

Vance v Luperon

2020 NY Slip Op 30648(U)

March 2, 2020

Supreme Court, New York County

Docket Number: 451854/18

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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CYRUS R. VANCE, JR., DISTRICT ATTORNEY
of the COUNTY OF NEW YORK, in his capacity as

Index No.: 451854/18

Plaintiff-Claiming Authority,

DECISION & ORDER

- against -

JOSE LUPERON, et al,

Defendants.

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HON. MARTIN SHULMAN, J.S.C.:

In this civil forfeiture action, plaintiff-claiming authority (DA or plaintiff) seeks default judgments against criminal defendants Jose Luperon (J. Luperon), Omar Luperon (O. Luperon), Xavier Vargas (Vargas), Robinson Collado (Collado), Julio Velazquez (Velazquez) and Francisco Medina (Medina) (collectively, criminal defendants). Plaintiff also seeks summary judgment as to non-criminal defendant Christian Herrera (Herrera). The criminal defendants have failed to answer the complaint or otherwise appear in this action and have failed to oppose this motion. Herrera has appeared in this action and interposed an answer to the complaint. He now opposes the motion and cross-moves for summary judgment in his favor. His cross-motion also seeks the return of \$871,570 that was seized from various safe deposit boxes leased to him. The DA opposes the cross-motion.

The property sought to be forfeited is alleged to be the proceeds and/or substituted proceeds of various felony crimes related to a major narcotics trafficking operation. All of the criminal defendants have pled guilty to various charges detailed below and have been sentenced. In support of this motion the DA submits an affidavit

from Detective Leandro Castro,¹ who investigated the criminal defendants' drug trafficking enterprise during the indictment period and prior to their arrests (see Motion at Exh. B).

Defendant J. Luperon

Defendant J. Luperon pled guilty on February 20, 2018 to operating as a major trafficker and conspiracy in the second degree and was sentenced on April 26, 2018. The DA's motion seeks forfeiture of the following from J. Luperon: \$162,874 in U.S. currency and multiple wristwatches and jewelry (personal property), all of which were recovered from J. Luperon's residence at the time of his arrest.

Detective Castro avers that: (1) his investigation revealed that J. Luperon had no legitimate means of income; (2) the \$162,874 recovered at his time of arrest was comprised of small denominations consistent with narcotics trafficking, to wit: 4,276 twenty dollar bills, 329 fifty dollar bills and 426 hundred dollar bills; and (3) drug dealers such as J. Luperon, who was at the top of his organization's hierarchy, regularly spend their narcotics proceeds on luxury items such as the personal property herein to flaunt their success. From the foregoing, Detective Castro opines that it can be reasonably inferred that the cash recovered is the proceeds of J. Luperon's crimes and the personal property recovered is the substituted proceeds of his crimes.

¹ Detective Castro was the lead detective in this investigation and is employed by the New York City Police Department (NYPD). He is assigned to the Criminal Enterprise Investigation Section and was previously assigned to the Narcotics Bureau Manhattan North (NBMN) command. He has been employed by the NYPD for 14 years, including approximately 5 years in the NBMN.

Based upon Detective Castro's detailed affidavit, this court finds that the DA has met its prima facie burden of linking the currency and personal property found in J. Luperon's residence to his crimes. For the foregoing reasons, this portion of the DA's motion is granted with respect to J. Luperon, and the \$162,874 in U.S. currency and the personal property currently held by the NYPD are subject to forfeiture.

Defendant O. Luperon

Defendant O. Luperon pled guilty on January 19, 2018 to operating as a major trafficker and conspiracy in the second degree and was sentenced on February 20, 2018. The DA's motion seeks forfeiture of \$354 in U.S. currency recovered from O. Luperon's residence at the time of his arrest.

Detective Castro alleges that this currency was found in close proximity to drugs and drug paraphernalia (see CPLR §1311[d] [3]).² He also avers that: (1) his investigation revealed that O. Luperon had no legitimate means of income; and (2) the \$354 recovered consisted of small denominations, to wit, 9 of 15 bills were twenties and hundreds, which is consistent with narcotics trafficking.

² CPLR §1311 (3) (d) provides:

In a forfeiture action commenced by a claiming authority against a defendant, the following rebuttable presumption shall apply: all currency or negotiable instruments payable to the bearer shall be presumed to be the proceeds of a pre-conviction forfeiture crime when such currency or negotiable instruments are (i) found in close proximity to a controlled substance unlawfully possessed by the defendant in an amount sufficient to constitute a violation of section 220.18 or 220.21 of the penal law, or (ii) found in close proximity to any quantity of a controlled substance or marihuana unlawfully possessed by such defendant in a room, other than a public place, under circumstances evincing an intent to unlawfully mix, compound, distribute, package or otherwise prepare for sale such controlled substance or marihuana.

Based upon Detective Castro's detailed affidavit, this court finds that the DA has met its prima facie burden of linking the currency to be forfeited to O. Luperon's crimes. For the foregoing reasons, this portion of the DA's motion is granted with respect to O. Luperon, and the \$354 in U.S. currency is subject to forfeiture.

Defendant Vargas

Vargas pled guilty on January 4, 2018 to conspiracy in the second degree and criminal sale of a controlled substance in the third degree and was sentenced on April 26, 2018. Plaintiff's motion seeks forfeiture of U.S. currency in the amount of \$810 which was recovered from Vargas' residence at the time of his arrest.

Detective Castro alleges that this currency was found in close proximity to drugs and drug paraphernalia (see CPLR §1311[d] [3]). He also avers that: (1) his investigation revealed that Vargas had no legitimate means of income; (2) the \$810 recovered consisted of small denominations, to wit, 60% of the total number of bills were twenties, which is consistent with narcotics trafficking; and (3) as further proof that Vargas had no legitimate means of income, he was represented in the criminal action by counsel assigned to him pursuant to Article 18-B of the County Law, which representation is only available to indigent criminal defendants.

Based upon Detective Castro's detailed affidavit, this court finds that the DA has met its prima facie burden of linking the currency to be forfeited to Vargas' crimes. For the foregoing reasons, this portion of the DA's motion is granted with respect to Vargas, and the \$810 in U.S. currency is subject to forfeiture.

Defendant Collado

Collado pled guilty on March 22, 2018 to conspiracy in the second degree and was sentenced on May 17, 2018. Plaintiff's motion seeks forfeiture of: (1) U.S. currency in the amount of \$202 which was recovered from a dresser drawer in Collado's residence at the time of his arrest; (2) four wristwatches and a bracelet (personal property) which were recovered from the same dresser drawer.

Detective Castro alleges that the currency was found in close proximity to drugs (see CPLR §1311[d] [3]). He also avers that: (1) his investigation revealed that Collado had no legitimate means of income; (2) the \$202 recovered consisted of small denominations, to wit, more than half of the bills were twenties, which is consistent with narcotics trafficking; (3) drug dealers such as Collado regularly spend their narcotics proceeds on luxury items such as the personal property herein to flaunt their success; and (4) as further proof that Collado had no legitimate means of income, he was represented in the criminal action by counsel assigned to him pursuant to Article 18-B of the County Law, which representation is only available to indigent criminal defendants. From the foregoing, it can be reasonably inferred that the cash recovered is the proceeds of Collado's crimes and the personal property is the substituted proceeds of his crimes.

Based upon Detective Castro's detailed affidavit, this court finds that the DA has met its prima facie burden of linking the currency and personal property to be forfeited to Collado's crimes. For the foregoing reasons, this portion of the DA's motion is granted with respect to Collado, and the \$202 in U.S. currency and personal property currently held by the NYPD are subject to forfeiture.

Defendant Velazquez

Velazquez pled guilty on February 8, 2018 to attempted conspiracy in the second degree and was sentenced on March 15, 2018. Plaintiff's motion seeks forfeiture of U.S. currency in the amount of \$8,903 which was recovered from a safe in the living room of Velazquez's residence at the time of his arrest. Detective Castro alleges that narcotics were also found in the same safe along with a ledger containing records of drug transactions.

In addition to the subject currency being found in close proximity to drugs (see CPLR §1311[d] [3]), Detective Castro also avers that: (1) his investigation revealed that Velazquez had no legitimate means of income; (2) the \$8,903 recovered consisted of small denominations, to wit, 330 twenty dollar bills and 233 singles, which is consistent with narcotics trafficking; and (3) as further proof that Velazquez had no legitimate means of income, he was represented in the criminal action by counsel assigned to him pursuant to Article 18-B of the County Law, which representation is only available to indigent criminal defendants.

Based upon Detective Castro's detailed affidavit, this court finds that the DA has met its prima facie burden of linking the currency to be forfeited to Velazquez's crimes. For the foregoing reasons, this portion of the DA's motion is granted with respect to Velazquez, and the \$8,903 in U.S. currency is subject to forfeiture.

Defendant Medina

Medina pled guilty on November 26, 2018 to conspiracy in the second degree and was sentenced on December 13, 2018. Plaintiff's motion seeks forfeiture of U.S.

currency in the amount of \$2,908 (\$133 recovered from Medina's person and \$2,775 recovered from his residence).

Detective Castro alleges that this currency was found in close proximity to drugs (see CPLR §1311[d] [3]). He also avers that: (1) his investigation revealed that Medina had no legitimate means of income; (2) the denominational distribution of the \$2,908 recovered was consistent with narcotics trafficking; and (3) as further proof that Medina had no legitimate means of income, he was represented in the criminal action by counsel assigned to him pursuant to Article 18-B of the County Law, which representation is only available to indigent criminal defendants.

Based upon Detective Castro's detailed affidavit, this court finds that the DA has met its prima facie burden of linking the currency to be forfeited to Medina's crimes. For the foregoing reasons, this portion of the DA's motion is granted with respect to Medina, and the \$2,908 in U.S. currency is subject to forfeiture.

As to All of the Criminal Defendants

The DA seeks to recover \$4,608,000 from all of the criminal defendants, jointly and severally. Plaintiff claims the criminal defendants' narcotics enterprise generated proceeds of at least this amount during the 16 month period covered by the indictment. The figure is calculated as a low estimate based upon the NYPD's investigation into their crimes. Based upon his investigation, Detective Castro explains that the amount of the minimum criminal proceeds:

was calculated using [defendants'] round-the-clock customer averages as determined by long-term surveillance at their sales locations, their per-tinfoil cocaine price as determined by undercover buys, and the duration of time covered by the Indictment. . . . Defendants charged twenty dollars per tinfoil of cocaine to their street-level customers. By observing the

Criminal Defendants selling drugs via surveillance video and by counting their customers, we determined that their organization had a round-the-clock average of twenty to thirty customers per hour. Using twenty customers per hour and assuming that each customer purchased only one tinfoil of cocaine each time, we estimated the organization's daily revenue at \$9,600.00 (\$20 per tinfoil x 1 tinfoil per customer x 20 customers per hour x 24 hours per day = \$9,600.00 per day). The Indictment covers a period of more than sixteen months, from August 29, 2015 to January 4, 2017 (the takedown date). Rounding down to sixteen months and assuming thirty days per month yields 480 days that the conspiracy generated at least \$9,600.00 per day (16 months x 30 days per month = 480 days).

Detective Castro arrives at the sum of \$4,608,000 by multiplying 480 days x \$9,600 per day. *Id.* at ¶160.

While Detective Castro sets forth a plausible basis for his calculation based upon his observations during the investigation, nonetheless, the lowest estimated amount of defendants' criminal profits is not a sum certain warranting entry of judgment in the amount of \$4,608,000 against each of the criminal defendants (see CPLR §3215). Accordingly, an inquest must be held to determine the amount of the enterprise's proceeds, and this portion of the DA's motion must be denied.

As to J. Luperon, O. Luperon & Non-Criminal Defendant Herrera

The DA also seeks to recover from the Luperons and Herrera the sum of \$871,570 in cash found in five safe deposit boxes held in Herrera's name. The keys to these safe deposit boxes were found when police searched the apartment Herrera shared, at least part of the time, with one or both of the Luperons.³ Plaintiff claims that

³ Police also recovered J. Luperon's identification cards, mail for O. Luperon and J. Luperon's expired Apple Bank ATM card from this apartment.

Herrera used the safe deposit boxes to cache the proceeds of the Luperons' criminal enterprise. As to Herrera, Detective Castro avers that:

- there is no evidence of Herrera having a legitimate job;
- the cash recovered from the safe deposit boxes consisted mostly of twenty dollar bills, which is consistent with narcotics trafficking (to wit, of the 25,102 bills recovered, 18,432 were twenties);
- Herrera was regularly observed during surveillance conversing with the Luperons at and around locations where they conducted their business, suggesting Herrera was familiar with their activities;
- though not related, the Luperons and Herrera were regarded in the community as "cousins", meaning they had a longstanding and close relationship, thus implying that they were aware of each other's affairs;
- a 2014 ledger containing daily entries of marijuana sales was found in Herrera's apartment, further indicating Herrera's knowledge of the Luperons' drug enterprise;
- Herrera stored the \$871,570 in cash in safe deposit boxes at Apple Bank in violation of the bank's policies, thus indicating his knowledge that the cash recovered was criminally tainted;
- the timing of Herrera's rental of each safe deposit box is consistent with the Luperons' expanding need to accommodate their increasing narcotics revenues; and
- one of the safe deposit box leases indicates that Herrera was a "student", further demonstrating that he had no legitimate job from which the cash found therein could have been derived.

From the foregoing, the DA argues that Herrera knew or should have known that he was storing the proceeds of the Luperons' criminal enterprise in the safe deposit boxes he leased.

The portion of plaintiff's motion seeking forfeiture of the funds recovered from Herrera's safe deposit boxes and Herrera's cross-motion are both denied. The DA does not sustain its burden of proof establishing that the funds in question were

proceeds of the Luperons' crimes. All of Detective Castro's observations are well taken and duly noted. However, after 16 months of surveillance and wire tapping, Herrera was not connected to any crime and was not arrested. While the circumstances are undeniably suspicious and Herrera offers no explanation as to the source of the recovered funds, there is no direct evidence linking the recovered currency to the Luperons' drug enterprise or any other criminal activity, and Detective Castro merely speculates as to its provenance.

Moreover, plaintiff argues that Herrera cannot credibly dispute any of the facts herein. However, issues of credibility cannot be determined on a motion for summary judgment. See *In re Ramm's Estate*, 37 AD2d 828 (1st Dept 1971) (the rule is clear that a court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine but feigned).

In opposition to the motion and in support of his cross-motion, Herrera submits affidavits from the Luperons, each denying that the funds recovered from Herrera's safe deposit boxes were theirs or bear any connection to the crimes to which they pled guilty. However, the cross-motion is denied inasmuch as it is not supported by an affidavit from an individual having personal knowledge of the subject matter herein (i.e., Herrera). From the foregoing analysis, it follows that the portion of the DA's motion seeking summary judgment against the Luperons forfeiting the cash found in Herrera's safe deposit boxes must be denied.

Accordingly it is

ORDERED that plaintiff's motion for a default judgment against the criminal defendants is granted to the extent that:

(1) As to J. Luperon, forfeiture of cash in the amount of \$162,874.00 and the wristwatches and jewelry seized at the time of his arrest is hereby granted;

(2) As to O. Luperon, forfeiture of cash in the amount of \$354.00 seized at the time of his arrest is hereby granted;

(3) As to Vargas, forfeiture of cash in the amount of \$810.00 seized at the time of his arrest is hereby granted;

(4) As to Collado, forfeiture of cash in the amount of \$202.00 and wristwatches and jewelry seized at the time of his arrest is hereby granted;

(5) As to Velazquez, forfeiture of cash in the amount of \$8,903.00 seized at the time of his arrest is hereby granted; and

(6) As to Medina, forfeiture of cash in the amount of \$2,908.00 seized at the time of his arrest is hereby granted; and it is further

ORDERED that plaintiff's motion is otherwise denied as to the criminal defendants, and the inquest to be held herein shall be conducted simultaneously with the trial of the action as to defendant Herrera or subsequent to any settlement; and it is further

ORDERED that plaintiff's motion is denied with respect to non-criminal defendant Herrera; and it is further

ORDERED that Herrera's cross-motion is denied.

Counsel for plaintiff and Herrera are directed to appear for a preliminary conference on April 7, 2020 at 9:30 a.m., at Part 1, 60 Centre St., Room 325, New York, NY.

Plaintiff's counsel is directed to serve notice of entry of this decision and order upon all of the defendants or their counsel within 30 days of its electronic filing.

Dated: March 2, 2020
New York, New York



Hon. Martin Shulman, J.S.C.