

APPELLATE DEPARTMENT OF THE SUPERIOR COURT  
IN AND FOR THE STATE OF CALIFORNIA  
COUNTY OF SAN MATEO

PEOPLE OF THE STATE OF  
CALIFORNIA

Plaintiff/Respondent

v.

 DURNEY

Defendant/Appellant

Court of Appeal No. AD-5141

(Super. Ct. No. C384925)

ENDORSED FILE  
SAN MATEO COUNTY

FEB 01 2010

Clerk of Court  
By Diana Castro  
DEPUTY CLERK

Appeal from the Superior Court, County of San Mateo  
Central Judicial District  
Honorable Susan Greenberg, Commissioner

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APPELLANT'S OPENING BRIEF

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Edward Durney  
ATTORNEY AT LAW

  
Attorney for Defendant/Appellant

## STATEMENT OF THE CASE

On August 26, 2009, Defendant N [REDACTED] Durney (“Defendant Durney”) was put on trial for violating California Vehicle Code section 21453A. The trial court found Defendant Durney guilty and ordered her to pay a fine of \$436 to San Mateo County.

Defendant Durney did not receive the fair trial guaranteed her by the United States Constitution. In addition, the prosecution did not present substantial *admissible* evidence to show that Defendant Durney violated the law.

Accordingly, Defendant Durney respectfully requests that the trial court’s judgment be reversed, and the citation dismissed.

## STATEMENT OF APPEALABILITY

This appeal is from the judgment of the Superior Court, County of San Mateo, Central Judicial District and is authorized by Code of Civil Procedure section 904.1 and Penal Code section 1466.

## STATEMENT OF FACTS

The facts underlying this appeal relate to motions made before trial, the trial itself, and the events leading up to this appeal.

### A. Motions before Trial.

Defendant Durney made two motions before trial:

- 1) One motion was for the court to provide a Japanese interpreter at the State’s expense. The court granted that motion, but only if Defendant Durney

agreed to waive her right to a speedy trial, which she did (without prejudice to raising this issue on appeal). (Proposed Statement on Appeal (“PSOA”), at item 4b(1)(d)) When the request for a Japanese interpreter was made, several weeks remained before the speedy trial period ended. (PSOA at item 8b(3))

- 2) The other motion was for the court to record the trial either by providing a court reporter or by taping the trial. The trial court denied that motion. (PSOA at item 4b(1)(d))

B. Events at Trial.

At trial, Defendant Durney’s attorney asked to be allowed to record the trial on his tape recorder. (PSOA at item 8b(2)) The trial court said no, and ordered him to turn off the tape recorder (it was not on). (PSOA at item 8b(2)) No record exists of the testimony or arguments given in the trial in this case. (PSOA at item 8b(3))

At trial, Defendant Durney’s attorney, Edward Durney, called himself as a witness, but the trial court refused to allow him to testify. ((Transcription of Notes Taken by Commissioner Greenberg at Time of Trial, August 26, 2009 (“TN”), at pg. 2; PSOA at item 5d(4)) That meant that he was unable to introduce as evidence several documents. (TN at pg. 2)

No attorney represented the People of the State of California at trial. (PSOA at item 4b(1)(d)) Millbrae Police Officer Jim Aboud testified that he is not a lawyer

and has no license to practice law in California. (PSOA at item 5c) Even so, Officer Aboud presented the People's case at trial. (TN at pg. 1)

Officer Aboud did not prepare the copies of the pictures, certificate of mailing and other documents that he presented into evidence. (TN at pg. 1; PSOA at item 5c) They were prepared by someone else (Officer Aboud did not know who) at American Traffic Solutions ("ATS") in Phoenix, Arizona and provided to him as part of the "court package" that ATS is obligated under contract to provide to testifying officers. (TN at pg. 1; PSOA at item 5c)

The certificate of mailing that Officer Aboud testified proved that the Millbrae Police Department mailed a Notice of Citation within the time required by law:

- a) was actually a "Certificate of Bulk Mailing,"
- b) had a signature line marked "(Postmaster of Designee)" under the words "It is hereby certified that the above-described mailing has been received and number of pieces and postage verified" that had been left blank,
- c) had a date stamp with the location given as "Astrodome Station Houston, TX,"
- d) had a "Mailed By" line that said "QuestMark Info Mgmt," and
- e) had nothing on the certificate to indicate that a ticket or anything else had been mailed by the Millbrae Police Department to Defendant Durney.

(PSOA at item 5c)

The trial court said in her notes on the case that:

Mr. Durney [Defendant's attorney] stated that NTA number on the Certificate of Bulk Mailing was added by Millbrae P.D. I [the trial court]

responded that he did not elicit that testimony during cross examination, and therefore that was a statement that was not in evidence.

(TN at pg. 2)

At trial, Officer Aboud testified that he has not seen the contract between the City of Millbrae and American Traffic Solutions and does not know what it says. (PSOA at item 5c) He did not know of any uniform guidelines that the Millbrae Police Department had prepared or were in force that applied to red light photo enforcement. (PSOA at item 5c) That is because he is not in charge of Millbrae Police Department red-light photo enforcement and spends only part of his time on that program, mainly testifying in court. Millbrae Police Sergeant Aronis is in charge of the program. (PSOA at item 5c)

Officer Aboud testified that his name appears as the “Declarant” on the ticket issued to Defendant Durney under a statement that says “I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.” (PSOA at item 5c) But Officer Aboud testified that his name is typed on the ticket, not signed. Not only did he not sign the ticket, he was not the one who typed his name on it, and does not know who typed it in or when or where they typed it. (PSOA at item 5c) Officer Aboud agreed, while testifying, that the Judicial Council of California rules require that the issuing officer sign the ticket, but he did not sign it. (PSOA at item 5c)

Officer Aboud agreed that the Judicial Council of California Form TR-115 requires that the bail amount be printed on the ticket sent to Defendant Durney,

but the bail amount was not printed on the ticket. (PSOA at item 5c) He had no idea when the “Notice of Bail” was sent to Defendant Durney, and had no certificate of mailing that purported to show when that was mailed. (PSOA at item 5c)

Officer Aboud had no record or recollection that he reviewed the camera images of Defendant Durney’s alleged infraction before the ticket was issued, and acknowledges that the records show that someone else did the review. (PSOA at item 5c) Officer Aboud had no record of any communications between him and any American Traffic Solutions employee about the ticket to Defendant Durney that were made before the ticket was issued, and does not remember any such communication. (PSOA at item 5c)

Officer Aboud testified that up to 33% of all drivers who trigger the cameras are not cited because they made a “slow roll right turn.” (PSOA at item 5c) He was not aware of any guidelines governing which drivers are cited and which are not. He testified that the cameras are not triggered at the relevant intersection if the speed measurement device shows that the driver’s speed is 8 miles per hour or less, but he does not believe that the speed measurement device is calibrated. (PSOA at item 5c)

Officer Aboud testified that he understands that the fine for a 21453 violation under statute is \$100, and that some of that amount and the surcharges over that

amount goes to the City of Millbrae and some goes to the County of San Mateo.  
(PSOA at item 5c)

C. Events after Trial.

Millbrae Police Officer Jim Aboud has continued to represent the People in the appeal process by: (a) filing on November 4, 2009 a Statement that forms a part of the record on this appeal<sup>1</sup> and (b) participating in the Settled Statement hearing held on November 23, 2009. (TN at pg. 1)

ARGUMENT

I. THE TRIAL COURT PROCEEDINGS DENIED DEFENDANT DURNEY  
HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL

A. The Standard of Review.

The trial court proceedings denied Defendant Durney the right to a fair trial that is guaranteed her under the United States Constitution. On review, an appellate court addresses constitutional and other legal issues de novo.

B. The Guarantees of the Constitution.

The guarantees in the Fifth, Sixth and Eighth Amendments to the United States Constitution apply in state courts. State courts must, among other things, provide the following rights to defendants in all trial proceedings:

- The right to call witnesses on their behalf.
- The right to a trial before an impartial decider of fact.

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<sup>1</sup> Although the trial court noted that a Statement of Officer Aboud was filed on November 4, 2009 (TN at pg. 1), no copy of that Statement was ever served on Defendant Durney or her attorney.

- The right to a speedy trial.
- The right to have the trial recorded. (*In re Armstrong* (1981) 126 Cal.App.3d 568)

C. The Constitutional Guarantees Were Not Met in This Case.

In this case, the guarantees in the United States Constitution to a fair trial were not met. Edward Durney was sworn in as a witness and was prepared to testify on Defendant Durney's behalf and to lay the foundation for putting several documents into evidence. Edward Durney's testimony and those documents were not considered by the trial court. They may have influenced the trial court in her decision had they been considered.

In particular, Edward Durney planned to introduce as evidence the contract between the City of Millbrae and American Traffic Solutions to show that the contract did not meet the requirement that any such contract be revenue-neutral. Because his testimony was barred, Defendant Durney was unable to make that argument at trial, or here in this appeal.

The trial court found Defendant Durney guilty and fined her \$436 knowing that part of that fine would benefit the court's employer. A judge who has an interest in a case cannot be completely impartial in deciding the case. The Constitution guarantees Defendant Durney a trial before an impartial judge, but she did not get that trial.

No prosecuting attorney appeared in this case. Some courts have allowed trials to go forward without an attorney representing the People. (*People v. Carlucci*



(1979) 23 Cal.App.3d 249, 152 Cal.Rptr. 439) But generally that was only after a strong caution that the judge or police officer not be allowed to act as prosecutors. (See *People v. Municipal Court* (1990) 220 Cal.App.3d 602, 269 Cal.Rptr. 542) In this case, both the police officer and the trial court took the role of prosecutor. In the trial court's own notes, she noted that she interrupted the defendant's attorney in his closing arguments to supply an argument and interpret evidence for the prosecution. The police officer and the trial court acting, to some degree at least, on behalf of the absent prosecuting attorney made the trial unfair.

The court found Defendant Durney guilty and fined her \$436, but the statute provides that the fine for a violation of 21453 is \$100. Defendant Durney was forced to pay for the building of jails, courthouses and other county and state projects that would otherwise be funded by tax revenues. A fine of only \$100 was set by the California government to deter people from violating 21453, making a fine of \$436 unconstitutionally excessive.

Defendant Durney asked to have a Japanese interpreter provided for her. Although several weeks remained before the speedy trial period ended, the trial court required Defendant Durney to waive her right to a speedy trial in order to gain her right to a Japanese interpreter. Defendant Durney had to give up one Constitutional right in order to gain the other.

Even in infraction cases, the trial court must provide for either stenographic or electronic recording of trial proceedings. This trial court refused to do so. That

makes the right to an appeal almost meaningless, since no record of the trial exists. Although the trial court agreed to allow Defendant Durney to hire a court reporter to record the proceedings and transcribe them, that was not a reasonable option. The costs of that would exceed the costs of the fine imposed.

## II. THE PROSECUTION DID NOT PRESENT SUBSTANTIAL *ADMISSIBLE* EVIDENCE TO SHOW A VIOLATION

### A. The Standard of Review.

The trial court erred in finding that the prosecution presented substantial *admissible* evidence that Defendant Durney committed a violation. On review, the appellate court looks to the record to see if there are properly admitted facts to support the trial court's findings. If there is substantial, properly admitted evidence to support the trial court's judgment, the appellate court will affirm. If not, it will reverse. (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132.)

### B. Elements of Proof in This Case.

In order to prove its case, the prosecution had to show that Defendant Durney committed a violation. The evidence to show that violation has to be substantial and admissible. If the prosecution does not present substantial evidence to prove that the statutory requirements for a red-light enforcement program have been met and followed, no violation can be found.

The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment (*Pointer v. Texas* (1965) 380 U. S. 400, 403), provides that “[i]n all criminal prosecutions, the accused shall enjoy the

right . . . to be confronted with the witnesses against him.” In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. \_\_\_, 129 S.Ct. 2527, the United States Supreme Court held that documentary evidence must be presented by the person who prepared it, so that that person can be cross-examined and the accuracy of the documentary evidence can be determined. If the person who prepared the documentary evidence does not appear, the right to confront witnesses has been violated, and documentary evidence is not admissible.

Vehicle Code section 21455.5(c) states that only a governmental agency, in cooperation with a law enforcement agency, can operate an automated enforcement system. That includes:

Developing uniform guidelines for screening and issuing violations and for the processing and storing of confidential information, and establishing procedures to ensure compliance with those guidelines.

(Vehicle Code section 21455.5(c)(1)) This responsibility to develop guidelines and establish procedures cannot be delegated to a private company. (See Vehicle Code section 21455.5(d))

Vehicle Code section 40518(a) requires that a notice to appear shall have “a certificate of mailing obtained as evidence of service.” California Code of Civil Procedure section 2015.5 gives the form that a certificate of mailing should take. Among other requirements, if executed outside of the State of California, the certificate should state that “I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.”

C. No Substantial, Admissible Evidence of Violation.

At trial, the evidence of a traffic citation presented by the police officer was improper. The citation was not signed by the police officer. The evidence showed that no officer of the Millbrae Police Department, with its responsibility for the safety of its citizens, issued the citation. Rather, a private company, with its only motive being profit, issued the citation, without any control or oversight by the police officer whose name appears on the citation.

The citation did not include the bail amount when it was mailed, even though that information is required by law.

Even though Vehicle Code section 21455.5(c)(1) specifically states that a governmental agency must develop uniform guidelines for screening and issuing violations, the police officer in this case conceded that he did not know of any such guidelines. Let alone ensure that the private contractor complied with the guidelines. Thus, there is no admissible evidence that the citation was properly issued, or even that a violation occurred.

Even though the law specifically requires a certificate of mailing for the citation, the “Certificate of Bulk Mailing” presented here was faulty. It had not been signed. It did not describe what was mailed, by whom to whom. As evidence that the Millbrae Police Department mailed a copy of the citation to Defendant Durney within the time required by statute, the certificate had no value at all.

The police officer in this case presented photographic evidence that had been prepared by employees of a private contractor in Phoenix, Arizona. The police officer testified that he did not review the photographic evidence in this case before a citation was issued, that he did not sign the citation that was issued, that he did not prepare the evidence he presented. In short, the police officer had nothing to do with the photographic evidence except to present it in court. Because no foundation was laid for that evidence, because it is inadmissible hearsay, and because Defendant Durney was denied the right to confront the person who prepared the documentary evidence, the trial court erred in admitting evidence from the automated enforcement system.

#### CONCLUSION

For the reasons set forth above, Defendant Durney respectfully asks that this Court reverse the decision of the trial court, with instructions to dismiss the citation. *People v. Kriss* (1979) 96 Cal.App.3d 913, 921.

Respectfully submitted,

DATED: January 28, 2010

By \_\_\_\_\_  
Edward Durney  
Attorney for Defendant/Appellant