

Police Dep't v. Cunningham

OATH Index No. 569/26, mem. dec. (Dec. 11, 2025)

Petitioner not entitled to retain custody of the seized vehicle pending a forfeiture action because the evidence failed to establish that returning the vehicle would pose a heightened risk to public safety.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
POLICE DEPARTMENT
Petitioner
- against -
MITCHI CUNNINGHAM
Respondent

MEMORANDUM DECISION

JONATHAN FOGEL, *Administrative Law Judge*

Petitioner, the Police Department (“Petitioner” or the “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 Mitchi Cunningham is the registered owner of the seized vehicle (Pet. Ex. 9). This proceeding is mandated by *Krimstock v. Kelly*, 2007 U.S. Dist. LEXIS 82612 (S.D.N.Y. Sept. 27, 2007) [3d amended order] (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).

On September 8, 2023, petitioner seized respondent’s vehicle, a 2021 Mercedes-Benz (Property Clerk Invoice No. 3001635892), following his arrest for criminal possession of a weapon in the second degree (Pet. Exs. 4, 7). Petitioner received respondent’s demand for a retention hearing on September 24, 2025 (Pet. Ex. 1).

The hearing was held remotely by videoconference on December 8, 2025. Respondent is incarcerated and did not appear. He was represented by his fiancée, Alexis St. Victor, who presented a notarized letter, signed by respondent and Ms. St. Victor, authorizing Ms. St. Victor to represent him in this matter (“letter of authorization”) (ALJ Ex. 1). 48 RCNY § 1-11(a) (Lexis 2025) (“Parties may appear . . . by a duly authorized representative”). Ms. St. Victor appeared

without counsel. I advised Ms. St. Victor of respondent's right to be represented by an attorney. The nature of the proceedings and the procedural aspects of the hearing were also explained to her. Ms. St. Victor decided to proceed without counsel or further adjournment of the hearing. At the hearing, petitioner relied upon documentary evidence. Respondent presented documentary evidence and testimony from Ms. St. Victor.

For the reasons below, petitioner is not entitled to retain the seized vehicle pending the outcome of a civil forfeiture action.

ANALYSIS

Petitioner seeks to retain the vehicle as the instrumentality of a crime. To prevail, it is required to prove by a preponderance of the evidence: (i) that probable cause existed for the arrest resulting in the vehicle's seizure; (ii) it is likely to prevail in a civil action for forfeiture of the vehicle; and (iii) that 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. Due process requires an "initial testing of the merits of the City's case," not "exhaustive evidentiary battles that might threaten to duplicate the eventual forfeiture hearing." *Krimstock*, 306 F.3d at 69-70; *Canavan*, 1 N.Y.3d at 144 n.3. Thus, petitioner may rely on hearsay. *Krimstock* Order ¶ 3; *see also* 48 RCNY § 1-46 (Lexis 2025).

According to the arrest report and criminal court complaint, at about 7:05 p.m. on September 8, 2023, at 263 Tompkins Avenue in Brooklyn, the arresting officer recovered two loaded firearms, a "black 9MM Taurus firearm" with thirteen rounds of ammunition and a "black springfield armory firearm" with nine rounds of ammunition, from respondent's 2021 Mercedes-Benz (Pet. Exs. 4, 6). The firearms were recovered pursuant to a search warrant (Pet. Ex. 4).

On July 3, 2025, respondent pled guilty to attempted criminal possession of a weapon in the second degree, a class D felony (Pet. Ex. 10).¹ On October 22, 2025, the court sentenced respondent to two years' imprisonment (*Id.*). Petitioner established that respondent has been convicted for offenses prior to his September 8, 2023 arrest: a December 2018 conviction for criminal contempt in the second degree, a May 2017 conviction for assault in the third degree, a

¹ On the same date, respondent also pled guilty to the following charges to resolve two other matters: criminal possession of stolen property in the fourth degree, a class E felony, and attempted criminal possession of a weapon in the second degree, a class D felony (Pet. Ex. 10).

December 2016 conviction for driving while intoxicated, and a March 2009 conviction for criminal possession of a weapon in the fourth degree (*Id.*).

The un rebutted evidence of respondent's criminal conviction precluded respondent from challenging the lawfulness of the arrest and the lawfulness of the proven criminal charge. *See, e.g., Police Dep't v. Ayala*, OATH Index No. 1539/05, mem. dec. at 4 (Apr. 5, 2005). Accordingly, respondent's guilty plea establishes the first two *Krimstock* prongs necessary for retention of the vehicle: probable cause for respondent's arrest and likelihood of success on the merits. *See Police Dep't v. Beltre*, OATH Index No. 2045/07, mem. dec. at 3 (May 17, 2007); *Police Dep't v. Cruz*, OATH Index No. 1643/06, mem. dec. at 3 (Apr. 25, 2006).²

To satisfy *Krimstock's* third prong petitioner must show that release of a vehicle presents a heightened risk to the public safety. *See Police Dep't v. Serrano*, OATH Index No. 2759/14, mem. dec. at 5 (July 11, 2014) ("As we have emphasized, in order for the third prong to be satisfied, a heightened risk *must* be shown; the existence of any risk is not sufficient."). That can be shown by the circumstances of the offense or the offender's background. *See, e.g., Police Dep't v. Alicea*, OATH Index No. 1237/20, mem. dec. at 3 (Jan. 8, 2020); *Police Dep't v. Rice*, OATH Index No. 1709/05, mem. dec. at 9 (Apr. 21, 2005); *Police Dep't v. Mohammed*, OATH Index No. 1159/04, mem. dec. at 3-4 (Mar. 2, 2004).

Possession of a loaded firearm in a vehicle is the type of crime that demonstrates a heightened risk to public safety and justifies retention of the vehicle. *See Police Dep't v. Smith*, OATH Index No. 539/08, mem. dec. (Nov. 7, 2007) (finding heightened risk to public safety where respondent was charged with possession of a weapon in the second degree); *Police Dep't v. Chan*, OATH Index No. 197/08, mem. dec. (Aug. 14, 2007) (possession of a loaded firearm in a vehicle is sufficient evidence of threat to public safety to justify retention of the vehicle); *Police Dep't v. Van Rossum*, OATH Index No. 2115/07, mem. dec. (June 12, 2007) (finding heightened risk to public safety where respondent was charged with possession of a loaded weapon); *Police Dep't v. Balseca*, OATH Index No. 103/07, mem. dec. (July 25, 2006) (finding a heightened risk to public safety where respondent, who had no criminal history and was gainfully employed, pled guilty to a felony firearm charge).

² Ms. St. Victor argued that she should be deemed an innocent owner with a possessory interest (Tr. 18). However, she acknowledged that she does not own the vehicle (Tr. 20-21).

This tribunal, however, has never held that possession of a weapon is always enough to show a heightened risk to public safety. To adopt such an inflexible rule would be contrary to the case-by-case determination required by the *Krimstock* Order. See *Police Dep't v. Harrison*, OATH Index No. 641/12, mem. dec. at 3 (Oct. 18, 2011). In limited circumstances, this tribunal has ordered vehicles released despite evidence that a driver or owner unlawfully possessed a weapon. See *Police Dep't v. Mathieu*, OATH Index No. 3120/09, mem. dec. at 7-8 (May 29, 2009) (heightened risk not shown where driver possessed handgun temporarily after it was left behind by a passenger who had a license to carry it); *Police Dep't v. Jones*, OATH Index No. 1943/07, mem. dec. at 4-5 (May 8, 2007) (51-year-old gainfully employed respondent, who chased after his son with a loaded gun to protect another son, appeared remorseful and did not pose a risk to public safety).

Ms. St. Victor asserted that releasing the vehicle to her poses no safety risk because she is the only person who would possess or drive the vehicle (Tr. 19). Respondent has no access to the vehicle because he is incarcerated (Tr. 20). Ms. St. Victor does not own the vehicle, but the letter of authorization allows Ms. St. Victor to obtain it if it is released (ALJ Ex. 1; Tr. 19). In addition, Ms. St. Victor testified that not having the vehicle has created a significant hardship for her and her family (Tr. 19-20). She does not have a car (Tr. 46). It has been difficult and expensive to travel to her job in Pennsylvania (Tr. 20, 46). Respondent and Ms. St. Victor have a six-year-old daughter, and Ms. St. Victor testified that she needs "quick access" to transportation to care for her and for respondent's mother who have medical conditions (Tr. 19-20, 45-46). During the two years since the vehicle was seized, Ms. St. Victor has rented cars and hired Ubers, resulting in debt and "financial hardship" (Tr. 19, 45, 49-50). She expects to live with respondent after his release from custody (Tr. 49).

Under these circumstances, petitioner failed to prove that returning respondent's vehicle to Ms. St. Victor would pose a heightened risk to the public. While respondent has a substantial criminal record, the car would not be returned to him, but to Ms. St. Victor, who has not been charged with a crime. Ms. St. Victor credibly asserted that she is the only person who would drive the car if it is released. Respondent has no access to the vehicle for a substantial amount of time based on his incarceration for two years for attempted criminal possession of a weapon in the second degree. This case is similar to *Police Dep't v. Nickey*, OATH Index No. 1826/15, mem. dec. at 7 (Mar. 12, 2015), where the Department failed to prove that releasing the

vehicle to respondent's father, the vehicle's owner, posed a heightened risk to the public because it was "highly probable" that respondent would be incarcerated for "some time" on a firearms possession conviction. In *Nickey*, respondent also had no immediate access to the vehicle because he did not live with his father and was unlikely to access it in the "foreseeable future." *Id.* at 7.

Petitioner argues that that respondent would use the vehicle when he is released from custody. Because respondent cannot access the vehicle for the foreseeable future, however, based on the substantial length of his incarceration, petitioner's argument is insufficient to demonstrate that releasing the vehicle poses a heightened risk to public safety. *See, e.g., Nickey*, OATH 1826/15 at 7; *Police Dep't v. Chase*, OATH Index No. 185/08, mem. dec. (July 23, 2007) (owner's son's "ready access" to vehicle, combined with prior drug and weapons convictions, established risk to the public justifying retention); *cf. Police Dep't v. Mason*, OATH Index No. 166/10, mem. dec. (July 28, 2009) (Department entitled to retain vehicle where owner did not provide representation that respondent would be prohibited from operating the vehicle once respondent was released from prison). Moreover, respondent must serve at least six-sevenths of his sentence before being released from custody. Corr. Law § 803(1)(c) (Lexis 2025) ("A person serving a determinate sentence of imprisonment may receive time allowance against the term of his or her sentence not to exceed one-seventh of the term imposed by the court.").

Petitioner also asserts that Ms. St. Victor's claims of hardship are not relevant in a *Krimstock* hearing. *Police Dep't v. Williams*, OATH Index No. 3423/24, mem. dec. (June 14, 2024) (finding a heightened risk to the public where respondent's lack of criminal record and hardship resulting from the vehicle's seizure insufficient to overcome the heightened risk to public safety). Here, however, Ms. St. Victor credible testimony that she needs the vehicle to travel a significant distance for work and to care for her daughter and respondent's mother relates directly to whether returning the car to her poses a heightened risk to the public. *See Canavan*, 1 N.Y.3d at 142-143 ("[T]he private interest affected by the deprivation of an automobile may be significant. When cars are . . . shared among household members . . . seizure may affect not only a culpable defendant, but also other innocent parties."). It is unlikely that Ms. St. Victor would risk her employment or daughter's health by failing to be prudent and responsible in her use of the car.³
See

³ Petitioner argued that Ms. St. Victor did not credibly testify about hardship she experienced because a property clerk invoice prepared after respondent was arrested in October 2024, indicates that Ms. St. Victor was renting a

In sum, petitioner failed to establish that returning respondent's vehicle poses a heightened risk to public safety.

ORDER

The Department is ordered to release the seized vehicle.

Jonathan Fogel
Administrative Law Judge

December 11, 2025

APPEARANCES:

QUWELLA BROWN, ESQ.
Attorney for Petitioner

ALEXIS ST. VICTOR
Representative for Respondent

Lamborghini (Tr. 58-59). However, Ms. St. Victor testified that she does not have a car and there is no evidence that Ms. St. Victor still uses that vehicle (Tr. 46).