Filed 2/28/12 P. v. Goldsmith CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ------ GOLDSMITH, Defendant and Appellant.	B231678 (Los Angeles County Super. Ct. No. 102693IN) (Appellate Div. No. BR048189)

APPEAL from a judgment of the Superior Court of Los Angeles County, John R. Johnson, Commissioner. Affirmed.

John J. Jackman for Defendant and Appellant.

Cal Saunders, City Attorney; Best Best & Krieger, Dean R. Derleth and John D. Higginbotham, for Plaintiff and Respondent.

INTRODUCTION

------ Goldsmith appeals from a judgment, entered following a court trial, finding Goldsmith guilty of violating Vehicle Code 21453, subdivision (a), by failing to stop at a red light at an intersection in the City of Inglewood.

Goldsmith challenges the admission into evidence of computer-generated photographs and a video of her traffic violation as unsupported by evidence that the computer operated properly. Testimony on the accuracy and reliability of computer hardware and software, however, is not required as a prerequisite to admission of computer records. There was no abuse of discretion in the trial court's admission of this evidence.

Goldsmith claims that the photographs and video are hearsay and prosecution did not establish that this evidence was admissible under the business records or public records exceptions to the hearsay rule. We find, however, that the photographs and video were not hearsay, the hearsay rule did not require their exclusion from evidence, and therefore no hearsay exception was necessary to admit this evidence.

Goldsmith also claims that the traffic signal's yellow light interval did not conform to the requirements of Vehicle Code section 21455.7. We conclude that substantial evidence supported the trial court's factual finding that the yellow light interval of the signal conformed to the statutory requirement. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On March 13, 2009, a traffic notice to appear was issued to ------ Goldsmith alleging that she violated Vehicle Code section 21453, subdivision (a)[1] by failing to stop

---

[1] Vehicle Code section 21453, subdivision states, in pertinent part: "(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, except as provided in subdivision (b).

"(b) Except when a sign is in place prohibiting a turn, a driver, after stopping as required by subdivision (a), facing a steady circular red signal, may turn right, or turn left from a one-way street onto a one-way street. A driver making that turn shall yield the

at a red light at the intersection of Centinela Avenue and Beach Avenue in the City of Inglewood. In a court trial, the trial court admitted evidence from a computerized automated traffic enforcement system (ATES) and convicted Goldsmith of failing to stop at a red light.

The ATES at the intersection was implemented in September 2003. The police department operates the ATES, but Redflex Traffic Systems (Redflex) maintains the ATES.

Dean Young, an investigator with the Inglewood Police Department, testified at trial. Young was assigned to the Traffic Division, Red Light Camera Photo Enforcement, and had more than six years experience in that assignment. Young testified that he visually inspected the traffic signal on a monthly basis to ensure that the duration of its yellow light interval complied with minimum guidelines set by the Department of Transportation. Young conducted timing checks of the traffic signal's yellow light interval on February 16 and March 16, 2009. His timing checks showed averages of 4.11 seconds on February 16, 2009, and 4.03 seconds on March 16, 2009. These test results were above the 3.9 second minimum interval established by the California Department of Transportation for a 40miles-per-hour highway.

Young further testified as follows. The ATES is a computer-based digital imaging system which photographs drivers who enter the intersection after the traffic signal has turned red or who fail to stop for a red light before turning right. When its sensors detect a vehicle in the intersection in the red light phase, the ATES is programmed to obtain three digital photographs and a 12-second video. The three photographs are a pre-violation photograph showing the vehicle behind the limit line, a post-violation photograph showing the vehicle in the intersection, and a photograph of the vehicle's license plate. A data bar, which contains the date, time, location, and how long the light

---

right-of-way to pedestrians lawfully within an adjacent crosswalk and to any vehicle that has approached or is approaching so closely as to constitute an immediate hazard to the driver, and shall continue to yield the right-of-way to that vehicle until the driver can proceed with reasonable safety."

had been red when each photograph was taken, is printed on each photograph. The 12-second video shows the approach and progression of the vehicle through the intersection. Once triggered, the ATES operates independently and stores information on the hard disc of a computer at the scene. Redflex technicians retrieve that computerized information through an internet connection. A police officer reviews all photographs before a citation is printed or mailed.

The data bar printed on the photographs of Goldsmith's violation indicated that the signal light was in the red light phase for 0.27 seconds when the pre-violation photograph was taken. The post-violation photograph taken 0.66 seconds later showed Goldsmith in the intersection while the signal light was still in the red light phase.

The trial court found Goldsmith guilty of the violation and imposed a $436.00 fine. Goldsmith appealed to the Appellate Division of the Los Angeles County Superior Court. Its opinion, *People v. Goldsmith* (20011) 193 Cal.App.4th Supp. 1 (*Goldsmith*), disagreed with *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1, and held that there was a presumption that the data and digital photographs captured by the ATES were accurate representations of the information and images, that Goldsmith failed to meet her burden of producing evidence casting doubt on the accuracy or reliability of the photographs, and therefore the photographs were presumed to be accurate and authenticated. The *Goldsmith* opinion also found that Investigator Young's testimony provided the foundation necessary to demonstrate that the photographs reliably portrayed data and images therein. *Goldsmith* further held that the hearsay rule did not render the ATES photographs inadmissible, and affirmed the trial court's finding that evidence of tests of the yellow light change interval at the intersection showed average yellow light intervals that exceeded the 3.9-second yellow light interval established by the California Department of Transportation for this intersection. *Goldsmith* also affirmed the trial court's factual finding that the photograph of the driver was Goldsmith.

On March 29, 2011, pursuant to California Rules of Court, rule 8.1002, this court ordered the case transferred to this court and subsequently set the matter for hearing.

ISSUES

Goldsmith claims on appeal that:

1. The trial court should have excluded the video, photographs, and data imprinted on the photographs because there was no evidence that the computer was operating properly;

2. The video, photographs, and data imprinted on photographs of Goldsmith's violation were hearsay, the prosecution did not establish the elements of the business records or public records exceptions to the hearsay rule in Evidence Code sections 1271 and 1280, and that neither exception applies to the video, photographs, and imprinted data; and

3. The traffic signal's yellow interval did not conform to the requirements of Vehicle Code section 21455.7.

DISCUSSION

1. *The Abuse of Discretion Standard of Review Applies to a Trial Court's Rulings on the Admissibility of Evidence*

An appellate court reviews a trial court's ruling on the admissibility of evidence for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) This standard applies to rulings on hearsay objections (*id.* at p. 725) and to rulings on objections to the authentication of and foundation for evidence (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 319; *People v. Smith* (2009) 179 Cal.App.4th 986, 1001). The test for whether an abuse of discretion has occurred is whether the trial court exceeded the bounds of reason, all of the circumstances before it being considered. An appellate court is not authorized to substitute its judgment for that of the trial judge. Absent a clear showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives, and its discretionary determinations ought not to be set aside on review. (*Ajaxo Inc. v. E*Trade Group, Inc*. (2005) 135 Cal.App.4th 21, 44-45.)

2. *Testimony On the Accuracy and Reliability of Computer Hardware and Software Is Not Required as a Prerequisite to Admission of Computer Records*

Goldsmith claims that the trial court should have excluded the video, photographs, and data imprinted on the photographs because there was no evidence presented to support a finding that the computer was operating properly. The data imprinted on the photographs includes the date, time, and location of the violation and how long the light had been red at the time each photograph was taken.

"Authentication of a writing is required before it may be received in evidence." (Evid. Code, § 1401, subd. (a).) A "writing" includes photographs, videos, and printouts of digitally generated computer records. (Evid. Code, § 250; *People v. Beckley* (2010) 185 Cal.App.4th 509, 514 [photographs]; *Ashford v. Culver City Unified Schools Dist.* (2005) 130 Cal.App.4th 344, 349, fn. 5 [videos], disapproved on unrelated ground, *Voices of Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 535; *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 797 [printouts of digitally generated computer records]). "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.)

Evidence Code sections 1552, subdivision(a)[2] and 1553[3] establish a presumption that printed representations of computer information and of images stored on a video or digital medium are accurate representations of the computer information and images they purport to represent. Thus the images and information (including the date, time, and location of the violation and how long the light had been red when each photograph was taken) imprinted on the photographs are presumed to accurately represent the digital data in the computer. Goldsmith produced no evidence that would support a finding of the nonexistence of this presumed fact. Therefore the trier of fact was required to assume the existence of the presumed fact. (Evid. Code, § 604.)

These presumptions, however, operate only to establish that a printed representation accurately reflects data in the computer. (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1450(*Hawkins*).) With regard to the accuracy and reliability of that digital data in the computer itself (as distinct from printed representations of that digital data), the California Supreme Court has determined that the admission of computer records does not require foundational testimony showing their accuracy and reliability.

---

[2] Evidence Code section 1552, subdivision (a) states: "A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent."

[3] Evidence Code section 1553 states: "A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent."

The issue in *People v. Martinez* (2000) 22 Cal.4th 106 (*Martinez*) was whether a computerized record of criminal history information was admissible under the official records exception to the hearsay rule (Evid. Code, § 1280), and specifically whether the sources of information and method and time of preparation of such a computer record were such as to indicate its trustworthiness. (*Martinez,* at pp. 111-112, 119-120.) The California Supreme Court stated that "our courts have refused to require, as a prerequisite to admission of computer records, testimony on the 'acceptability, accuracy, maintenance, and reliability of . . . computer hardware and software.' " (*Id.* at p. 132.) Moreover, where errors and mistakes occur, they could be developed on cross-examination and should not affect the admissibility of the computer record itself. (*Ibid.*)

Martinez relied on *People v. Lugashi* (1988) 205 Cal.App.3d 632 (*Lugashi*), which rejected a test proposed by a criminal defendant that would require the proponent of computer evidence to introduce testimony on the reliability and acceptability of hardware, software, and internal maintenance and accuracy checks as a prerequisite to admission of that computer data. *Lugashi* stated that other California courts, *People v. Cohen* (1976) 59 Cal.App.3d 241, 249 and *People v. Dorsey* (1974) 43 Cal.App.3d 953, 960-961, had previously rejected similar claims, as had a majority of other state courts[4] and some federal courts. (*Lugashi,* at pp. 638, 643-644.) *Lugashi* stated that the defendant's proposed test incorrectly presumed computer data to be unreliable and would

---

[4] *Lugashi* cited numerous federal and state court decisions rejecting the defendant's proposed test. For example, *Hutchinson v. State* (Tex.App. 1982) 642 S.W.2d 537 held that a computer printout record verifying that missing gasoline was dispensed by use of a key card issued to the defendant was properly admitted into evidence with no showing that the computer was functioning properly on the date of the printout and that it had been tested and was working properly before that date. (*Id.* at p. 538.) *State v. Kane* (Wash.App. 1979) 594 P.2d 1357 held that admission of computerized bank records was proper even though the proponent did not supply technical information of the type of computer or program used. *State v. Veres* (Ariz.App. 1968) 436 P.2d 629 found no abuse of discretion in the admission of bank records of checks and deposits encoded by "automatic machine" where bank official in charge of operations and bank procedures testified that he did not know the mechanical operation aspects of the machine and his only knowledge was his access to the records. (*Id.* at p. 637.)

require its proponent to disprove the possibility of error in order to meet the minimal showing required for admission of the evidence. (*Id.* at p. 640.) *Lugashi* particularly found this proposed presumption to be inapplicable where the records consisted of retrieval of computer-generated data rather than data stemming from manually input, human-generated data. (*Id*. at p. 642.) Following *Martinez* and *Lugashi*, we do not presume computer data to be unreliable, and do not require the proponent of such evidence to disprove the possibility of error to meet the minimal showing required for admission. (*Lugashi,* at p. 640.) Neither is the proponent of the computer records evidence required to produce testimony on the acceptability, accuracy, maintenance, and reliability of the computer hardware and software, especially where, as here, the computer data consists of retrieval of automatic inputs rather than computations based on data entered into the computer by human beings. (*Id.* at p. 642.)

People v. Nazary (2010) 191 Cal.App.4th 727 (*Nazary*) involved a similar issue to the one in this appeal. The defendant in *Nazary* was convicted of grand theft and embezzlement after it was discovered that cash recovered from gas station Pay Island Cashiers (PIC) was less than the computerized total, found on the PIC receipt, of cash which customers placed into the PIC machine. The issue in *Nazary* was the accuracy and reliability of the printed information on the PIC receipts. Relying on *Martinez, ante*, *Nazary* held that testimony on the acceptability, accuracy, maintenance, and reliability of computer hardware and software was not required for admission of computer records. (*Nazary,* at p. 755.) *Nazary* reiterated the statement in *Martinez* that where errors and mistakes occurred, they could be developed on cross-examination and should not affect the admissibility of the computer record itself. (*Nazary,* at p. 755.) In this case, Goldsmith did not develop those issues on cross-examination, and at no time "offered any relevant evidence regarding the reliability" of the Redflex ATES system. (*People v. Martinez, supra*, 22 Cal.4th at p. 133.) We conclude that there was no abuse of discretion in the trial court's admission of the computer-generated photographs, video, and data.

3. *The Photographs, Video, and Data Imprinted on Them Were Not Hearsay and Their Admission into Evidence Was Not an Abuse of Discretion*

Goldsmith further claims that the photographs, video, and data imprinted on them were hearsay, that the prosecution did not establish the elements of the business records exception in Evidence Code section 1271 or the public records exception in Evidence Code section 1280, and that neither exception applies. We disagree. Pursuant to *Hawkins* and *Nazary*, the photographs and video were not hearsay, and the hearsay rule did not require their exclusion from evidence. Consequently neither hearsay exception was necessary to admit the evidence.

a. *Because the Photographs and Video Were Not Hearsay, the Hearsay Rule Did Not Require Their Exclusion from Evidence*

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) "The hearsay rule" states: "Except as provided by law, hearsay evidence is inadmissible." (*Id*., subds. (b), (c).)

" 'Statement' means (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (Evid. Code, § 225.) The video and photographs in the instant case are not "verbal" expression because they do not contain words.[5] Moreover, a "statement" is made by a "person," which Evidence Code section 175 defines as including "a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity[,]" but not including a computer. The Evidence Code does not contemplate that a machine can make a statement, and a printout of results of a computer's internal operations is not a "statement" constituting hearsay evidence. (*Hawkins, supra,* 98 Cal.App.4th at p. 1449.) The hearsay rule stems from the requirement that testimony shall be tested by cross-examination, which can best expose possible deficiencies, suppressions, sources of error, and untrustworthiness that may lie

---

[5] "Verbal" means: "of, relating to, or consisting of words;" "of, relating to, or involving words rather than meaning or substance;" "consisting of or using words only and not involving action;" "of or relating to facility in the use and comprehension of words." (Webster's 10th Collegiate Dictionary (1995), p. 1311.)

beneath a witness's bare, untested assertions; the hearsay rule should exclude testimony which cannot be tested by such cross-examination. It is not possible, however, to cross-examine computer-generated photographs or videos. (*Nazary, supra,* 191 Cal.App.4th at pp. 754-755.) As "demonstrative evidence," photographs and videos are not testimony subject to cross-examination, and are not hearsay. (*People v. Cooper* (2007) 148 Cal.App.4th 731, 746.) Thus the hearsay rule did not require their exclusion from evidence.

b. *Data Printed on Photographs by the Computer Was Not Hearsay, and the Hearsay Rule Did Not Require Exclusion of That Data*

The computer printed data on photographs depicting Goldsmith's violation which gave the date, time, and location of the photographs, and how long the light was red at the time the photographed image was taken. This information was generated by a machine, not a person. The printed data on the photographs was not subject to cross-examination. It was therefore not a statement constituting hearsay. (*Hawkins, supra*, 98 Cal.App.4th at p. 1449; *Nazary, supra*, 191 Cal.App.4th at pp. 754-755.) The trial court did not abuse its discretion in admitting this evidence.

4. *We Disagree With People v. Borzakian, and Disapprove People v. Khaled*

People v. Borzakian (2012) ___ Cal.App.4th ___ [2012 Cal.App. Lexis 127] held that because the prosecution provided no evidence of the mode of preparation of ATES maintenance logs or that the sources of information and method and time of preparation of maintenance logs and ATES photographs were such as to indicate trustworthiness, the trial court improperly admitted ATES photographs into evidence. However, the *Borzakian* opinion did not cite the rule in *Martinez, supra*, 22 Cal.4th at p. 132 and *Nazary, supra*, 191 Cal.App.4th at p. 755 that testimony of the accuracy, maintenance, and reliability of compute records is not required as a prerequisite to their admission, and did not agree that computer-generated photographs are not hearsay evidence (*Hawkins, supra,* 98 Cal.App.4th at p. 1449). We therefore disagree with *People v. Borzakian*.

In *People v. Khaled, supra*, 186 Cal.App.4th Supp. 1, the Appellate Division of Orange County Superior Court held that ATES computer photographs and a video of a

traffic violation were inadmissible because the prosecution could not establish the time or method of retrieval, or that the photographs and video tape were reasonable representations of what they alleged to portray. (*Id.* at pp. 5-6.) This was erroneous because testimony of the accuracy, maintenance, and reliability of computer records is not required as a prerequisite to their admission. (*Martinez, supra*, 22 Cal.4th at p. 132; *Nazary, supra*, 191 Cal.App.4th at p. 755.) *Khaled* also found that computer photographs and a video of a traffic violation were hearsay, and that the business records and official records exceptions to the hearsay rule did not apply (*People v. Khaled,* at pp. 7-8.) As we have stated, however, the photographs and video were not hearsay and their admission did not require a hearsay exception. (*Hawkins, supra*, 98 Cal.App.4th at p. 1449; *Nazary,* at pp. 754-755.) For these reasons we disapprove *People v. Khaled*.

5. *The Yellow Light Interval of the Traffic Signal at Centinela and Beach Avenues Conformed to the Requirements of Vehicle Code Section 21455.7*

Goldsmith claims that the traffic signal's yellow light interval did not conform to the requirements of Vehicle Code section 21455.7.

Vehicle Code section 21455.7 states:

"(a) At an 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.

"(b) For purposes of subdivision (a), the minimum yellow light change intervals relating to designated approach speeds provided in the Traffic Manual of the Department of Transportation are mandatory minimum yellow light intervals.

"(c) A yellow light change interval may exceed the minimum interval established pursuant to subdivision (a)."

The California Manual on Uniform Traffic Control Devices for Streets and Highways requires a minimum yellow interval of 3.9 seconds where the posted speed is 40 miles per hour. (Cal. Manual on Uniform Traffic Control Devices for Streets and Highways, 2003 ed., Part 4, pp. 4D-11, 4D-50). Investigator Young testified that his tests indicated that the yellow interval at the intersection of Centinela and Beach Avenues

averaged 4.11 seconds on February 16, 2009, and 4.03 seconds on March 16, 2009. This constituted substantial evidence supporting the trial court's factual finding that the yellow light interval of the traffic signal at Centinela and Beach conformed to the requirements of Vehicle Code section 21455.7.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.

Note: highwayrobbery.net edited this document, removing defendant's first name. No other edits have been made.