the following evening, August 29, 2014, before being released. During that time, she was not provided with any documents. Upon her release, she was handed a number of documents but none of them notified her of a right to a *Krimstock* hearing. She testified that she reviewed all of these papers carefully because she wanted to make sure that she followed the necessary steps to get her car back, and she was certain that the notice form was not included.

Respondent also testified that she did not receive any mailed notice of her right to a retention hearing. Instead, she claimed that she first learned of her right to request a retention hearing more than three months later, in early December 2014, after she obtained a release of her vehicle from the district attorney's office and went to the precinct to retrieve her car. At that time, she was informed that she would need to request a retention hearing in order to get her car back, and she was provided with the notice and the hearing demand form that had to be submitted (Pet. Ex. 1A). She was also told that she had to contact petitioner's forfeiture unit, which she did immediately by phone from the precinct. Respondent promptly filled out the hearing request form and submitted it to petitioner on December 12, 2014, as the time stamp on the submitted document reflects (Pet. Ex. 1A). Thereafter, petitioner scheduled the hearing for December 23, 2014, in compliance with the requirement that a hearing be scheduled within ten business days from receipt of respondent's demand.

Respondent argues that the notice requirements of the *Krimstock* Order should be strictly construed and that the proper remedy for petitioner's failure to serve a notice of the right to a retention hearing and a hearing demand form at the time of the vehicle seizure, and by mail thereafter, should be dismissal of the petition and an order directing the vehicle's release.

Petitioner contends that it complied with the notice requirements. In support of that claim, it submitted an Affidavit of Mailing of Notice of Right to Retention Hearing, which indicated that the notice was mailed to respondent on August 29, 2014, at a Hillside Avenue,

Glen Head address (Pet. Ex. 8). The attached envelope indicates that the notice was returned to petitioner marked by the post office as "no such number - unable to forward" on or about September 7, 2014 (Pet. Ex. 8). Petitioner provided no evidence to demonstrate that respondent was personally served with the required notice at the time of her arrest. Instead, petitioner argued that respondent's denial that she received notice was unreliable because she was so intoxicated at the time of her arrest that it was likely that she would not recall receiving it and/or that she may have lost or misplaced it.

I find that petitioner failed to adequately prove its compliance with the *Krimstock* dual notice requirement. I credited respondent's assertions that she never received the notice of her right to a retention hearing when she was arrested or at any time thereafter until early December 2014. While the evidence supports petitioner's claims that respondent may have been intoxicated at the time of her arrest (*see* Pet. Exs. 2, 7), respondent credibly testified that she received no paperwork while she was in custody. Instead, as was logical, she testified that she only received paperwork at the time of her release on August 29th. I credit her testimony that she carefully went through that paperwork at the time so that she would know what was required of her, and that no notice of a right to a retention hearing was included. Respondent was certainly not intoxicated at that point.

Moreover, respondent credibly testified that she was anxious to get her car back from the outset, as demonstrated by her efforts to get the district attorney's release and her subsequent trip to the precinct to retrieve the car. Once she learned at the precinct that she needed to request a vehicle retention hearing, she acted promptly to contact the forfeiture unit and to submit the required demand for such hearing. Respondent had no clear reason to refuse to acknowledge service of the retention hearing notice and demand form or to ignore the form or delay action on it if it had actually been served on her earlier. Rather, the length of the delay between her arrest and the request for a hearing is consistent with her claims that she never received the required notice. *See Brooks*, OATH 1745/13, at 4.

Most importantly, petitioner failed to offer evidence to contradict respondent's claims of no personal service of the notice. This tribunal has previously relied on documentary evidence, such as the Vehicle Seizure Form (now entitled Notice of Right to Retention Hearing), to demonstrate required personal service. *See, e.g., Police Dep't v. Melendez*, OATH Index No. 1520/06, mem. dec. at 3 (Apr. 5, 2006) (finding evidence sufficient to show that respondent was

served with notice of retention hearing). Yet no such documentation or other evidence was provided here. Petitioner's insinuations that respondent may have been too intoxicated to remember does not suffice. Once respondent credibly testified that she was never personally served with the Notice of Right to Retention Hearing, the burden shifted to petitioner to demonstrate otherwise, which it failed to do. *Krimstock v. Kelly*, 506 F. Supp.2d 249, 257-58 (S.D.N.Y. 2007); *see also Police Dep't v. Byrd*, OATH Index No. 648/10, mem. Dec. (Sept. 23, 2009). .

There is no dispute that respondent never received mail service of the notice. While petitioner timely mailed the notice to respondent on August 29th, it was mailed to a Hillside Avenue, Glen Head address where respondent testified that she was no longer living at the time. The address was listed on her driver's license, as well as in the arrest report, her criminal history information and the property clerk invoices (Pet. Exs. 2, 4, 5A, 5B). Respondent, however, claimed that she provided officers with a Port Washington address, and the DMV abstract obtained by petitioner on the date of respondent's release shows that the car is registered to her at a Port Washington post office box address (Pet. Ex. 6).

Mail service to respondent's last known address of record has been held to be sufficient to meet mail service requirements, even though respondent may have relocated. *See Brooks*, OATH Index No. 1745/13, at 3-4 (compliance found where Department properly mailed the notice to the address where respondent registered his car, although respondent did not receive such notice because he had relocated). Whether the mail service in this case was sufficient need not be decided, given my finding that dual notice is required and that personal service of the notice on respondent at the time of her arrest never occurred.

Because petitioner failed to prove that it complied with the dual notice requirement of the *Krimstock* Order, it must release the vehicle. *Brooks*, OATH 1745/13 at 4 (ordering release of vehicle where petitioner proved adequate notice via mail, but failed to prove personal service); *Police Dep't v. Blackwell*, OATH Index No. 164/13, mem. dec. at 6-7 (Aug. 21, 2012) (ordering release of vehicle where the Department did not personally serve notice at the time of arrest).

Accordingly, respondent's motion to dismiss the petition is granted.

ORDER

The Department is hereby directed to return the seized vehicle to respondent forthwith.

Raymond E. Kramer
Administrative Law Judge

December 26, 2014

APPEARANCES:

NICHOLAS GAUS, ESQ.
JOHN CESTARO, ESQ.
Attorneys for Petitioner

THE LEGAL AID SOCIETY
Attorneys for Respondent
BY: STEVEN B. WASSERMAN, ESQ.