

JUN 18 2010

ALAN CARROLL, Clerk of the Court

BY *Phap* DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

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7 People of the State of California,
8 Plaintiff
9 vs.
10 [REDACTED] Soriano
11 Defendant

CASE NO. SA151252PE
ORDER RE: Motion for Reconsideration
Hon. Carmen R. Luege
Dept. C-54

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13 This matter came on regularly for trial on May 12, 2010 and the court took the case
14 under submission to consider defense counsel's evidentiary objections. On or about May
15 25, 2010, this court issued a ruling on the case overruling most of defendant's evidentiary
16 objections and finding defendant guilty of the offense. At the time the court issued its ruling,
17 the court did not have available the decision of the Central Justice Center Appellate Panel in
18 People v. Khaled (May 21, 2010), Case No. 30-2009-304893. On June 15, 2010, defense
19 counsel orally made a motion for reconsideration of this court's May 25th decision based on
20 Khaled. After considering Khaled, this court concludes that Khaled does not affect this
21 court's May 25th ruling.

22 In Khaled the court addressed the question of whether the police officer who testified
23 at trial laid a proper foundation for the admissibility of the automatic traffic enforcement
24 (ATE) photos and video that established defendant's culpability. In Khaled, the court found
25 that the officer who testified at trial did not provide sufficient information about the
26 capabilities of the ATE system to lay a proper foundation for the admissibility of the photos
27 and video. The court also explained that the officer did not know and could not explain how
28 the computer collected and stored the evidence gathered by the equipment at the

1 intersection. Unlike Khaled, the officer who testified in this case explained in detail the
2 training he received at Redflex and the information he learned about the operations of the
3 ATE system as a result of that training. This court's May 25th ruling sets forth in detail the
4 testimony of the officer regarding the operation of the ATE system. Just because in Khaled
5 the officer failed to provide sufficient information about the operation and capabilities of the
6 ATE system to lay a proper foundation for the admission of the photos and video, it does not
7 mean that in every future case involving ATE photos and video the testimony will be
8 insufficient to lay a proper foundation. Whether there is sufficient foundation to admit the
9 ATE photos and video into evidence is an issue that has to be decided based on the
10 testimony provided in each individual case.

11 Defense counsel argued that based on Khaled the ATE photos and video are
12 hearsay evidence. Khaled does not support this position. Photographs are not writings that
13 contain out of court statements subject to a hearsay objection. Evidence Code § 1200
14 defines hearsay evidence as "a statement that was made other than by a witness while
15 testifying at the hearing . . ." A photo and/or a silent video does not contain a "statement"
16 made by a "witness." In Khaled the court expressed concern that the ATE photos contain
17 hearsay statements because the photos have a data bar stating the date, time, and location
18 of the incident captured in the photos. However, in Khaled the court believed that the
19 information contained in the data bar had been entered by a person who did not testify at
20 trial. The court stated that the officer who testified at trial did not know "who entered" the
21 information that is contained in the data bar located in the ATE photos and that "no one with
22 personal knowledge testified about how often the date and time (information contained in
23 the data bar) are verified and corrected." This is not the evidence before the court in this
24 particular case. The evidence presented at trial here established that there is no witness
25 encrypting the data bar information on the photographs. Officer Bell testified that the data
26 bar is encrypted on the photograph by the computer at the time the cameras take the
27 photos. He also testified that the computer software runs an internal check to verify the
28 accuracy of the time and date entry. In People v. Hawkins (2002) 99 Cal. App. 4th 1333A,

1 1449, the court explained that when a computer is programmed to generate information on
2 its own, a hearsay analysis does not apply to that information because it is not a statement
3 by a person. The court explained that the only issue to determine admissibility of that type
4 evidence is whether the computer was operating properly. Moreover, Evidence Code §
5 1552 states that a "printed representation of computer information . . . is presumed to be an
6 accurate representation of the computer information . . ." unless a party introduces evidence
7 that the information is inaccurate or unreliable. In this case, defendant did not present any
8 evidence that the information contained in the data bar is unreliable or inaccurate.

9 Having decided that the officer who testified at trial failed to provide sufficient
10 information to authenticate the ATE photos and video, the Khaled court then considered the
11 issue of whether a declaration signed by Redflex employees was sufficient to lay the
12 foundation for the admissibility of the photos and the video. The Redflex declaration
13 discussed in Khaled is probably similar to the document identified in this case as Exhibit 2.
14 In Khaled the court found that Evidence Code § 1280, the public record exception to the
15 hearsay rule, did not apply and on that basis found the declaration inadmissible. For a
16 document to be admissible under Section 1280 the proponent of the evidence must show
17 that: (1) the writing was made by a public employee within the scope of his duties; (2) the
18 writing was made at or near the time of the act, condition, or event; and (3) the sources of
19 information and methods were such as to indicate trustworthiness. In Khaled the court
20 found that the proponent of the evidence did not show the declaration was signed by a
21 "public employee" and that "the record [was] totally silent as to whether the trial court took
22 judicial notice of anything" that would satisfy the elements of Section 1280. Unlike Khaled,
23 here Officer Bell testified that Redflex has a contract with the City of Santa Ana to install,
24 operate, and maintain the ATE system within the City. Officer Bell further explained that
25 Redflex maintains and stores in its computers the ATE photos and video captured at the
26 Santa Ana intersections. Based on these fact, the court takes judicial notice that the City of
27 Santa Ana entered into a contract with Redflex to maintain and operate the ATE system.
28 Accordingly, the court finds that the Redflex employees who signed Exhibit 2 as custodian

1 of records are "public employees" as that term is used in Evidence Code Section 1280.
2 Khaled does not overrule cases that have held that to be a "public employee" under Section
3 1280, the person does not have to work for a public entity; it is sufficient that the private
4 entity have a contract with the public entity to perform duties of the public entity. Imachi v.
5 DMV (1992) 2 Cal. App. 4th 809, 816-817 (blood test report prepared by a private lab
6 technician would be admissible under the public record exception because the lab
7 technician acts as an agent of the public entity and thus meets the definition of public
8 employee); Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 547 fn 6
9 ("we further note that whether or not the forensic laboratory in question was itself a public
10 entity, the analyst performing chemical tests for a law enforcement agency would be a
11 public employee within the statutory definition of the term, which includes an officer, agent,
12 or employee of a public entity").

13 Addressing the trustworthiness prong of Section 1280, the court noted that in Khaled
14 the record lacked evidence from which a court could find the elements of trustworthiness.
15 Here, Officer Bell testified that the photos and video captured at the Santa Ana intersection
16 are sent, via a secured internet server, to Redflex and that Redflex maintains the photos
17 and video in its computer system. Officer Bell testified that he received Exhibits 1 through 3,
18 and Exhibit 5 from Redflex and that those exhibits came with the declaration identified in
19 this case as Exhibit 2. Based on the evidence presented at trial, the Redflex employees
20 who signed the declaration as custodians of record are qualified to attest that the photos
21 and video presented at trial were obtained from data stored at Redflex computers and
22 brought to trial in a medium that makes it possible for the court to view the evidence. Thus,
23 the court finds that those portions of Exhibit 2 that authenticate the photos and video are
24 trustworthy. See People v. Parker (1992) 8 Cal. App. 4th 110 (trustworthiness requirement
25 is established by showing that the written report is based upon observations of a public
26 employee who have a duty to observe the facts and report them correctly; it is a matter
27 within the trial court's discretion).

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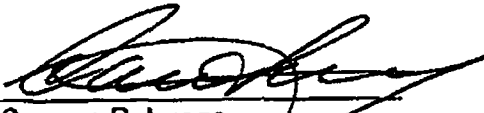
1 The court recognizes that even if a document satisfies a hearsay exception, the
2 document may become inadmissible if admitting the evidence violates defendant's right to
3 cross-examination under the Sixth Amendment. See Melendez-Diaz v. Massachusetts 129
4 S.Ct 2527 (2009). The court's May 25th ruling addressed the Sixth Amendment issue and
5 determined that Exhibit 2 does not constitute "testimonial hearsay" as that term is used in
6 Crawford v. Washington, 541 U.S. 36 (2004) and Melendez-Diaz. Khaled did not address
7 the right to confrontation issue; thus, it does not affect this court's original ruling on this
8 issue. Moreover, the court notes that recently the Fourth Appellate District issued an
9 opinion, People v. Chikosi (May 6, 2010) __, Cal. App. 4th __, 2010 WL 1804679,
10 analyzing the effect of Melendez-Diaz. In Chikosi the appellate court explained that under
11 Melendez-Diaz not everyone whose testimony is relevant to establishing chain of custody,
12 authenticity, or accuracy of a testing device must testify in person to protect defendant's
13 right to cross-examine witnesses because "collateral facts" that do not speak to a
14 defendant's guilt or innocence have been excepted from the Sixth Amendment. Based on
15 this analysis the Chikosi court ruled that the prosecution was not required to call as a
16 witness the police officer who tested the Alco-Sensor breathalyzer machine for accuracy
17 and maintained the record of those test results. It was sufficient that defendant cross-
18 examined the police officer who testified, based on his review of the test result (records
19 obtained and maintained by the non-testifying officer), that he believed the device was
20 accurate. The court explained that the records of the accuracy tests performed by the non-
21 testifying witness were "neutral" and did not fall within the definition of testimonial hearsay.
22 Here, Exhibit 2 contains "neutral" or "collateral" facts that do not speak to defendant's guilt
23 or innocence. The declaration simply establishes that Redflex has cameras at the
24 intersection that captures the incident, the data is stored at Redflex computers, and the data
25 is printed in a medium that allows the court to review the evidence at trial (Exhibits 1 through
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1 3, and Exhibit 5). In sum, under the Chikosi analysis, the prosecution is not required to
2 bring a custodian of record from Redflex to testify that the photos and video presented at
3 trial come from Redflex computers.

4 For all the foregoing reasons, defendant's motion for reconsideration is denied.

5 Date: June 18, 2010

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Carmen R. Luege
Commissioner of the Superior Court