

**Almeyda v Vance**

2012 NY Slip Op 32243(U)

August 27, 2012

Sup Ct, New York County

Docket Number: 402671/11

Judge: Joan B. Lobis

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

PRESENT: JOAN B. LOBIS  
Justice

PART 6

Nelson Almeyda

INDEX NO.

402671/11

MOTION DATE

6/5/12

MOTION SEQ. NO.

2

MOTION CAL. NO.

CYNUS R. VANCE, ET AL

- v -

The following papers, numbered 1 to 12 were read on this motion (to) for release property.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-11

12

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

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

**FILED**  
AUG 28 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

**FILED**  
AUG 27 2012  
COUNTY CLERK'S OFFICE  
NEW YORK

THIS MOTION IS DECIDED IN ACCORDANCE  
WITH THE ACCOMPANYING MEMORANDUM DECISION  
& ORDER

Dated: 8/27/12

JOAN B. LOBIS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
NELSON ALMEYDA,

Petitioner,

Index No. 402671/11

-against-

**Decision, Order, and Judgment**

CYRUS R. VANCE and PROPERTY CLERK,  
NEW YORK CITY POLICE DEPARTMENT,

Respondents.

-----X  
**JOAN B. LOBIS, J.S.C.:**

Petitioner Nelson Almeyda brings this mandamus proceeding under C.P.L.R. § 7803(a) for an order releasing property in the possession of the Property Clerk of the New York Police Department (“NYPD”) that was taken from petitioner after his arrest. Respondent NYPD provides a response to the petition, but respondent Cyrus R. Vance (“DA”) does not.<sup>1</sup> The petition is granted to the limited extent set forth below.

On February 25, 2010, petitioner was arrested in New York County and charged with grand larceny, criminal possession of stolen property, and burglary. Upon arrest, the following items were recovered from petitioner and were assigned corresponding vouchers:

- (A) eight hundred dollars (\$800.00) under voucher number R282845;
- (B) one (1) red and white Samsung cellular phone, a cellular phone battery, and a clear cellular phone case under voucher number R282843;

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<sup>1</sup> According to the affidavit of service, on April 20, 2012, a copy of the order to show cause, verified petition, and accompanying affidavit and exhibits were served upon Cyrus R. Vance at One Hogan Place, New York, New York, as well as the Property Clerk of the New York Police Department at One Police Plaza, New York, New York.

The court also notes that petitioner submitted reply papers dated June 12, 2012. However, the motion was submitted on June 5, 2012, making petitioner’s reply papers untimely, and the court may not consider them.

- (C) an iPod, an iPod Touch, two metrocards, two New York University Identification (“NYU ID”) cards for people other than petitioner, one white headphone, and a purple NYU ID card holder under voucher number R282842; and
- (D) a computer bag and an Apple laptop computer under voucher number R282840.

On or about March 31, 2011, petitioner was convicted upon a guilty plea of burglary in the third degree. Petitioner states that, in May 2011, he wrote a letter to the District Attorney’s office (“DA’s office”) seeking a release of the items listed above. By letter dated June 7, 2011, the DA’s office confirmed receipt of his request, informed petitioner that he needed to supply them with a copy of the vouchers, and stated that a release decision would be provided once the information was reviewed. Petitioner states that he thereafter submitted the vouchers. By letter dated August 12, 2011, petitioner inquired about the status of his release request. Petitioner states that he has yet to receive a response regarding the release of the vouchered items and brings this petition to compel respondents to release these items.

A petition seeking mandamus to compel seeks to compel a body or officer to perform a duty that is required by law. C.P.L.R. § 7803(1). Upon arrest, property in the possession of the individual arrested is inventoried by the property clerk of the NYPD and a voucher is issued for all non-contraband items. N.Y.C. Admin. Code § 14-140(b). The vouchered items are denominated as “arrest evidence” or otherwise. Property that is not “arrest evidence” is kept for safekeeping. The procedure for the return of the vouchered property differ for these two categories and is set out in 38 R.C.N.Y. § 12-32, et seq. For property kept for safekeeping, the property clerk must respond to a written demand to release the items. When property is considered as arrest evidence, a request for its release must be made to the DA prior to seeking its return from the NYPD. The request must be

accompanied by a copy of the voucher and proper identification. The DA shall grant the release if the evidence is no longer needed. If the DA denies a release because the property is still necessary for an ongoing criminal proceeding or otherwise, then the claimant must be notified with a written statement setting forth the reasons for the denial and the process for a review of the denial no more than fifteen days after the request. Once the DA has approved the release, the claimant can request the return of his or her property. The claimant must make the demand to the property clerk within 120 days of the termination of the criminal proceedings, and must establish his or her lawful title to the property.

The NYPD does not object to the release of the items under voucher numbers R282845 (\$800 in United States currency) and R282843 (cellular phone, battery, and case), as petitioner is listed to be the owner of these items. The NYPD agrees to release these items as long as petitioner complies with the procedural requirements of the Rules of the City of New York. The court notes that items listed under voucher number R282843 (cellular phone, battery, and case) were listed for safekeeping, meaning that the property clerk may release the property without the DA's permission. 38 R.C.N.Y. § 12-32(iii). As for the items under voucher number R282845 (\$800 in United States currency), the court notes that petitioner submitted a request, which was acknowledged by the DA, and that petitioner submitted the voucher, as was requested by the DA, a copy of which is also annexed to the petition. Petitioner states that the DA has neither given a release for these items nor issued a statement refusing to grant a release for this voucher. The DA has offered no opposition to this petition. Since both petitioner and the NYPD agree that this money is petitioner's lawful property, and the DA has stated no reason as to why it should not be released, petitioner is entitled to the release of the \$800 in United States currency.

As to voucher numbers R282842 (iPod, iPod Touch, two metrocards, NYU ID cards, white headphone, and purple NYU ID card holder) and R282840 (a computer bag and an Apple laptop computer), petitioner alleges that he is entitled to these items because the DA's office did not charge petitioner with any crimes based on these items, and because the DA's office failed to commence a forfeiture proceeding. As to the iPod, petitioner states that the relevant complaining witness testified that his iPod was returned to him after he confronted the individual that he believed took it. As to the laptop, petitioner argues that the relevant complaining witness testified that his laptop was silver in color, while the computer seized from petitioner was black. Petitioner further posits that neither of these witnesses identified him to be the person that stole those items.

In answering the petition, the NYPD states that the items under voucher numbers R282842 and R282840 are not the lawful properties of petitioner because they were the stolen items that led to petitioner's incarceration. The NYPD explains that Assistant District Attorney for New York County, Eunice Choi, Esq., informed them that the items under voucher number R282840 (a computer bag and an Apple laptop computer) have already been released to the owner, an NYU professor, who identified the laptop as being his by the color, the desktop image, and the passcode that allows access to the laptop.

Petitioner fails to prove that the items under voucher numbers R282842 and R282840 are lawfully his. Contrary to his contention, the DA did charge petitioner with stealing these items and vouchered them as investigatory arrest evidence. Petitioner pled guilty to stealing these items and was convicted on his guilty plea. Petitioner did not acquire title to property that he stole because one cannot acquire a valid title by criminal means. Hofferan v. Simmons, 290 N.Y. 449, 455-56

[\* 6]  
(1943). That respondents did not commence a forfeiture proceeding does not relieve petitioner from the burden of proving his lawful ownership of these items. In addition, petitioner's recitation of the complaining witnesses' testimony does not stand as evidence that establishes petitioner's lawful title to these items. In fact, petitioner offers no evidence to establish his ownership as to any of the vouchered items. Regardless, as to the laptop and bag, they have already been released to the NYU professor who demonstrated his rightful ownership to them. Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is granted to the limited extent that respondent the Property Clerk of the New York City Police Department shall immediately release the red and white Samsung cellular phone, a cellular phone battery, and a clear cellular phone case under voucher number R282843 and the eight hundred dollars in United States currency (\$800.00) under voucher number R282845; and it is further

ORDERED and ADJUDGED that the remainder of the petition is denied.

Dated: August 27, 2012

ENTER:

  
JOAN E. LOBIS, J.S.C.

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COUNTY CLERK'S OFFICE  
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