Court of Appeal Case No. B 231678
(Appellate Div. Case No. BR048189)
(Trial Court Case No. 102693IN)

IN THE COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

People of the State of California

Plaintiff and Respondent,

[redacted]Goldsmith

Defendant and Appellant.

Appeal from the Appellate Division of the Superior Court for
Los Angeles County,
Justices McKay, P.J., Dymant and Kumar

APPELLANT'S REPLY BRIEF

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Dated: June 30, 2011

By: John J. Jackman, Esq.

ARGUMENT

A. Trial Courts are Bound by Rules Of Evidence.

Here Respondent argues for unrestrained discretion to be exercised by a traffic court to speed the disposition of those pesky traffic violations. Respondent argues that traffic courts are unrestrained by the more stringent procedural requirements of a major criminal trial and significantly that [traffic courts] are free to develop innovative procedures to expedite traffic cases. (Respondent's Brief (RB) @ 8). Respondent would permit a police officer to authenticate photographic evidence generated by the RedFlex system. The trouble with this notion is the California Vehicle Code section 40901 (e) and the Evidence Code.

California Vehicle Code section 40901 (e) provides in pertinent part: "... nothing contained herein shall be interpreted to permit the submission of evidence other than in accordance with the law, nor to prevent courts from adopting other rules to provide for trials in accordance with the law." [emphasis added] Accordingly, the Evidence Code applies to infraction trials based on California's Vehicle Code.

Accordingly while courts are possibly free to develop procedural rules to expedite infractions, the trial courts are bound to follow the

evidence code. Clearly traffic courts are not authorized to disregard the Evidence Code. Because Respondent has offered no authority in support of their fanciful argument, it should be disregarded. Moreover the forum to petition for changes sought RedFlex would be the legislature, not a court of law.

B. The Photographic, Video and Data Bar Evidence Was NOT Properly Authenticated

It can not be argued that: "A writing, including a photograph or videotape, must be authenticated before it can be received in evidence." (Evid. Code, § 1401, subd. (a.)). Similarly "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) The testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is legally sufficient foundation for its admission into evidence. (Evid. Code, § 1413; *Jones v. City of Los Angeles, supra, 20 Cal.App.4th at p. 440, quoting People v. Bowley (1963) 59 Cal.2d 855, 859; People v. Doggett (1948) 83 Cal.App.2d 405, 409- 410.*)

Accordingly, Respondent argues the statutory presumptions of Evidence Code 1552 and 1553 relate to authenticity of the photographic and video depictions of Appellant's violation and therefore those same photographs and video are presumed to be admissible evidence. However, Respondent's reliance upon Evidence Code 1552 and 1553 is too broad an interpretation of these code sections.

In *Aguimatang v. California State Lottery (1991) 234 Cal.App.3d 769 at p. 797,* concerning a printout of lottery winners, the court stated that "[C]omputer printouts are admissible and are presumed to be an accurate representation of the data in the computer..." (Emphasis added) In other words the data printed out is an accurate representation of the data that exists within the

computer. However the presumption of Evidence Code 1552 and 1553 is not directed to the data that is entered into the computer and its accuracy.

In *People v. Hawkins (2002) 98 Cal.App.4th 1428,* the court stated: "[t]his presumption [Evidence Code section 1553(a)] 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." (*Hawkins, supra, 98 Cal.App.4th at p; 1450*) Thus, the presumption establishes only "that the data in the printout accurately represents the data in the computer."

Pursuant to Vehicle Code section 21455.5(c)(2)(B) and (C) : "Only a governmental agency, in cooperation with a law enforcement agency, may operate an automated enforcement system, which includes the following activities: ...(2) Performing administrative functions and day-to-day functions, including, but not limited to,...(B) Ensuring that the equipment is regularly inspected. (C) Certifying that the equipment is properly installed and calibrated, and is operating properly."

There is no presumption that the data itself is accurate or reliable or that the computer device is operating properly. As here where Appellant's counsel objects "the proponent of the evidence must offer foundational evidence that the computer was operating properly." (Jefferson, California Evidence Benchbook, 4th ed., § 3244 [citing *Hawkins at p. 1450;* emphasis in original].) And see Evid C. § 1401(b) which requires that a writing be authenticated even when it is not offered in evidence but is sought to be proved by a copy or by testimony as to its content under the circumstances permitted by Sections 1500-1510 (the best evidence rule). This is declarative of existing California law. *Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289 (1889); Smith v. Brannan, 13 Cal. 107, 115 (1859); Forman v. Goldberg, 42 Cal.App.2d 308, 316-317, 108 P.2d 983, 988 (1941).*

Therefore, under Section 1401(b), if a person offers in evidence as here photographic video and data to depict Appellant's violation, the data box and the information contained therein must be authenticated.

1. Respondent Failed to Authenticate the Evidence

Here, no employees of RedFlex testified at trial. The prosecutions "evidence" was supplied to Young by Redflex. Young testified that the data bar indicated the light was red for .27 seconds as Appellant approached; and that the second photograph taken .66 seconds later showed the vehicle in the intersection. (RT 7:26-8:6). Neither of these two photographs show a violation of V.C. § 21453 which requires evidence that Appellant "entered" the intersection after the red light was illuminated.

By his own admission, Young had no personal knowledge of the accuracy, maintenance and condition of the camera which produced the photographs, video, and the information contained therein, because he was not involved in the maintenance of the system. Young had no personal knowledge of the maintenance and accuracy record of the camera that produced the photographs and video. Young could not and did not testify to the accuracy of the information contained on the photograph and video - namely the date and time of violation and the number of seconds the light had been yellow before it turned red and/or that the data bar indicated the light was red for .27 seconds as Appellant approached; moreover that the second photograph taken .66 seconds later showed the vehicle in the intersection. (RT 7:26-8:6). Young was simply reading the information from the source material supplied by RedFlex.

Young did not testify he made the photographs or videotape himself. He did not testify he was present at the time of appellant's alleged vehicle code violation, and witnessed the events depicted in the photographs. He did not testify to any personal knowledge of the contents of the photographic images or the method of their creation, storage or transmission. He did not testify regarding the background, training or

qualifications of any of the Redflex employees involved in any of those activities and, in fact, it would appear he did not know any of them.

At most, Young testified that sometime in the past he had been told by "other people" about the operation and procedures involving the "red light" camera system, and that he was aware of some of the general operating procedures for the system. (RT 6:21-7:2) He did not, and could not, attest that the photos or videos were true representations of what they purported to depict because he had no such personal knowledge. Young failed to provide any of the evidence necessary to lay a foundation for the admission of the photographs or the videotape into evidence. Young's testimony was based upon hearsay and the photographs even if somehow relevant lack a proper foundation.

2. Similarly Respondent failed to authenticate Evidence of The Traffic Signal's Yellow Interval.

Vehicle Code § 21455.7 requires that minimum Yellow Interval times in California be set according to the CADOT Traffic Manual. That Traffic Manual, in turn, specifies a mathematical formula to be used in determining minimum Yellow Interval time. It also provides a tabulation showing examples of such calculations at various "Approach Speeds". California Vehicle Code (hereafter Vehicle Code) § 21455.7 states:

> "At each 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."

The sole basis for Young's belief that the phasing length of the yellow light is 4-seconds is that someone in the Traffic Engineering Department told him the yellow light phases at 4-seconds. (RT 8:14-21). Notably, Young failed to provide evidence that the phasing of the yellow light was based upon the only acceptable

criteria, the traffic manual of the Department of Transportation." The evidence should have been excluded. *(Evid. C. Section 353; Cf. People v. Martinez (2000) 22 Cal.4th 106, 126-129.)*

Moreover the testimonial evidence of Young shows the yellow light signal is not dependable. During the coarse of a single month Young visually measured the yellow light with a stop-watch and averaged the yellow light phasing at 4.11 seconds, later he obtained average results of 3.9 seconds. (RT 10:19-25) Notably the length of the yellow phasing, critical information has been omitted from the Data Bar upon which Respondent's rely. Moreover that the measured time is close to 4.0 seconds is not the point, point being that the timing wanders, accuracy demands that the phasing be consistently the same, not an impossible task for a properly functioning machine that never lies.

There is a striking similarity between the facts of Goldsmith and the facts in In *People v. Khaled,* (2010) 186 Cal.App.4th Supp 1, a recent decision by the appellate division of the Orange County Superior Court. 1n that case, the appellant was given a traffic citation generated by a red light camera system operated by the same company involved in this case. The only prosecution witness was a local police officer, who testified about the general process by which "red light" camera photographs are used to generate traffic citations.

After noting the prosecution bore the burden of establishing the admissibility of the evidence in support of its case, the appellate division held the police officer was not competent to lay a foundation for the admission of the photographs into evidence., because the officer did not qualify as the appropriate witness; did not have the knowledge necessary of the underlying workings, maintenance or recordkeeping of RedFlex; and the underlying workings of RedFlex was outside of the officer's personal knowledge. *Khaled,* (supra) 186 Cal.App.4th Supp @8.

The same is true of the instant case. The only evidence supporting the conviction was the testimony of Young. As clearly shown by the Reporter's Transcript the photographs and video was never offered nor admitted into

evidence. (RT Master Index-Exhibits). Even if somehow the photographs and video are deemed admitted, the proper functioning of the camera and computer system was never established at trial and the proper functioning cannot be established by the maintenance log alone. There was no evidence or mention of a maintenance log that the internal camera computer or its connected counterpart at RedFlex, or the computer's date and specific time settings, the local or remote measurements of the exact signal, phase times, the speed calculations, the RedFlex computer connection with each of the intersection camera systems, etc., were or are ever checked for proper functioning. In fact, again Investigator Young offered there was no calibration that the systems were independent of each other.

C. The Law Is Well Settled, The Proponent Bears The Burden Of Authentication.

Respondent's argue they were under no duty to the automated enforcement system was in working order. (RB 12-14). "If Appellant had an issue....it was her burden to produce evidence [that the automated enforcement system] was not in working order." (RB 14).

Here Young did not establish the time in question, the method of retrieval of the photographs, or that any of the photographs or the videotape were a "reasonable representation of what it is alleged to portray...." (*People v. Gonzalez*, supra, *38 Cal.4th at p. 952, 44 Cal.Rptr.3d 237, 135 P.3d 649.*)

Courts have consistently held that such testimony establishes a sufficient foundation if the videotape is a " 'reasonable representation of what it is alleged to portray....' " (*People v. Gonzalez (2006) 38 Cal.4th 932, 952, 44 Cal.Rptr.3d 237, 135 P.3d 649; see generally, id. at pp. 952- 953, 44 Cal.Rptr.3d 237, 135 P.3d 649; People v. Carpenter (1997) 15 Cal.4th 312, 385-387, 63 Cal.Rptr.2d 1, 935 P.2d 708; People v. Mayfield (1997) 14 Cal.4th 668, 745-747, 60 Cal.Rptr.2d 1, 928 P.2d 485;* Imwinkelried, Cal. Evidentiary Foundations (3d ed. 2000) pp. 115, 117; see,

also, *United States v. Jernigan (9th Cir.2007) 492 F.3d 1050 (en banc).*) Without establishing a foundation for admission of the photographs, the video and the data box information the burden that the automated enforcement system was not in working order, never shifted. Appellant could not disprove evidence, never admitted and lacking a foundation.

Again as in the situation in *Ashford v. Culver City Unified School Dist. (2005) 130 Cal.App.4th 344, 349-350, 29 Cal.Rptr.3d 728*, the court held that the unauthenticated videotape allegedly showing an employee's actions lacked sufficient foundation to be admitted. And in so holding, the court noted that without establishing such a foundation, the videotape was inadmissible."

Here, as in the *Khaled* case, where the Officer did not establish the time in question, the method of retrieval of the photographs, or that any of the photographs or the videotape were a reasonable representation of what it is alleged to portray, Investigator Young did not testify he made the photographs or videotape himself. He did not testify to any personal knowledge of the method of their creation, storage or transmission. He did not testify how often the system was maintained, how often the date and time are verified and corrected as needed, no one with direct knowledge of the workings of the camera-computer system testified. No one testified as to the frames per second of the video, justifying the manner in which the times portrayed in the data box were generated created or how they were a " 'reasonable representation of what it is alleged to portray....' " (*People v. Gonzalez (2006) 38 Cal.4th 932, 952, 44 Cal.Rptr.3d 237, 135 P.3d 649*

Young was unable to testify about the specific procedure for the programming and storage of the system information. He did not testify regarding the background, training or qualifications of any of the RedFlex employees involved in any of those activities. He did not, and could not, attest that the photos or videos were true representations of what they purported to depict because he had no such personal knowledge. Thus the Respondent failed to provide any of the

evidence necessary to lay a foundation for the admission of the photographs or the videotape into evidence.

D. Evidence Code section 1271 does not apply.

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a) The writing was made in the regular course of a business;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Respondent admits that each of the documents relied upon at trial was made and maintained by an independent, non-governmental, private company by the name of RedFlex. Accordingly, the documents are a collection of data assembled by RedFlex and not collected gathered and stored by the City of Inglewood Police Department. Respondent's attempt to distinguish *Palmer* are not convincing for the reason that RedFlex is a private entity indeed a corporation whose very continued existence depends upon an ever expanding profit. RedFlex exists to pay dividends to its stockholders. RedFlex therefore comes squarely under the factual setting of *Palmer*. Here, Young was an employee of a public agency the City of Inglewood Police Department. He was not an employee of RedFlex. Moreover Young, simply read off the information provided through RedFlex, as if it was true and correct, without any basis for doing so.

According to the U.S. Supreme Court , documents created for use at trial are hearsay not subject to the Business Records exception. In *Melendez-Diaz v. Massachusetts (2009) 129 S. Ct. 2527,* the Supreme Court stated the following:

> "Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. See Fed. Rule Evid. 803(6). But that is not the case if the regularly conducted business activity is the production of evidence for use at trial. Our decision in *Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943),* made that distinction clear. There we held that an accident report provided by an employee of a railroad company did not qualify as a business record because, although kept in the regular course of the railroad's operations, it was 'calculated for use essentially in the court, not in the business.' *Id.*, at 114, 63 S. Ct. 477, 87 L. Ed. 645. The analysts' certificates – like police reports generated by law enforcement officials – do not qualify as business or public records for precisely the same reason. See Rule 803(8) (defining public records as 'excluding, however, in criminal cases matters observed by police Officers and other law enforcement personnel"). . . 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." (*Id*, at p.2540, 129 S. Sc. 2527) [emphasis added]

In the instant case, RedFlex has created and maintains a system of cameras and computers that produce photographs, videos and documents that are used by various law enforcement agencies to prosecute alleged traffic violators. It is indisputable that the exclusive reason that these records are created (photos, and video) and provided under contract for profit to law enforcement agencies is for use in a criminal prosecution. Therefore and the most significantly RedFlex's photo red light documents were prepared in contemplation of litigation for the City of Inglewood Police Department, who uses the documents to bring criminal prosecutions. (*Palmer v. Hoffman (1943) 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645; Gee v. Timineri (1967) 248 Cal.App.2d 139, 56 Cal.Rptr. 211.*) It can not be argued that RedFlex, did not anticipate the documents were to be used in criminal prosecution In this case, as Respondent admits, the photographs and video were created, stored and delivered to the City of Inglewood Police Department by RedFlex to provide evidence of an alleged traffic violation for criminal prosecution. It is folly to argue otherwise.

E Evidence Code section 1280 does not apply.

Evidence Code section 1280 cannot be applied to the evidence provided to the City of Inglewood Police Department., as the RedFlex employees, who prepared photographs and video were not public employees or Officers, agents or employees of a public entity, and therefore do not operate under a duty to observe the facts and report them correctly. (*People v. Baske (1999) 58 Cal.App.3d 775, 780*]. Unlike an official who has an official duty to observe and report the facts accurately, RedFlex has a contractual obligation to the City of Inglewood and a duty to its shareholders to make a profit. On these facts the RedFlex documents are easily distinguished from the cases cited by Respondent.

Here, at no point does RedFlex state it is a public entity. Absent this critical foundational information, the document that was created cannot be and is not an "official record" under section 1280. In addition, section 1280 requires that "[t]he sources of information and method and time of preparation of the record be such as to indicate its trustworthiness." There is a total lack of evidence to establish this element of a section 1280 hearsay exception.

F. This Court Must Disregard Respondent's Argument that Relies Upon the Traffic Manual of the Department of Transportation.

Respondent has interjected facts found in source materials not made part of the record in the trial court or in the Appellate Division.. Such data and facts must be disregarded.

At Respondent's Brief page 33, Respondent has argued: "the traffic manual in use at the time of Appellant's traffic violation mandated a minimum yellow light change interval of 3.9 seconds based upon a prima fascia speed limit of 40 miles per hour for approaching vehicles..

There is no such evidence, that the traffic manual required and specific interval of yellow light phasing or that the prima fascia speed limit at the site of the intersection was 40 mph.

As such Respondent's argument must be disregarded.

CONCLUSION

There was no evidence in the record that the trial court "qualified" Young as an expert. Young's testimony was that of a percipient witness albeit unqualified percipient witness. Young Lacks the requisite knowledge to establish the qualification to testify as an expert either for his opinion that the cameras were working properly or for his opinion that the cameras were working properly on the date and time of the alleged violation. In fact, during *voir dire*, Young

admitted that the company responsible for maintaining the equipment which caused the photographs and video to be recorded was RedFlex.

Pursuant to Vehicle Code section 21455.5(c)(2)(B) and (C), Young failed to prove that the equipment responsible for the production of the data box information was regularly inspected, correctly installed and calibrated, and operating properly. His testimony was solely based on the photos and video prepared by RedFlex.

The Prosecution's sole witness, was not the custodian of records for the automated enforcement system, could not provide the necessary evidence to prove the necessary elements of Vehicle Code section 21455.5(c)(2)(B) and (c).

Evidence Code section 702(a) provides that "[S]ubject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." Here, Young had no personal knowledge of the matters to which he testified The camera was not inspected regularly as required pursuant to Vehicle Code section 21455.5.

The rules of Evidence are an integral part of the criminal justice system. They insure due process and a fair trial. They should not be compromised or dispensed with simply because the trial is held in traffic court. There is a certain irony when law enforcement breaks the law to enforce the law. Contrary to the argument of Respondent's expediency is not a good reason to dispense with complying with the rules of Evidence. The Court, the sole source of justice should not be compromised to exact revenues for a foreign corporate entity.

Dated: June 30, 2011

Respectfully submitted,

By: [redacted]
John J. Jackman, Esq.