

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
VALERIE KRIMSTOCK, CHARLES :  
FLATOW, ISMAEL DELAPAZ, :  
CLARENCE WALTERS, JAMES WEBB, :  
MICHAEL ZURLO, AND SANDRA JONES, :  
individually and on behalf of all :  
other persons similarly situated, :  
 :  
Plaintiffs, : 99 Civ. 12041 (MBM)  
 :  
-against- : SECOND  
 :  
 : AMENDED ORDER AND JUDGMENT  
RAYMOND KELLY, in his official :  
capacity as Commissioner of the :  
New York City Police Department; :  
and THE CITY OF NEW YORK, :  
 :  
Defendant. :  
-----X

MICHAEL B. MUKASEY, U.S.D.J.

This Second Amended Order and Judgment reflects the holding of the United States Court of Appeals for the Second Circuit that persons whose vehicles are seized under N.Y.C. Code § 14-140 as alleged instrumentalities of crime "must be given an opportunity to test the probable validity of the City's deprivation of their vehicles pendente lite, including probable cause for the initial warrantless seizure." Krimstock v. Kelly, 305 F.3d 40, 70 (2d Cir. 2002), and that such opportunity be provided in a "prompt post-seizure retention hearing, with adequate notice." Id. at 68. In addition, it addresses the

issue of class certification and "whether exceptions to the mootness doctrine preserve the merits of the case for judicial resolution of the unnamed class members' claims." Id. at 70. It reflects as well the outcome of the evidentiary hearing held on April 25, 2005, mandated by the Court of Appeals in Jones v. Kelly, 378 F.3d 198 (2d Cir. 2004), as reflected in this court's ruling of September 9, 2005. The issues in those proceedings are resolved as follows:

1. Plaintiffs have sought to represent a class consisting of all persons whose vehicles have been seized by the New York City Police Department upon arrest, and kept in police custody for a prospective or pending action to forfeit such vehicles as the alleged instrumentalities of crimes, or as evidence. Defendants have offered no substantive reason why such a class should not be certified. In particular, defendants have not disputed that the requirements of commonality, numerosity and typicality were met by plaintiffs in this case at the time the complaint was filed. It would be difficult to conceive of how defendants could raise such a dispute because the issues in this action are entirely issues of law and recur whenever a vehicle is seized by the Police Department at the time of the arrest of a driver as either the instrumentality of a crime or as evidence. That the claims of all named plaintiffs have now become moot for various reasons merely illustrates principally that such claims

are inherently transitory. For the reasons set forth in the cases cited by the Court of Appeals at 306 F.3d 70, n.34, the class plaintiffs have sought to represent is hereby certified.

2. Following seizure of a vehicle, at the time of the driver's arrest, as evidence of a crime or as the instrumentality of a crime, a claimant, as described in paragraph 5 below, who is entitled to possession of such vehicle, may contest such seizure at a hearing to be held at defendant City of New York's (the "City"'s) Office of Administrative Trials and Hearings ("OATH') pursuant to the OATH Rules of Practice to the extent such rules are not in conflict with the terms of this Order and Judgment. Such a hearing will provide the claimant with an opportunity to be heard, either in person or through counsel, as to three issues: whether probable cause existed for the arrest of the vehicle operator; whether it is likely that the City will prevail in an action to forfeit the vehicle, and whether it is necessary that the vehicle remain impounded in order to ensure its availability for a judgment of forfeiture. The burden of proof by a preponderance of the evidence as to these issues will be upon the Police Department, and the OATH judge may consider such hearsay and other evidence as that judge may consider reliable. The OATH judge will decide those issues by a statement of findings on the record, or by a written statement to be made a matter of record, not later than three business days following

the close of evidence and the completion of argument, if any, at the hearing, unless both parties have consented on the record or in writing to extend the time for such statement. Absent a timely finding by the OATH judge that the Police Department has met the burden of proof as to the issues at the hearing, the vehicle shall be released to the claimant, without prejudice to further proceedings, including a forfeiture proceeding.

3. Notice of the right to a forfeiture hearing will be provided at the time of seizure by attaching to the voucher already provided to a person from whom a vehicle is seized a notice, in English and Spanish, as set forth below. A copy of such notice will also be sent by mail to the registered and/or title owner of the vehicle within five business days after the seizure. The notice will appear in type at least as large as the largest entry elsewhere on the form, but in no event smaller than 8-point type, and will read as follows:

NOTICE OF RIGHT TO A RETENTION HEARING

You are entitled to a hearing to determine whether it is valid for the Property Clerk to retain the vehicle seized in connection with an arrest. Please complete this form, make and keep a copy for yourself, and deliver or mail the completed original form to NYPD Legal Bureau, Two Lafayette Street, 5<sup>th</sup> floor, New York, NY 10007, Attention: VEHICLE SEIZURE UNIT. When

the form is received, you will be notified of the date, time and place where your hearing is scheduled to be held. The NYPD Legal Bureau will do its best to accommodate your schedule by having the retention hearing on a date when you are available. Please indicate in the space provided below the date(s), if any, within the next four weeks following receipt of this form, when you are NOT available to attend a hearing. A retention hearing will be scheduled within ten (10) business days after we receive this form, and will be held at the Office of Administrative Trials and Hearings, located at 40 Rector Street, Sixth Floor, New York, NY 10006, telephone no. (212) 442-4000. The retention hearing will provide you with an opportunity to be heard either yourself or through your attorney with respect to three issues: (1) whether probable cause existed for the arrest of the vehicle operator; (2) whether it is likely that the City will prevail in an action to forfeit the vehicle; and (3) whether it is necessary that the vehicle remain impounded in order to ensure its availability for a judgment of forfeiture. The burden of proof by a preponderance of the evidence as to each of these issues will be on the Police Department, and the judge may consider such hearsay and

other evidence as the judge may consider reliable. If the Police Department proof is insufficient as to any of these issues, the vehicle will be returned to the claimant. Only one person may appear as claimant, and if more than one of these forms is received by the Police Department, priority will go to the registered owner of the vehicle.

4. The claimant of a seized vehicle has the right to a hearing at OATH, which will commence on a date and at a time, as fixed by the Police Department within 10 business days after receipt by the Police Department of a written demand for such a hearing on the form provided by the Police Department and in accordance with the instructions set forth thereon, unless the date for such hearing shall have been extended by OATH upon a showing of good cause by either party. If the Police Department receives more than one such written demand, the timing of the hearing will be governed by receipt of the first such written demand.

5. The claimant seeking release of the vehicle at the hearing may be either the person from whom the vehicle was seized, if that person was then in lawful possession of the vehicle, or the owner if different from such person. Only one person or entity may appear as claimant at the hearing, and preference shall be given to the registered owner of the vehicle.

6. The Police Department will notify OATH, the claimant and the relevant District Attorney of the date of the hearing in a notice to be sent by mail within two business days after receipt of the written demand for a hearing, to the addresses specified for such notice by the claimant and the District Attorney. The notification will provide to the claimant the address and telephone number of OATH, and will state that in cases in which the District Attorney has determined that the vehicle is needed as evidence in a criminal proceeding, including any appeals in any such proceeding, the hearing may not be held during the period the vehicle is so needed.

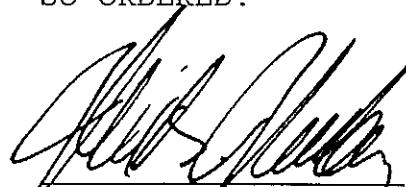
7. After the District Attorney receives the notice specified in paragraph 6 above, the District Attorney shall respond in writing to the Police Department so that such response is received prior to the date of the scheduled hearing, that either (i) the vehicle is needed as potential evidence in a criminal proceeding, or (ii) the vehicle is not so needed. If the District Attorney responds that the vehicle is so needed, then the OATH hearing will not be held until the conclusion of the criminal proceeding for which the vehicle is needed as evidence, including any appeals, or until the District Attorney determines that the vehicle is not so needed. If the District Attorney responds that the subject vehicle is not so needed, then

the OATH hearing, and any judgment therein, may proceed pursuant to the provisions of this Second Amended Order and Judgment and without any further response from the District Attorney. The Police Department will forward a copy of the District Attorney's response to the claimant and to OATH. If the response states that the vehicle is so needed, such response will include the name and telephone number of the Assistant District Attorney (ADA) who determined that the vehicle is so needed, and the name and telephone number of the ADA in charge of the proceeding in which the vehicle is so needed, if different from the ADA who made that determination.

8. The decision of the OATH judge will be subject to review in New York State Supreme Court but the filing of an action in that Court does not affect the claimant's right to an OATH hearing or to release of the seized vehicle in the event the Police Department is found not to have satisfied the burden of proof at such hearing.

9. This court will retain jurisdiction to enforce the terms of this Second Amended Order and Judgment.

SO ORDERED:

  
Michael B. Mukasey,  
U.S. District Judge

Dated: New York, New York  
December 6, 2005