

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 17

X
IN THE MATTER OF THE APPLICATION OF
SHAHIN KHOSHNEVISS,

- against -

THE PROPERTY CLERK OF THE NEW YORK
CITY POLICE DEPARTMENT

INDEX NO. 27654/08

MOTION SEQ. NO. 1

MOTION CAL NO. 45

BY: KITZES, J

DATED: February 2, 2010

X

In this Article 78 proceeding petitioner Shahin Khoshnevis seeks a judgment directing respondent Property Clerk of the New York City Police Department to return all property vouchered under Invoice Number N7222666, including a .45 caliber firearm and magazine clip.

On July 19, 2007 Shahin Khoshnevis was arrested by the Port Authority Police Department at LaGuardia Airport Terminal B at the ATA Airlines counter, after he declared a firearm for transportation on his flight to California. Mr. Khoshnevis was charged with Criminal Possession of a Weapon in the Second Degree, a class C felony (Penal Law § 265.03[1][B], and Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01)

At the time of his arrest Mr. Khoshnevis lacked any documentation for lawful possession of said firearm in New York. The subject firearm and magazine clip was

vouchered as arrest evidence and remains in the possession of respondent the Property Clerk of the New York City Police Department (Property Clerk). On May 22, 2008, Mr. Khoshnevisss pled guilty to Disorderly Conduct, a violation (Penal Law § 240.20).

On August 6, 2008, Mr. Khoshnevisss made a formal demand upon the Property Clerk for the return of the subject firearm. The Police Department, in an internal memo dated September 19, 2008, stated that it had conducted a license check and determined that Mr. Khoshnevisss did not have a valid New York City license for the weapon and thus did not have permission or authority to possess the firearm in New York City. The Police Department therefore concluded that the firearm is considered contraband and cannot be returned to Mr. Khoshnevisss, and recommended that the Property Clerk dispose of the property pursuant to law. The Police Department sent a similar letter dated September 19, 2008 to Mr. Khoshnevisss' counsel stating that the vouchered property is considered contraband and cannot be returned, in that it is illegal to possess said property as his client did not have valid permission or authority to have said firearm in New York City.

Mr. Khoshnevisss counsel, in a letter addressed to the Property Clerk, and dated October 20, 2008, stated that in view of his conversation with Executive Officer Robert Fodera of the New York City Police Department Legal Department, he was renewing his request to have the subject firearm returned to his client, by any designated courier or transporter, with the fees to be paid by his client. He stated that Mr. Fodera was not opposed to the return of said firearm, and further stated that Mr. Khoshnevisss had legitimately owned

and possessed the firearm since August 31, 1990. He further asserted that it was always his position that such possession was protected by federal statute(18 USC 926A), and enclosed a copy of the original sale invoice for said firearm.

Mr. Khoshnevis's counsel states that he had a conversation with Specialist Hicks from the Property Clerk's office on November 6, 2008, and was advised that the Property Clerk would not honor the request for the return of the subject firearm, and that it would be destroyed as contraband.

Petitioner thereafter commenced the within Article 78 proceeding and seeks a judgment directing respondent to return the vouchered property to him in California. He alleges in his petition that he resides in San Diego, California and that since 1991 he has been the legal owner of a .45 caliber Springfield firearm with a magazine clip, identified as "S/N NM93684". Petitioner further alleges that said firearm is not contraband and is protected under 18 USC § 926A (Interstate Transportation of Firearms).

Petitioner's counsel, in his supporting affirmation, states that Mr. Khoshveniss legally purchased and possessed the subject firearm in California, and was returning to California, via New York, from a camping trip in Vermont where the possession of the subject firearm was legal. It is further asserted that Mr. Khoshnevis declared the firearm at the time he arrived at the airport in California and at the airport in New York, and that it was transported unloaded. Counsel asserts that respondent's position is contrary to that of the United States Department of Justice and the State of New Jersey with respect to 18 USC 926A. Counsel

thus asserts that as petitioner was in compliance with, and protected by the provisions of 18 USC 926A, he is entitled to the return of the subject firearm.

Counsel asserts that as respondent has failed to institute a timely forfeiture action as required by 38 RCNY 12-36, the subject firearm should be returned to petitioner in California, at his expense. Finally, it is asserted that respondent's informal determination that the subject firearm is contraband is unjustified and was made in violation of due process.

Respondent Property Clerk, in opposition, asserts that as petitioner does not have a license or permit for the subject firearm, its mere possession in New York City is unlawful under Penal Law § 265.01(1), and, therefore, it is contraband and should not be returned to petitioner. Respondent further asserts that since the firearm is not subject to civil forfeiture, no time period accrued against the respondent which would require it to commence such a proceeding. Finally, respondent asserts that 18 USC § 926A does not apply to air travel, and that even it were applicable to air travel, petitioner's possession of the subject firearm was unlawful, as he failed to submit any evidence or documentation of his whereabouts prior to the time he sought to return to California with the firearm.

Petitioner's counsel, in a reply affirmation, states that while the firearm and magazine clip may have been arrest evidence, upon the disposal of the underlying criminal action such status terminated and the property should have either been returned or made the subject of a civil forfeiture proceeding. It is asserted that said property is not contraband, as it was legally purchased by the petitioner in 1990, that petitioner has the legal right to possess it in

California, and that petitioner was in full compliance with the requirements of 18 USC § 926A.

It is well settled that upon the termination of criminal proceedings, “seized property, other than contraband, should be returned to the rightful owner” (*United States v Francis*, 646 F2d 251, 262 [1980], *cert. denied*, 454 US 1082, [1981]; *United States v David*, 131 F3d 55, 59 [1997]). Where evidence, even though illegally seized, is contraband, the owner is not entitled to its return (*United States v Jeffers*, 342 US 48, [1951]; *Matter of Sea Lane Trading Co., Inc. v Michael*, 94 AD 2d 309, [1983]; *see also People v Qu*, 2007 N.Y. Misc. LEXIS 4909, 238 NYLJ 4 [2007]).

A distinction has been made between confiscated property which is per se contraband and that which is merely “derivative contraband”. The former category includes such patently illegal items as narcotics, gambling apparatus and the paraphernalia used to make bootleg alcohol. In the latter category are such ostensibly innocent items as cash or an otherwise legal automobile which happened to have been used for illegal purposes. In *One 1958 Plymouth Sedan v Pennsylvania* (380 US 693, 699 [1965]), the Supreme Court announced the following test: If mere possession of the contraband constitutes a crime, then repossession of such per se contraband would subject the possessor to additional criminal penalties. Return of such contraband would obviously frustrate the express public policy against the possession of such objects (*see Sea Lar Trading Co. v Michael*, 94 AD2d 309, 315-316 [1983]).

Here, the rules governing the return of property by the Property Clerk define the term contraband as “property the mere possession of which is prohibited under federal, state or local law. Property shall not be deemed to be contraband merely because it has been held as evidence or for custodial safe-keeping, or because it may be suspected or believed to be unlawfully obtained, stolen or the proceeds or instrumentality of a crime” (38 RCNY § 12-31). In New York, possession of a firearm is a criminal act, unless one holds a license to so possess, pursuant to Penal Law § 265.20(a)(3) and Article 400 (*see People v Abdullah*, 23 Misc 3d 232 [2008]; *People v Zabar Lynch*, 2008 NY Misc LEXIS 4587, 240 NYLJ 15 (July 15, 2008)). It is undisputed that Mr. Khoshnevis is not licensed to possess a firearm in New York. Therefore, the subject firearm constitutes contraband, and its return would be improper (*see Sea Lar Trading Co. v Michael*, 94 AD2d 309, 315-316 [1983]; *People v Didonna* 124 Misc 872[1925]).

Although New York may have more stringent firearm standards than those of some other states, Congress has provided relief from those standards under certain conditions. 18 USC § 926A allows law-abiding citizens to transport firearms that are legal in their state and the state of destination (See 132 Cong Rec S5358-04 [May 6, 1986]). Fundamental to a claim under this statute, is the firearm owner’s actually engaging in travel, or acts incidental to travel, through the state of arrest, such as stopping for food or gasoline or picking up passengers or packages for the trip. Any pause in the journey must be directly incident to it. Since the statute suspends the operation of a state’s penal law, it should be strictly construed.

Any activity by the owner in the state passed through for a purpose unrelated to accomplishing the passage forfeits the protection of the federal law.

Section 926A does not address anything but vehicular travel. Thus, for example, “it does not encompass keeping the weapon--locked in a case or not--in an airport hotel overnight” (*Revell v Port Auth.*, 2009 U.S. Dist. LEXIS 26839 [2009]; *see also Torracco v Port Auth.*, 539 F Supp 2d 632 [2008]; *People v Selyukov*, 2008 NY Slip Op 28104, 2-3 [2008]). To the extent that section 926A may be applicable to air travel, petitioner is required to establish that he was only engaged in travel through New York. Mr. Khoshnevis, in his verified petition, states that he lives in California, where the firearm was legally owned, and adopts as true the statements made by his attorney Victor Knapp, in his affirmation. Mr. Knapp states that Mr. Khoshnevis was returning from a camping trip in Vermont where possession of the firearm is legal, and was arrested at LaGuardia Airport on June 19, 2007, when checking in for a return flight to California. However, neither Mr. Khoshnevis nor Mr. Knapp have disclosed any of Mr. Khoshnevis’ intrastate movements prior to his arrival at LaGuardia airport on June 19, 2007. No information has been provided as to dates and means of transportation used by Mr. Khoshnevis between California, Vermont, and New York. In the absence of any evidence regarding Mr. Khoshnevis’ alleged travel between these three states, he cannot establish that he is entitled to the protections afforded by 18 USC § 926A.

Finally, contrary to petitioner’s assertions, the Property Clerk’s failure to institute a forfeiture proceeding within 25 days of the demand for the return of the firearm, does not

mandate the return of the subject firearm. Respondent has established that the subject firearm is contraband as defined by 38 RCNY § 12-31, and petitioner has not established that the subject firearm is subject to a forfeiture proceeding, pursuant to 38 RCNY §§ 12-35, 12-36. Furthermore, Section 14-140(2) of the Administrative Code of the City of New York provides that where the property consists of “firearms, cartridges or explosives” the Police Commissioner may direct the property clerk to destroy said property. Therefore, as petitioner was informed of the respondent’s intent to destroy the subject firearm, his dues process claims are rejected.

In view of the foregoing, petitioner’s request for a judgment directing respondent to return the vouchered property, including the subject firearm and magazine clip is denied, and the petition is dismissed.

Settle judgment.

J.S.C.