

CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT
DIVISION THREE

No. B231678

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

██████████ GOLDSMITH,

Defendant and Appellant.

Appeal from the Appellate Division of the Superior Court of the
State of California for the County of Los Angeles
The Honorable Patti Jo McKay, Anita H. Dymant and Sanjay Kumar
Appellate Division Case No. BR048189
Superior Court Case No. 102693IN

**RESPONDENT'S ANSWER TO ██████████ KUNG'S AMICUS
CURIAE BRIEF IN SUPPORT OF DEFENDANT/APPELLANT**

<p>CITY OF INGLEWOOD OFFICE OF THE CITY ATTORNEY Cal Saunders, Cal. Bar. No. 63497 1 W. Manchester Blvd., #860 Inglewood, California 90301 Tel: (310) 412-5372</p> <p>Attorneys for Respondent People of the State of California</p>	<p>BEST BEST & KRIEGER LLP Dean R. Derleth, Cal. Bar. No. 162583 John D. Higginbotham, Cal Bar. No. 204179 3500 Porsche Way, Suite 200 Ontario, California 91764 Tel: (909) 989-8584</p> <p>Attorneys for Respondent People of the State of California</p>
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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

The trial court convicted Appellant [REDACTED] Goldsmith ("Appellant") for driving through a red light in violation of California Vehicle Code section 21453(a). Appellant's conviction was based on photographic and video evidence generated by a red light camera system maintained and operated by the City of Inglewood in conjunction with Redflex Traffic Systems, Inc. ("Redflex"). The Appellate Division of the Los Angeles Superior Court affirmed Appellant's conviction and the case was subsequently transferred to the California Court of Appeal. After oral argument, this Court gave anyone interested until August 19, 2011 to file an amicus brief, and the parties until September 2, 2011 to file answers to amicus briefs.

Amicus contends that the trial court's application of the presumptions of authenticity under California Evidence Code sections 1552 and 1553 violated Appellant's due process rights under the Fifth Amendment by shifting the "burden of proof" to Appellant. As a threshold matter, this argument is improper because it has not been raised by the parties to this appeal and Appellant waived the argument by not raising it at trial. In any event, the trial court's application of the presumptions did not implicate Appellant's due process rights because the presumptions affect only the **burden of producing evidence**, and not the **burden of proof**.

Amicus also contends that the Appellate Division erred in finding that Appellant waived her Confrontation Clause argument by failing to raise it at trial. Again, this argument is improper because it has not been raised by the parties to this appeal. In any event, Amicus's argument fails on the merits because it is plainly established under California law that a party waives a Confrontation Clause challenge by failing to assert it at trial.

Amicus next argues that the prosecution failed to establish that the length of the yellow light interval in question complied with the requirements of the Vehicle Code. Amicus contends that Investigator Young's testimony that the interval requirement was 3.9 seconds was based on inadmissible hearsay. As a threshold matter, Appellant waived this argument by failing to assert it at trial. Moreover, this argument is without merit because as an expert witness, Investigator Young was entitled to rely on even inadmissible evidence in forming his opinion. In any event, nothing in the Vehicle Code requires the prosecution to prove compliance with the minimum yellow light interval requirement to secure a conviction.

Amicus finally argues that the trial court erred by not examining the City of Inglewood's strict compliance with Vehicle Code section 21455.5 as a whole. Amicus cites to no authority supporting this contention (nor can he). Indeed, nothing in the Vehicle Code requires the prosecution to establish compliance with all subsections of Vehicle Code section 21455.5 to secure a conviction under Vehicle Code section 21453(a) based on photographic evidence.

Accordingly, the Amicus Brief fails to offer any argument to support a reversal of Appellant's conviction. Appellant's conviction should therefore be affirmed.

II. ARGUMENT

A. THE COURT SHOULD WHOLLY DISREGARD AMICUS'S ARGUMENTS BASED ON THE FIFTH AND SIXTH AMENDMENTS AND COMPLIANCE WITH VEHICLE CODE SECTION 21455.5 BECAUSE SUCH ISSUES HAVE NOT BEEN RAISED BY THE PARTIES TO THIS APPEAL

This Court should disregard Amicus's arguments based on the Due Process Clause of the Fifth Amendment [see Amicus Brief, p. 6], the Confrontation Clause of the Sixth Amendment [see Amicus Brief, pp. 6-7]

and compliance with Vehicle Code section 21455.5 [see Amicus Brief, p. 9] because the parties themselves have not raised such arguments in this appeal. "The general rule . . . is that amicus curiae may not raise new issues but must 'accept the case as it finds it.'" Bruno v. Superior Court (1990) 219 Cal.App.3d 1359, 1365 (quoting Pratt v. Coast Trucking, Inc. (1964) 228 Cal.App.2d 139, 143); E.L. White, Inc. v. City of Huntington Beach (1978) 21 Cal.3d 497, 510-11. "Amici curiae are not allowed to expand the issues raised by the parties." Pan Asia Venture Capital Corp. v. Hearst Corp. (1999) 74 Cal.App.4th 424, 429 n.4; see also United Parcel Service v. Lewis (1981) 451 U.S. 56, 61 n.2 (refusing to consider amicus's arguments because they were not raised by the parties). The California Court of Appeal has aptly summarized this principle as follows:

The rule is universally recognized that an appellate court will consider only those questions properly raised by the appealing parties. Amicus curiae must accept the issues made and the propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered.¹

Eggert v. Pacific States Sav. & Loan Co. (1943) 57 Cal.App.2d 239, 251.

In Eggert, a proposed amicus "urge[d] various propositions for the modification of the judgment which [were] not presented by either plaintiffs (respondents) or defendant (appellant)." Id. The court refused to consider the arguments because they were not raised by the parties in the appeal. Id.; see also Longval v. W.C.A.B. (1996) 51 Cal.App.4th 792, 798 n.5 (refusing to consider amicus's contentions of violations of certain

¹ Courts have recognized two narrow exceptions to this rule: (1) where the argument would result in affirmance of the lower court decision and (2) where the argument is jurisdictional. E.L. White, supra, 21 Cal.3d at 511.

constitutional and statutory provisions because such claims were not raised by either party).

Here, the Amicus Brief is filled with arguments not raised by either party to this appeal. In her Opening Brief, Appellant contends that her conviction should be reversed for exclusively the following reasons: (1) the yellow light interval at the intersection in question did not comply with the California Vehicle Code; (2) the prosecution failed to authenticate photographic and video evidence of Appellant's offense; (3) the evidence was inadmissible because the prosecution failed to demonstrate that the red light camera system was in proper working order at the time of the offense; and (4) the evidence constituted inadmissible hearsay. [See generally Opening Brief.]

The Amicus Brief contains the following arguments that have not been raised by either party in this appeal: (1) the trial court's application of the presumptions of authenticity to the evidence of Appellant's violation under Evidence Code sections 1552 and 1553 violated Appellant's due process rights under the Fifth Amendment, [see Amicus Brief, p. 6.]; (2) the Appellate Division erred in holding that Appellant waived her Confrontation Clause argument by failing to raise it at trial because such a waiver resulted in a violation of Appellant's constitutional rights, [see id. at 7.]; and (3) the trial court failed to examine the City of Inglewood's strict compliance with Vehicle Code section 21455.5 as a whole before convicting Appellant, [see id. at 9.] As noted above, Appellant's arguments on appeal are limited to evidentiary issues of authentication and hearsay, and non-compliance with the yellow light interval requirement. Neither the Due Process Clause, the Confrontation Clause nor compliance with Vehicle Code section 21455.5 generally are even mentioned in Appellant's Opening Brief or Reply Brief. Moreover, the limited exceptions to the rule limiting amicus arguments do not apply here because Amicus is seeking reversal

(not affirmance) of the lower court ruling and neither of the new arguments are jurisdictional in nature. The court should therefore disregard these arguments.

B. THE APPELLATE DIVISION PROPERLY HELD THAT APPELLANT WAIVED HER CONFRONTATION CLAUSE ARGUMENT BY FAILING TO RAISE IT AT TRIAL

Amicus argues that the Appellate Division erred in holding that Appellant waived her Confrontation Clause argument by failing to raise it at trial. [See Amicus Brief, p. 7.] Amicus cites to no authority to support this argument, but states merely that waiver "should" not result "when such forfeiture may be in violation of the Defendant/Appellant's Constitutional rights." [See *id.*]

The Court should reject Appellant's novel and unsupported argument. The California Supreme Court has made clear that a party waives a Confrontation Clause argument if the argument is not raised at trial. People v. Redd (2010) 48 Cal.4th 691, 730-31; see also People v. Raley (1992) 2 Cal.4th 870, 892 (holding that defendant waived his Confrontation Clause argument by failing to raise it at trial and that his hearsay objection did not preserve the argument); North Coast Business Park v. Nielsen Construction Co. (1993) 17 Cal.App.4th 22, 28 (holding that failure to assert an argument at trial constitutes waiver of the argument). Thus, a Confrontation Clause argument cannot be raised for the first time on appeal. See Redd, supra, 48 Cal.4th at 730-31.

Amicus ignores this longstanding principle in asserting that the Appellate Division erred in finding that Appellant waived her Confrontation Clause argument. The law is established that a party must assert a Confrontation Clause argument at trial, or the argument is waived. As such, the Appellate Division properly found that Appellant waived her Confrontation Clause argument by failing to raise it at trial.

C. **AMICUS'S ARGUMENT THAT THE COURT VIOLATED APPELLANT'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT IS MERITLESS**

Amicus contends that the trial court violated Appellant's due process rights under the Fifth Amendment by applying the presumptions of authenticity under Evidence Code sections 1552 and 1553 to the evidence of Appellant's violation. [See Amicus Brief, p. 6.] As explained above, Amicus's due process argument is improper because no party to this appeal has raised this issue. In any event, Amicus's contention fails for two other independent reasons: (1) Appellant waived this argument by failing to assert it at trial and (2) application of the presumptions of authenticity do not affect the burden of proof and thus did not violate Appellant's due process rights.

1. **Appellant Waived Any Due Process Argument By Failing To Assert It At Trial**

This Court should wholly disregard Amicus's due process argument because Appellant did not raise the argument at trial. "Ordinarily, the failure to preserve a point below constitutes a waiver of the point." North Coast Business Park, 17 Cal.App.4th at 28; Sommer v. Martin (1921) 55 Cal.App. 603, 609-10. Under the related "theory of trial" principle, "[a] party is not permitted to change his position and adopt a new and different theory on appeal." Ernst v. Searle (1933) 218 Cal. 233, 240-41; North Coast Business Park, supra, 17 Cal.App.4th at 29. This principle is based on the rationale that to allow a party to adopt a new theory on appeal "would not only be unfair to the trial court, but manifestly unjust to the opposing party." Ernst v. Searle (1933) 218 Cal. 233, 241; North Coast Business Park, supra, 17 Cal.App.4th at 29.

In North Coast Business Park, the trial court granted the defendant's motion for summary judgment on the plaintiff's design defect

claim on statute of limitations grounds. North Coast Business Park, supra, 17 Cal.App.4th at 25. On appeal, the plaintiff argued for the first time that the defect the trial court concluded it had discovered was different from the defect that actually caused the damage, and that the date of its discovery of that defect raised triable issues of fact. Id. at 28. The California Court of Appeal held that the plaintiff was barred from making this argument under principles of both waiver and theory of trial because at trial it sued upon one defect of which it had notice, but on appeal switched theories and argued that the defect sued upon was a different defect of which it had no notice. Id. at 30.

Here, as in North Coast Business Park, Amicus advances an argument that Appellant did not assert at trial. By failing to argue at trial that application of the presumptions of authenticity violated her due process rights, Appellant forfeited the argument under principles of both waiver and theory of trial. Appellant cannot now take advantage of this new theory on appeal. Permitting her to do so would be manifestly unjust to Respondent. See North Coast Business Park, supra, 17 Cal.App.4th at 29. This Court should therefore reject Amicus's due process argument.

2. **Application Of The Presumptions Of Authenticity Under Evidence Code Sections 1552 And 1553 Did Not Violate Appellant's Due Process Rights**

Amicus contends that the trial court violated Appellant's due process rights under the Fifth Amendment by applying the presumptions of authenticity under Evidence Code sections 1552 and 1553 to the evidence of Appellant's violation. [See Amicus Brief, p. 6.] More specifically, Amicus argues that such application effectively shifted the burden of proof from the prosecutor to Appellant in violation of her due process rights. [See id.]

Amicus's argument is wholly without merit. Amicus cites to no authority in support of his argument (nor can he). Evidence Code sections 1552 and 1553 are expressly presumptions "affecting the burden of producing evidence." Cal. Evid. Code § § 1552, 1553 (emphasis added). These are not presumptions "affecting the burden of proof." See Cal. Evid. Code § 660. As such, Amicus's contention that the presumptions in Evidence Code sections 1552 and 1553 "shift the burden of proof to the Defendant/Appellant" is wholly without merit. Thus, Amicus has failed to show that the application of the presumptions violated Appellant's due process rights under the Fifth Amendment.

D. AMICUS'S ARGUMENT THAT THE PROSECUTION FAILED TO ESTABLISH COMPLIANCE WITH VEHICLE CODE SECTION 21455.7 IS MERITLESS

1. Amicus's Contention That Investigator Young's Testimony Regarding Compliance With The Minimum Yellow Light Interval Requirement Was Based on Inadmissible Hearsay Fails

Amicus argues that Investigator Young's testimony that the California Manual on Uniform Traffic Control Devices ("MUTCD") mandates a yellow light interval of at least 3.9 seconds constitutes inadmissible hearsay because the MUTCD was not admitted into evidence. [See Amicus Brief, p. 8.] Amicus's argument fails because Appellant waived this evidentiary objection by failing to raise it at trial. Notwithstanding that waiver, as an expert witness, Investigator Young was entitled under California law to rely on hearsay evidence in forming his opinion.

a. Appellant Waived This Hearsay Objection by Failing to Raise it at Trial

As a threshold matter, Appellant waived Amicus's hearsay challenge to Investigator Young's testimony regarding the yellow light interval by failing to assert it at trial. It is well established under California

law that "failure [at trial] to object to claimed evidentiary error on the same ground asserted on appeal results a forfeiture of the issue on appeal."

People v. Dykes (2009) 46 Cal.4th 731, 757; see also People v. Partida (2005) 37 Cal.4th 428, 431 ("A defendant may not argue on appeal that the court should have excluded the evidence for a reason *not* asserted at trial").

Here, Appellant has not argued – at trial or in this appeal – that Investigator Young's testimony that the MUTCD mandates a minimum yellow light interval of 3.9 seconds constituted inadmissible hearsay. As such, Appellant has waived this evidentiary objection and thus cannot take advantage of it in this appeal.

b. **Investigator Young was Entitled to Rely on the MUTCD in Offering His Testimony**

As an expert witness, Investigator Young was permitted by law to rely on inadmissible evidence in forming his opinion that the yellow light interval complied with California law. An expert witness's testimony may be "[b]ased on matter . . . perceived or personally known to him at or before the hearing, **whether or not admissible**, that is the type that reasonably may be relied upon by an expert forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." Cal. Evid. Code § 801(b) (emphasis added).

Here, Investigator Young testified as an expert witness on the subject of red light cameras after Appellant conducted *voire dire* on him. [See Reporter's Transcript, pp. 5-7.] As an expert witness, Investigator Young was permitted to rely on any matter that may reasonably be relied upon by an expert forming an opinion as to whether a yellow light interval complies with California law, even if such matter constitutes inadmissible hearsay. Amicus does not contend (nor could he) that the official California MUTCD to which the Vehicle Code refers for the minimum

yellow light interval requirement does not meet this standard. Indeed, the Vehicle Code makes the MUTCD the standard for yellow light intervals. Thus, Investigator Young was plainly entitled to rely on the MUTCD in forming his opinion.

2. **Amicus's Contention That The Court Erred In Applying The Minimum Yellow Light Interval Requirement For A 40 Miles-Per-Hour Highway Fails**

Amicus also argues that the prosecution failed to establish compliance with the yellow light interval requirement because Investigator Young failed to establish why he relied on the 3.9 second mandate for a 40 miles-per-hour highway in forming his conclusion. Amicus, however, does not offer any reasoning or analysis as to why it may have been an error to apply this requirement. Moreover, Amicus does not (nor can he) point to any part of the record suggesting that the applicable yellow light interval requirement should have been anything other than 3.9 seconds. As such, the trial court plainly did not "exceeds the bounds of reason, all of the circumstances before it being considered," in concluding that Investigator Young's testimony that the yellow light interval complied with the requirements for a 40 miles-per-hour highway established compliance with the Vehicle Code. See Denham v. Superior Court (1970) 2 Cal. 3d 557, 566.

3. **The Prosecution Was Not Required To Prove Compliance With The Minimum Yellow Light Interval Requirement**

As explained above and in the Brief of Respondent, the prosecution adequately demonstrated that the yellow light interval at the intersection in question complied with Vehicle Code section 21455.7. Even if it had not, however, Appellant's conviction would still be proper because

the prosecution is not required to prove such compliance to secure a conviction.

Vehicle Code section 21455.7(a) provides that "[a]t 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." Cal. Veh. Code § 21455.7(a). Nothing in the Vehicle Code, however, makes compliance with this section a precondition to the issuance of a citation or a conviction for a violation of Vehicle Code section 21453(a) based on photographic and video evidence. Amicus's argument therefore fails.

E. AMICUS'S ARGUMENT THAT THE TRIAL COURT ERRED BY NOT EXAMINING THE CITY'S COMPLIANCE WITH VEHICLE CODE SECTION 21455.5 FAILS

Amicus finally contends that the trial court erred by not examining the City of Inglewood's compliance with Vehicle Code section 21455.5, which governs the use of red light cameras. [See Amicus Brief, p. 9.] As explained above, this argument is improper because it has not been raised by the parties to this appeal. Additionally, Appellant waived this argument by failing to assert it at trial. See North Coast Business Park, 17 Cal.App.4th at 28. In any event, Amicus's argument is without merit because nothing in the Vehicle Code makes strict compliance with all subsections of Vehicle Code section 21455.5 a precondition to the issuance of citations or convictions under Vehicle Code section 21453(a) based on photographic evidence. Not surprisingly, Amicus points the Court to no such authority. Amicus's argument therefore fails.

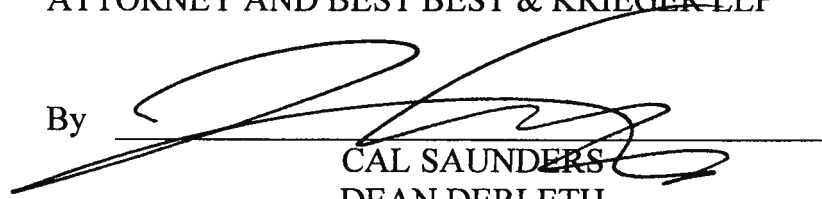
III. CONCLUSION

For the foregoing reasons, Respondent the People of the State of California respectfully request that this court affirm Appellant's conviction.

Dated: September 2, 2011

CITY OF INGLEWOOD OFFICE OF THE CITY
ATTORNEY AND BEST BEST & KRIEGER LLP

By

A large, stylized handwritten signature in black ink, appearing to read 'Cal Saunders', is written over a horizontal line.

CAL SAUNDERS
DEAN DERLETH
JOHN HIGGINBOTHAM

Attorneys for Respondent