

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STANISLAUS

IN RE: RESTORATION OF SEIZED PROPERTY, NAIEL AMMARI et al.,
vs.
CALIFORNIA STATE DEPARTMENT OF MOTOR VEHICLES, et al.,

NATURE OF HEARING: Plaintiff's Motion For Restoration of Property Pursuant to Penal Code Section 1540.

No. 659126

JUDGE: TIMOTHY W. SALTER
Clerk: N. Dughi

Bailiff: None
Reporter: None

Date: 12/23/2010
Modesto, Calif.

Appearances: None

The Motion of Naiel Ammari and Best RV Center, Inc. for restoration of property pursuant to Penal Code Section 1540, came on for hearing on October 21, 2010, in Department 1, the Honorable Timothy W. Salter, Judge, presiding. Plaintiff was represented by Markus Mueller Dombois, Peter Rausch and Joe Ferraro. Defendant was represented by John Goulart, Deputy District Attorney. Witnesses were sworn and testified, exhibits were entered into evidence. The matter was argued, and submitted to the Court.

Naiel Ammari and Best RV Center seek return of property seized during execution of a search warrant. The warrant was issued based on a Statement of Probable Cause signed by Eugene Brathwaite detailing three (3) sales transactions in which Ammari and Best RV allegedly falsely represented to customers that a \$750 pre-delivery inspection fee was a mandatory fee required by the State of California. Ammari and Best RV Center have brought forth evidence showing that Brathwaite's Statement of Probable Cause contained significant omissions.

Vehicle Code § 11713.1(b) Issues:

The People attempt to justify the warrant on the basis that Vehicle Code § 11713.1(b) precludes dealers from charging a "Pre-Delivery Inspection fee" if this fee is not included in the advertized price of the vehicle. However, Mr. Brathwaite did not seek the warrant on the grounds of suspected violations of Vehicle Code § 11713.1(b). Indeed, Brathwaite's Statement of Probable Cause does not even mention this code

section. Rather, Brathwaite alleged simply that "[t]here is no California law that permits the assessment of a pre-delivery inspection fee." The primary focus of Brathwaite's Statement of Probable Cause was that Ammari and Best RV Center were committing Grand Theft (Penal Code § 487) and Theft by False Pretenses (Penal Code § 532(a)) by falsely representing the "Pre-Delivery Inspection fee" as one that is required by the State.

However, Vehicle Code § 11713.1(b) does not preclude dealers from charging a "Pre-Delivery Inspection fee." It merely holds that if such a fee is charged, it must be included in the vehicle's advertized price. Brathwaite's Statement of Probable Cause says nothing about the advertized price of the vehicles at issue in the three sales transactions he describes. Further, the People presented no evidence concerning advertizing practices of Best RV Center. Thus, even if Brathwaite had sought the warrant on the grounds that Best RV Center and Ammari were violating Vehicle Code § 11713.1(b), the facts alleged in his Statement of Probable Cause would be insufficient to justify issuance of the warrant.

Was There Probable Cause to Issue the Warrant?

If issuance of the warrant is to stand, it must do so on the basis of the evidence submitted in support of the alleged violations of Penal Code §§ 487 and 532(a). The issue before the Court is whether it would have had probable cause to issue the warrant if Brathwaite has disclosed the additional facts set forth in Ammari's Penal Code § 1540 motion.

Probable cause to issue a warrant exists where "given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found" *Illinois v. Gates* (1983) 462 U.S. 213, 238; *People v. Bennett* (1998) 17 Cal.4th 373, 391. The law enforcement officer's affidavit carries a presumption of validity, *Franks v. Delaware* (1978) 438 US 154, 171, and courts resolve doubtful or marginal cases in favor of the warrant. See *People v. Superior Court (Corona)* (1981) 30 Cal.3d 193, 207. The phrase "fair probability" refers to facts "such as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion" *People v. Barnum* (1980) 113 Cal.App.3d 340, 345.

CALCRIM doesn't appear to have jury instructions specific to Penal Code §§ 487 and 532(a). However, CALCRIM 1804 sets forth the elements for theft by false pretenses, which is essentially what Brathwaite's Statement of Probable cause alleged. The important elements for the purposes of Mr.

Ammari's motion are: 1) an intentionally false representation and 2) reliance on this statement by the victim.

The question before the Court is whether the following facts would cause the Court to "entertain a strong suspicion" that Ammari and Best RV had made false representations about the pre-delivery inspection fees and that customers had paid these fees in reliance on the false representation that they were required by California law:

- The Affidavit in Support states that during the last 36 months, the Better Business Bureau received 25 consumer complaints against Best RV Center. Due to these complaints, the BBB gave Best RV an "F" rating. However, at the hearing, evidence was produced that the vast majority of these complaints were brought against a dealership in Manteca that Mr. Ammari no longer operates rather than Best RV Center. Further, all but two of the complaints are listed as "resolved." Mr. Brathwaite testified he did not put the latter fact in his Affidavit because he "would have to explain it".
- The Affidavit states that one consumer complaint filed by Matthew Ball alleged that when he questioned the \$766.00 "CA PRE DELIVERY INSPECTION FEE" on his bill, he was told by Ammari that this "was a mandatory fee 'required by the State of California.'" However, the only evidence in support of this assertion is a copy of a Retail Installment Sale Contract in the name of "Remedios Ball". Matthew Ball was not a party to the sale. However, the Affidavit led the Court to believe that Matthew Ball was the purchaser. There was no explanation in the Affidavit for the discrepancy, and the Court did not discover it until the Motion had been filed.
- A second consumer complaint was filed by Gary Butts, and it appears the basis for this complaint was that after purchasing a used RV "as is," and being charged a Pre-Delivery Inspection fee, he discovered a problem with the brakes. Turlock RV offered to fix the problem for free, but Butts instead went to another repair shop and demanded Turlock RV reimburse him for this expense. The paperwork for the sale does not make reference to the Pre-Delivery Inspection fee, and Butts stated this is because it was included in the cost of accessories. Nowhere in his hand-written statement does Mr. Butts claim that the inspection fee was "state-mandated". Indeed, his only

complaint appears to be that the inspection was poorly done, because it failed to reveal some brake problems that he later experienced.

- A third complaint was filed by Lisa Bratland. Ms. Bratland lived out of state and wanted the "Pre Delivery Inspection fee" waived. Ms. Bratland "stated that the salesman never clearly explained the reason for the fee." At the hearing Mr. Brathwaite testified that he knew after talking with Ms. Bratland, that her money was refunded to her, and the sale was rescinded. However, there was no mention of this fact in the Affidavit.
- Evidence was presented through Affidavits in Support of the Motion, as well as testimony that Pre-Delivery Inspections are standard practice in the industry and many manufacturers require dealers to conduct them. Many dealers charge a separate pre-delivery inspection fee.

Had the Court known that all but two BBB complaints had been resolved, the Court would not have considered the BBB complaint information in determining whether there was probable cause. Had the Court known that Mr. Ball was not a party to the sales agreement, the Court would not have considered Mr. Ball's complaint in determining whether there was probable cause. Had the Court known there was no evidence that Mr. Butts or Ms. Bratland were ever told the pre-delivery inspection fee was required by the State of California, and had the Court known that Ms. Bratland had received all her money back, the Court would not have considered that portion of the Affidavit concerning them.

After eliminating all of the above facts in support of the issuance of the Warrant, the remaining facts do not give rise to a "strong suspicion" that Ammari and Best RV were falsely representing the pre-delivery inspection fee as a State required fee. Had the full facts been revealed to the Court, the search warrant would not have been issued. Therefore, the motion pursuant to Penal Code Section 1540 for restoration of property is hereby **GRANTED**.

Counsel for Petitioner is ordered to prepare formal order.

MINUTE ORDER