CHAIRPERSON'S FINAL DETERMINATION AND ORDER

In the Matter of
New York City Taxi & Limousine Commission
Petitioner
against
Daniel Jean Francois
Respondent

ISSUE

The issue in this case is whether the officer of the Taxi and Limousine Commission ("TLC") that seized the Respondent's vehicle had probable cause to believe that the Respondent's vehicle was subject to forfeiture at the time of that seizure.

The TLC officer did have probable cause to believe that the vehicle was subject to forfeiture. He was able to rely on the information relayed to him by his handheld computer and by the words contained in the Notice of Seizure that the TLC officer printed and provided to Respondent.

STATEMENT OF FACTS

On October 16, 2017, TLC Inspector Arnan Murphy stopped a 2007 Lincoln Town Car, bearing Vehicle Identification Number 1LNHM82V57Y608876, at Jamaica Avenue and 168th Street in the borough of Queens after he observed the operator of the vehicle run a red light and then drop off a passenger at Merrick Boulevard and 168th Street. Inspector Murphy spoke briefly to that passenger, who indicated that she had just "gotten out of a taxi and she had paid $2."[1]

Inspector Murphy then pulled the vehicle over and interviewed both the driver of the vehicle and the remaining passenger that was still in the vehicle when he stopped it. The Inspector then issued Summons #70560787A, dated October 16, 2017, which alleged that Respondent Daniel Jean Francois violated Administrative Code § 19-506(b)(1)(unlicensed vehicle engaged in illegal for-hire activity).

At this point Inspector Murphy began his analysis of whether or not it was appropriate to seize Respondent's vehicle. First, he identified Respondent as the owner of the vehicle after he obtained Respondent's New York State Department of Motor Vehicle ("DMV") license number and the vehicle plate and input those credentials into a handheld electronic summonsing device (a "handheld"). The handheld then returned a message to Inspector Murphy that the vehicle was "subject to forfeiture." Inspector Murphy then "called his Lieutenant who arrived and approved the seizure of the vehicle."[2]

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[1] *See NYC TLC v. Jean Francois Daniel*, Notice of Decision, Office of Administrative Trials and Hearings, Hearings Division, Lic. No. 5826582, page 1, Nov. 3, 2017.
[2] *Id.*

Finally, as a last step before seizing, Inspector Murphy issued a Notice of Seizure to Respondent, which reads, in relevant part:

> To the registered owner:
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> Your vehicle is being seized under NYC Administrative Code Section 19-506(h). You will have a hearing at the date, time, and location written on the summons you just received. . . . If you are found guilty of the unlicensed activity, TLC will then try to prove: (1) You have at least one past violation for unlicensed activity (listed below), and (2) It is necessary to keep your vehicle while TLC seeks to have it forfeited. If TLC proves these two issues, TLC will keep your vehicle and seek to have it forfeited.
>
> Past Violation(s)
>
> 1. Summons EA70021428A, 02/01/2017
> 2. Summons EA70651373A, 01/20/2017
> 3. Summons EA70641529A, 12/15/2016

PROCEDURAL HISTORY

This matter was first adjudicated at a hearing at the Office of Administrative Trials and Hearings ("OATH") on October 23, 2017. OATH Hearing Officer ("H.O.") Mark Du issued his Notice of Decision on November 3, 2017.

H.O. Du first considered the propriety of the stop of the vehicle. He credited Inspector Murphy's testimony and found that "there was reasonable suspicion to stop the straight plate vehicle due to Officer [Murphy] initially interviewing the female passenger being dropped off at McDonalds [sic] informing him that she had paid $2 for a ride."[3]

After finding that there was reasonable suspicion for the stop, H.O. Du found that Respondent "was engaged in illegal for hire activity" and that he violated § 19-506(b)(1) on October 16, 2017.[4]

Regarding the retention of Respondent's vehicle pending forfeiture, H.O. Du found that the TLC established that: 1) the owner engaged in the unlicensed activity alleged in the summons; 2) that the owner did have two or more violations of § 19-506(b)(1) in the past 36 months and 3) that it was necessary that the vehicle remain impounded pending forfeiture.[5]

Respondent appealed, reiterating his hearing testimony, arguing that he did not violate Administrative Code § 19-506(b)(1), that he has lost use of his vehicle since the time of the seizure and that he wants his vehicle returned to him.

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[3] *Id* at page 3.
[4] *Id.*
[5] *Id.* at pages 3-4.

The OATH Appeals Unit reviewed that appeal and granted it in part and denied it in part in a decision that was issued on December 21, 2017. The Appeals Unit upheld the § 19-506(b)(1) violation but reversed with respect to the propriety of the forfeiture of the vehicle, noting that the "Government bears the burden of demonstrating that it had 'reasonable grounds to believe the property is subject to forfeiture, and that these grounds must rise above the level of mere suspicion' " and holding that the

> [TLC] officer did not demonstrate at the hearing that at the time of the seizure, he had probable cause to believe that the vehicle was subject to forfeiture. . . . The issuing officer did not specifically testify that, at the time of the stop, he knew or was notified that the respondent had a prior violation of Administrative Code § 19-506(b)(1), (c), or (k) within 36 months.[6]

TLC now petitions the Chair pursuant to TLC Rule 68-12 to reverse the decision of the Appeals Unit, arguing that Inspector Murphy had probable cause to believe that the vehicle was subject to forfeiture when it was seized.

ANALYSIS

a. Background: vehicle forfeiture class action lawsuits, the Administrative Code, and TLC Rules

The TLC has been named as a defendant in two class-action lawsuits based on its vehicle seizure practices and procedures. In the first case, *Harrell v. City of New York*,[7] the court granted plaintiffs' motion for summary judgment with respect to liability and granted in part and denied in part defendants' cross-motion for summary judgment in an Opinion and Order dated September 30, 2015. In the second case, *DeCastro v. City of New York*,[8] the court considered Plaintiffs' motion for summary judgment and Defendants' cross-motion for summary judgment and both were granted in part and denied in part in an Opinion and Order dated precisely two years later, September 30, 2017.

Prior to the *Harrell v. City of New York* litigation TLC officers seized any vehicle that they had probable cause to believe was engaged in unlicensed for-hire activity. That practice ended after the *Harrell* court deemed the seizure of vehicles belonging to first-time § 19-506(b)(1) offenders unconstitutional.[9]

TLC now only seizes vehicles subject to section § 19-506(h)(2) of the Administrative Code, which states:

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[6] *See NYC TLC v. Jean Francois Daniel*, Office of Administrative Trials and Hearings, Hearings Division – Appeals Unit, Lic. No. 5826582, page 4-5, Dec. 21, 2017.

[7] *Harrell v. City of New York,* 138 F.Supp.3d 479 (S.D.N.Y. 2015).

[8] *DeCastro v. City of New York*, 278 F. Supp. 3d 753 (S.D.N.Y. 2017) (this case deals with the same constitutional concerns as those described in *Harrell, supra,* but here the putative class is comprised of individuals whose vehicles were seized after repeated alleged violations, as opposed to first time violations, of Administrative Code §19-506(b)).

[9] *Harrell* at 484 ("The Court agrees that the City's procedure of seizing vehicles that are suspected of being used for hire without proper licensing is unconstitutional under the Fourth and Fourteenth Amendments as it applies to vehicle owners with no prior violations in the preceding 36 months.").

> if the owner is ... found liable ... for [a 19-506(b), (c) or (k)] violation ... two or more times ... within a thirty-six month period, the interest of such owner in any vehicle ... shall be subject to forfeiture upon notice and judicial determination.

TLC Rule 68-17(a)(1) states that an officer may seize any vehicle where probable cause exists to believe that the vehicle is operated or engaged in Unlicensed Activity and where, at the time of the stop, the vehicle owner has at least one prior violation of sections 19-506 (b), (c), or (k) of the Administrative Code in the past 36 months.

The Appeals Unit appears to have based its decision on the *DeCastro v. City of New York* Opinion and Order that was issued on September 30, 2017. That Opinion and Order focused on owners of unlicensed vehicles who had one or more violations of § 19-506(b)(1) at the time of the stop as well as owners of TLC-licensed vehicles that engage in activity outside the scope of their license. The *DeCastro* court reasoned that because the TLC personnel could not research the violation history of the drivers of the vehicles that they were seizing, they could not form the necessary probable cause to believe that the vehicles were subject to forfeiture.[10]

b. TLC Seizure Policy changes after *Harrell* and *DeCastro*

The *Harrell* and *DeCastro* Orders forced the TLC to reshape the process by which its Inspectors seize vehicles. The TLC now only seizes vehicles in accordance with the dictates of *Harrell*, *DeCastro*, Administrative Code § 19-506(h)(2) and TLC Rule 68-17(a)(l), and the Agency has overhauled the safeguards in place before a seizure can be effectuated.

In order to properly seize within the confines of the judicial, Code-based and rule-based strictures listed above, and as noted in the H.O. Du's Decision and the Appeals Unit reversal, TLC officers rely upon handhelds to verify whether or not a given vehicle is subject to forfeiture under § 19-506(h)(2). TLC officers are trained to look up the drivers of these vehicles by their Department of Motor Vehicles identification and if no prior violations are found through that initial look-up, to then search for any prior §19-506 violations by the vehicle license plate number. If, after entering this information, the handheld indicates that the stopped vehicle is subject to forfeiture, the TLC Inspector confirms that finding (that the vehicle is in fact subject to forfeiture) with their commanding officer and only then seizes the vehicle.

The TLC issues a Notice of Seizure when a given respondent's violation history merits vehicle forfeiture. Each Notice of Seizure lists the respondent's past § 19-506 violations (if any such violations exist).[11] In this case the Notice of Seizure reads, in relevant part:

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[10] *DeCastro* at 769.

[11] In her petition, TLC Supervising Attorney Leandra Eustache explains the difference between a summons and a violation as follows:

> "The Appeals Unit's contention that it is unclear of the exact dispositions of the summonses is without merit because the Notice repeatedly refers to the listed items as 'past *violations*' which suggests that any listed summonses resulted in guilty dispositions. The term 'violation' is also employed in the NYC ADC § 19-506(h) to describe a vehicle owner's priors. In contrast, had the Notice referred to the listed items only as 'summonses' with nothing more or referred to the items as 'notices of violations,' some ambiguity would arguably arise as to the outcome of the summonses.

> To the registered owner:
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> Your vehicle is being seized under NYC Administrative Code Section 19-506(h). You will have a hearing at the date, time, and location written on the summons you just received. . . . If you are found guilty of the unlicensed activity, TLC will then try to prove: (1) You have ***at least one past violation for unlicensed activity*** (***listed below***), and (2) It is necessary to keep your vehicle while TLC seeks to have it forfeited. If TLC proves these two issues, TLC will keep your vehicle and seek to have it forfeited.
>
> Past Violation(s)
>
> 1. Summons EA70021428A, 02/01/2017
> 2. Summons EA70651373A, 01/20/2017
> 3. Summons EA70641529A, 12/15/2016

(emphasis added).

The Notice of Seizure quoted here contains sufficient information to provide Inspector Murphy with probable cause to believe that the vehicle was subject to forfeiture. The violation history clearly indicates that the vehicle owner has at least one prior violation for unlicensed activity and the listed dates of those prior violations provide the necessary information to conclude that there have been two or more total violations[12] of section 19-506 within the past 36 months, satisfying the demands of § 19-506(h)(2). All of this information is contained within the four corners of the Notice of Vehicle Seizure, which was produced contemporaneously within the October 16, 2017 stop itself.

c. The revised TLC seizure policies applied to Petition 1037

Contrary to the Appeals Unit's conclusion, the *DeCastro* Opinion and Order is not fatal to the analysis of whether Inspector Murphy had probable cause to believe that the respondent's vehicle was subject to forfeiture. The facts in *DeCastro* can be distinguished from this case.

First, the seizures scrutinized in the *DeCastro* Opinion and Order occurred between November 2013 and May 2015 (prior to the *Harrell* decision), when TLC officers seized all vehicles that they could identify as being used in the commission of unlicensed for-hire activity, irrespective of that vehicle owner's violation history (meaning, they seized first-time § 19-506(b)(1) violators as a matter of course). Since that time period, TLC's seizure practices have changed in that its officers

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> However, in the current instance, no more specific information is needed because whether the violations resulted from a guilty plea, hearing decision, appeal or signed stipulation is irrelevant. For the purposes of forfeiture, all that matters is whether the respondent was in violation the requisite number of times within the relevant period."

[12] The potential violation for which a given respondent is currently being stopped would count toward that total, meaning if the unlicensed activity car stop for which is respondent is currently being issued a summons is upheld and results in a violation, there need be only one other violation within the past 36 months to satisfy § 19-506(h)(2).

only seize vehicles that are operated by repeat violators and that they believe to be subject to forfeiture under § 19-506(h)(2).

Second, the summonses and the seizure forms that were scrutinized in the *DeCastro* Opinion and Order (issued between November 2013 and May 2015) made no reference to past vehicle owner violations. The *DeCastro* Opinion and Order reads:

> The City has provided no evidence that the TLC inspectors who effected the seizures at issue had any reasonable basis for believing that [plaintiffs] had been 'convicted' of or 'found liable' for any prior violations at the time of the seizures. None of the inspectors involved in these seizures claims that he had any specific information regarding the violation histories of these [plaintiffs] before seizing their vehicles. None of the inspectors states that he even investigated the prior violations, if any, of [plaintiffs] prior to the seizures at issue. The summonses issued by these inspectors . . . do not mention the violation histories of [plaintiffs].[13]

The fact pattern above bears no resemblance to the case at bar. By the time that the Notice of Seizure issued in the instant case was created on October 16, 2017, the TLC's policy and procedure related to vehicle forfeiture had been overhauled to include safeguards against the type of unconstitutional seizures detailed in *Harrell* and *DeCastro*.

By October of 2017 the TLC officers had been trained to check their handheld devices for vehicle owner summons history through first a DMV search and then a vehicle license plate search. If that handheld look-up indicated seizure to be an appropriate remedy, TLC officers were at this point obligated to confirm their findings by checking in with their commanding officer before proceeding with the vehicle seizure. And most importantly, at least for the purpose of forming probable cause, the TLC handhelds had been programmed to print a Notice of Vehicle Seizure that contained a given respondent's §19-506-unlicensed activity violation history.

All of these safeguards were implemented after the *DeCastro* Opinion and Order, all were in place at the time of seizure on October 16, 2017, and the TLC issuing officer followed these new procedures before seizing Respondent's vehicle. The facts of Respondent's vehicle seizure are thoroughly distinct from the fact patterns recited in *DeCastro* and the Appeals Unit erred when it either ignored or failed to recognize these manifest distinctions in its analysis.

In its opinion, the Appeals Unit found the new TLC seizure policy wanting by specifically casting doubt as to whether a TLC Inspector's use of the handheld to research a respondent's violation history could allow that Inspector to form the probable cause needed to appropriately seize a vehicle after it had been stopped for a § 19-506 violation. The Appeals Unit cites *DeCastro* for the proposition that "[w]hile the notification 'subject to forfeiture' indicated in the respondent handheld device may be based on relevant records of prior violations, such basis [for this notification] must be conveyed or known to an officer to form the requisite probable cause."[14]

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[13] *DeCastro* at 769 (internal footnote and citation omitted).

[14] *See NYC TLC v. Jean Francois Daniel*, Office of Administrative Trials and Hearings, Hearings Division – Appeals Unit, Lic. No. 5826582, page 5, Dec. 21, 2017.

This holding is incorrect. In *DeCastro,* the court rejected the TLC argument that the collective knowledge doctrine provided its Inspectors with probable cause to seize even when "there is no evidence that any [radio room] operator conveyed this [respondent § 19-506 violation history] information to the inspectors who seized their vehicles."[15] The same concerns do not apply here, as the handhelds have been programmed to automatically convey the precise information needed to form probable cause—namely that there is a violation history in place that satisfies § 19-506(h)(2). As TLC Supervising Attorney Leandra Eustache notes in her petition, "the plain meaning and only conceivable interpretation of a message [from a handheld] stating that a vehicle is 'subject to forfeiture' is that the vehicle is subject to forfeiture."

The Appeals Unit erred first in conflating the standard to form probable cause with the standard to prove that the collective knowledge exception has been met and it erred again by ignoring the fact that in the case at bar the collective knowledge exception would have been met anyway, as the precise lack of communication complained of in *DeCastro* had been remedied through the § 19-506 violation history search performed by the handheld.

The Appeals Unit also erred in its critique of the Notice of Seizure when it held that "this document merely lists prior summons numbers and issue dates under the heading 'Past Violations.' It does not specify for what violation the summons was issued."[16] But the Notice of Seizure includes the following words: "Your vehicle is being seized under NYC Administrative Code Section 19-506(h). . . .You have at least one past violation for unlicensed activity (listed below)." The specific unlicensed operation violations are then listed under this plain-language unlicensed activity violation descriptor.

The Appeals Unit's contention that there was not "any indication of what the violations were"[17] is belied by a plain reading of the language included in the Notice of Vehicle Seizure.

For all the reasons stated above, the Appeals Unit erred in finding that the TLC officer did not have probable cause to believe that the respondent had the relevant §19-506(b)(1) violation history necessary to effectuate seizure of the vehicle. Since the hearing officer that presided over the hearing found that the release of the respondent's vehicle would pose a heightened risk to the public, the original order granting TLC's motion to retain the vehicle should be reinstated.

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[15] *DeCastro* at 771.

[16] Appeals Unit at page 5.

[17] *Id.*

DIRECTIVE

In the matter of New York City Taxi & Limousine Commission against Daniel Jean Francois (TLC License No. 5826582), the decision of the OATH Taxi and Limousine Appeals Unit regarding summons #70560787A is reversed. If the TLC is still in possession of the Respondent's vehicle, it may continue to retain the vehicle pending civil forfeiture proceedings in New York State Supreme Court.

So Ordered: April 4, 2018

Sherryl A Eluto

Sherryl Eluto, ***Assistant General Counsel/Managing Attorney***