Court of Appeal Case No. B
231678(Appellate Div. Case No.
BR048189)(Trial Court Case No.
102693IN)

IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

People of the State of California

Plaintiff and Respondent,

[redacted]**Goldsmith**

Defendant and Appellant.

Appeal from the Appellate Division of the Superior Court for
Los Angeles County,
Justices McKay, P.J., Dymant and Kumar

APPELLANT'S OPENING BRIEF

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Dated: May 30, 2011

By: _____
John J. Jackman, Esq.

STATEMENT OF APPEALABILITY

This appeal is taken from a judgment of Los Angeles County Superior Court and is authorized by California Penal Code § 1471.

STANDARD OF REVIEW

On appeal from the conviction of CVC 22453A where the testimonial evidence of the prosecutions' witness is without personal knowledge of the events, and where that testimony rests upon hearsay, and documents that lack foundation, that evidence is unreliable. Moreover that testimony does not meet the standard which requires only "Substantial Evidence"

Substantial evidence is evidence of ponderable legal significance, reasonable, credible and of solid value. *(Kuhn v. Department of General Services (1994) 22 Cal.App.4th 1627, 1633, 29 Cal.Rptr.2d 191.)* However, "Substantial Evidence ... is not synonymous with 'any' evidence." *(Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871, 269 Cal.Rptr. 647.)* Instead, the evidence must be " 'substantial' proof of the essentials which the law requires." *(Estate of Teed (1952) 112 Cal.App.2d 638, 644, 247 P.2d 54.)* The focus is on the quality, rather than the quantity, of the evidence. "Very little solid evidence may

be 'substantial' while a lot of extremely weak evidence might be 'insubstantial.' " (Toyota *Motor Sales U.S.A., Inc. v. Superior Court, supra,* at pp. *871-872, 269 Cal.Rptr. 647.*) Inferences may constitute substantial evidence as long as they are the product of logic and reason rather than speculation or conjecture. (*Louis & Diederich, Inc. v. Cambridge European Imports, Inc. (1987) 189 Cal.App.3d 1574, 1584-1585, 234 Cal.Rptr. 889.*)

With respect to the prosecution's photographic and documentary evidence, the applicable standard of review is the "abuse of discretion" standard of review to any trial court ruling on the admissibility of evidence. [*Gordon v. Nissan Motor Co., Ltd.* (2009) *170 CA4th 1103, 1111, 88 CR3d 778, 784; Zhou v. Unisource Worldwide, Inc. (2007) 157 CA4th 1471, 1476, 69 CR3d 273, 277]*

ISSUES PRESENTED

Whether the trial court erred in admitting over objection the testimony of the prosecution' witness where the testimony is simply read from: 1) the photographs and data bar evidence presented in the 12-second video of the alleged violation, neither which had foundation; 2) the testimonial evidence by Officer Young, that the red light-yellow-light interval was appropriate based upon the hearsay statements that someone told him the appropriate interval was four-seconds.

SUMMARY OF FACTS

The case arises from a Automated Traffic Enforcement System (ATES), at the intersection of Centinela Avenue and Beach Avenue in the city of Inglewood in Los Angeles County, installed for the purpose of capturing evidence of the violation of C.V.C. § 21453A (failure to stop at a red light) and thereafter to prosecute those red light traffic offenders. The system was operated by a private contractor, Redflex Traffic Systems, Inc., (hereinafter Redflex).

STATEMENT OF FACTS

On March 13, 2009 at 4:57 p.m., a purported violation of CVC § 21453A occurred. Redflex collected and processed the evidence of the purported red-light camera violation. In some manner the package including several photographs and a 12-second video came into the possession of an unknown officer of the City of Inglewood Police Department. Subsequently a citation was issued by an employee of the City of Inglewood Police Department, Investigator Dean Young (hereinafter Young).

All photographs are reviewed by a police officer before a citation is printed or mailed. (RT 3:2-3) Young provided no information as to the origin of the citation issued the Appellant. Young did not testify he received information from Redflex, or that he reviewed and as in this case upon the basis of that review, determined that a violation of CVC 22453A had occurred. Young did however testify someone issued the citation to the registered owner of the vehicle, Goldsmith. (CT 3:2-6). Accordingly Young had no personal knowledge of the circumstances constituting the purported violation only that which was gleaned from his observation of the photographic evidence.

Trial commenced on November 6, 2009. Young provided a "foundational statement" which provides a general overview of the operation of the red light camera system and offered evidence the City of Inglewood had complied with the notice requirements by sending only warning notices of red light violations. (RT 1:26-3:5)

At the time of Appellant's trial, which followed, Young on *voir dire* testified for the past six years has functioned as a red-light enforcement officer in Inglewood. (RT 5:20-28). Young testified he has no independent knowledge of the red-light photo system only the knowledge of the operation as told to him by Redflex Traffic Systems and the City of Inglewood. (RT 6:21-26)

Over objection of the defendant's counsel, hearsay and lack of foundation, the forgoing testimony by Young was permitted (RT 7:10-19)

Young testified the citation arose from the operation of a Red-Light Camera Program implemented by the City of Inglewood (RT 1:28-2:8) Young testified the system is a computer based digital imaging system that takes a photograph of drivers who enter the intersection after the traffic signal has turned to red or who fail to stop for a red light prior to negotiating a right turn. (RT 2:9-13)

Redflex operates, maintained, and stored the digital photographic information. (RT 6:4-6 ND 7:5-9). There is no calibration of the system. (RT 6:6). The data is stored on a hard disc at the scene, and retrieved periodically thorough the day by technicians of Redflex by way of internet DSL connection. (RT 7:5-9) Young also testified that the red-light system in place at this particular intersection operates "independently" meaning that there is no timing of the photograph to the light. The system records the events occurring within the intersection after the traffic signal has turned red. (RT 6:7-20)

The system produces a 12-second video imprinted on the images is a data bar with the date, time and location of the violation, how long the light had been red at the time each image was taken. (RT 2:23-3:2) The sole basis for Young's belief that the length of the yellow light is 4-seconds is that someone in the Traffic Engineering Department told him the yellow phases at 4-seconds. (RT 8:14-21) On February 16, 2009, (before the violation), he visually measured the yellow light with a stop-watch and averaged the yellow light phasing at 4.11 seconds. A month later he performed that same check and obtained average results of 3.9 seconds. (RT 10:19-25) Counsel for Defendant again objected that the yellow phasing was unreliable and indicated the system was unreliable because of the changing length of the light as measured and averaged by Young. The Court again overruled the objection. (RT 10:28-11:7).

Young testified that the data bar indicated the light was red for .27 seconds as Goldsmith approached; moreover that the second photograph taken .66 seconds later showed the vehicle in the intersection. (RT 7:26-8:6).

Additionally based upon the Reporter's Transcript (RT) and the Clerk's Transcript (CT) it does not appear that the photographic evidence or evidence of the 12 second video was ever admitted into evidence.

After the testimony of the people's only witness and over the objections of the defendant's counsel, the court found Appellant guilty of the violation and imposed a fine of $466.00. (CT 5) This timely appeal followed. (CT 6-10)

The person who collected/entered/recorded/presented evidence of the date, time, and other evidence of the alleged violation, did not appear and did not testify. Young did not testify that Redflex transmits to him the data which he reviews and upon the recognition of a violation from that data he issues, to the registered owner a notice of violation. Indeed there is no evidence of how Young came into possession of the evidence.

The custodian of records for Redflex did not testify. The person with direct knowledge of the workings of the camera-computer system did not testify. The persons presumably employees of Redflex who maintain the red-light system, did not testify. No one with personal knowledge testified about how the system is maintained, how the information is collected, how the information is translated into a useable format, such as the still photographs of the vehicle and operator of the vehicle and color of the traffic lights all come to appear on one piece of paper and a video clip as shown to the court. No one from Redflex testified as to how often the date/ time/ timing of the lights are maintained or how these criterions are corrected.

ARGUMENT

A. As in All Criminal Matters, The Prosecution bears the burden of proof in a Traffic Citation

California Penal Code section 16 defines Crimes: "Crimes and public offenses include: 1. Felonies; 2. Misdemeanors; and 3. Infractions." California Penal Code section 17(a) further defines crimes as follows: "(a) A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions." California Penal Code section 19.7, entitled, application of misdemeanor- related laws to infractions, provides: "Except as otherwise provided by law, all provisions of law relating to misdemeanors shall apply to infractions..."

1. The Rules Of Evidence Apply To The Trial Of An Infraction.

California Vehicle Code section 40901 subdivision e provides in pertinent part: "... nothing contained herein shall be interpreted to permit the submission of evidence other than in accordance with the law, nor to prevent courts from adopting other rules to provide for trials in accordance with the law." [emphasis added] Accordingly, the Evidence Code applies to infraction trials based on California's Vehicle Code.

B. For Defendant's Conviction To Stand, The Traffic Signal's Yellow Interval Must Conform With The Requirements Of California Vehicle Code § 21455.7, Here It Does Not.

Vehicle Code § 21455.7 requires that minimum Yellow Interval times in California be set according to the CADOT Traffic Manual. That Traffic Manual, in turn, specifies a mathematical formula to be used in determining minimum Yellow Interval time. It also provides a tabulation showing examples of such calculations

at various "Approach Speeds". California Vehicle Code (hereafter Vehicle Code) § 21455.7 states:

> "At each intersection at which there is an automated enforcement system in operation, the minimum yellow light change interval shall be established in accordance with the traffic manual of the Department of Transportation."

The sole basis for Young's belief that the phasing length of the yellow light is 4-seconds is that someone in the Traffic Engineering Department told him the yellow light phases at 4-seconds. (RT 8:14-21)

A review of the record indicates that the People provided scant evidence relevant to the foundational requirements of this hearsay exception. Notably, there was no evidence that the phasing of the yellow light was based upon the only acceptable criteria, the traffic manual of the Department of Transportation." The evidence should have been excluded. *(Evid. C. Section 353; Cf. People v. Martinez (2000) 22 Cal.4th 106, 126-129.)*

Moreover the testimonial evidence of Young shows the yellow light signal is not dependable. On February 16, 2009, (before the violation), Young visually measured the yellow light with a stop-watch and averaged the yellow light phasing at 4.11 seconds. A month later he performed that same check and obtained average results of 3.9 seconds. (RT 10:19-25) Appellant's Counsel again objected that the yellow phasing was unreliable and indicated the system was unreliable because of the changing length of the light as measured and averaged by Young. The Court again overruled the objection. (RT 10:28-11:7).

Young testified the citation arose from the operation of a Red-Light Camera Program implemented by the City of Inglewood (RT 1:28-2:8) Young testified the

system is a computer based digital imaging system that takes a photograph of drivers who enter the intersection after the traffic signal has turned to red or who fail to stop for a red light prior to negotiating a right turn. (RT 2:9-13)

Young also testified that the red-light system in place at this particular intersection operates "independently" meaning that there is no timing of the photograph to the light. The system records the events occurring within the intersection after the traffic signal has turned red. (RT 6:7-12). Based upon this testimony it is difficult to understand how a "pre-violation photograph" is ever obtained. If indeed the two systems are truly independent the camera would have to photograph every vehicle that passed through the intersection, because it would not "know" when the red light was illuminated. Clearly the testimony that there is "no calibration between the systems" is erroneous.

Moreover a pre-violation photograph would be irrelevant. Vehicle Code § 21453(a) provides: "(a) A driver facing a steady circular red signal alone shall stop at a marked limit line, but if none, before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection, and shall remain stopped until an indication to proceed is shown..." Accordingly, to violate § 21453(a) the driver must enter the intersection after the red light has illuminated indicating he/she should stop prior to the limit lines. Thus the prosecutions "pre-violation" photograph as here, a still photo showing the vehicle before the limit line and a red light, is not proof of a violation. Similarly a post violation photograph showing the offending vehicle within the intersection and a red light is not proof of § 21453(a).

The prosecutions "evidence" was supplied by Redflex, Young testified that the data bar indicated the light was red for .27 seconds as Appellant approached; and that the second photograph taken .66 seconds later showed the vehicle in the intersection. (RT 7:26-8:6). Neither of these two photographs show a violation of

V.C. § 21453 which requires evidence that Appellant "entered" the intersection after the red light was illuminated. Young's testimony was based upon hearsay and the photographs even if somehow relevant lack a proper foundation.

C. Young Had No Personal Knowledge Of The Violation, The Computer And Independent Camera System Which Produced The Photographs, Video And Computer Data.

By his own admission, this witness had no personal knowledge of the alleged violation as he was not at the scene when the alleged violation occurred. Accordingly, he had no personal knowledge of: 1) The alleged traffic violation; 2) The date of the alleged traffic violation; 3) The time of the alleged traffic violation; 4) The identity of the alleged violator; or 5) Any other matter in the purview of a witness who was present at the scene. Accordingly his testimony was not based on his personal knowledge.

By his own admission, Young, had no personal knowledge of the accuracy, maintenance and condition of the camera which produced the photographs, video, and the information contained therein, because he was not involved in the maintenance of the system. Absent personal knowledge of the maintenance and accuracy record of the camera that produced the photographs and video Young could not testify to the accuracy of the information contained on the photograph and video - namely the date and time of violation and the number of seconds the light had been yellow before it turned red and/or that the data bar indicated the light was red for .27 seconds as Appellant approached; moreover that the second photograph taken .66 seconds later showed the vehicle in the intersection. (RT 7:26-8:6). Young was simply reading the information from the source material supplied by RedFlex.

1 Photographs and Video Are Writings Requiring Authentication.

Under the Evidence Code, photographs and videotapes are considered "writings." (Evid. Code, § 250; *Rojas v. Superior Court (2004) 33 Cal.4th 407, 416* [photographs]; *Jones v. City of Los Angeles (1993) 20 Cal.App.4th 436,440* [videotapes].) A writing, including a photograph or videotape, must be authenticated before it can be received in evidence. (Evid. Code, § 1401, subd. (a.)). "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) The testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is legally sufficient foundation for its admission into evidence. (Evid. Code, § 1413; *Jones v. City of Los Angeles, supra, 20 Cal.App.4th at p. 440, quoting People v. Bowley (1963) 59 Cal.2d 855, 859; People v. Doggett (1948) 83 Cal.App.2d 405, 409-410.*)

"No photograph or film has any value in the absence of a proper foundation. It is necessary to know when it was taken and that it is accurate and truly represents what it purports to show. It becomes probative only upon the assumption that it is relevant and accurate. This foundation is usually provided by the testimony of a person who was present at the time the picture was taken, or who is otherwise qualified to state that the representation is accurate. In addition, it may be provided by the aid of expert testimony, as in the *Doggett* case, although there is no one qualified to authenticate it from personal observation." *Bowley, supra, (1963) 59 Cal.2d 855, at 862*

2. The Data Imprinted On the Photographs Was Not Admissible.

The information imprinted on the photographs should have been excluded as there was no evidence at all presented to support a finding that the computer itself (either in the camera system at the location of the violation or equipment located at RedFlex Traffic Systems in Arizona) was operating properly.

The RedFlex photographs relied upon had a box superimposed on each photograph containing writing used by Young to testify as to the violation. Specifically, Investigator Young used the information on the photographs to testify to the location of the alleged violation, the date of the alleged violation, the time of the alleged violation, the date of each photograph, the red light length, the yellow light length, the time elapsed between photos, the speed of the vehicle over the sensors and other information. Indeed the writing imprinted on the photographs was relied heavily upon by the Appellate Division, pursuant to Evidence Code section 1153 to affirm the conviction by the Trial Court.

In *Aguimatang v. California State Lottery (1991) 234 Cal.App.3d 769 at p. 797,* concerning a printout of lottery winners, the court stated that "[C]omputer printouts are admissible and are presumed to be an accurate representation of the data in the computer... If offered for the truth, however, they must qualify under some hearsay exception, such as business records under Evidence Code sections 1271." As discussed below, the writing on the photographs is hearsay and not admissible under any exception to the hearsay rule, including the business record exception.

Evidence Code section 1152 [1153] does not make the writings admissible. In *People v. Hawkins (2002) 98 Cal.App.4th 1428,* the trial court allowed into evidence computer printouts showing a date and time when computer files were last accessed (i.e., a date/time stamp). The defendant objected on hearsay grounds, arguing the computer printouts did not qualify under the business records

exception. The court of appeal rejected defendant's argument after noting that hearsay is an out-of-court statement offered to prove the truth of the matter stated (Evidence Code § 1200), that a statement is an oral or written verbal expression of a person (Evidence Code §225), and considering the definition of "person" (Evidence Code § 175), the court stated that "the Evidence Code does not contemplate that a machine can make a statement." (*Hawkins*, supra, *98 Cal.App.4th at p. 1449*).

Significantly, the *Hawkins* court went on to cite and agree with "the leading case of *State v. Armstead (La. 1983) 432 So.2d 837*," which explained "[T]he printout of the results of the computer's internal operations is not hearsay evidence. It does not represent the output of statements placed into the computer by out of court declarant.". . . "There is no possibility of a conscious misrepresentation, and the possibility of inaccurate or misleading data only materializes if the machine is not functioning properly." (*Id. at p. 840; cf. Ly v. State (Tex.App. 1995) 908 S.W.2d 598, 600.*) "The role that the hearsay rule plays in limiting the fact finder's consideration to reliable evidence received from witnesses...has no application to the computer generated record in this case. Instead, the admissibility of the computer tracing system record should be measured by the reliability of the system, itself, relative to its proper functioning and accuracy." [Citations](*Hawkins, supra*, 98 Cal.App.4th at p. 1449, quoting from *Ly v. State, Id.*) The Hawkins court concluded that "the true test for admissibility of a printout reflecting a computer's internal operations is not whether the printout was made in the regular course of business, but whether the computer was operating properly at the time of the printout." (*Hawkins, supra*, 98 Cal.App.4th at p. 1449-1450).

The court in *Hawkins* stated, "[t]his presumption [Evidence Code section 1553(a)] operates to establish only that a computer's print function has worked properly. The presumption does not operate to establish the accuracy or

reliability of the printed information. On that threshold issue, upon objection the proponent of the evidence must offer foundational evidence that the computer was operating properly." (*Hawkins, supra, 98 Cal.App.4th at p; 1450*) Thus, the presumption establishes only "that the data in the printout accurately represents the data in the computer." There is no presumption that the data itself is accurate or reliable or that the computer device is operating properly. As here where Appellant's counsel objects "the proponent of the evidence must offer foundational evidence that the computer was operating properly." (Jefferson, California Evidence Benchbook, 4th ed., § 3244 [citing *Hawkins at p. 1450*; emphasis in original].)

Here, similar to the date/time stamp at issue in *Hawkins*, the data imprinted on the photographs is a function of the computer and camera system's own internal operations. Because the information imprinted on the photographs is a function of the system's internal function, the imprinted information the Respondent must have offered foundational evidence that the computer was operating properly. In this In this case, like the date/time stamp at issue in *Hawkins*, the data imprinted on the photographs is a function of the computer and camera system's own internal operations. Since the information printed on the photographs is a reflection of the system's internal operations, the imprinted information would be admissible unless defendant "objected on the ground that the data is unreliable," in which case the prosecution should have offered foundational evidence that the computer was operating properly. Indeed in this case Investigator Young offered that there was no calibration and not required.

Here, the proper functioning of the camera and computer system was never established at trial and the proper functioning cannot be established by the maintenance log alone. There was no evidence or mention of a maintenance log that the internal camera computer or its connected counterpart at RedFlex, or the

computer's date and specific time settings, the local or remote measurements of the exact signal, phase times, the speed calculations, the RedFlex computer connection with each of the intersection camera systems, etc., were or are ever checked for proper functioning. In fact, again Investigator Young offered there was no calibration that the systems were independent of each other. Moreover the testimonial evidence of Young shows the yellow light signal is not dependable. On February 16, 2009, (before the violation), Young visually measured the yellow light with a stop-watch and averaged the yellow light phasing at 4.11 seconds. A month later he performed that same check and obtained average results of 3.9 seconds. (RT 10:19-25) Counsel for Defendant again objected that the yellow phasing was unreliable and indicated the system was unreliable because of the changing length of the light as measured and averaged by Young. The Court again overruled the objection. (RT 10:28-11:7). Clearly the data embossed on the photographs should have been excluded.

3. Photographs and Video Were Inadmissible

It was error to admit the photographs and video. The prosecution failed to provide sufficient evidence to support a finding that the camera was operating properly at the date and time of the alleged violation.

In *People v. Khaled,* (2010) 186 Cal.App.4th Supp 1, the police department of the City of Santa Ana issued a "photo enforcement" citation to the Appellant, Tarek Khaled, alleging a violation of Vehicle Code section 21453, subdivision (a). A traffic trial was held on the matter. The prosecution sought to establish the majority of the violation with the testimony of an Officer and a declaration from RedFlex. Appellant objected to the introduction of the photographs and declaration as inadmissible hearsay, and violative of Appellant's confrontation rights. The objection was overruled and the trial judge admitted the photographs as business records, official records, and because a

proper foundation for the admission had been made based on the submitted declaration.

The Appellate Court reversed the judgment holding that the trial court erred in admitting the photographs and the accompanying declaration over the Appellant's hearsay and confrontation clause objections. Specifically, regarding the foundation for the photo-enforcement photographs, the Court in *Khaled* (supra) stated at p. 5: "These photo enforcement cases present a unique factual situation to the courts regarding the admissibility of videotapes and photographs. There are two types of situations where a videotape or photographs are typically admitted into evidence where the photographer or videographer does not testify. The first involves a surveillance camera at a commercial establishment .... In those situations, a person testifies to being in the building and recounts the events depicted in the photographs. Courts have consistently held that such testimony establishes a sufficient foundation if the videotape is a " 'reasonable representation of what it is alleged to portray....' " (*People v. Gonzalez (2006) 38 Cal.4th 932, 952, 44 Cal.Rptr.3d 237, 135 P.3d 649; see generally, id. at pp. 952- 953, 44 Cal.Rptr.3d 237, 135 P.3d 649; People v. Carpenter (1997) 15 Cal.4th 312, 385-387, 63 Cal.Rptr.2d 1, 935 P.2d 708; People v. Mayfield (1997) 14 Cal.4th 668, 745-747, 60 Cal.Rptr.2d 1, 928 P.2d 485*; Imwinkelried, Cal. Evidentiary Foundations (3d ed. 2000) pp. 115, 117; see, also, *United States v. Jernigan (9th Cir.2007) 492 F.3d 1050 (en banc).*) The second involves what is commonly known as a "nanny cam." A homeowner hides a surveillance camera in a room and then retrieves the camera at a later time. At the court proceeding, that person establishes the time and placement of the camera. This person also has personal knowledge of when the camera was initially started and when it was eventually stopped and retrieved. Neither of these situations is analogous to the instant case.

Here the Officer did not establish the time in question, the method of retrieval of the photographs, or that any of the photographs or the videotape were a "reasonable representation of what it is alleged to portray...." (*People v. Gonzalez*, supra, *38 Cal.4th at p. 952, 44 Cal.Rptr.3d 237, 135 P.3d 649.*)

Here the situation is similar to that found in *Ashford v. Culver City Unified School Dist. (2005) 130 Cal.App.4th 344, 349-350, 29 Cal.Rptr.3d 728*, where the court held that the unauthenticated videotape allegedly showing an employee's actions lacked sufficient foundation to be admitted at an administrative hearing. And in so holding, the court noted that without establishing such a foundation, the videotape was inadmissible."

Here, as in the *Khaled* case, the Officer did not establish the time in question, the method of retrieval of the photographs, or that any of the photographs or the videotape were a reasonable representation of what it is alleged to portray. Investigator Young did not testify he made the photographs or videotape himself. He did not testify he was present at the time of Appellant's alleged Vehicle Code violation, and witnessed the events depicted in the photographs. He did not testify to any personal knowledge of the contents of the photographic images or the method of their creation, storage or transmission. He did not testify regarding the background, training or qualifications of any of the RedFlex employees involved in any of those activities. At most, Investigator Young testified he had received and understanding of the system through conversations with an unnamed traffic engineer sometime in the past in the general operating procedures for the system. He did not, and could not, attest that the photos or videos were true representations of what they purported to depict because he had no such personal knowledge. Thus the prosecution failed to provide any of the evidence necessary to lay a foundation for the admission of the photographs or the

videotape into evidence. Investigator Young was not competent to nor could he lay the required foundation for the photos and the video.

People v. Beckley (2010) 185 Cal.App.4th 509, 110 Cal.Rptr.3d 362, addresses the issue of authentication of digital photographs. In 1948 prior to the invention of digital computer technology and red-light photo tickets *People v. Doggett (1948) 83 Cal.App.2d 405 and People v. Rowley (1963) 59 Cal.2d 885* were decided, and discussed the fact that in order for one to manipulate photographic images and movies, one would have to possess the equipment (i.e., special cameras, dark room, equipment and chemicals) and skills to do what was at the time considered "trick photography." This was especially difficult with moving pictures (video).

In *Doggett*, a photography expert testified that the photo that was admitted was not a composite and had not been faked. The court in *Reckely* stated: "Such expert testimony is even more critical today to prevent the admission of manipulated images that it was when *Doggett* and *Rowley* were decided....Indeed, with the advent of computer software programs such as Adobe Photoshop 'it does not always take skill, experience, or even cognizance to alter a digital photo,' (Parry, Digital Manipulation and Photographic Evidence; Defrauding The Courts One Thousand Words At A Time (2009) 2009 J.L. Tech, & Pol'y 175, 183.)"

Hawkins, supra, states unequivocally that a computer expert is required to testify in order to establish a foundation for the computer generated date and time information. In this case, Investigator Young's testimony indicates that he had no personal knowledge as to the date and time of the alleged violation, nor had he verified that any of the citation specific acts contained in the data bar was correct. The photographs admitted into evidence, over Appellant's objection, showing that the photographs were obviously manipulated

after being created by a remotely operated, inanimate machine, and that the pictures had images of a box superimposed upon them, containing hearsay evidence concerning the date, time, length of the amber light (a requirement under Vehicle Code section 21455.7) and other information should not have been admitted into evidence and Investigator Young should not have been permitted to use the photographs to testify as he had no independent personal knowledge of the purported violation.

D. The Prosecution did not establish the elements of Evidence Code section 1271. Evidence Code section 1271 does not apply.

1) The Officer did not testify to the elements of Evidence Code section 1271; 2) The Officer was not a qualified witness or a custodian of record for RedFlex; and 3) The Officer could not have testified to the elements of Evidence Code section 1271 as the records were created for litigation. Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made in the regular course of a business;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

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, The party

offering business records evidence bears the burden of establishing the foundational requirements of trustworthiness.

Even though the trial court is vested with broad discretion, there has to be evidence in the record that the requirements of Evidence Code section 1271 have been met. In *Gee v. Timineri, (1967) 56 Cal.Rptr. 211,* the Court stated: "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*)

The Reporter's Transcript is silent as to any testimony by Investigator Young as to any of the elements of Evidence Code section 1271. The Prosecution's witness, testified without assistance from a prosecutor, did not testify as to any of the elements of Evidence Code section 1271.

1 Prosecution's witness was not a custodian of record for RedFlex.

Each of the documents relied upon at trial was made and maintained by an independent, non-governmental, private company by the name of RedFlex . None of the documents in documents in the Prosecution's proof of violation of the Vehicle Code were therefore the business records of the City of Inglewood Police Department. Accordingly, if they were to be found to be business records, and they are not, they would be the business records of the RedFlex and not that of the City of Inglewood Police Department.

In order to establish the proper foundation for the admission of a business record, an appropriate witness must be called to lay that foundation (*Bhatt v. Dept. of Health Services for the State of California (2005) 133 Cal.App.4th 923, 929, 35 Cal.Rptr.3d 335.*) The underlying purpose of section 1271 is to eliminate the necessity of calling all witnesses who were involved in a

transaction or event. (*People v. Crosslin (1967) 251 Cal.App.2d 968, 60 Cal.Rptr. 309.*) generally, the witness who attempts to lay the foundation is a custodian, but any witness with the requisite firsthand knowledge of the business's recordkeeping procedures may qualify. The proponent of the admission of the documents has the burden of establishing the requirements for admission and the trustworthiness of the information. (*People v. Beeler (1995) 9 Cal.4th 953, at p. 978, 39 Cal.Rptr.2d 607, 891 P.2d 153.*) And the most significantly as happens with the photo red light citations here, the document cannot have been prepared in contemplation of litigation. (*Palmer v. Hoffman (1943) 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645; Gee v. Timineri (1967) 248 Cal.App.2d 139, 56 Cal.Rptr. 211.*)

Here, Young was an employee of a public agency the City of Inglewood Police Department. He was not an employee of RedFlex. Young, simply read off the information provided through RedFlex, as if it was true and correct, without any basis for doing so. In *People v. Khaled, (2010) 186 Cal.App. Supp. 1,* the Court held that the police Officer did not qualify as the appropriate witness to lay the foundation to admit photographs taken from a "photo enforcement" camera installed at an intersection within the business record exception, where Officer did not have the necessary knowledge of underlying workings, maintenance, or recordkeeping of the private company that contracted with the municipality to install, maintain, and store the digital photographic information.

Similarly, in this case, Investigator Young was not qualified as the appropriate witness to lay the fountain to admit the photographs and video taken from the "photo enforcement" camera and did not have the necessary knowledge underlying workings, maintenance, or recordkeeping of the private company that contracted with the municipality to install, maintain, and store the digital photographic information. Investigator Young could not qualify as the custodian of records for RedFlex nor was he qualified to testify under Evidence Code section 1271(c) as the custodian of records for RedFlex. The

record simply does not support any finding that Investigator Young was qualified to testify as the custodian of records for RedFlex. Evidence Code section 1560 sets forth the requirements and procedures for the admission of business records where there is no testimony presented from a qualified custodian of record is not applicable here. (Evid.Code, § 1560 *et seq.; Taggart* v. *Super Seer Corp. (1995) 33 Cal.App.4th 1697, 40 Cal.Rptr.2d 56.*) No such subpoena duces tecum was issued or introduced here.

Moreover, the burden to subpoena RedFlex rests with the party seeking to introduce the packet into evidence. The Prosecution failed to produce the custodian of records to testify concerning the records and their mode of preparation, accordingly, the documents are inadmissible hearsay. If the evidence fails to establish each foundation fact, this hearsay exception is not available. *People v. Mathews (1991) 229 Cal.App. 4th 930, 940).*

2) Young Could Not Have Satisfied The Elements Of Evidence Code Section 1271 Because The Records Were Created For Litigation.

According to the Supreme Court of the United States, documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But this is not the case if the regularly conducted business activity is the production of evidence for use at trial.

In *Melendez-Diaz v. Massachusetts (2009) 129 S. Ct. 2527,* the Supreme Court stated the following:

> "Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943),* made that distinction clear.

There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was 'calculated for use essentially in the court, not in the business.' *Id.*, at 114, 63 S. Ct. 477, 87 L. Ed. 645. The analysts' certificates -- like police reports generated by law enforcement officials -- do not qualify as business or public records for precisely the same reason. See Rule 803(8) (defining public records as 'excluding, however, in criminal cases matters observed by police Officers and other law enforcement personnel")... Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because -- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial -- they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here -- prepared specifically for use at petitioner's trial -- were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment." (*Id*, at p.2540, 129 S. Sc. 2527) [emphasis added]

In the instant case, RedFlex has created and maintains a system of cameras and computers that produce photographs, videos and documents that are used by various law enforcement agencies to prosecute alleged traffic violators. In fact, it appears the company's primary purpose is to deliver the products it produces (incriminating evidence) to law enforcement agencies as evidence for conviction. It is indisputable that the exclusive reason that these

records are created (photos, and video) and provided under contract for profit to law enforcement agencies is for use in a criminal prosecution. In deed, the sole purpose for the existence of RedFlex cameras is for the prosecution of alleged red light offenders. RedFlex generates the documents contained in the RedFlex packet, with full knowledge that in every single case they may be needed in court for the prosecution of alleged violators. It is hard to argue that RedFlex, when creating the documents/evidence, did not expect the documents/evidence to be used in prosecution or trial when they are in the business of documenting incriminating evidence for delivery to law enforcement agencies. In this case, the only reason the photographs and video was created, stored and delivered to the City of Inglewood Police Department by RedFlex was to provide evidence of an alleged traffic violation for prosecution.

The trial court's admission of RedFlex's products circumvented constitutional protections that are in place to protect against the convenient production of "acceptable" hearsay evidence used to garner quick and defenseless convictions.

The trial court and the appellate division in affirming the traffic court's conviction in this case, erred in finding admissible the photographs and videos which were created solely for use in a prosecution in a "photo enforcement" trial, to be a business record. Business and public records are generally admissible, not because they are an exception to the hearsay rules, but because they have been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial.

The same can be said of the videotape evidence. These are not business records. The RedFlex camera does not take a photograph of every car which passes through the intersection. Young testified the camera only takes a picture

when a car has passed the light when it was red. The sole reason for the picture that is produced by the camera is to be used to prosecute the driver of the car. The selective nature of the photos is proof that it is not a business record. Further, the Officer did not testify as to the photos being created for any other reason than litigation. "Evidence of a writing made as a record of an act, condition or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: (a) The writing was made in the regular course of a business; . . ." It is the Prosecution's burden to prove these elements, it did not even try.

3 Evidence Code section 1280 does not apply.

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: (a) The writing was made by and within the scope of duty of a public employee. (b) The writing was made at or near the time of the act, condition, or event. (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Evidence Code section 1280 cannot be applied to the evidence provided to the City of Inglewood Police Department., as the RedFlex employees, who prepared photographs and video were not public employees or Officers, agents or employees of a public entity, and therefore do not operate under a duty to observe the facts and report them correctly. (*People v. Baske 58 Cal.App.3d 775, 780*]

Here, at no point does RedFlex state it is a public entity. Absent this critical foundational information, the document that was created cannot be and is not an "official record" under section 1280. In addition, section 1280 requires that "[t]he sources of information and method and time of preparation of the

record be such as to indicate its trustworthiness." There is a total lack of evidence to establish this element of a section 1280 hearsay exception.

CONCLUSION

There was no testimony from Young establishing his qualification to testify as an expert neither 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*, Young admitted that the company responsible for maintaining the equipment which caused the photographs and video to be recorded was RedFlex. Young did not perform the maintenance nor was he present when it was done. Young 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. His testimony was solely based on the photos and video prepared by RedFlex. Pursuant to Vehicle Code section 21455.5(c)(2)(B) and (C): "Only a governmental agency, in cooperation with a law enforcement agency, may operate an automated enforcement system, which includes the following activities: ...(2) Performing administrative functions and day-to-day functions, including, but not limited to,...(B) Ensuring that the equipment is regularly inspected. (C) Certifying that the equipment is properly installed and calibrated, and is operating properly."

The Prosecution's sole witness, was not the custodian of records for the automated enforcement system, could not provide the necessary evidence to prove the necessary elements of Vehicle Code section 21455.5(c)(2)(B) and (c).

Evidence Code section 702(a) provides that "[S]ubject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such

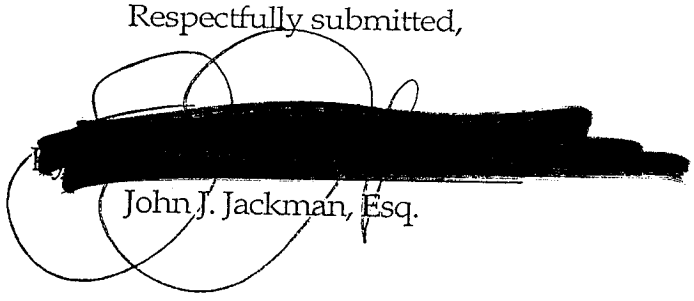
personal knowledge must be shown before the witness may testify concerning the matter." Here, Investigator Young had no personal knowledge of the matters to which he testified The camera was not inspected regularly as required pursuant to Vehicle Code section 21455.5.

The trial court permitted Young to circumvent constitutional protections in place to aid in the convenient production of "acceptable" hearsay evidence needed to convict Appellant.

The rules of Evidence are an integral part of the criminal justice system. They insure due process and a fair trial. They should not be compromised or dispensed with simply because the trial is held in traffic court. There is a certain irony when law enforcement breaks the law to enforce the law. More than once Courts of Appeal in this state have said that the average citizen's contact with the court is through the traffic enforcement, and they should feel like they were heard and got a fair trial. Expediency is not a good reason to dispense with complying with the rules of Evidence. The Court, the sole source of justice should not be compromised to exact revenues for a foreign corporate entity. Computers and digital technology seemingly exists to create a better society not to enslave it.

Dated: May 31, 2011

Respectfully submitted,



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