

Matter of Lewis v Messner

2011 NY Slip Op 30031(U)

January 4, 2011

Supreme Court, New York County

Docket Number: 400633-10

Judge: Joan Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Madden
Justice

PART 11

James Lewis
Robert F. Messmer, Assistant
Commissioner, of the NYCPD, Property
clerk, of the NYCPD

INDEX NO. 400633-10
MOTION DATE _____
MOTION SEQ. NO. 801
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this ^{application} motion to/for Article 78 relief

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ^{application is decided} motion in accordance with the annexed Memorandum Decision
Order + Judgment

UNFILED JUDGMENT

no judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 11B)

Dated: January 4, 2011 _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

-----X

In the Matter of the Application of
JAMES LEWIS,

Index No. 400633-10

Petitioner,

-against-

ROBERT F. MESSNER, Assistant Commissioner of
the New York City Police Department and PROPERTY
CLERK, of the New York City Police Department,

Respondents.

For A Judgment Pursuant to Article 78
Of the Civil Practice Laws and Rules

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
11B).

-----X

JOAN MADDEN, J.:

In this Article 78 proceeding, petitioner James Lewis ("Lewis"), who is pro se, seeks the return of property seized from petitioner prior to his arrest. Respondents oppose the petition, which is granted to the extent set forth below.

Background

According to the Property Clerk's invoices, on May 15, 2008 and May 19, 2008, Detective Yvonne Leon of the New York City Police Department's Major Case Squad seized from Lewis various items of property and classified them as "Investigatory" under Property Clerk's invoices P002313, P002358, P002361, P002363, P002364, and P002360 (hereinafter "the subject property").¹ According to respondents, Lewis was arrested by Detective Leon on July 17, 2008, and charged with violating New York Penal Law Sections 155.40, Attempted Grand Larceny in the Second Degree; 190.80, Identity Theft in the First Degree; 170.10 Forgery

¹The subject property includes, *inter alia*, approximately \$1,200, a walkie talkie, CD's, DVD's, and clothing. The circumstances under which Detective Leon seized the property are unclear. Lewis alleges that he was arrested on May 15, 2008, while the attorney for respondent states in his affirmation that Lewis was arrested on July 17, 2008 pursuant to a Supreme Court arrest warrant.

in the Second Degree; 155.35 Grand Larceny in the Third Degree; 190.26(1), Criminal Impersonation in the First Degree; 190.26(2), Criminal Impersonation in the Second Degree; and 155.30, Grand Larceny in the Fourth Degree. On March 26, 2009, Lewis pleaded guilty to two counts of violating New York Penal Law Section 190.80, Identity Theft In the First Degree, and was sentenced on May 28, 2009 to consecutive terms of 4 to 8 years.

On June 9, 2009, Lewis filed a motion with the Criminal Court in Richmond County seeking the return of the subject property, which was opposed by the Richmond County District Attorney's Office. By decision and order dated July 13, 2009, Justice Robert J. Collins of the Supreme Court, Richmond County denied Lewis' motion, writing that the motion "lacks any basis in statutory or common law in both its form and chosen forum," and that Lewis failed to provide an affidavit with sworn allegations of fact" (hereinafter "the Criminal Court decision").

On August 4, 2009, an inquiry was made on behalf of Lewis with the New York City Police Department's Property Clerk for the subject property, and the Property Clerk issued an acknowledgment of the demand. Upon receiving an inquiry, the Property Clerk contacted Detective Leon to determine the status of the subject property. In memorandum dated August 11, 2009, Detective Leon changed the classification of the subject property from "Investigative" to "Arrest Evidence."

By letter dated September 10, 2009, Sergeant Janine M. Spector of the New York City Police Department Legal Bureau, Civil Enforcement Unit, informed Lewis that the demand made on August 9, 2009 was improper as it was made without a District Attorney's release. He was also advised that he would need to correct this deficiency within 270 days by providing either a District Attorney's release or a supervising District Attorney's statement refusing to grant such a release. On September 17, 2009, Lewis wrote to the District Attorney for Richmond County

seeking a release.² By letter dated September 24, 2009, Assistant District Attorney David Frey responded that his office would not be issuing a release to him, writing that “because of your multiple convictions for fraud related crimes and identity theft, without proof the items are yours and were not obtained through fraudulent means and were not purchased by funds obtained by you through fraudulent means, we will be unable to release these items to you.” He did not indicate whether he was a supervising district attorney. On October 7, 2009, Lewis presented the letter to the Property Clerk.

By letter dated November 2, 2009, respondent Messner, advised Lewis that the demand for the subject property was being denied “based on the Decision of the Supreme Court of the State of New York of Richmond County...and the District Attorney refusing to grant releases to obtain requested property.” Lewis then sought to appeal the November 2, 2009 denial but received no response from respondents.

On March 8, 2010, Lewis commenced this proceeding challenging respondents’ refusal to release his property. Lewis argues that there has been no adjudication that the subject property was related to any crime and that the subject property is not arrest evidence as it was not in his possession at the time of his arrest. Furthermore, Lewis argues that as he made a timely demand for the subject property, and respondents failed to bring a forfeiture proceeding within 25 days of the demand as required by Administrative Code §14-140, they can no longer bring such a proceeding.

In opposition to the petition, respondents assert that they are bound by the Criminal Court decision, denying Lewis’ motion for the return of the subject property, and therefore precluded

²A copy of the September 17, 2009 letter is not part of the record. However, the letter is referred to in other documents submitted to the court.

from returning the subject property to Lewis. Moreover, respondents argue that even if they were not bound by the decision, the time limitation for commencing forfeiture proceedings has not began to run since as the subject property was “arrest evidence” Lewis was required to provide a District Attorney’s release or supervising district attorney’s statement refusing to grant the release within 270 days of the Lewis inquiry under Title 38, Subchapter A of the Rules of the City of New York (“RCNY”). Moreover, respondents argue the letter from Assistant District Attorney Frey provided by Lewis on October 7, 2009, did not satisfy this requirement.

In reply, Lewis questions the decision to reclassify the subject property as arrest evidence only after he demanded its return. He also argues that none of the subject property were related to the terminated criminal proceedings. Additionally, Lewis notes that he was not informed of the procedure for obtaining a statement from the supervising district attorney refusing to release the property. Lewis also asserts that the Criminal Court decision does not bar the return of his property as it was made on procedural grounds..

Discussion

The time for the Property Clerk to commence a forfeiture action was established in accordance with McClendon v. Rosetti, 460 F2d 111 (2d Cir 1972), McClendon v. Rosetti, 369 Fsupp 1391 (SD NY 1974) and subsequent regulations codified in RCNY, Title 38, Chapter 12. In McClendon, the Second Circuit held that former section 435-4.0 (now 14-140) of the Administrative Code of the City of New York, relating to the duties and powers of the Property Clerk, violated due process “as applied to persons from whose possession money or property, other than contraband, has been taken or obtained, though such money or property was not related to any criminal proceeding, or, if it was so related such criminal proceeding had been terminated, or if the money or property had been needed as evidence in the criminal proceeding,

it was no longer needed for that purpose.” 460 F2d at 116. On remand from the Second Circuit the District Court “construed the Second Circuit’s decision as requiring that in the circumstances described in that decision (i.e. where the property is unrelated to a criminal proceeding, the criminal proceeding is terminated, or the property is not needed), the property clerk must initiate forfeiture or other proceedings to justify the continued detention of property.” DeBellis v. Property Clerk of the City of New York, 79 NY2d 49, 53 (1992), citing, McClendon v. Rosetti, 369 FSupp 1391.

Reflecting the concerns in McClendon, the RCNY distinguishes between property seized as arrest evidence, which may be needed to prosecute a crime, and other property. Specifically, under 38 RCNY § 12-36(a) ,

If a timely demand is made for the return of the property before the forfeiture proceeding is instituted, such proceeding shall be brought no later than (I) in the case of arrest evidence, 25 days after the claimant provides the property clerk with a district attorneys’ release, and (ii) in all other cases, as a district attorneys’ release is not required, within 25 days after the date of the demand.

The 38 RCNY § 12-31 defines the term “arrest evidence” to mean:

property taken from the person or possession of an individual prior to, simultaneous with, or subsequent to an arrest because of its relation to the matter for which the person had been arrested. No property shall be deemed arrest evidence prior to the person’s arrest. No property taken from a person and held by the Police Property Clerk merely for safekeeping shall be deemed arrest evidence.

Under 38 RCNY §12-35(d) where a timely demand for arrest evidence is made without a district attorney’s release, the property clerk may treat the demand as an inquiry and require a claimant within 270 days of the inquiry to provide a district attorney’s release or a supervising

attorney's release. Respondents' argument that their time to seek forfeiture of the subject property has not began to run centers on Lewis' purported failure to comply with this provision.

On the other hand, under 38 RCNY § 12-32(e)(3), "property other than arrest evidence" is defined as:

non-contraband property taken from an arrestee merely for safekeeping or taken from the person or individual prior to or simultaneously with or subsequent to an arrest which is unrelated to the matter for which the individual was arrested. Following receipt of demand for such property, the property clerk may return the property or [bring a forfeiture proceeding within 25 days of the demand].

In this case, the classification of the subject property was changed from "investigatory" to "arrest evidence" seven days after Lewis demanded the return of the subject property, and after the termination of criminal proceedings against Lewis, who was sentenced in May 2009.³

Notably, respondents provide no explanation for the change in classification of the subject property.

In any event, even assuming *arguendo* that the subject property can be fairly classified as "arrest evidence," the respondents' assertion that it is entitled to retain the property without bringing a forfeiture proceeding is without merit. As the Court of Appeals wrote in DeBellis v. Property Clerk of the City of New York, 79 NY2d at 57 :

The purpose of the *McClendon* procedure is to make it easier for claimants to retrieve property taken from them, not to place procedural obstacles in their way. The core principle of the Second Circuit's *McClendon* decision is that, although the government may seize and hold a citizen's property for a variety of reasons in connection with a criminal or related proceeding, once those proceedings have terminated or it is determined that the property is

³Of relevance here, under RCNY 38 §12-31, " termination of criminal proceedings shall mean the earliest of ... thirty-one days following the imposition of sentence."

not related to or is otherwise not needed from those proceedings, due process requires that the property be returned upon demand unless the government can establish a new basis for the detention.

Applying the above-stated principles, the Court of Appeals held that the failure of the claimant to obtain a District Attorney's release for arrest evidence did not justify the Property Clerk's refusal to return the property, when the criminal proceedings related to the property had been terminated and therefore "the government's presumptive right to detain the property no longer exists." DeBellis, 79 NY2d at 58. The court explained that it "would be inconsistent with the due process underpinnings of the [McClendon] decision to allow the District Attorney to block the return of the property by simply refusing to issue a release." Id., at 58-59

In this case, as in Debellis, the criminal proceeding has terminated. Moreover, while Lewis attempted to obtain a District Attorney's release, the request was denied on the grounds of Lewis' "multiple convictions for fraud related crimes and identity theft" and his failure to provide "proof the items are yours and were not obtained through fraudulent means and were not purchased by funds obtained by you through fraudulent means." These grounds are insufficient since under McClendon, after the criminal proceedings have terminated, the Property Clerk, and not the claimant, has the burden of demonstrating that a claimant does not lawfully own the seized property. DeBellis, 79 NY2d at 59.

Notably, while refusing to provide a release, the Office of the District Attorney in Richmond County failed to inform Lewis whether or not the denial was made by a supervising district attorney as required by the applicable regulation, so that Lewis, if necessary, could obtain review from "a supervising assistant district attorney, who shall not be an individual who made the initial determination, which review must be made provided to claimant within ten days of the

request for review.” 38 RCNY §12-34(e). The court concludes that under these circumstances, Lewis’ failure to provide a release from a district attorney, or a denial of a release from a supervising district attorney, does not bar him from obtaining the subject property in the absence of a showing by respondents of a valid reason for retaining it. DeBellis v. Property Clerk of the City of New York, 79 NY2d at 59.

Finally, contrary to respondents’ position, the Criminal Court decision denying Lewis’ motion for the return of the subject property on jurisdictional and procedural grounds does not bar them from returning the property to Lewis following the termination of the criminal proceedings against him.

Accordingly, the petition is granted to the extent of finding that Lewis has effectively demanded the return of the subject property, thus triggering respondents’ obligation under 38 RCNY § 12-36(a) to return the subject property or to commence a forfeiture proceeding within 25 days.

Conclusion

In view of the above, it is

UNFILED JUDGMENT
his judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk’s Desk (Room 11B)

ORDERED and ADJUDGED that the petition for Article 78 relief is granted to the extent of directing that within 25 days of the date of this decision, order and judgment, respondents bring a forfeiture proceeding or return the subject property to James Lewis or his authorized representative within such period; and it is further

ORDERED that in any forfeiture proceeding, proof based on personal knowledge must be provided explaining the basis for the original classification of the seized items as “Investigatory” and the change of classification to “Arrest Evidence.”

DATED: January 4, 2011


J.S.C.