FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

JUL 15 2011

ALAN CARLSON, Clerk of the Court
BY J. GOMEZ

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3 IN THE
4 APPELLATE DEPARTMENT OF THE SUPEROR COURT
5 FOR THE COUNTY OF ORANGE
6 NO. 30-2011-00457710
7
8 PEOPLE OF THE STATE OF CALIFORNIA,
9 Plaintiff and Respondent,
10 V.
11
12 BLUMENTHAL,
13 Defendant and Appellant
14
15
16 **APPELLANT'S REPLY BRIEF**
17 Appeal From a Judgment
18 Of The Superior Court, County of ORANGE on Case SA156171PE
19
20 Commissioner Carmen R. Luege
21
22
23 JEFFREY P. OUSLEY ESQ. SBN 231299
THE LAW OFFICES OF JEFFREY P.
24 OUSLEY
316 W. 4TH ST. STE. 221
25 SANTA ANA, CA 92646
Tel. (714) 667-0069
26 Fax. (714) 667-7080
27
ATTORNEYS FOR APPELLANT
28 BLUMENTHAL

REPLY ARGUMENTS

I. THE PHOTOGRAPHIC AND VIDEO EXHIBITS ADMITTED AT TRIAL WERE HEREASAY, AND ADMITTED IN ERROR.

II. THE AGREEMENT BETWEEN THE CITY OF SANTA ANA AND REDFLEX VIOLATES CALFIRONIA VEHICLE CODE SECTION 21455.5 SUBSECTION (g) BECAUSE IT REWARDS SANTA ANA FOR WRITING MORE CITATIONS.

III. THE AGREEMENT BETWEEN THE CITY OF SANTA ANA AND REDFLEX VIOLATES CALIFORNIA VEHICLE CODE SECTION 21455.5 BECAUSE NO WARNING NOTICES WERE MAILED FOR THE INTERSECTION IN QUESTION.

ARGUMENTS

I. THE PHOTOGRAPHIC AND VIDEO EXHIBITS ADMITTED AT TRIAL WERE HEREASAY, AND ADMITTED IN ERROR.

The Respondent's brief attempts to dance around the "hearsay issue" which sits before them much like a 600 pound gorilla who refuses to move from blocking the only avenue of escape. No amount of argument or maneuvering can allow one to elude it. In contrast, Appellant has directly dealt with the issue, by citing a case that is published; and thus, binding precedent to this Court. It is case that came directly out of Santa Ana. The case was People v. Khaled ((2010) 186 Cal.App.4th Supp.1, 113 Cal.Rptr.3d 796. (The full text of the published Khaled opinion is attached in Appendix A). Khaled involved nearly identical circumstances, and addressed the "hearsay" issue as it applied to Automated Enforcement System (red-light cameras) installed and operated by Redflex, in the City of Santa Ana. Khaled is applicable as binding precedent, and is the law in Santa Ana and in Orange County. It was decided here, and most fittingly, quite recently.

Also of note is the fact that all of the cases cited by Respondent as being supportive for their position were decided well BEFORE the Khaled case was decided. Undoubtedly, the Khaled Court had full opportunity to review any such cases prior to ruling, and yet the ruling stands. There's nothing new presented by Respondent in this Appeal. In fact, the Respondent in our case and Khaled are one in the same...the City of Santa Ana. The Respondent lost Khaled, like they must lose now and for the very same reasons.

A. Hearsay Exceptions are Inapplicable

Any argument by Respondent that a hearsay exception for official records may apply because Redflex is somehow considered to be employed by a public entity (Santa Ana) fails, as such a position was considered in Khaled, and unambiguously rejected. Redflex is at best, an independent contractor (See Trial Exhibit 12, "Contract" at paragraph 13).

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A business record exception is equally inapplicable because the photographs and video are only produced by Redflex when a citation is contemplated after an alleged violation.

II. THE AGREEMENT BETWEEN THE CITY OF SANTA ANA AND REDFLEX VIOLATES CALFIRONIA VEHICLE CODE 21455.5 BECAUSE IT REWARDS SANTA ANA FOR WRITING MORE CITATIONS.

Paragraph 26 of the contract (Trial Exhibit #12) between Redflex and the City of Santa Ana is all about "cost recovery". A careful read of the contract (Trial Exhibit #12 at 18: paragraph 26) reveals that there is a bi-annual review conducted to "ensure received revenue provides for sufficient cost recovery". Redflex collects all the revenue from a violation, and pays the City of Santa Ana the revenue less a fixed fee for each intersection ($5,370/month(See Trial Exhibit #12 at 10: paragraph 10(a))) that has an traffic camera system installed in it.

A few preliminary conclusions may be deduced: firstly, both parties must collect an amount from each camera in excess of the monthly fee intersection lease fee to recover their costs; secondly, parties to the contract have the right to "renegotiate" the fee…to ensure cost recovery, (i.e. the parties may renegotiate the monthly fee if the camera does not cover the costs of each party); thirdly, red light violations generate compensation (the more violations, the more compensation) for both parties; and lastly, high compensation by the each camera will likely prevent any renegotiation of the contract as costs will be sufficiently covered and both parties will be profitable.

Thus, the City of Santa Ana has incentive to make sure the cameras produce as much revenue as possible to prevent a Redflex imposed renegotiation of the contract if Redflex does not cover it's costs of installation and maintenance, and Redflex has incentive to make sure the cameras produce as much revenue as possible to prevent Santa Ana from renegotiating the intersection fee. California Vehicle Code Section 21455.5 subsection

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(g) works to prevent the parties from "cashing in" on these cameras by making contracts that contain provisions for adjustable compensation illegal.

In our case, the dispositive issue is the City of Santa Ana's ability to move cameras at their sole discretion. While there was no mention of Santa Ana's ability to move camera systems in the settled statement of facts, it is established and well know fact, and was discussed at length in a recent unpublished case (on this very issue) that is useful as persuasive authority, the case was People v. Murray, Case # SA136390PE (a certified copy of the Verdict of Not Guilty containing the court's findings is included in Appendix A).

In Murray, the City of Santa Ana announced their intention to move the traffic cameras based on intersection behavior. High accident occurrences in any particular intersection were viewed by the City of Santa Ana to be caused by red light violations that were ongoing. The traffic cameras would reduce accidents (and provide much needed revenue). During a press conference, City of Santa Ana Chief Paul Walters described the City's movement of various cameras from intersection to intersection as a "floating red light camera program" (Murray, at 6:23). Such ability to move the cameras from low risk (i.e. low revenue) intersections to high risk (i.e. high revenue) intersections rewards both parties to the contract. Moving a traffic camera to adjust their revenue production for a cameras would also prevent involuntary contract renegotiation. This violates California Vehicle Code section 21455.5 subsection (g).

III. THE AGREEMENT BETWEEN THE CITY OF SANTA ANA AND REDFLEX VIOLATES CALIFORNIA VEHICLE CODE SECTION 21455.5 BECAUSE NO WARNING NOTICES WERE ISSUED FOR THE INTERSECTION IN QUESTION.

Or more aptly stated, "still violates". The seminal case on this issue is yet another published case, right out of Santa Ana. This was the case of People v. Park (2010), 187 Cal.App.4th Supp.9, 115 Cal.Rptr.3d 337 (a full copy of which is included in Appendix

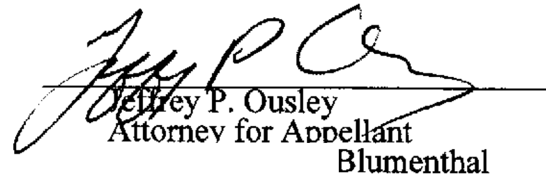
A), which found that as of July 2010, the City of Santa Ana had apparently not complied with the warning notice requirement mandated by California Vehicle Code Section 21455.5, despite a finding of fact in our case by the trial court that Santa Ana had complied with the warning notice requirement back in 2009 (See, Settled Statement at :5-9). This finding of fact seems inconsistent with the Park ruling.

Respondent's argument that the City of Santa Ana is presumed to have complied with a warning notice requirement by virtue of California Evidence Code section 664 falls short of the mark as well. This code section existed at the time of the Park case but did not prevent the Park ruling. Perhaps the biggest indictment to this argument is the fact that copies of mailed warning notices for the intersection in question were requested in the Appellant's informal discovery request (Trial Exhibit #13) and absolutely none were ever produced by the prosecution. It was apparent to the Appellant, that no such notices exist.

Respondent's arguments have been used over and over again with no success. As seen in the Khaled and Park cases, the arguments are of no merit in Santa Ana and Orange County. This Appeal should be granted and the judgment reversed.

Respectfully submitted on July 14, 2011

By:



Jeffrey P. Ousley
Attorney for Appellant
Blumenthal

CERTIFICATE OF COMPLIANCE

Pursuant to of the California Rules of Court rule 8.204 subsection (c), I hereby certify that this brief contains 1,649 words, including footnotes. In making this certification, I have relied on word count of a computer program used to prepare the brief. The brief has been typeset with one and a half line spacing and a 13 point font.

By ______________________

APPENDIX A

Appellate Division, Superior Court,
Orange County.
The PEOPLE, Plaintiff and Respondent,
v.
KHALED, Defendant and Appellant.

No. 30–2009–304893.
May 21, 2010.

Background: Defendant was convicted in the Superior Court, Orange County, Daniel M. Ornelas, Commissioner, of driving through an intersection against a red light. Defendant appealed.

Holdings: The Appellate Division of the Superior Court held that:
(1) police officer failed to establish foundation for admission of photographs from "photo enforcement" camera;
(2) document not signed by employee of official entity was not within hearsay exception for official records;
(3) photographs from "photo enforcement" camera were not within hearsay exception for official records; and
(4) officer could not establish that photographs from "photo enforcement" camera were within hearsay exception for business records.

Reversed.

West Headnotes

[1] Criminal Law 110 ⚷444.16

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k444 Authentication and Foundation
110k444.16 k. Photographs and videos. Most Cited Cases

Police officer failed to establish a sufficient foundation for admission of photographs taken from "photo enforcement" camera installed at intersection, in testifying that officer attended a training session where he was instructed on the overall workings of the photo enforcement system at the time of the training, where officer could not establish the time in question, the method of retrieval of the photographs, or that any of the photographs were a reasonable representation of what they were alleged to portray.

[2] Criminal Law 110 ⚷444.9

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110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k444 Authentication and Foundation
110k444.9 k. Business records; books of entry. Most Cited Cases

Criminal Law 110 ⟾444.12

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k444 Authentication and Foundation
110k444.12 k. Public records in general. Most Cited Cases

The trial court is vested with wide discretion in determining whether sufficient foundation is laid to qualify evidence under the "official records" or "business records" hearsay exceptions. West's Ann.Cal.Evid.Code §§ 1271, 1280.

[3] Criminal Law 110 ⟾429(1)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k429 Public or Official Acts, Proceedings, Records, and Certificates
110k429(1) k. In general. Most Cited Cases

A document offered in evidence in a traffic trial of a defendant allegedly captured on a "photo enforcement" camera was not an "official record" within the hearsay exception for official records, absent evidence that the signatory of the document was employed by a public entity. West's Ann.Cal.Evid.Code § 1280.

[4] Criminal Law 110 ⟾429(1)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k429 Public or Official Acts, Proceedings, Records, and Certificates
110k429(1) k. In general. Most Cited Cases

Statutory "official record" hearsay exception permits the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner to assure its trustworthiness. West's Ann.Cal.Evid.Code § 1280.

[5] Criminal Law 110 ⟾429(1)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence

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110k429 Public or Official Acts, Proceedings, Records, and Certificates
110k429(1) k. In general. Most Cited Cases

Photographs taken from "photo enforcement" camera installed at intersection were not within the hearsay exception for official records, absent evidence that they were prepared in such a manner to assure their trustworthiness, or evidence about the specific procedure from the programming and storage of the system information. West's Ann.Cal.Evid.Code § 1280.

[6] Criminal Law 110 ⚷444.9

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k444 Authentication and Foundation
110k444.9 k. Business records; books of entry. Most Cited Cases

In order to establish the proper foundation for the admission of a business record under the business record hearsay exception, an appropriate witness must be called to lay that foundation. West's Ann.Cal.Evid.Code § 1271.

[7] Criminal Law 110 ⚷436(2)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k436 Registers and Records
110k436(2) k. Business records in general. Most Cited Cases

The underlying purpose of the statute creating the business record hearsay exception is to eliminate the necessity of calling all witnesses who were involved in a transaction or event. West's Ann.Cal.Evid.Code § 1271.

[8] Criminal Law 110 ⚷444.9

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k444 Authentication and Foundation
110k444.9 k. Business records; books of entry. Most Cited Cases

Any witness with the requisite firsthand knowledge of the business's recordkeeping procedures may qualify to lay the foundation for the business record hearsay exception. West's Ann.Cal.Evid.Code § 1271.

[9] Criminal Law 110 ⚷444.3

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k444 Authentication and Foundation

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110k444.3 k. Presumptions and burden of proof. Most Cited Cases

The proponent of the admission of documents under the business record hearsay exception has the burden of establishing the requirements for admission and the trustworthiness of the information. West's Ann.Cal.Evid.Code § 1271.

[10] Criminal Law 110 ⚿436(2)

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k436 Registers and Records
110k436(2) k. Business records in general. Most Cited Cases

For a document to be within the business record hearsay exception, the document cannot be prepared in contemplation of litigation. West's Ann.Cal.Evid.Code § 1271.

[11] Criminal Law 110 ⚿444.16

110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k444 Authentication and Foundation
110k444.16 k. Photographs and videos. Most Cited Cases

Police officer did not qualify as the appropriate witness to lay the foundation to admit photographs taken from "photo enforcement" camera installed at intersection within the business record hearsay 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. West's Ann.Cal.Evid.Code § 1271.

See Annot., Automated Traffic Enforcement Systems (2007) 26 A.L.R.6th 179; Annot., Admissibility in State Court Proceedings of Police Reports Under Official Record Exception to Hearsay Rule (2003) 112 A.L.R.5th 621; 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, §§ 239, 243; Cal. Jur. 3d, Evidence, § 312.

****798** Richard Allen Baylis, for appellant.

No appearance for respondent.

Joseph W. Fletcher, City Attorney (Santa Ana) and Ryan O'Connell Hodge, Deputy City Attorney for City of Santa Ana as amicus curiae on behalf of respondent.

GREGG L. PRICKETT, Acting Presiding Judge FN*

FN* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

***3** This appeal involves an issue far too often presented to this court, namely the admissib-

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ility of evidence and the statutory compliance with the procedures employed by several municipalities in this county in what have come to be known as "photo enforcement" citations.

***4** On August 2, 2008, the police department of the City of Santa Ana issued a traffic citation to the appellant, 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 a declaration that was intended to support the introduction of photographs purporting to show the appellant driving through an intersection against a red light. 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.

We hold that the trial court erred in admitting the photographs and the accompanying ****799** declaration over the appellant's hearsay and confrontation clause objections. Absent the photographs and content in the declaration, there is insufficient evidence to support the violation. Accordingly we reverse the judgment.[FN1]

FN1. Appellant and amicus curiae the City of Santa Ana address issues regarding the prosecution of photo enforcement cases in general, and the lack of notice in this case, that we find unnecessary to address in light of the insufficiency of the evidence to sustain the trial court's finding.

I. Factual Summary

The underlying facts in this case are fairly simple. No police officer witnessed the alleged traffic violation. Instead, a police officer testified about the general area depicted in a photograph taken from a camera installed at an intersection in Santa Ana. A particular private company contracts with the municipality to install, maintain, and store this digital photographic information. The officer testified these photographs are then periodically sent back to the police department for review as possible driving violations.

To be more specific, the photographs contain hearsay evidence concerning the matters depicted in the photographs including the date, time, and other information. The person who entered that relevant information into the camera-computer system did not testify. The person who entered that information was not subject to being cross-examined on the underlying source of that information. The person or persons who maintain the system did not testify. No one with personal knowledge testified about how often the system is maintained. No one with personal knowledge testified about how often the date and time are verified or corrected. The custodian of records for the company that contracts with the city to maintain, monitor, store, and disperse these photographs did not testify. The person with direct knowledge of the ***5** workings of the camera-computer system did not testify. Instead, the prosecution chose to submit the testimony of a local police officer, Santa Ana Police Officer Alan Berg. This witness testified that some time in the distant past, he attended a training session where he was instructed on the overall workings of the system at the time of the training. Officer Berg was unable to testify about the specific procedure for the programming and storage of the system information.

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II. Analysis

A. Admissibility of videotape and photographic evidence

[1] 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 (oftentimes a bank or convenience or liquor store). 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; ****800** see also *United States v. Jernigan* (9th Cir.2007) 492 F.3d 1050 (en banc).)

The second situation involves what is commonly known as a "nanny cam." In that situation, 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 situation at bar. Here the officer could 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.) A very analogous situation to the case ***6** at bar, however, is 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.

B. Exceptions to the hearsay rule are not applicable here

[2] In lieu of establishing the necessary foundation by direct testimony, the proponent of the evidence, respondent, argues that independent hearsay exceptions justify admission of the photographs under either the "official records exception" or the "business records exception" of the Evidence Code. (*Id.,* §§ 1280, 1271.) Neither of these sections supports respondent's contention. We recognize that the trial court is vested with " 'wide discretion' " in determining whether sufficient foundation is laid to qualify evidence under these hearsay exceptions. (*People v. Beeler* (1995) 9 Cal.4th 953, 978, 39 Cal.Rptr.2d 607, 891 P.2d 153.) And " '[o]n appeal, exercise of that discretion can be overturned only upon a clear showing of abuse.' " (*Id.* at pp. 978–979, 39 Cal.Rptr.2d 607, 891 P.2d 153.)

1. *Official Records Exception (Evid.Code, § 1280)*

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The prosecution argues that these documents were properly admitted under Evidence Code section 1280 (section 1280), the official records exception to the hearsay rule.[FN2] A plain reading of this section cannot support the prosecution's position. Not only does this section require that the writing be "made by ... a public employee" (*§ 1280,* subd. (a); see e.g., *Shea v. Department of Motor Vehicles* (1998) 62 Cal.App.4th 1057, 1059, 72 Cal.Rptr.2d 896 [forensic laboratory trainee did not qualify as a "public employee"]), but the public employee must be under a legal duty to make such reports (§ 1280, subd. (a); see e.g., *People v. Clark* (1992) 3 Cal.4th 41, 158–159, 10 Cal.Rptr.2d 554, 833 P.2d 561 [autopsy report prepared by now deceased ****801** coroner of autopsy he performed properly admitted through testimony of another coroner]).

FN2. Section 1280 provides: "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 to indicate its trustworthiness."

[3] ***7** Here, the signatory of the document exhibit No. 3 states he or she is an employee of the "Redflex Traffic Systems." At no point does the signatory state that Redflex Traffic Systems is a public entity or that he or she is otherwise employed by 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" (*id.,* subd. (c)). Except for the written content of exhibit No. 3, which presents another layer of hearsay, there is a total lack of evidence to establish this element of a section 1280 hearsay exception. Each layer of hearsay must meet the foundational elements of this exception or another hearsay exception, or the writing is inadmissible. (*People v. Reed* (1996) 13 Cal.4th 217, 224–225, 52 Cal.Rptr.2d 106, 914 P.2d 184 ["As with all multiple hearsay, the question is whether each hearsay statement fell within an exception to the hearsay rule."]; *People v. Ayers* (2005) 125 Cal.App.4th 988, 995, 23 Cal.Rptr.3d 242; *People v. Baeske* (1976) 58 Cal.App.3d 775, 130 Cal.Rptr. 35 [police report containing contents of phone call to police department inadmissible under official record exception].)

[4] However, section 1280 does permit the court to admit an official record or report without necessarily requiring a witness to testify as to its identity and mode of preparation " ' "*if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner to assure its trustworthiness.*" [Citations.]' " (*Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 929, 35 Cal.Rptr.3d 335 (*Bhatt*).)

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[5] Here, the record is totally silent as to whether the trial court took judicial notice of anything, nor does it show " ' "sufficient independent evidence ... that the record or report was prepared in such a manner to assure its trustworthiness." ' " (*Bhatt, supra,* 133 Cal.App.4th at p. 929, 35 Cal.Rptr.3d 335, italics omitted.) The only evidence outside of the contents of exhibit No. 3 describing the workings of the photo enforcement system and recordation of information from that system came from Officer Berg who, admittedly, was unable to testify about the specific procedure from the programming and storage of the system information. Consequently, the trial court erred in admitting this evidence as an official record.

***8 2. Business Records Exception (Evid.Code, § 1271)**

[6][7][8][9][10] These exhibits also do not fall under the business records exception of Evidence Code section 1271 (section 1271). FN3 In order to establish the proper foundation for the admission of a business record, an appropriate witness must be ****802** called to lay that foundation (*Bhatt, supra,* 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, supra,* 9 Cal.4th at p. 978, 39 Cal.Rptr.2d 607, 891 P.2d 153.) And the document cannot be 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.)

FN3. "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;

(d) The sources of information and method and time of preparation were such as to indicate it trustworthiness." (§ 1271.)

[11] Here, Officer Berg did not qualify as the appropriate witness and did not have the necessary knowledge of underlying workings, maintenance, or recordkeeping of Redflex Traffic Systems. The foundation for the introduction of the photographs and the underlying workings of the Redflex Traffic Systems was outside the personal knowledge of Officer Berg. If the evidence fails to establish each foundational fact, neither the official records nor the business records hearsay exception is available. (*People v. Matthews* (1991) 229 Cal.App.3d 930, 940, 280 Cal.Rptr. 134.) FN4 Accordingly, without such foundation, the admission of exhibits Nos. 1 and 3 was erroneous and thus the trial court abused its discretion in admitting these exhibits. Without these documents, there is a total lack of evidence to support the Vehicle Code violation in question.

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FN4. This is not a situation where, in compliance with a lawfully issued subpoena duces tecum, the custodian submitted a declaration attesting to the necessary foundational facts (Evid.Code, § 1560 et seq.; see also *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.

***9** The judgment is reversed and with directions that the charge be dismissed. (*People v. Bighinatti* (1975) 55 Cal.App.3d Supp. 5, 7, 127 Cal.Rptr. 310.)

GREGORY H. LEWIS and KAREN L. ROBINSON, JJ.

Cal.App.Super.,2010.
People v. Khaled
186 Cal.App.4th Supp. 1, 113 Cal.Rptr.3d 796, 10 Cal. Daily Op. Serv. 9394

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Appellate Division, Superior Court,
Orange County.
The PEOPLE, Plaintiff and Respondent,
v.
PARK, Defendant and Appellant.

No. 30–2009–00329670.
July 23, 2010.

Background: Defendant was convicted in the Superior Court, Appellate Division, Orange County, No. SA137669PE, Daniel M. Ornelas, Commissioner, of failing to stop at red signal. Defendant appealed.

Holding: The Superior Court, Appellate Division, Gregory H. Lewis, J., held that, as matter of first impression, requirement that city make public announcement and issue notice of automated traffic enforcement system 30 days prior to enforcement applied to each particular intersection at which automated photographic system was installed.

Reversed with directions.

Karen L. Robinson, J., concurred in judgment.

West Headnotes

Automobiles 48A ⚷349(1)

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(1) k. In general. Most Cited Cases

Requirement that city make public announcement and issue notice of automated traffic enforcement system 30 days prior to enforcement applied to each particular intersection at which automated photographic system was installed. West's Ann.Cal.Vehicle Code § 21455.5(b).
See Annot., Automated Traffic Enforcement Systems (2007) 26 A.L.R.6th 179; 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 259; Cal. Jur. 3d, Automobiles, § 297.

***337** Park, for appellant.

No appearance for respondent.

Joseph W. Fletcher, City Attorney (**Santa** Ana) and Ryan O'Connell Hodge, Deputy City Attorney for City of **Santa** Ana as amicus curiae on behalf of respondent.

338 *OPINION

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GREGORY H. LEWIS, Judge.

Based upon evidence obtained via an automated photographic enforcement system within the City of **Santa** Ana on February 17, 2009, appellant, Park, was convicted of failing to stop for a red signal in violation of Vehicle Code section 21453, subdivision (a). On appeal, as at trial, appellant contends that the citation was unlawfully issued and that the conviction is therefore invalid, because the People failed to demonstrate compliance with the warning requirements of Vehicle Code section 21455.5, subdivision (b).

Appearing as amicus curiae, the City of **Santa** Ana contends that the requirements of section 21455.5, subdivision (b), were satisfied by the issuance of warning notices six years earlier when the first photographic enforcement equipment was installed within the City's jurisdictional limits, and that no additional 30–day warning notice program was necessary when photographic enforcement equipment was installed at the particular intersection at which appellant's violation was recorded. For the reasons set forth below, we agree with appellant's construction of the statute and consequently reverse the judgment of the trial court.

DISCUSSION

A. *The Governing Statute*

When issued "based on an alleged violation ... recorded by an automated enforcement system pursuant to Section 21455.5," a written notice to appear constitutes a complaint to which the defendant may enter a plea. (Veh.Code, § 40518, subd. (a).) The issuance of citations based upon automated traffic enforcement systems is thus governed by the procedural requirements of Vehicle Code section 21455.5. Subdivision (b) of section 21455.5 provides,

> "Prior to issuing citations under this section, a local jurisdiction utilizing an automated traffic enforcement system shall commence a program to issue only warning notices for 30 days. The local jurisdiction shall also make a public announcement of the automated traffic enforcement system at least 30 days prior to the commencement of the enforcement program."

The record indicates that the "local jurisdiction" which utilized the automated traffic enforcement system in this case was the City of **Santa** Ana (the City) and that the City sought to comply with section 21455.5, subdivision (b) by making public announcements and issuing warning notices during a 44–day period when the first automated enforcement equipment was activated at a different intersection in 2003. The trial court evidently concluded that the requirements of section 21455.5, subdivision (b), were satisfied by these actions. Appellant, however, argues that "automated enforcement system" refers not to the entirety of all automated cameras located at intersections throughout the City, but rather to the set of photographic equipment installed at each individual intersection, and that his conviction should be reversed because no warning notices or public announcements were issued pursuant to section 21455.5, subdivision (b), with respect to the intersection at which the violation occurred in this case. The case thus presents a clearly defined issue of statutory construction.

"Our task in construing a statute is to ascertain and give effect to the Legislature's intent. [Citation.] We begin by examining the words of the statute, giving them their usual and ordinary meaning and construing them in the context of the statute as a whole. [Citations.]

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> ***339** If the plain language of the statute is unambiguous and does not involve an absurdity, the plain meaning governs. [Citations.] If the statute is ambiguous, the court may consider a variety of extrinsic aids, including the apparent purpose of the statute. [Citation.]"

(*Leonte v. ACS State & Local Solutions, Inc.* (2004) 123 Cal.App.4th 521, 526–527, 19 Cal.Rptr.3d 879.) Although no published decision has directly addressed the meaning of subdivision (b) of section 21455.5, the *Leonte* opinion, in discussing the statute, appears to have assumed that "system" refers to the automated enforcement equipment at each intersection: "Former Vehicle Code section 21455.5 (Stats. 2001, ch. 496, § 1) [FN1] authorized the use of automated traffic enforcement systems at intersections where drivers are required to stop." (*Leonte,* at p. 526, 19 Cal.Rptr.3d 879.)

FN1. Subdivision (b) of the cited 2001 version of section 21455.5 was identical to the current subdivision.

B. *Plain Meaning of the Word "System"*

The trial court's construction of Vehicle Code section 21455.5, subdivision (b) is inconsistent with the plain meaning of the word "system" as used in Vehicle Code section 21455.5, as well as in related statutory provisions. Section 21455.5, subdivision (a), provides that "the intersection ... may be equipped with an automated enforcement system," and requires a governmental agency utilizing "the system" to "[i]dentif[y] the system by signs that clearly indicate the system's presence and are visible to traffic approaching from all directions...." (*Id.,* subd. (a)(1).) Based upon this intersection-specific usage, "automated enforcement system" in section 21455.5, subdivision (b) cannot refer to a municipality's overall automated enforcement plan, but must instead refer to each individual set of automated equipment operated at an intersection within the municipal jurisdiction.

Other references to "system" and "equipment" within the statutory scheme are consistent with this construction. Vehicle Code section 21455.7, subdivision (a) prescribes change intervals for yellow lights "[a]t an intersection at which there is an automated enforcement system...." Section 21455.5, subdivision (d), permitting specified operational aspects of "the system" to be contracted out if a governmental agency "maintains overall control and supervision of the system," does not necessarily refer to the entire aggregation of automated enforcement equipment operated by a governmental agency, inasmuch as the agency may elect to "contract[ ] out" the operation of intersection-specific systems within its jurisdiction to multiple contractors. Similarly, because the statute does not require governmental agencies to grant operational responsibilities exclusively to a single contractor, the prohibition in section 21455.5, subdivision (d), against contracting out certain operational activities "to the manufacturer or supplier of the automated enforcement system" is not evidence of a legislative intent for each agency to operate a single "system." Contrary to amicus curiae's assertion, Vehicle Code section 21455.6, subdivision (a), does not require municipalities to conduct a public hearing every time use of an automated enforcement system is proposed; it requires the governing body to hold such a hearing only "prior to authorizing the city or county to enter into a contract for use of the system"; if a system is installed at a new intersection pursuant to an existing contract, there is no need for a hearing.

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***340** An intersection-specific construction is also consistent with the common definition of "system" as a group of regularly interacting or interdependent items forming a unified whole. (See Merriam–Webster OnLine Dict. <http:// www. merriam- webster. com/ dictionary/ system> [as of Jul. 23, 2010].) Although automated enforcement equipment operating at a particular intersection must interact in a manner necessary to produce photographic images of a violation, sets of equipment operating at different intersections within a municipality need not interact with each other in order to fulfill that function, and a municipality might even elect to operate incompatible types of equipment at different intersections. Tellingly, one of the People's own trial exhibits, a hearsay document containing information regarding the automated enforcement equipment operated by the City, refers to "each intersection where an Automated Red Light Enforcement System is installed" and to "[t]he intersections where the Automated Red Light Enforcement Systems are operated."

C. *Legislative History*

Even if use of the word "system" in Vehicle Code section 21455.5 were ambiguous, the legislative history of section 21455.5 demonstrates that the word was intended to refer to the set of equipment installed and operated at an individual intersection and not to a municipality's entire aggregation of such equipment. Section 21455.5 was originally enacted in 1995 (Sen. Bill No. 833 (1995–1996 Reg. Sess.); Stats. 1995, ch. 922). According to the Legislative Counsel's Digest for Senate Bill No. 833, section 21455.5 expanded the use of "automated rail crossing enforcement systems" (at that time codified in Veh.Code § 22451, subd. (c)), to encompass "all places where a driver is required to respond to an official traffic control signal showing different colored lights." With this expansion, the system was renamed "automated enforcement system." Mirroring the intersection-specific language of section 21455.5, section 22451, subdivision (c) now provides that a notice to appear may be issued pursuant to Vehicle Code section 40518 "[w]henever a railroad or rail transit crossing is equipped with an automated enforcement system...."

Vehicle Code section 21362.5, subdivision (a), enacted in conjunction with Vehicle Code section 40518 in 1994, refers to the same "system" in a clearly intersection-specific context: "Railroad and rail transit grade crossings may be equipped with an automated rail crossing enforcement system if the system is identified by signs clearly indicating the system's presence and visible to traffic approaching from each direction." (§ 21362.5, subd. (a).) The purpose of these warning requirements was also described in intersection-specific language in the legislative findings and declarations of the Rail Traffic Safety Enforcement Act (Sen. Bill No. 1802 (1993–1994 Reg. Sess.)), which added subdivision (c) to section 22451: "Automated rail crossing enforcement systems that photographically record violations occurring at rail crossing signals and rail crossing gates are a significant deterrent to these violations where motorists are aware of the presence of the automated systems." (Stats. 1994, ch. 1216, § 2, subd. (c).)

An amendment to Vehicle Code section 21455.5 proposed in 2003 (Sen. Bill No. 780 (2003–2004 Reg. Sess.)) would have required warning notices to be issued "during the first 30 days after the first recording unit is installed." (*Id.,* § 11, subd. (c)(1).) The Legislature's rejection of this language in a year when other amendments to the statute were enacted provides further evidence of a legislative intention ***341** for the 30–day warning period to continue to

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apply, instead, to each installation of automated enforcement equipment at an intersection. (See *City of* ***Santa*** *Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 88–89, 260 Cal.Rptr. 520, 776 P.2d 222; *People v. Adams* (1976) 59 Cal.App.3d 559, 565–566, 131 Cal.Rptr. 190.) Section 21455.5 was instead amended via Assembly Bill No. 1022 (2003–2004 Reg. Sess.), and the Legislative Counsel's Digest concerning that bill (see Stats. 2003, ch. 511) noted that "[e]xisting law authorizes the limitline, intersection, or other places where a driver is required to stop to be equipped with an automated enforcement system" and that "[e]xisting law requires that, at an intersection at which there is an automated enforcement system in operation the minimum yellow light change interval be established in accordance with the Traffic Manual of the Department of Transportation."

It would make little sense for the scope of the 30–day warning period to be limited temporally and to be defined arbitrarily by the geographic size of the local jurisdiction, inasmuch as the legislatively stated purpose of the warning requirement is to deter red light violations. This purpose is best achieved by the issuance of new warnings and announcements to proximate users each time automated enforcement equipment commences operation at an intersection.

CONCLUSION

Because the record in this case shows a lack of compliance with the requirement of Vehicle Code section 21455.5, subdivision (b), that a municipality utilizing an automated enforcement system at an intersection comply with the prescribed warning requirements "[p]rior to issuing citations," the conviction must be reversed. (See *Ralph v. Police Court* (1948) 84 Cal.App.2d 257, 258–259, 190 P.2d 632; *People v. Municipal Court* (*Pellegrino*) (1972) 27 Cal.App.3d 193, 206, 103 Cal.Rptr. 645.)

DISPOSITION

The judgment is reversed, with directions that the charge be dismissed.

I concur. JOSEPHINE S. TUCKER, Acting Presiding Judge.
I concur in the judgment. KAREN L. ROBINSON, Judge.

Cal.App.Super.,2010.
People v. Park
187 Cal.App.4th Supp. 9, 115 Cal.Rptr.3d 337, 10 Cal. Daily Op. Serv. 11,344

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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
~~WEST~~ Central JUSTICE CENTER
AUG 05 2009
ALAN CARLSON, Clerk of the Court
BY N. RODRIGUEZ DEPUTY

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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF ORANGE - CENTRAL JUSTICE CENTER**
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11 THE PEOPLE OF THE STATE OF CALIFORNIA, 12 Plaintiff, 13 vs. 14 MURRAY, 15 Defendant.	Case No.: SA136390PE
16 THE PEOPLE OF THE STATE OF CALIFORNIA, 17 Plaintiff, 18 vs. 19 LORI A 20 Defendant.	Case No.: SA139586PE **~~TENTATIVE~~ VERDICT OF NOT GUILTY**

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24 WRITTEN FINDINGS BY THE COURT
25
26 On January 12, 2009 and April 2, 2009, defendants Murray and A are
27 alleged to have violated Vehicle Code (hereafter VC) section 21453(a) for failing to stop at
28 red signal lights in the City of Santa Ana at the intersections of Bristol and Edinger

northbound and Dyer and Pullman westbound, respectively. The signal lights were of part of an automated enforcement system – commonly known as red light cameras – installed pursuant to VC 21455.5 et. seq.; and the result of a contractual agreement between the city and Redflex Traffic Systems, Inc., entered into in December, 2002 and amended and extended in February, 2008.

At trial, defendant Murray alleged that the charge should be dismissed because the city did not give a 30 day warning notice of the camera's installation for enforcement at Bristol & Edinger, pursuant VC 21455.5(b). Defendant A contended in limini at her trial that the Santa Ana police officer should be precluded from testifying in the matter because the contract's compensation clause violated the statutory mandates of VC 21455.5(g)(1)&(2). While the Court generally agrees with these contentions, it is compelled to declare - on its own motion - that the contract between the Santa Ana and Redflex is contrary to terms of a law designed for the protection of the public, which prescribes a penalty for violation; is illegal and void, and that no action may be brought to enforce it. The Court also finds that *Santa Ana* violated the "public announcement" requirement of VC 21455.5(b). Therefore, the Court enters verdicts of not guilty in these matters.

<u>The Public Announcement</u>

In the contract's initial recitals, Santa Ana and Redflex agreed that vehicle code violations in general pose a serious threat to the lives and property of residents of and visitors to the city, and violations of VC 21453 have been shown to possess a significant risk to life and property. On May 27, 2003, Santa Ana Police Chief Paul Walters and Lt. (now Deputy Chief) Tony Levetino, conducted a public press announcement at the intersection of Harbor and McFadden, regarding the installation of the first red light camera.[1] Reporters

[1] At the public briefing, these Santa Ana Police officials told the public that the red light cameras would save the city *innumerable* lives; that no dollar amount could be put on the benefits that would occur; that research has shown it will make the community much safer, and that the *purpose* is to make the streets safer and avoid accidents, not to make money. Nothing in this opinion should be taken as an inference that this Court doubts the sincerity of these recitations and representations.

from the Orange County Register and the Los Angeles Times were present; and these papers thereafter published articles regarding the announcement. This public press briefing qualifies as a legal public announcement. (cf. People vs. Squire, 15 Cal. App. 4th 775,782, (1993)).

At the briefing, Chief Walters announced the completion of the first week of successful operation of the system; which had been activated 442 times during the first 5 days of operation from May 19-23. He stated that the city officially began its 30 day warning period on May 19th and that warning notice letters (pursuant to VC 21455.5(b)) were being sent out. Effective June 19th, the chief indicated that the system would begin to issue real traffic citations. VC 21455.5(b) states: "The local jurisdiction shall also make a public announcement of the automated enforcement system at least 30 days prior the commencement of the enforcement program" (emphasis added). In another case interpreting VC 21455.5 et. seq., the court has held that statutes must be construed to ascertain and give effect to the Legislature's intent; and to give the words of a statute their usual and ordinary meaning. (Leonte vs. ACS State & Local Solutions, Inc., 123 Cal. App. 4th 521, 526-7, (2004)). The public announcement here which was made after the warning period commenced, and only 24 days prior to the actual enforcement program, was legally insufficient. On this basis alone, the verdict of not guilty must be entered.

Advanced publicity engendered by a public announcement serves the purpose of deterring the violative driving conduct, legitimizes the law enforcement tool in question, and lessens intrusiveness by reducing surprise, fear, and inconvenience. (People vs. Squire, supra). While not a DUI checkpoint, a traffic device which flashes a bright camera light at a driver deserves similar considerations. The public announcement herein was not only legally untimely, it created factual problems as well. On May 27th, Chief Walters announced that "when the yellow light comes on, you have 4.4 seconds before it turns red". Yet it has been adduced in court that the only yellow light of that duration in Santa Ana's automated

system is at the original Harbor/McFadden intersection; which has been increased to 4.5 seconds, none of the other 18 intersection approaches currently in operation (with the possible exception of Harbor & Warner, where the speed limit is 45 mph) have a yellow signal which exceeds 4.0 seconds. Today, July 8, 2009, in addition to the above cases, there are 13 red light camera cases set for trial in Department C54, Central Justice Center. In 8 of the 13, the Defendant is alleged to have been behind the limit line at a red light for less than the .4 seconds. In still 2 others, the violation time would have been an impossible to discern .08 and .09 of a second.[2] Therefore, none of these 10 cases would have been before the court if the yellow light duration was of the time stated at the only public announcement on the subject, versus the duration the yellow lights actually are on at the intersections. While there was never any requirement for such a statement, that it was made at all has additional bearing on the issue of Notice, as will herein be set forth.

<u>The Contract and the Warning Notice</u>

This opinion has discussed the automated enforcement system as a whole. That is because this Court does not necessarily agree with other respected conclusions which would appear to require a separate 30 day warning period <u>as a matter of law</u> for each camera at each intersection. For example, the very definition of "intersection" (VC 365) is the area embraced by the boundary lines of the highways which join each other. There would seem to be no logic basis for parceling out notices for each 1/4th approach to the intersection itself.[3]

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[2] Vinson, SA135721PE, .26 seconds; Han, SA136762PEA, .18 seconds; Mez , SA138138PE, .21 seconds; Coen, SA138633PEA, .26 seconds; Monge, SA139103PE, .23 seconds; Kim, SA139860PE, .23 seconds; Mahmud, SA140421PE, .27 seconds, Kelly, SA140606, .30 seconds, Crockett, SA137660PE, .48 seconds, speed limit 45 mph; A SA111098PE, .49 seconds

[3] On the other hand, this Court doesn't subscribe to the fear that every time a new intersection is added to the automated camera system, then a new public city council meeting has to be held. VC 21455.6 clearly states that the initial hearing is for "authorizing the city...<u>to enter into a contract for the use of the system</u>" only (emphasis added).

This divergence does not resolve the fundamental notice question. The Santa Ana/Redflex contract specifically defines "Warning Period" as "the period of thirty (30) days after the Installation Date of the first intersection approach". Not surprisingly then, at the public announcement, Chief Walters said: "They'll be a one month period and the subsequent ones, if they're within that one month period, they'll be a warning. If not, if they're after the first month of warning, then they'll be issued citations unless we decide otherwise. Administratively we could, but technically by the law after the first month warning then any that we install we can issue citations right from the start".

Eighty-four years ago, in Fleming vs. Superior Court (Orange County), 196 Cal. 344, 349 (1925), the Supreme Court upheld the constitutionality of speed trap laws which had been enacted two years earlier. As the Court in People vs. Sullivan, 234 Cal. App. 3d 56, 58 (1991), stated, the Fleming court observed that the Legislature "'clearly expressed its conviction that the presence of traffic officers actually patrolling the highways would have a most salutary effect in securing the observance of each and all of the regulations imposed upon drivers of vehicles upon the public highways'". Originally, the speed trap law related solely to a section of the highway within the vision of a law enforcement officer who calculated the speed of a vehicle by the time it took for the vehicle to enter and exit the section.

For several years though, the law has additionally prohibited law enforcement officers from testifying about the speed of a vehicle when "enforcement of the speed limit involves the use of radar or any other electronic device that measures the speed of moving objects." (VC 40802, et. seq.). Thus such evidence is excluded in court proceedings, unless the prosecution prima facie (ie. as a condition precedent) generally establishes the appropriate training of the officer, the reliability of the electronic device, and that a traffic and engineering survey has been conducted which justifies the speed limits on posted signs that drivers would pass by. In other words, the law requires the driver to be put on notice when he sees a speed limit sign, that a reliable electronic device can be used to show he is in violation of the vehicle code. On the other hand, the basic statutory faith in an overt police

presence remains. VC 21455.5 establishes its own statutory procedure for the use of an electronic device to detect red light violations; and it also requires as a condition precedent that "prior to issuing citations under this section a local jurisdiction ...shall commence a program to issue warning notices for 30 days" (emphasis added). In this Court's opinion, this is really quite similar in scope and intent to basic speed trap legislation.

At the public announcement, the Chief correctly observed: "If you think about it, in order for us to put someone out here 24 hours a day, seven days a week, you would need 5 around the clock full time officers that did nothing else. And the fact that they can't watch or record the same type of evidence that you could get; they can't possibly humanly do what technology can do." This Court finds nothing wrong with new electronic tools to monitor traffic; which will reduce accidents and save lives. However, when the law favors "the presence of traffic officers actually patrolling the highways" (Fleming, supra), then statutory notice requirements like those in VC 21455.5 take on an enhanced significance and must be strictly obeyed.

In Santa Ana, these notice requirements were to be virtually eliminated. Thus the following exchange at the press conference:

Chief Walters: "The other thing you have to remember is, these are not permanent; these can be moved. If we determine that this is no longer a high accident location, in a year or two we'll move it to another site. But we have 20 systems that we can move to wherever the need is in the city; the whole idea again is to change the way people behave".

Question: "So basically, the key here that's different is that you have a floating red light camera program?"

Chief Walters: "Yes, very much so".

Generally speaking, the terms of a contract may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. However, where the validity of an agreement is the fact in dispute, evidence relevant to that issue will not be excluded. Further, the parole evidence rule does not exclude evidence which establishes the illegality of the agreement. Finally, the parole evidence rule is not applicable to a controversy as to

1 the meaning of a writing between a party to the writing (here, Santa Ana) and a stranger to
2 the writing (here, the defendants). (Code of Civil Procedure section 1856; Pecarovich vs.
3 Becker, 113 Cal. App. 2d 309, 314-15, 1952). The statements by Santa Ana police officials
4 are therefore relevant, material and admissible to determining whether or not the contract in
5 question complies with the warning notice requirements of VC 21455.5 on which it is
6 founded.

7 Whenever a statute is made for the protection of the public, a contract in violation of
8 its provisions is void. (Firpo vs. Murphy, 72 Cal. App. 249, 253, 1925). Here, VC 21455.5
9 et. seq., was enacted to allow automated system enforcement of VC 21453 violations; which
10 are punishable by a statutorily designated fine of $100 (plus penalty assessments) (VC
11 42001.15). A contract contrary to terms of law designed for the protection of the public and
12 prescribing a penalty for violation is illegal and void, and no action may be brought to
13 enforce it. A court should, on its own motion, refuse to entertain an action when its illegality
14 appears as a matter of law from the whole case before the court. (Civil Code section 1667;
15 Industrial Indemnity Company vs. Golden State Company, 117 Cal. App. 2d 519, 527,
16 1953).

17 In the instant case, the evidence shows that Santa Ana created a contract for
18 enforcement of red light violations which expressly provided for only a single warning notice
19 and at a time when only one of a contemplated 20 red light cameras existed. The evidence
20 additionally shows that it was the intent of the city not to issue further warnings for other
21 cameras installed after the first 30 days even though it knew that was within its lawful
22 administrative powers. Finally the evidence shows a plan by the city to use the cameras as
23 a floating enforcement program so that installations and enforcement could occur at any
24 signalized intersection in Santa Ana at any time and literally without any warning.[4]
25 Whether or not 30 day warning notices are required for every signalized installation, this set
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[4] Of course, a member of the public who did have notice of potential enforcement from the original public announcement would find himself with almost ½ a second less time to make it through a yellow light. At 40 mph, the speed limit at the intersections of all but one of today's cases set for trial, this would be over 23 feet; or about 1 ½ car lengths of yellow light time which turns red, instead.

of circumstances is so completely contrary to any reasonable interpretation of VC 21455.5's notice requirements as to compel this Court, on its own motion, to declare the contract as unenforceable as a matter of law. On this basis, the defendants are entitled to a verdict of not guilty.

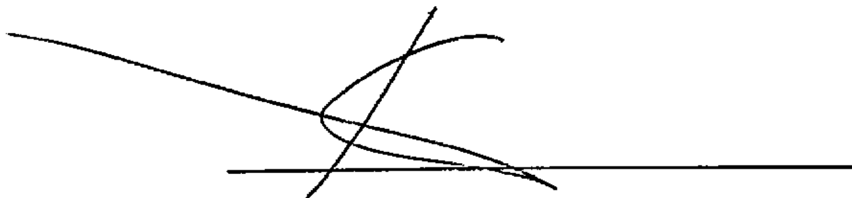
Compensation

The Santa Ana/Redflex contract provides for a monthly fee for each functioning approach containing a red light camera operating system in the city. This "flat rate" is consistent with VC 21455.5(g), which states that compensation cannot be based on the number of citations or percentage of the revenue generated. However, in its "Miscellaneous Provisions" section, the contract provides Santa Ana with "the option to renegotiate" the compensation, "if the City determines it is unable to recover its costs..." Defendant A contends that this effectively negates the requisite flat rate, because it provides an incentive for Redflex to generate as many citations as possible so that the fees received from the city don't get renegotiated and reduced.

The defendant is wrong in this factual assertion. Under the "Standards of Performance" section of the contract, "Contractor warrants that its camera systems will detect and capture all red light violations that occur..." One can't generate more than 100%. As seen from the short time in the red in several of the aforementioned cases, Redflex does its job well. However, Santa Ana's contractual plan to move cameras to different locations "if we determine this is no longer a high accident location" does itself put the compensation issue directly into question. It's simply a matter of common sense to state that if violations are decreasing, then so are accidents. Therefore, the contract contemplates moving a red light camera which is no longer generating sufficient revenue to another signalized intersection – again, without any warning – and a concomitant opportunity to renegotiate the amount of compensation required. Giving the words of VC 21455.5(g) their usual and ordinary meaning, (Leonte, supra) the contract fails because it potentially violates both the

number of citation and percentage of revenue proscriptions of the section.[5] For this reason, the compensation section violates the mandate of VC 21455.5, and the defendants are entitled to a verdict of not guilty.

Dated: July 8, 2009



KENNETH SCHWARTZ
COMMISSIONER OF THE SUPERIOR COURT

[5] To be distinguished – especially in today's economic times – is language which would allow for termination of the contract if Santa Ana determined it was unable to recover its costs. This Court sees no legal problem from this possibility, but this is not present in the contract's "Termination" section. As presently agreed, a change based on circumstances which by necessity mean less money just gives Santa Ana an opportunity to seek different monetary circumstances and concessions. This is exactly what is to be avoided by VC 21455.5(g). Termination, rather than renegotiation, would be consistent with the sincere statements of the police officials at the public announcement; see ft. 1.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 316 W. 4th Suite 221, Street, Santa Ana, CA 92701.

On July 15, 2011. 2011 I served the foregoing document described as: **Appellant's Reply Brief** on all interested parties/persons by delivering the same to the address below by placing true copies thereof in a sealed envelope addressed as follows:

Melissa Crosthwaite Esq.
Santa Ana City Attorney's Office
20 Civic Center Plaza #M029
Santa Ana, CA 92701

Tony Rackauckas
O.C. District Attorney
Attn: Writs & Appeals
P.O. Box 808
Santa Ana, CA 92701

Orange Conty Superior Court
Department C-54
700 Civic Center Drive West
Santa Ana, CA 92701

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I declare under penalty of perjury that the foregoing is true.

Executed July 15, 2011at Santa Ana, California.

Jeffrey Ousley
Printed name

[signature]
Signature