

(Please note that this is the next-to-final draft of defendant's opening brief.)

DAMON

Defendant and Appellant in Pro Per

IN THE SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

APPELLATE DEPARTMENT

PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

vs.

DAMON,
Defendant and Appellant.

Case No. BR053324

Trial Court No. S059028-
1965

APPELLANT'S
OPENING BRIEF

Appeal from a Judgment of
The Superior Court of California, County of Los Angeles
West District- Santa Monica Courthouse
The Honorable James K. Hahn, Judge Presiding

SUMMARY OF FACTS

Appellant was cited on August 29th, 2016 for an infraction violation of Vehicle Code Section 22350. (Except where noted otherwise, all further code references are to the Vehicle Code.)

Trial of the matter commenced on February 16, 2017 in the Santa Monica Branch of the Superior Court before the Hon. James K. Hahn, Judge Presiding, without a jury. The Appellant appeared without counsel for the trial, and no prosecutor was present.

Officer R. Dawson of the City of Santa Monica Police Department testified that he used a radar or laser unit to measure the speed of Appellant's vehicle as 50 mph in a posted 35 mph speed zone on San Vicente Boulevard in Santa Monica. An Engineering and Traffic Survey dated 12/11/13 and showing an 85th Percentile speed of 41 mph on San Vicente Boulevard (hereinafter the San Vicente survey) was "lodged" with the court. (Judge Hahn's March 27, 2017 corrections to the Settled Statement, second paragraph.) Appellant moved to have the officer's testimony excluded per (40804vc), because the Engineering and Traffic Survey's justification (under "conditions not readily apparent/comments") to lower the posted speed 5 mph was that San Vicente was a "residential area," something that would be readily apparent to a driver (Judge Hahn's March 27, 2017 corrections to the Settled Statement, typed version, second and third paragraphs pg 39 of the record). The trial court overruled Appellant's objection, found that the survey complied with the requirements set forth in Vehicle Code 627, and summarily

found Appellant guilty in this matter, imposing a fine of \$238.00.

The record in this case is by settled summary with references by circled page number of the transcript and a section number wherever possible. Judge Hahn's text of changes for the Order Concerning Appellant's Statement On Appeal is found on page 30, and again on page 39 in typed out form and incorporated into the settled statement as ordered by Judge Hahn. Appellant will refer to the typed version by page and paragraph for ease of reading.

BACKGROUND

Since 1972, the ‘speed trap laws’ (Section 40801, et seq.) have required that radar/laser enforcement of prima facie speed limits on any non-local road be justified by an Engineering & Traffic Survey. When the survey does not justify the speed limit, the presumption that a speed trap exists stands; “No evidence as to the speed...shall be admitted,” the “[o]fficer [is]...incompetent as a witness,” and the “[c]ourt without jurisdiction to render a judgment of conviction.” (Sections 40803(a), 40804(a), and 40805.) Defendant/Appellant alleges that in this case, the prosecution did not provide sufficient evidence to rebut the presumption of a speed trap at and around the location of the citation.

QUESTION PRESENTED

I. WHETHER THE COURT WAS WITHOUT JURISDICTION TO FIND APPELLANT GUILTY WHEN, OVER APPELLANT'S OBJECTION, THE COURT ADMITTED TESTIMONY BASED ON THE USE OF SPEED DETECTION RADAR OR LASER EVEN THOUGH NO ENGINEERING AND TRAFFIC SURVEY LAWFULLY JUSTIFYING THE POSTED SPEED LIMIT HAD BEEN INTRODUCED INTO EVIDENCE.

SUMMARY OF ARGUMENT

The court lacked jurisdiction to enter a judgment of conviction based upon a "speed trap" (Secs. 40801 - 40805), where accompanying evidence of a Traffic and Engineering Survey legally justifying the posted speed limit was not introduced into evidence. If the prosecution fails to do this, and the court nevertheless allows radar or laser-based testimony, it is without jurisdiction to convict the defendant (Sec. 40805vc) and the witness is incompetent to testify (Sec. 40804vc).

ARGUMENT

I. THE COURT WAS WITHOUT JURISDICTION TO FIND APPELLANT GUILTY WHEN, OVER APPELLANT'S OBJECTION, THE COURT ADMITTED TESTIMONY BASED ON THE USE OF SPEED DETECTION RADAR OR LASER EVEN THOUGH NO ENGINEERING AND TRAFFIC SURVEY LAWFULLY JUSTIFYING THE POSTED SPEED LIMIT HAD BEEN INTRODUCED INTO EVIDENCE.

Evidence that an Engineering and Traffic Survey was conducted within the five year period is prima facie evidence that the evidence or testimony is not based on a speed trap (§ 40803), subd.(c.) However that is merely a prima facie case, and the speed limit must be *justified* by the survey (*People v Goulet* (17 Cal Rptr.2d 801; 13 Cal.App4th supp.1).

Section 627(a) says, "Engineering and Traffic Survey,' as used in this code, means a survey of highway and traffic conditions in accordance with methods determined by the Department of Transportation for use for state and local authorities." (Emphasis added.)

The Department of Transportation's *Manual on Uniform Traffic Control Devices*, 2014 Edition, Revision 2 (April 7, 2017), (hereinafter the MUTCD) says:

"Standard: When a speed limit is to be posted, it shall be established at the nearest 5 mph increment of the 85th-percentile speed of free-flowing traffic, except as shown in the two Options, below.

1. The posted speed may be reduced by 5 mph from the nearest 5 mph increment of the 85th-percentile speed, in compliance with CVC Sections 627 and 22358.5.
2. For cases in which the nearest 5 mph increment of the 85th-percentile speed would require a rounding up, then the speed limit may be rounded down to the nearest 5 mph increment below the 85th-percentile speed, if no further reduction is used. Refer to CVC Section 21400(b)." (MUTCD Section 2B.13.)

Section 22358.5, cited in the first Option above, says:

"It is the intent of the Legislature that physical conditions such as width, curvature, grade and surface conditions, or any other condition readily apparent to a driver, in the absence of other factors, would not require special downward speed zoning, as the basic rule of Section 22350 is sufficient regulation as to such conditions." (Emphasis added.)

The form used for the San Vicente survey has a box designated for "Conditions Not Readily Apparent/Comments," and that box contained only "85th percentile downgraded due to residential area." Appellant asked Officer Dawson if in his opinion it would be readily apparent to a motorist that the survey location is a residential area, and the officer testified, "Yes of course." (Appellant's Proposed Statement on Appeal, page 6, **circled pg 37**) Nevertheless, Judge Hahn ruled that the survey's use of "residential area" in that box was as a comment that should be considered as a factor in favor of justifying the downgrading of the speed limit. (Judge Hahn's March 27, 2017 corrections to the Settled Statement, par.3)

For sake of argument, Section 22358.5 does allow the consideration of "other

factors," and Section 627(c) says that "residential density" can be considered if certain conditions exist on the particular portion of highway, those conditions being:

(A) Upon one side of the highway, within a distance of a quarter mile, the contiguous property fronting thereon is occupied by 13 or more separate dwelling houses or business structures.

(B) Upon both sides of the highway, collectively, within a distance of a quarter of a mile, the contiguous property fronting thereon is occupied by 16 or more separate dwelling houses or business structures.

(C) The portion of highway is longer than one-quarter of a mile but has the ratio of separate dwelling houses or business structures to the length of the highway described in either subparagraph (A) or (B)."

However, the MUTCD restricts the approval of said "other factors" to only the professional engineer conducting the survey.

"Standard. If the speed limit to be posted has had the 5 mph reduction applied, then an E&TS [Engineering and Traffic Survey] shall document in writing the conditions and justification for the lower speed limit and be approved by a registered Civil or Traffic Engineer." (MUTCD Section 2B.13.)

The San Vicente survey does not assess residential density in the mathematical and objective manner prescribed by Section 627(c). There is nothing in the survey indicating that any of the three conditions enumerated in Section 627(c) were studied at all.

The survey also indicates a low accident rate. Because it does not contain "other factors" or "conditions not readily apparent" to justify the downgrading of the speed limit to 35, the San Vicente survey does not meet the requirements of Sections 627 and 22358.5 for a valid speed survey, thus creating a speed trap.

Despite this Judge Hahn declared the survey in compliance with the requirements of the vehicle code with no mention anywhere in the record that these other factors were considered. The officer was allowed to testify when he should not have been (vc 40804) and the court, with a survey that did not justify the speed limit, rendered itself without jurisdiction (40805)

CONCLUSION

For the reasons set forth above, Appellant's conviction should be reversed. In addition, the trial court should be ordered to dismiss the matter rather than retry Appellant. The People's failure to introduce a lawfully justified survey into evidence constituted a failure of proof of an essential element expressly required by Section 40803(b). In other words, the evidence was insufficient to support a conviction. Retrial is therefore barred by the Double Jeopardy clause (*Burks. v. United States* (1977) 437 U. S. 1). Reversal would also advance the interests of justice. In *People v. Kriss* (1979) 96 Cal.App.3d 913, the court reversed traffic violation convictions for ten defendants in a consolidated appeal, and ordered them dismissed, stating:

"Given the relatively minor nature of the infractions involved and the fines imposed, and the necessity for retrials that an unqualified reversal would require, we conclude that in these instances it would not be in the interest of justice to prolong these matters. Accordingly, the judgments are reversed with directions to dismiss the complaints." (96 Cal.App.3d, at 921.)

Dated June, 2012

Respectfully submitted,

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