IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

PEOPLE OF THE STATE OF
CALFORNIA

Plaintiff/Respondent

v.

█████████KUNG,

Defendant/Appellant

Court of Appeal No.: A131987

Appellate Division No.: 5113

Trial Court No.: 50608153/TRL

PETITION FOR RECONSIDERATION AND TRANSFER

For the Petitioner

████████KUNG

IN PRO PER

███████████████

Telephone: ██████████

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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Defendant/Appellant

Court of Appeal No.: A131987

Appellate Division No.: 5113

Trial Court No.: 50608153/TRF

PETITION FOR RECONSIDERATION

Request for reconsideration for transfer of an infraction case to the Court of Appeal, First Appellate District

Court of Appeal, First District, Division Three
HONORABLE William R. McGuiness, Administrative Presiding Justice

For the Petitioner

█████ KUNG

IN PRO PER

█████████

█████████

Telephone: ████████

Statement for Reconsideration

This reconsideration is taken from a dismissal order of the Court of Appeal, First District and is authorized by Code of Civil Procedure Section 1008(a).

Summary

Petitioner, ▮▮▮ Kung, defendant and appellant of *People of the State of California v.* ▮▮▮ *Kung*, hereby petition the Court of Appeal to grant reconsideration for the transfer of *People of the State of California v.* ▮▮▮ *Kung* in the interest of justice and to secure uniformity of decision.

On April 11, 2011, the Appellate Division of Superior Court of California, Alameda County, affirmed the Trial Court judgment. On April 21, 2011, the Appellate Division denied the Petitioner's request for publication of opinion. On April 25, 2011, the Petitioner filed a timely Petition for Rehearing. On May 5, 2011, the Petitioner filed an untimely Application to Certify Case for Transfer to the Court of Appeal[1]. On May 16, 2011, the Petitioner filed a timely Petition for Transfer. On May 17, 2011, the Application to Certify Case for Transfer to the Court of Appeal was denied, but the Petition for Rehearing was granted and the decision on April 11, 2011 was vacated.

On June 1, 2011, the Appellate Division reversed the Trial Court judgment[2]. On June 8, 2011, the Court of Appeal, First District issued a dismissal order for the Petition for Transfer filed on May 16, 2011. On June 16, 2011, the Petitioner filed a timely Application to Certify Case for Transfer to the Court of Appeal for its decision on June 1, 2011 and requested the Appellate Division for publication of opinion. The Application

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[1] Pursuant to the Dismissal Order by the Court of Appeal, First District, Division Three on June 8, 2011 (Court of Appeal Case No.:A131987)

[2] The decision on June 1, 2011 is used for the purpose of this Petition for Reconsideration.

was automatically denied pursuant to the Rules of Court Rule 8.1005(c) on July 1, 2011, which the appellate division decision on June 1, 2011 was final. The Petitioner never received a response for its request for publication of opinion.

Discussion

<u>1. The issuance of a new decision should effectively allow the Petitioner to request a new transfer in order to secure uniformity of decision and to settle important questions of law in the interest of justice.</u>

The Dismissal Order issued on June 8, 2011 was based on the Application to Certify Case for Transfer to the Court of Appeal on May 5, 2011 and Petition to Transfer on May 16, 2011. However, by granting the Petition of Rehearing on May 17, 2011, the Appellate Division has effectively modified its decision and the date related to finality of decision, and timeliness for appeal should have reset by the Appellate Division's action in accordance to the Rules of Court. Therefore, the Petitioner should be allowed to petition for transfer again in order to secure uniformity of decision and to settle important questions of law in the interest of justice.

Conclusion

Petitioner requests the Court of Appeal to grant reconsideration for the Transfer of *People of the State of California v. ▓▓▓▓ Kung*. The transfer is necessary in order to secure uniformity of decision and to settle important questions of law in the interest of justice.

DATED: July 11, 2011   Respectfully submitted,

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▓▓▓▓ KUNG

Petitioner, IN PRO PER

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

PEOPLE OF THE STATE OF CALFORNIA

Plaintiff/Respondent

v.

▮▮▮▮▮ KUNG,

Defendant/Appellant

Court of Appeal No.: A131987

Appellate Division No.: 5113

Trial Court No.: 50608153/TRF

PETITION FOR TRANSFER

<u>Request for transfer of an infraction case to the Court of Appeal, First Appellate District</u>

Superior Court of California, County of Alameda, Appellate Division

HONORABLE Gloria Rhynes, Presiding Judge

Superior Court of California, County of Alameda, Fremont Hall of Justice

HONORABLE David Byron, Judge Pro Tem

For the Petitioner

▮▮▮▮▮ KUNG

IN PRO PER

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Petition for Reconsideration and Transfer - People v. ▮▮▮ Kung

TABLE of CONTENTS

Table of Authorities

Federal Cases

- *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527

California Cases

- *People v. Bighinatti* (1975) 55 Cal.App.3d Supp. 5

- *People v. Jenkins* (1976) 55 Cal.App.3d Supp. 55

- *People v. Ruhl* (1976) 63 Cal.App.3d 6

Statutes and Miscellaneous Cites

- Vehicle Code 21453(a)

- Vehicle Code 21455.5

Statement of Appealability

This appeal is taken from a judgment of Superior Court of California, County of Alameda and is authorized by Penal Code Section 1471.

Issues Sought to be Certified to the Court of Appeal

1. Is material evidence prepared solely for prosecution constituted testimonial evidence under the Confrontation Clause of the Sixth Amendment?

2. Are trial courts required to examine the municipality's compliance of Vehicle Code Section 21455.5 before convicting an alleged violation of Vehicle Code 21453(a)?

3. Is the current penalty assessment of Vehicle Code Section 21453(a) constitutes a violation of Excessive Fines Clause under the Eighth Amendment by allowing disproportional fine assessed?

4. What is the definition of "excessive" when the Court determines excessive delay in appeal?

Introduction

      Petitioner, ▮▮▮ Kung, defendant and appellant of *People of the State of California v.* ▮▮▮ *Kung*, hereby petition the Court of Appeal to grant transfer of *People of the State of California v.* ▮▮▮ *Kung* in the interest of justice and to secure uniformity of decision.

      Petitioner, ▮▮▮ Kung, defendant and appellant of *People of the State of California v. Kin Wah Kung*, hereby petition the Court of Appeal to grant reconsideration for the transfer of *People of the State of California v.* ▮▮▮ *Kung* in the interest of justice and to secure uniformity of decision.

      On April 11, 2011, the Appellate Division of Superior Court of California, Alameda County, affirmed the Trial Court judgment. On April 21, 2011, the Appellate Division denied the Petitioner's request for publication of opinion. On April 25, 2011, the Petitioner filed a timely Petition for Rehearing. On May 5, 2011, the Petitioner filed an untimely Application to Certify Case for Transfer to the Court of Appeal[3]. On May 16, 2011, the Petitioner filed a timely Petition for Transfer. On May 17, 2011, the Application to Certify Case for Transfer to the Court of Appeal was denied, but the Petition for Rehearing was granted and the decision on April 11, 2011 was vacated.

      On June 1, 2011, the Appellate Division reversed the Trial Court judgment[4]. On June 8, 2011, the Court of Appeal, First District issued a dismissal order for the Petition for Transfer filed on May 16, 2011. On June 16, 2011, the Petitioner filed a timely Application to Certify Case for Transfer to the Court of Appeal for its decision on June 1, 2011 and requested the Appellate Division for publication of opinion. The Application

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[3] Pursuant to the Dismissal Order by the Court of Appeal, First District, Division Three on June 8, 2011 (Court of Appeal Case No.:A131987)

[4] The decision on June 1, 2011 is used for the purpose of this Petition for Reconsideration.

was automatically denied pursuant to the Rules of Court Rule 8.1005(c) on July 1, 2011, which the appellate division decision on June 1, 2011 was final. The Petitioner never received a response for its request for publication of opinion.

Discussion

<u>1. Is material evidence prepared solely for prosecution constituted testimonial evidence under the Confrontation Clause of the Sixth Amendment?</u>

This issue needs to be decided in order to secure uniformity of decision. The use of Automatic Enforcement System (hereinafter AES) on prosecuting an alleged violation of Vehicle Code Section 21453(a) is dramatically increasing throughout the State of California. When prosecuting an alleged violation of Vehicle Code Section 21453(a), the prosecution, usually a peace officer representing the municipality, provides the trial court that an evidence packet, prepared by a third-party non-governmental vendor, to explain how the alleged violation occurred and how the prosecution issued a citation based on the evidence in the evidence packet. The representative from the vendor is not available to testify or authenticate the packet.

In *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527, the U.S. Supreme Court addressed that the use of Affidavits constituted testimonial evidence as they were prepared for the purpose of a later criminal trial. By the interpretation of the *Melendez-Diaz* decision, is the evidence packet prepared for the prosecution of Vehicle Code Section 21453(a) constituted a testimonial evidence that subject to Confrontation Clause?

2. Are trial courts required to examine the municipality's compliance of Vehicle Code Section 21455.5 before convicting an alleged violation of Vehicle Code 21453(a)?

Vehicle Code Section 21455.5 governs the use of AES for the prosecution of Vehicle Code Section 21453(a). As the key element of conviction - legitimacy of the use of AES, the trial courts often fail to neither examine legitimacy of the use of AES, nor request the prosecution to substantiate the legitimacy of the use of AES in the mean of prosecuting Vehicle Code 21453(a). In the interest of the justice, are the trial courts required to examine the municipality's compliance of Vehicle Code Section 21455.5 before convicting an alleged violation of Vehicle Code 21453(a)?

3. Is the current penalty assessment of Vehicle Code Section 21453(a) constitutes a violation of Excessive Fines Clause under the Eighth Amendment by allowing disproportional fine assessed?

The total fine of the alleged violation of Vehicle Code 21453(a) imposed was $446 with Traffic School. However, in the $446 fine imposed, about 75% of the fine, known as penalty assessment, is not related with the violation itself. In other word, the penalty assessment has nothing to do with the alleged act of violation, but an additional assessment of fine itself. By the interpretation of the Eighth Amendment, assessing such amount of fine with no mean of preventing violation of Vehicle Code Section 21453(a) was unjustified.

<u>4. What is the definition of "excessive" when the Court determines excessive delay in appeal?</u>

People v. Bighinatti (1975) 55 Cal.App.3d Supp. 5, *People v. Jenkins* (1976) 55 Cal.App.3d Supp. 55, and *People v. Ruhl* (1976) 63 Cal.App.3d 6 addresses the Court's interpretation of case dismissal on the ground of excessive delay in the process of appeal. However, none of these cases has set guidance on how such "excessive" was determined. In the interest of justice and uniformity of decision, this issue needs to be decided.

Conclusion

        Petitioner requests the Court of Appeal to grant transfer of *People of the State of California v.* ▓▓▓▓*Kung* for decision on the above issues. The transfer is necessary in order to secure uniformity of decision and to settle important questions of law in the interest of justice.

DATED: July 11, 2011   Respectfully submitted,

                                          ▓▓▓▓ KUNG

                                          Petitioner, IN PRO PER