Court of Appeal Case No. B229748
(Appellate Div. Case No. BR048012)
(Trial Court Case No. BI 20734)
(Citation No. BI20734)

IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

People of the State of California — **Plaintiff and Respondent,**

v.

Annette B[redacted] — **Defendant and Appellant.**

Appeal from the Appellate Division of the Superior Court for
Los Angeles County,
Justices Wasserman, Dymant and Kumar

REPLY

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I.

INTRODUCTION

Respondent begins with the statement "Appellant makes no claim of factual innocence but rather launches an attack on the automated red light enforcement system ('ARLES')."

The assertion that Appellant has launched an attack on ARLES misses the entire point of the Appeal, which is the People's failure to lay the proper foundation at trial for the evidence produced by ARLES. Appellant made no argument regarding the constitutionality of ARLES.

The People's dishonest description of this case as an attack on ARLES, is preceded by an equally dishonest description of the law that the Appellant was under a legal obligation to make a "claim of factual innocence." The People's assertion that Appellant had to make a claim of factual innocence misses the entire point of this Appeal, which is that everyone is entitled to a fair trial and to the presumption of innocence– even if the People do not think so.

II.

THERE IS ONE CENTRAL ISSUE: WHETHER OFFICER BUTKUS IS A QUALIFIED WITNESS

The issues raised by this Appeal and the Response can be boiled down to one central issue, that being whether Officer Butkus was a qualified witness to lay the foundation for and proffer People's Exhibit "1" into evidence over Appellant's hearsay, foundation and Confrontation Clause objections.

People's Exhibit "1" was comprised primarily of three kinds of evidence:

1) A **Maintenance Record** which required authentication, an exception to Hearsay Rule and a witness qualified and capable of being cross-examined regarding the contents of the Maintenance Record;

2) **Altered photographs and video,** which required foundation/authentication;

3) **Information Box superimposed on the photographs and** video, which required foundation/authentication.

The People's sole witness at trial was a police officer with no personal knowledge of the alleged offense. Nevertheless:

A. With regard to the Maintenance Record: The People used Officer Butkus, in the place of the Redflex Systems Custodian of Record or a qualified witness, to try to establish the Business Record Exception to the Hearsay Rule to admit the Maintenance Record prepared by Redflex Systems. The trial court permitted this over Appellant's hearsay objection. Appellant respectfully submits that the trial court erred as Office Butkus was not the Custodian of Record or a qualified witness to lay the foundation for the Business Record Exception to the Hearsay Rule for Redflex System records and that Officer Butkus did not testify to the any of the required elements of Evidence Code section 1271;

B. With regard to the Maintenance Record: The People used Officer Butkus, in the place of the declarant (employed at Redflex Systems) who allegedly maintained the computer/camera system and prepared the Maintenance

Record, submitted by the People in their case in chief to show that the computer/camera was working properly to establish an element of the charge as well as to lay the foundation for the photographs and video. The trial court permitted this over Appellant's Sixth Amendment Confrontation Clause Objection. It is respectfully submitted that the trial court erred as Officer Butkus was not the proper witness capable of being cross-examined regarding the maintenance log so as to provide the Defendant with her Sixth Amendment Right to Confront the witness against her.

C. *With regard to the photographs and video*: The People used Officer Butkus, in the place of an "expert," to authenticate the photographs and video produced by Redflex Systems. The trial court permitted this over Appellant's Foundation and Hearsay objection. It is respectfully submitted that the trial court erred as it was the State's burden to show that the computer/camera was working properly on the date and time the photos and video was produced in order to authenticate and lay a foundation for the photographs and video. The People failed in meeting their burden, as Officer Butkus had no personal knowledge of the maintenance/working condition of the computer/camera system and Officer Butkus was not qualified to give "expert" testimony as he was not a photographic "expert."

Appellant respectfully submits that Officer Butkus was not a qualified witness for any of the purposes for which his testimony was submitted at trial and that the trial court erred in admitting People's Exhibit "1" over Appellant's repeated objections.

III.

OFFICER BUTKUS WAS NOT A QUALIFIED WITNESS REGARDING THE MAINTENANCE RECORD WITH RESPECT TO THE HEARSAY OBJECTION

Respondent's brief rests heavily on the trial court's statement that Officer Butkus was "perfectly capable" of laying the foundation for and authenticating People's Exhibit "1."

The Court's Settled Statement however contains no facts regarding how the officer was qualified, what his qualifications were or on what basis of fact the Court found Officer Butkus to be "perfectly capable." Referring to the Court's settled statement (CR-144), it is silent as to the actual qualifications of the State's witness.

The only evidence regarding Officer Butkus' qualification in the settled statement is the following:

> "He testified about his background, training and experience, what the City had to do before being allowed to operate the red light camera ticket system, how the system works and how it is maintained...Officer Butkus testified about the data boxes imprinted on the photographs an d the letters and numbers contained in them. He explained what the letters and numbers mean, how they are generated and how they relate to the citation..Officer Butkus further testified that he reviewed the technician's logs and that the cameras were working properly on the date and at the time of Appellant's alleged violation."

The Court's settled statement is completely devoid of any facts (vs. conclusions) regarding Officer Butkus' actual background, training or experience. According to Appellant's statement, which was not approved

by the trial Court, Appellant's trial began with Officer Butkus making a general statement to everyone in the courtroom that he was employed by the Beverly Hills Police Department. (CR-144) He had been so employed for 25 years. He had 5 years of experience in photo enforcement. He had undertaken 40 hours of training in photo enforcement some time in the past. He reviewed the photos and videos and determined whether a citation should issue. He testified about the requirements of the Vehicle Code section including what was necessary for the People to prove their case. Regarding the requirement that the equipment be calibrated and maintained regularly, he stated that the Beverly Hills Police Department contracts with a Company called RedFlex Systems. He stated that they are in charge of maintaining and servicing the equipment used for photo enforcement. He testified briefly regarding the triggering mechanism which causes the camera to take pictures and video. After his introductory testimony, the court held individual trials. (CR 143 Proposed Statement on Appeal Dated February 11, 2010, hereafter "CR-143")

The only facts testified to by Officer Butkus regarding his background, training and experience was his testimony that he had taken a 40-hour course in photo enforcement and had 5 years' experience in photo enforcement and had been a police officer for twenty-five years. (CR-143) Officer Butkus did not testify as to when he had taken the 40 hour course, what he had learned in that course, whether he had taken any refresher courses, whether he had ever visited the central Redflex location in Arizona where the information is transmitted, whether he knows anything at all about their record keeping in order to act as their custodian of record for purposes of establishing the business record exception.

Here, the record does not reflect that Officer Butkus could be a qualified witness under Evidence Code section 1271, to take the place of the custodian of records of Redflex. Nowhere is there a showing that he

had the appropriate necessary knowledge of the recordkeeping, underlying workings or maintenance of RedFlex Traffic Systems. Officer Butkus was an employee of a public agency not of Redflex. (CR-143) The Officer here simply received a packet from Redflex (by unknown means) and simply read off the information provided through RedFlex as if it was true and correct, without any basis for doing so. (CR-143)

Not only was Officer Butkus not a qualified witness under Evidence Code Section 1271, but Officer Butkus **did not testify to any of the necessary elements of Evidence Code section 1271**. To warrant admission of business records under statutory business records exception to hearsay rule, there must be some evidence showing that the basic minimal requirements –identifying records, mode of their preparation, and showing that they were prepared in the regular course of business have been met. *Gee v. Timineri* (1967) 248 Cal.App.2d 139, 56 Cal.Rptr. 211. **Even though the trial court is vested with great discretion, there has to be some evidence in the record that the requirements of Evidence Code section 1271 have been met**. In *Gee v. Timineri*, (*supra*), the Court stated the following: "While it is true that the trial court has broad discretion in admitting business records under section 1953f (citation omitted) the authorities above cited and the express language of the statute, make it clear that there must be some evidence showing that the basic minimal requirements--identifying the records, the mode of their preparation...--have been met." (id at p. 147)

Referring to the Court's settled statement, (CR-144) it is silent as to any testimony by the State's witness regarding any of the elements of Evidence Code section 1271. This is because the State's witness did not testify to any of the elements of Evidence Code section 1271. The trial court's settled statement reflects this fact. (CR-144) The Appellant's main objection during trial and in her appeal was that Respondent failed to lay a

foundation for Respondent's Exhibit "1." (CR-143 and CR-144) The record on Appeal and the Court's settled statement both are consistent in that they show that that the testimony of the Respondent's witness did not establish any of the basic minimal requirements of Evidence Code section 1271. (CR-143 and CR-144) The State's sole witness, who testified without assistance from a prosecutor, did not testify as to any of the elements of Evidence Code section 1271. (CR-143 and CR-144)

IV.

OFFICER BUTKUS WAS NOT A QUALIFIED WITNESS TO TESTIFY REGARDING THE TRUTH OF THE MAINTENANCE RECORD, THEREBY VIOLATING THE CONFRONTATION CLAUSE

In this case, the individual who allegedly maintained the camera system and who prepared the maintenance log which was submitted as evidence at trial did not testify. Without the right to cross-examine this witness, Appellant was denied the right to examine a qualified witness regarding the truths asserted in the maintenance record.

In both the *Crawford v. Washington*, (2004) 541 U.S. 36 and *Melendez-Diaz v. Massachusetts*, (2009) 129 S.Ct. 2527 cases, the Supreme Court addressed defendant's right under the Sixth Amendment's confrontation clause. *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527, **stated that the right to cross-examine extends to accuracy-testing reports**. The full text of the quotation provides as follows:

> "FN1. Contrary to the dissent's suggestion, *post,* at 2544 - 2545, 2546 (opinion of KENNEDY, J.), we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to

> establish the chain of custody," *post,* at 2546, this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation, *ibid.,* from *United States v. Lott,* 854 F.2d 244, 250 (C.A.7 1988), "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." **It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live…"** (emphasis added)

The recent Supreme Court in *Bullcomings v. New Mexico* (June 2011) 2011 WL 2472799, recently found that parroting the written testimony of a witness by another person violates the Confrontation Clause.

Petitioner in Bullcoming's jury trial was charged with driving while intoxicated (DWI). This case occurred after Crawford, (*supra*) but before Melendez–Diaz (*supra*). Principal evidence against him was a forensic laboratory report certifying that his blood-alcohol concentration was well above the threshold for aggravated DWI. Bullcoming's blood sample had been tested at the New Mexico Department of Health, Scientific Laboratory Division (SLD), by a forensic analyst named Caylor, who completed, signed, and certified the report. However, the prosecution neither called Caylor to testify nor asserted he was unavailable; the record showed only that Caylor was placed on unpaid leave for an undisclosed reason. In lieu of Caylor, the State called another analyst, Razatos, to validate the report. Razatos was familiar with the testing device used to analyze Bullcoming's blood and with the laboratory's testing procedures, but had neither participated in nor observed the test on Bullcoming's blood sample. Bullcoming's counsel objected, asserting that introduction of Caylor's report without his testimony would violate the Confrontation Clause, but the trial court overruled the objection, admitted the SLD report as a business record, and permitted Razatos to testify. Bullcoming was convicted, and, while his

appeal was pending before the New Mexico Supreme Court, this Court decided Melendez–Diaz. The state high court acknowledged that the SLD report qualified as testimonial evidence under Melendez–Diaz, but held that the report's admission did not violate the Confrontation Clause because: (1) certifying analyst Caylor was a mere scrivener who simply transcribed machine-generated test results, and (2) SLD analyst Razatos, although he did not participate in testing Bullcoming's blood, qualified as an expert witness with respect to the testing machine and SLD procedures. The court affirmed Bullcoming's conviction. The Supreme Court of the United States granted certiorari to address the following question:

> "Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification. 561 U.S. ——, 131 S.Ct. 62, 177 L.Ed.2d 1152 (2010). Our answer is in line with controlling precedent: As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness. Because the New Mexico Supreme Court permitted the testimonial statement of one witness, i.e., Caylor, to enter into evidence through the in-court testimony of a second person, i.e., Razatos, we reverse that court's judgment." (*Id.* at page 6)

The Court went on to say:

> "More fundamentally, as this Court stressed in Crawford, "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." 541 U.S., at 54, 124 S.Ct. 1354. Nor is it "the role of courts to extrapolate from the words of the [Confrontation Clause] to the values behind it, and then to enforce its guarantees only to the extent they serve (in the courts' views) those underlying values." Giles v. California, 554 U.S. 353, 375, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008).

> Accordingly, **the Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination.**" (Emphasis added - Id at p. 9)

In *Melendex-Diaz*, the testimonial evidence was the laboratory workers written statement that the substance was cocaine.

In *Bullcomings*, the testimonial evidence was the laboratory workers written statement that Mr. Bullcomings blood alcohol was above the threshold for aggravated DWI.

In this case, the testimonial evidence was the maintenance worker's written statement that computer/camera system was inspected/calibrated and his conclusion that the computer/camera system was in working order. Just as in the first two cases, the Confrontation Clause requires that the State produce the declarant who wrote the maintenance log and subject him to cross-examination.

Here the maintenance log was woefully deficient. Officer Butkus' testimony was solely based on the RedFlex Maintenance Job Statistics-Detail sheet (Respondent's Exhibit "1") which showed an inspection lasting 50 minutes was done on May 29, 2009, and another inspection lasting 25 minutes was done on June 23, 2009. The work performed under each day's **alleged work performed was a cut and paste of the same duties performed each of the two days**. No inspection was done on the date of the violation. There was no testimony from Officer Butkus establishing his qualification to testify as an expert for his opinion that the cameras were working properly nor for his opinion that the cameras were working properly on the date and time of the alleged violation. In fact, during voir dire, Officer Butkus admitted that the company which prepared the Job Maintenance Sheet, the sheet containing the description of the maintenance

and the party responsible for maintaining the equipment which caused the photographs and video to be recorded, was a company by the name of RedFlex Traffic Systems. Officer Butkus did not perform the maintenance nor was he present when it was done. Officer Butkus, while admitting that he was required to prove, as his case in chief, that necessary elements of the charge required that the equipment be regularly inspected, correctly installed and calibrated, and operating properly, failed to do so. By his own admission, his testimony was solely based on the maintenance log that was prepared by RedFlex. He did not know who the custodian of records was for RedFlex. Furthermore, the log did not show any proof of calibration. (CR-143 and CR-144)

V.

OFFICER BUTKUS WAS NOT A PHOTOGRAHIC "EXPERT"

Respondent, is arguing against himself when citing to cases in which a photographic expert testified at trial to lay the foundation for photographs. This is exactly the problem that Appellant raised in her Appeal - as the People in this case presented no expert.

Each case cited by Respondent, had at an expert in photography testify.

1) *People v. Samuels* (1067) 250 Cal.App.2d 501, 512: "...was sufficiently authenticated by the testimony of **three photographic experts**..." (Respondent's brief – emphasis added –p. 10)

2) *People v. Doggett* (1948) 83 Cal.App.2d 405: "...there was **unimpeached expert testimony** that they were not 'faked'..." (Respondent's brief- emphasis added – p. 10)

3) *People v. Bowley* (1963) 59 Cal.2d 855: "Indeed, in Bowley, the California Supreme Court observed that a photograph constitutes a 'silent witness' to the acts it shows ... and that for admission of such

evidence 'may **be provided by the aid of expert testimony**..." (Respondent's brief –emphasis added- p. 11)

4) "Thus in *Samuels, Doggett,* and *Bowley*, California appellate courts – including the California Supreme Court – have agreed that **experts** who were not eyewitnesses to the scene depicted in a photograph, film ...may provide testimony sufficient to authenticate that evidence." Respondent's Brief – emphasis added- p. 11)

In all these cases there was an expert. Respondent's brief is fraught with statements that Appellant argues that only when the officer is a percipient witness can a photograph be admitted. This is done, no doubt, to mock the Appellant. A reading of Appellant's brief however, shows no such argument. The reason Appellant brought up the fact that the officer was not a percipient witness is because if he was, he could have laid the foundation without having to resort to other means – means which were not accomplished by this officer.

Respondent seeks to convince this Court that Officer Butkus is comparable to the real "photographic experts" in Samuels, Bowely and Doggett. Respondent does so even though the record contains no facts showing any qualification by Officer Butkus as a photographic expert nor a finding by the trial court that Officer Butkus was a photographic expert. Instead, Respondent relies on an Appellate Division case, *People v. Goldsmith* (2011) 193 Cal.App.4th Supp. 1, 3), which is presently subject to review by the 7th Division, and states that "In the present case, Officer Butkus – exactly as did the officer in *Goldsmith* – provided expert testimony regarding the operations of ARLES, the photographs and data it produces based on his training and experience with the images obtained from the ARLES equipment." (Respondent's brief p. 13)

Appellant respectfully submits that Officer Butkus is not a "photographic expert" and he lacked the qualification to testify as such.

The whole point of these cases is the fact that they had an expert. Respondent ignores that fact completely. Ignores the fact that in each case the proponent called a witness who was an expert in photograph. That is the whole point of these cases.

Officer Butkus' testimony was solely based on the RedFlex Maintenance Job Statistics- Detail sheet (Respondent's Exhibit "1") There was no testimony from Officer Butkus establishing his qualification to testify as an expert for his opinion that the cameras were working properly, nor for his opinion that the cameras were working properly on the date and time of the alleged violation. In fact, during voir dire, Officer Butkus admitted that the company which prepared the Job Maintenance Sheet, the sheet containing the description of the maintenance and the party responsible for maintaining the equipment which caused the photographs and video to be recorded, was a company by the name of RedFlex Traffic Systems. Officer Butkus did not perform the maintenance nor was he present when it was done. Officer Butkus, while admitting that he was required to prove, as his case in chief, that necessary elements of the charge required that the equipment be regularly inspected, correctly installed and calibrated, and operating properly, failed to do so. By his own admission, his testimony was solely based on the maintenance log that was prepared by RedFlex. (CR-143 and CR-144)

Other than stating conclusions and citing a an Appellate Division case which is on review (*Goldsmith*), Respondent does not state what Officer Butkus did or said to authenticate the photographs and video.

Officer Butkus was not an expert nor was he qualified as an expert. The People did not prove that the computer/camera system was working properly. Just because a police officer looked a maintenance log and said so is not sufficient.

To summarize:

1) Officer Butkus was not an expert;

2) Officer Butkus had no personal knowledge;

3) The Maintenance Record, even if admitted, does not say that the computer/camera system was working properly at the date and time the photographs and video were taken.

VI.

CONCLUSION

This Appeal is not about a red light or a "busy intersection in the City of Beverly Hills..." (Respondent's Brief – p. 1) Nor is it an "attack on the automated red light enforcement system ('ARLES')." (Respondent's Brief – p. 1) This Appeal is about a defendant's right to a fair trial.

The Court should consider the following statements by the People and the trial court and their implications on whether Appellant received a fair trial:

> "Appellant makes no claim of factual innocence ..." (Respondent's Brief: p. 1)
>
> "[T]he People have never been required to have RedFlex employees such as the custodian of records or the field service technicians present in court in order for the Respondent's Exhibit to be admissible." (CR-143 and CR-144)
>
> "It was explained to the Appellant that she could have filed a discovery motion or issued her own subpoenas, as many motorists do, had she cared to do so." (CR-143 and CR-144)
>
> "Indeed, if Appellant wished to have the custodian of records of Redflex present, she should have exercisd her prerogative to subpoena that person, as the trial court

> explained. (CT, p.30) It was Appellant's choice not to do so and she cannot now be heard to complain that it was the People's burden to produce the Redflex custodian of records or other 'witnesses.' In fact, in choosing not to subpoena certain people, Appellant waived her Sixth Amendment right to confront them..." Respondent's Brief : p. 31)

For the People and the trial court to make the statements cited above suggesting that it was the Appellant's duty to subpoena the People's witness - faulting Appellant for the People's witness' absence at trial and suggesting that Appellant, by not subpoenaing the People's witness, waived her Sixth Amendment Right of Confrontation, and the suggestion that Appellant should be faulted for not making a claim of innocence – is an undeniable sign that the People's and the trial court's perception of what constitutes a fair trial is fundamentally flawed.

Respectfully submitted,

Dated: June 29, 2011

By:______________________________
Annette [redacted] Esq.