Superior Court of the State of California
County of Orange
Central Justice Center

ORIGINAL

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
AUG 19 2010
ALAN CARLSON, Clerk
BY: _____ DEPUTY
J. KELLY

People of the State of California, Plaintiff, vs. [redacted] CALHOON, [redacted] CHAPMAN, [redacted]COLLINS, JAMES F[redacted], [redacted] GREENE, [redacted] SAAVEDRA, [redacted]TRUONG, Defendant(S)	Case No(s).: SA151929PE SA154656PE SA153758PE SA154550PE SA154097PE SA154608PE SA152672PE

RULING

In these red light photo enforcement cases, the photographs and video constitute the only evidence linking a defendant to the alleged infraction. (Hereafter, the photographs depicted in Exhibit 1 (the Notice of Traffic Violation), Exhibit 3 (four pages of photographs purporting to depict the infraction in question), and Exhibit 5 (a video purporting to depict the infraction in question) are collectively referred to as "the photographs.")

Defendants objected to Officer Bell's testimony concerning the operation of the Redflex red light photo enforcement system, and to the admission of Exhibits 1 (regarding the photographs reproduced therein), 2, 3 and 5, as (among other grounds), inadmissible hearsay, lacking foundation, and violating each defendant's confrontation right.

The prosecution's sole witness, Officer Bell, provides no direct testimony whatsoever about the particular defendant or the particular infraction. Instead, the proffered relevance of his testimony lies in (1) the purported foundation it lays for the admission of the photographs which, if they are properly admitted, themselves constitute "probative evidence of what they depict" (*People v Bowley* (1963) 59 Cal.2d 855, 860)[1], and (2) his purported confirmation, in reliance on the Redflex declaration, Exhibit 2, that the Redflex photo enforcement systems in operation at the intersections in question had been installed correctly, were operating correctly at the dates and times of each alleged infraction, and generated the respective photographs (and other data) pertaining to each alleged infraction.

Unlike in *People v Doggett* (1948) 83 Cal.App.2d 405, which was cited with approval in *Bowley,* here there is no evidence about the authenticity of the actual photographs offered as Exhibits 3 and 5, other than in Exhibit 2 (discussed further below). Instead, there is only a description by the officer of the circumstances under which these types of photographs can be taken at the intersections in question. At best, the officer's testimony establishes in general how the photo enforcement system at the intersections is supposed to work, and that, had it worked as it was supposed to, it should capture video and photographs like the ones before the court. The officer could not (and did not purport to) testify based on his own personal knowledge about any of the facts and circumstances of the particular infractions in issue here (save regarding the timing of the yellow phase at each intersection in question, which he testified as having measured himself, on undetermined dates).

Instead, in order to establish that at the dates, times and locations purportedly identified in the photographs, those particular photographs were actually taken and reliably depict what they purport to depict, the officer relied on Exhibit 2, the one-

[1] Photographs are not hearsay (*People v Cooper*, (2007) 148 Cal.App.4th 731, 746), and their admission requires a proper foundation, but not an exception to the hearsay rule.

page declaration, under penalty of perjury, from Redflex. Ignoring for present purposes that the declaration is signed by three people, without any delineation of which person speaks to which contention therein, the declaration contains testimonial hearsay without which the officer (1) cannot identify the photographs as photographs actually taken by the Redflex system, (2) cannot identify the photographs as pertaining to any particular infraction, and (3) cannot provide any testimony concerning the actual (proper) operation of the photo enforcement equipment at the locations in question at the dates and times in question. (Regarding a proper foundation for the computer-generated data appearing on the photographs, see *People v Hawkins*, 98 Cal.App.4th 1482 (2002): "[The presumption under Evidence Code 1552] operates to establish only that a computer's print function has worked properly. The presumption does not operate to establish the accuracy or reliability of the printed information. On that threshold issue, upon objection the proponent of the evidence must offer foundational evidence that the computer was operating properly." (Emphasis added.) Here, the foundation evidence is solely to be found in the Redflex declaration, Exhibit 2, discussed further below.)[2]

The hearsay contained in Exhibit 2 is proffered as admissible hearsay relied upon by an expert witness in forming his opinions. Given the officer's remoteness from the design, installation, day to day maintenance and day to day operation of the red light enforcement system, query whether the training he received regarding that system was sufficient to qualify him as an expert witness for purposes of testifying

[2] The People argue in their August 4, 2010 Response that under *Doggett*, what is required is that there be evidence of "when the photograph was taken [and] the place the photograph was taken." Response, p. 3. Exactly. Here such evidence is found only in the Redflex declaration. The People also argue (Response, p. 4) that the witness laying foundation for the photographs "must explain the reliability of the process by which the photograph or video was created." Again, exactly. The emphasis is on the photographs, not any photographs, and the only purported evidence linking the photographs in these cases to the defendants in these cases is found in the Redflex declaration.

as to all aspects of that system. (Note, for example, that according to the officer's testimony, as confirmed in his declaration submitted as Exhibit 6, he last received training on the Redflex system in April 2009, and nothing in the record confirms that the system as taught to the officer is in all material respects functionally the same as the system in place as of the date of each of the infractions in issue here.) Notwithstanding that Officer Bell appeared to provide more extensive descriptions of his training and experience with the photo enforcement system than had the witness in *People v. Khaled*, Appellate Division Case No. 30-2009-304893, the concerns raised there (regarding inadmissible hearsay and lack of foundation for the declaration and photographs in particular), appear to apply with equal force here, but need not be resolved regarding the specific testimony of Officer Bell for the reasons which follow.[3]

Regardless the sufficiency of Officer Bell's qualifications to testify as an expert, the hearsay relied upon by him as material (and indeed essential) to the issues here (for example as to the critical facts that the photographs were taken at and received from a particular intersection, that an automated verification routine was run on the photographs, that (and how) the data bars were captured on the photographs in Exhibits 1 and 3, and that the system "that captured this violation" was checked in

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[3] In the context presented here, the Court rejects the notion that otherwise inadmissible evidence can be "sanitized" and presented under the guise of being relied upon by an expert. Here, the expert is testifying to the reliability of the evidence presented to support a finding that a violation occurred. In order to do that, he must rely on hearsay and on computer data proffered without proper foundation, to opine that that same hearsay and data is reliable. He cannot bootstrap himself into supporting his own opinions in this way. In any event, the expert cannot, "under the guise of reasons, bring before the jury [here the court] incompetent hearsay evidence." *People v Dean*, 174 Cal.App. 4th 186. ("As a general rule, out-of-court statements offered to support an expert's opinion are not hearsay because they are not offered for the truth of the matter asserted. Instead, they are offered for the purpose of assessing the value of the expert's opinion. *Id.*, citing *People v. Thomas*, 130Cal.App.4th 1202).") Here, the prosecution does indeed seek to have the hearsay relied upon by Officer Bell introduced for the truth of what is contained in such hearsay.

a certain way, as testified to under penalty of perjury by the Redflex employees in Exhibit 2), constitutes testimonial hearsay as defined in *Crawford v. Washington* (2004) 541 U.S. 36 ("*Crawford*") and *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527, 174 L.Ed.2d 314] ("*Melendez-Diaz*"). Its admission over defendants' objections would accordingly violate their confrontation rights under the Sixth Amendment. (As noted above, defendants objected to Officer Bell's testimony, and to the admission of Exhibits 1, 2, 3 and 5, as (among other grounds), hearsay, lacking foundation, and violating the confrontation clause (under *Crawford* and *Melendez-Diaz*)).[4] [5] [6]

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[4] In the recent case of *People v. Disandro*, 2010 DJDAR 10564, the court queried the applicability of the Sixth Amendment right to confrontation in the context of traffic infractions. "Defendant has not cited, and we were unable to locate, any case in which the United States Supreme Court has specifically addressed the extent to which the Sixth Amendment right to confrontation applies in minor traffic infraction cases where a loss of liberty is not involved." Nevertheless, and without purporting affirmatively to resolve that question here, this Court notes, as did the court in *Disandro*, that the Vehicle Code itself provides that a person charged with an infraction has a statutory right to be present and to confront and cross-examine witnesses. Vehicle Code 40901(c). (Emphasis added.) This Court's conclusion regarding Defendants having been denied their rights of confrontation remains the same under both the Sixth Amendment and the Vehicle Code's statutory mandate.

[5] Evidence Code Sections 1271 (business records) and 1280 (official records) also do not render the photographs, or Exhibit 2, admissible here. Regarding Section 1280, I question (but need not here decide) whether Redflex, simply because of its contract with the City, can be equated with a "public employee" so as to bring Redflex "writings" under the ambit of that section. Regarding both Sections 1271 and 1280, I conclude that where the records are created and maintained, and ultimately provided, for the sole purpose of supporting criminal convictions, they do not, without considerably more than has been presented here, meet the required "trustworthy" tests under those sections. Most fundamentally, however, as stated in *Melendez-Diaz*: "Respondent also misunderstands the relationship between the business-and-official-records hearsay exceptions and the Confrontation Clause. As we stated in *Crawford*, most of the hearsay exceptions covered statements that by their nature were not testimonial-for example,

Defendants' objections to the admissibility of (a) the photographs in Exhibit 1, (b) the photographs (Exhibit 3), (c) the video (Exhibit 5), (d) the Redflex declaration (Exhibit 2), and (e) all portions of Officer Bell's testimony (both orally in court and as contained in his declaration, Exhibit 6) which are based on Exhibits 1, 2, 3 and 5, are accordingly sustained, on hearsay, foundation, and confrontation clause grounds (as applicable, per the discussion above).

Absent the evidence which such exhibits and testimony would have provided had they been admissible, the prosecution has failed to meet its burden of proving that the defendants committed the infractions charged, and they are dismissed.

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business records or statements in furtherance of a conspiracy." (Citation omitted.) Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because - having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial - they are not testimonial. Whether or not they qualify as business or official records, the analysts' statements here -prepared specifically for use at petitioner's trial - were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment." *Melendez-Diaz*, at 2539. (Emphasis added.)

[6] Footnote 1 of the *Melendez-Diaz* decision also does not support the admissibility of the evidence challenged here. In that footnote, the Supreme Court did not hold that where there was a "chain of custody to the evidence presented at trial," certain witnesses to that chain of custody could be dispensed with. People's Trial Brief, p. 8. What the Court in fact held was that: "As stated in the dissent's own quotation [citation omitted] "gaps in the chain (of custody) normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the defendant objects) be introduced live." (Emphasis added.) *Melendez-Diaz* also cannot be distinguished on the basis (see Response, p. 10) that what is at issue here is merely neutral information relating only to the proper operation of the equipment. Instead, the Redflex declaration goes far beyond such "neutral information" and instead sets forth alleged facts that directly relate to guilt or innocence.

The above entitled cases are DISMISSED.

Dated this 08/19/10

Peter J. Wilson
Superior Court Judge

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