

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 :  
 v. : No. 08-44  
 :  
 MARK GREEN :  
 :

**MEMORANDUM**

**Juan R. Sánchez, J.**

**June 30, 2015**

On November 4, 2009, a jury convicted Defendant Mark Green of access device fraud conspiracy, use of unauthorized access devices, and aggravated identity theft. Green seeks the return of personal items he asserts the Government seized from him and still retains without a legitimate reason for keeping the property. Based on the evidence submitted during and after an evidentiary hearing on the status of the personal items, and for the reasons that follow, the Court will grant Green's motion in part.

**FACTUAL BACKGROUND**

In 2007, the United States Secret Service began investigating the use of stolen identities to purchase vehicles and obtain unauthorized credit cards. The Upper Dublin Township Police Department discovered Green was the owner of one of the cars involved the investigation. On November 16, 2007, Green voluntarily went to the Upper Dublin Township Police Department to speak with a detective. During this meeting, Green consented to a search of his car, and he asserts the Police Department seized his Pionex Elite computer, among other items, during the search.

On December 19, 2007, Pennsylvania State Police conducted a search of Green's residence pursuant to a search warrant. The officers seized numerous items from Green's apartment and also seized four vehicles in Green's possession, including a 2007 Dodge Charger. Because the focus of

the search was for “[a]ny documents associated with the sale, purchase, transfer, and release of a lien of a 2006 Infinity or any other vehicles,” *see* Evidentiary Hr’g Tr. 19, Feb. 17, 2015, the officers performed only a cursory inspections of the vehicles upon seizing them. This December 2007 search was led by Pennsylvania State Trooper David Shearn.

On January 24, 2008, Green was indicted on one count of access device fraud conspiracy, in violation of 18 U.S.C. § 1029(b)(2); two counts of unauthorized use of an access device, in violation of 18 U.S.C. § 1029(a)(2); and two counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1). On November 4, 2009, a jury convicted Green of four of the five counts. He was sentenced on September 12, 2011, to 139 months’ imprisonment and three years of supervised release.<sup>1</sup>

On November 16, 2011, after a forfeiture hearing, Secret Service Agent Michael Miller returned to Green’s counsel various personal items belonging to Green. *See* Def.’s Mot. 2 n.1 & Ex. A. On December 28, 2011, Green’s counsel contacted Trooper Shearn about property Green asserted was still unreturned, and Trooper Shearn told Green’s counsel that Agent Miller returned most if not all of the items seized during the November 2007 vehicle search following the forfeiture hearing. Trooper Shearn also informed Green’s counsel that he had turned over to the Secret Service all of the items seized during the December 2007 residence search. Green confirmed that the items Agent Miller returned to counsel after the forfeiture hearing were recovered from his vehicle during the November 2007 search, but he asserts the computer seized during that search and several items seized during the December 2007 residence search were never returned.

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<sup>1</sup> Green appealed, and the Third Circuit affirmed this Court’s judgment on March 19, 2013.

## PROCEDURAL HISTORY

On August 22, 2012, Green filed the instant motion to return property, in which he asserted he was entitled to the return of personal items in the Government's possession that were not used at his trial, not needed for evidence, not returned after the November 2011 forfeiture hearing, and not included in a previous Forfeiture Order issued by this Court.<sup>2</sup> In a response filed on March 21, 2013, the Government stated it did not oppose the return of any items seizure during the November 2007 vehicle search that were of a non-criminal nature—i.e., items that were not acquired by fraud and/or the subject of the forfeiture proceeding—but maintained it had returned all such items to Green's counsel following the forfeiture hearing. As to the items it seized from Green's residence on December 2007, the Government explained these items had been transferred to the Secret Service, except for the 2007 Dodge Charger which had been conveyed to the lien holder by the State Police. The Government also stated it remained committed to return any property it still had that was of a non-criminal nature, but denied that the State Police officers who performed the December 2007 search seized \$4,000 in cash or any clothing, as Green alleged. On October 25, 2013, this Court denied Green's motion without an evidentiary hearing, and Green appealed.

While Green's appeal was pending, the Secret Service sent Green a letter stating it had several items that belonged to him and provided the inventory sheet numbers for those items. On December 17, 2013, Green replied to the letter, asserting some personal items were missing from the list of returnable items,<sup>3</sup> and stating he would send a representative to pick up the property. He

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<sup>2</sup> In the Forfeiture Order entered on January 12, 2012, this Court declared a 2005 Mercedes-Benz SL500 and a \$9,000 forfeiture money judgment fully and finally forfeited to the United States of America.

<sup>3</sup> Although Green purported to identify the allegedly missing items by inventory sheet number, at the evidentiary hearing, he admitted the numbers he used were based on his independent and unsupported conclusion that the inventory sheet numbers must be sequential and any numbers

also requested copies of the inventories prepared after the searches of his cars and home and the inventory of the personal items in the Dodge Charger. On January 23, 2014, Attorney Martin Daniels, acting as Green's representative, retrieved from the Secret Service several of Green's personal items. *See* Gov't's Resp. to Order Re Return of Prop. Ex. A (Receipt for Evidence), ECF 199.<sup>4</sup>

On October 28, 2014, the Court of Appeals for the Third Circuit vacated this Court's Order denying Green's motion to return property and remanded the case, directing the Court to hold an evidentiary hearing to determine if the Government still possessed any items belonging to Green.

The Court held an evidentiary hearing on February 17, 2015, which Green attended via videoconference. The Government presented two witnesses—(1) Pennsylvania State Trooper Shearn, who was the point person for the December 19, 2007, search of Green's residence, and (2) Secret Service Agent Corey Scales, the agent who "inherited" this case from other Secret Service agents and became involved in the return of Green's property. Five days before the evidentiary hearing, the Government submitted copies of the property records prepared by the Pennsylvania State Police for the items seized during the December 19, 2007, search and copies of the property

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skipped were therefore his property. Evidentiary Hr'g Tr. 61-62 ("Your Honor, the numbers that I were going by were the numbers that were missing in between, on the inventory sheet, it had a bunch of numbers missing . . . so I just put in the numbers that were missing."). Secret Service Agent Corey Scales testified the property receipt numbers do not go in sequence and she did not have the numbers provided by Green in her records; she stated it was a "huge possibility" that the property receipt numbers that Green claims correspond to his missing items are actually unrelated to his case. *Id.* at 62.

<sup>4</sup> On March 20, 2014, while Green's appeal remained pending, the Government requested permission to destroy the items relating to this case that remained in the Government's possession. The Government provided a list of those items with their Secret Service inventory numbers, asserting they were contraband and instrumentalities of Green's criminal activities. By Order of April 4, 2014, the Court denied the motion without prejudice to reassertion after the Third Circuit decided Green's appeal of the Court's denial of his motion to return property.

record for items transferred to the Secret Service on August 13, 2009. The Government also submitted several documents related to the seizure and transfer of possession of the Dodge Charger at issue in this case. Because Green did not receive these documents prior to the hearing, the Court permitted him to respond to the documents after he had a chance to review them. On March 4, 2015, Green submitted a response listing the items he asserts the Government still retains and must return to him. Green still maintains there were thousands of dollars' worth of clothing and \$4,000 cash in the Dodge Charger that rightfully belong to him.

## **DISCUSSION**

Under Federal Rule of Criminal Procedure 41, “[a] person aggrieved . . . by the deprivation of property may move for the property’s return,” and, in evaluating such a motion, “[t]he court must receive evidence on any factual issue necessary to decide the motion.” Fed. R. Crim. P. 41(g). Although the Government is “permitted to seize evidence for use in investigation and trial, . . . such property must be returned once criminal proceedings have concluded, unless it is contraband or subject to forfeiture.” *United States v. Chambers*, 192 F.3d 374, 376 (3d Cir. 1999). Once a criminal proceeding has terminated, “the person from whom the property was seized is presumed to have a right to its return, and the government must demonstrate that it has a legitimate reason to retain the property.” *Id.* at 377. The Government can meet this burden by demonstrating “a cognizable claim of ownership or right to possession adverse to that of the movant.” *Id.* (citation and internal quotation marks omitted). However, the Government “must do more than state, without documentary support, that it no longer possesses the property at issue.” *Id.* at 378. Importantly, “a motion for return of property is not rendered moot merely because the government no longer possesses the seized property,” and “the government cannot defeat a properly filed motion for return of property merely by stating that it has destroyed the property or given the

property to third parties.” *Id.* at 377.

In this case, the Government asserts it no longer has the property Green seeks to have returned to him. Pursuant to *Chambers*, this Court must determine whether the Government actually retains possession of the property, and if not, what happened to it. *See id.* at 378. Specifically, the Court must determine whether the Government possessed the Dodge Charger and the \$4,000 cash and the clothing Green alleges were in the car; if the Government did possess this property, what happened to the property; and whether the Government still possesses the specific items Green listed in his March 4, 2015, response as rightfully belonging to him. If the Court concludes that the Government’s actions with regard to Green’s property “were not proper,” this Court must “determine what remedies are available.” *Id.*

#### **1) November 2007 Vehicle Search**

Green asserts the Government still possesses a computer found during a consensual search of his vehicle on November 16, 2007.

Following the evidentiary hearing, the Government submitted an affidavit from FBI Special Agent Robert Loughney, explaining that on November 16, 2007, Green consented to a search of his vehicle by Detective Daniel Wade of Upper Dublin Township Police Department, and the only item seized during that search was a Pionex Elite Computer, Serial Number 7001578980. Agent Loughney stated he received this computer from Detective Wade on December 3, 2007, and entered on a property receipt that was signed by both Agent Loughney and Detective Wade. On December 4, 2007, Green signed a Consent to Search form giving the FBI permission to perform a complete search of the seized computer. This form was witnessed and signed by Agent Loughney and FBI Special Agent Corey Reilly. That same day, Agent Loughney transferred custody of the seized computer to Secret Service Special Agent Sabrina Cipriano along

with a copy of Green's consent to search. This transfer was recorded on a property receipt signed by both Agent Loughney and Agent Cipriano. The two property receipts and the Consent to Search form were attached as exhibits to Agent Loughney's affidavit.

The Government also submitted an affidavit from Secret Service Special Agent Scales, stating that the Pionex computer was returned to Green after its contents were searched with Green's consent. The Government also submitted a Secret Service Electric Crimes Special Agent Program (ECSAP) Report dated December 5, 2007, stating that no evidence of identity theft was found on the computer and that the computer was returned to Green. In response, Green testified at the evidentiary hearing that Agent Loughney contacted him after the November 2007 search and told him he could retrieve his property, but Green was unable to do so before he was arrested on December 26, 2007. Evidentiary Hr'g T. 77. Green asserts the Government still possesses the computer.

Based on the Government's detailed evidence regarding the chain of custody for the computer taken from Green's vehicle, including an affidavit and report indicating that the computer was returned to Green, the Court finds this item was properly returned to Green and is no longer in the Government's possession.

## **2) Dodge Charger**

Green asserts the Pennsylvania State Police improperly seized a Dodge Charger during the December 19, 2007, search of his residence and took the car to the State Police headquarters on Belmont Avenue, and not to a local impound lot as the State Police allege. Although Green's main concern with the Dodge Charger is the property he alleges was inside of it at the time it was confiscated, as discussed below, he wishes to "establish the chain of custody as to who had possession of the vehicle and when and at what point did anyone search the vehicle." Resp. to the

Court Order of Feb. 17, 2015, at 2, ECF 207.

The Government alleges the Dodge Charger was transferred to the State Police headquarters and then an impound lot, and eventually transferred to Wells Fargo Bank, N.A., the holder of a lien on the car. The Government submitted several documents regarding the possession and transfer of the Dodge Charger. First, the Government provided a December 19, 2007, property record for the vehicles seized by the Pennsylvania State Police during the search of Green's residence. The record lists four vehicles, including the Dodge Charger, and identifies Trooper Shearn as the submitting and investigating officer. *See* Gov't Resp. to Feb. 9, 2015, Order Ex. 1, at 1. The Government also submitted a March 27, 2009, repossession request form from Wells Fargo Financial to Recovery Management Systems, which describes the 2007 Dodge Charger, identifies Mark Green as the borrower, and instructs, "please run given addy secure unit, or make contact and demand unit." *Id.* at 2. The Government provided a copy of a fax sent by Wells Fargo Auto Finance to Trooper Shearn on July 1, 2009, informing him that Wells Fargo Bank, N.A. had a secured interest in the Dodge Charger and stating, "In the event your office forfeits the Vehicle, said forfeiture should be granted subject to Wells Fargo's lien interest." *Id.* at 3. The fax included a copy of the Pennsylvania Certificate of Title issued February 1, 2007, listing Mark Green as the owner of the vehicle and first lien payor of Wells Fargo, and a Department of Transportation Affidavit for Repossession of a Vehicle form, also dated July 1, 2009. *Id.* at 4-5. The Affidavit for Repossession explains that it is to be used by the repossessing lien holder for securing a repossessed title in the name of the lien holder. *Id.* at 5. The form names Mark Green as the defaulting owner and Wells Fargo as the lien holder, describes the Dodge Charger, and states, "the undersigned certify that the motor vehicle described herein has been repossessed due to the failure of the registered owner, named herein, to meet his obligation in the settlement of the lien shown on

the face of this affidavit.” *Id.*

During the evidentiary hearing, Trooper Shearn testified that on December 19, 2007, in conjunction with the search of Green’s residence, the State Police seized four vehicles found on the property, including the 2007 Dodge Charger, to ensure liens had not been fraudulently removed from the vehicles. Evidentiary Hr’g Tr. 20. The police arranged for the cars to be towed to the State Police barracks on Belmont Avenue and then placed in the impound yard. *Id.* at 11. Trooper Shearn testified the Dodge Charger remained in the impound lot while the State Police determined whether the vehicle’s lien had been removed, as had happened with many vehicles involved in the case against Green. *Id.* at 13. In March 2009, while the Dodge Charger was still in the impound lot, Trooper Shearn received the repossession request from Wells Fargo Bank, and, because the police did not need the vehicle for the case against Green, he told Wells Fargo that the State Police would turn the vehicle over to it if it could prove it was the true owner. *Id.* at 13-14. At no time did Trooper Shearn receive any filings by Mark Green concerning ownership of the vehicle. After Trooper Shearn received the fax from Wells Fargo in July 2009 demonstrating the bank’s interest in the vehicle, a towing service moved the car to Wells Fargo. *Id.* at 15.

Based on the foregoing evidence, the Court finds not only that the Dodge Charger was never in the Federal Government’s possession, but also that the State Police properly surrendered the Dodge Charger to the lien holder in July 2009. It is of no consequence that, as Green claims, there was no repossession order from the lien holder at the time the car was seized. The State Police followed proper procedures in transferring the car to the lien holder. The Government has sufficiently accounted for the transfer of possession of this vehicle, and, given that Wells Fargo had a lien on the property, Green is not entitled to its return.

### 3) \$4,000 and Clothing Items

Green asserts there were thousands of dollars' worth of clothes and \$4,000 in cash in the Dodge Charger at the time it was seized, none of which have been returned to him. He asserts the clothing was in the trunk of the vehicle and the cash was in the armrest.

At the evidentiary hearing, Trooper Shearn repeatedly testified he performed only a quick, cursory check of the vehicles seized during the December 2007 search after they were towed to the State Police barracks and before they were moved to the impound lot yard. Trooper Shearn was in charge of taking the vehicles to the impound lot, and he personally looked through the vehicles to ensure they contained no items of value in plain view. *Id.* at 22. Because it was simply a cursory search, Trooper Shearn did not look in the glove compartment, center console, or trunk of any of the cars. *Id.* at 12, 22. Rather, the point of his inspection was to ensure nothing of value was left out in the open. *Id.* at 11.

According to Trooper Shearn, because he found nothing of value during his cursory search of the Dodge Charger, he did not enter anything on a property record nor did he create any type of inventory sheet for the vehicle. *Id.* at 12. Green argues it is mandatory for the State Police to complete an inventory form whenever the police take possession of vehicle even if nothing of value is found inside the vehicle. This argument is incorrect. Trooper Shearn testified that it is State Police policy that once the police take custody of a vehicle and perform a search, the officers do not complete an inventory sheet if nothing of value is found in the vehicle. *Id.* at 24. Also, according to Trooper Shearn, from the time the State Police seized the car in December 2007 to the time Wells Fargo took possession sometime after July 2009, Green did not alert the police to any items inside the vehicle. *Id.* at 15. Trooper Shearn did not know if Wells Fargo

conducted an inventory search of the vehicle prior to taking possession of it. *Id.*<sup>5</sup>

Given the chain of custody of the Dodge Charger as described above, the Court finds the Federal Government never had possession of either the vehicle or any items allegedly inside the vehicle when it was seized, and therefore the Court cannot order the Government to return the money or clothing, even if those items existed. Based on the testimony during the hearing, the Court further concludes that there was not \$4,000 or clothing left in the open in the Dodge Charger when it was seized by the State Police in December 2007, and, even if anything of value was hidden from view, these items are no longer with the State Police and as the vehicle was properly surrendered to Wells Fargo.

#### **4) Items Removed from Green's Residence**

Green asserts many of the items removed from his residence during the December 2007 search by the State Police and later transferred to the Secret Service still have not been returned to him even though they are of a non-criminal nature. Prior to the evidentiary hearing, the Government submitted to the Court two property records, one listing the items seized from Green's residence on December 19, 2007, which identifies Trooper Shearn as the submitting and investigating officer, *see* Gov't's Resp. to Feb. 9, 2015 Order Ex. 1, 6-15, and the other listing those items seized on December 19, 2007, which were then transferred to Secret Service Agent

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<sup>5</sup> Green requests that the Court order the Government to obtain copies of inventory forms from the towing companies that towed the Dodge Charger on December 19, 2007. Trooper Shearn testified, however, that the towing company would not have performed an inventory of the vehicles because it is not an agent of the State Police. Evidentiary Hr'g Tr. 25. Green also requests that the Court subpoena all State Police records concerning the December 19, 2007, search and confiscation of the 2007 Dodge Charger and any other vehicle confiscated from his residence. The Government has submitted records concerning the Dodge Charger to the Court, as explained above, and Trooper Shearn testified that he has provided the Government all of the documentation he received from Wells Fargo with regard to the repossession of this vehicle. *Id.* at 15. In addition, because the other vehicles seized during the December 2007 search are not at issue for purposes of the instant motion, the Court will not direct the Government or State Police to submit any records regarding those vehicles' seizures or current whereabouts.

Sabrina Cipriano. This second property receipt is dated May 18, 2009, and identifies Trooper Shearn as the submitting and investigating officer and Matthew P. Carr as the receiving officer. It contains 143 items. At the bottom of the property record, a table shows that Agent Cipriano received and signed for the items on August 13, 2009. *See id.* at 16-24.

In his response to these documents, Green mistakenly combined the Government's two property records and used that combined list to identify items he believes should be returned to him. The Government, however, only took possession of items 1 through 143 on the second property receipt. Therefore, when reviewing Green's response, the Court will only consider items he identified that appear on pages 16 through 24 of the Government's exhibit. Of these seventeen items listed by Green, six were retrieved by his attorney Martin Daniels on January 23, 2014. *See Gov't's Resp. to Order Re Return of Prop. Ex. A, ECF 199.*<sup>6</sup> As to the remaining eleven items, the Government has made no showing either that it has a legitimate reason to retain these items or that it no longer possesses them, including how and when the items were discarded.

The Court will therefore direct that the Government return the remaining eleven items, unless the Government can show Green is not entitled to receive these items or explain why it no longer possesses these items. The items to be returned, as listed on the state's property record transferring the property to the Secret Service, are: (1) Item 51, 6 power cords, (2) Item 58, Green

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<sup>6</sup> The items returned to Green's representative by the Secret Service are, as described by Green, (1) Item 52, Wallet, (2) Item 53, Wallet, (3) Item 55, small black wallet (4) Item 104, keys to vehicles, (5) Item 105, Silver Breitling Watch, and (6) Item 109, black brief case.

Items 52, 53, and 55 are listed on Secret Service Receipt SSF 1544 #: 109 2009 CE 445 (described as brown wallet (female), black wallet (female), and black wallet (male)). Items 104 and 105 are listed on Secret Service Receipt SSF 1544 #: 109 2009 CE 447 (described as miscellaneous keys and silver Breitling watch). Item 109 is listed on Secret Service Receipt SSF 1544 #: 109 2009 CE 450 (described as black briefcase).

The Receipt for Evidence submitted by the Government demonstrates these items were returned to Attorney Martin Daniels, on behalf of Green, on January 23, 2014. *See Gov't's Resp. to Order Re Return of Prop. Ex. A (Receipt for Evidence), ECF 199.*

Dot Master Card xxxx xxxx xxxx 6436, (3) Item 60, American Express Prepaid Gift Card xxx  
xxxxxx 03777, (4) Item 62, All Access Visa Gift Card xxxx xxxx xxxx 1472, (5) Item 91, Borders  
Rewards Card, (6) Item 93, Mug Shots Coffee House and Juice Bar Gift Card, (7) Item 94,  
Walmart Gift Card Dora the Explorer, (8) Item 107, Bank of America Check Books/Mark Green,  
(9) Item 110, Miscellaneous Documents, (10) Item 117, Mark Green Driver License Update Card  
PA OLN 23407997, and (11) Item 126, Registration Ren[e]wal PA Registration GPK6288 Mark  
Green.

An appropriate order follows.

BY THE COURT:

/s/ Juan R. Sánchez  
Juan R. Sánchez, J.

IN THE UNITED STATES DISTRICT COURT  
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UNITED STATES OF AMERICA : CRIMINAL ACTION  
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**ORDER**

AND NOW, this 30th day of June, 2015, for the reasons set forth in the accompanying Memorandum, it is ORDERED Defendant Mark Green's Motion to Return Property Pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure (Document 180) is GRANTED in part and DENIED in part as follows:

- The motion is GRANTED insofar as the Government is DIRECTED to return the following eleven items to Green, unless the Government can show it has a legitimate reason to retain the items or that it no longer possesses the items:
  - (1) Item 51, 6 power cords
  - (2) Item 58, Green Dot Master Card xxxx xxxx xxxx 6436
  - (3) Item 60, American Express Prepaid Gift Card xxx xxxxxx 03777
  - (4) Item 62, All Access Visa Gift Card xxxx xxxx xxxx 1472
  - (5) Item 91, Borders Rewards Card
  - (6) Item 93, Mug Shots Coffee House and Juice Bar Gift Card
  - (7) Item 94, Walmart Gift Card Dora the Explorer
  - (8) Item 107, Bank of America Check Books/Mark Green
  - (9) Item 110, Miscellaneous Documents
  - (10) Item 117, Mark Green Driver License Update Card PA OLN 23407997
  - (11) Item 126, Registration Ren[e]wal PA Registration GPK6288 Mark Green<sup>1</sup>
- Any response by the Government concerning the foregoing items must be filed no later than July 13, 2015.

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<sup>1</sup> The item numbers are numbers the Pennsylvania State Police assigned to the items on the property record that lists the property transferred to the Secret Service on August 13, 2009. *See* Gov't Resp. to Feb. 9, 2015, Order Ex. 1, at 16-24, ECF 205.

- The motion is DENIED in all other respects.

BY THE COURT:

/s/ Juan R. Sánchez  
Juan R. Sánchez, J.