

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

APPELLATE DIVISION

**ENDORSED
FILED
ALAMEDA COUNTY**

APR 05 2011

CLERK OF THE SUPERIOR COURT
By Shay Ryans, Deputy

PEOPLE OF THE STATE OF
CALIFORNIA

Plaintiff/Respondent

Appellate No. 5113

Trial Court No: 50608153/TRF

v.

██████████ KUNG,
Defendant/Appellant

**APPELLANT'S APPLICATION TO CERTIFY CASE FOR TRANSFER TO THE
COURT OF APPEAL, FIRST DISTRICT**

Request for certification of an infraction case by the Appellate Division of the Superior
Court of California, County of Alameda to the Court of Appeal

Appellate Division of the Superior Court of California, County of Alameda
HONORABLE Gloria Rhynes, Presiding Judge

HONORABLE David Byron, Judge Pro Tem

For Defendant/Appellant

██████████ KUNG

IN PRO PER

████████████████████

Telephone: ██████████

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Table of Authorities

Federal Cases

- *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527

California Cases

- *People v. Bighinatti* (1975) 55 Cal.App.3d Supp. 5
- *People v. Jenkins* (1976) 55 Cal.App.3d Supp. 55
- *People v. Ruhl* (1976) 63 Cal.App.3d 6
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Statutes and Miscellaneous Cites

- Vehicle Code 21453(a)
- Vehicle Code 21455.5

Issues Sought to be Certified to the Court of Appeal

1. Is material evidence prepared solely for prosecution constituted testimonial evidence under the Confrontation Clause of the Sixth Amendment?
2. Is the Court required to examine the municipality's compliance of Vehicle Code Section 21455.5 before convicting an alleged violation of Vehicle Code 21453(a)?
3. Is the current penalty assessment of Vehicle Code Section 21453(a) constitutes a violation of Excessive Fines Clause under the Eighth Amendment by allowing disproportional fine assessed to defendant/appellant?
4. What is the definition of “excessive” when the Court determines excessive delay in appeal?

Discussion

1. Is material evidence prepared solely for prosecution constituted testimonial evidence under the Confrontation Clause of the Sixth Amendment?

This issue needs to be decided in order to secure uniformity of decision. The use of Automatic Enforcement System (hereinafter AES) on prosecuting an alleged violation of Vehicle Code Section 21453(a) is dramatically increasing throughout the State of California. When prosecuting an alleged violation of Vehicle Code Section 21453(a), the prosecution, usually a peace officer representing the municipality, provides the trial court that an evidence packet, prepared by a third-party non-governmental vendor, to explain how the alleged violation occurred and how the prosecution issued a citation based on the evidence in the evidence packet. The representative from the vendor is not available to testify or authenticate the packet.

In *Melendez-Diaz v. Massachusetts* (2009) 129 S.Ct. 2527, the U.S. Supreme Court addressed that the use of Affidavits constituted testimonial evidence as they were prepared for the purpose of a later criminal trial. By the interpretation of the *Melendez-Diaz* decision, is the evidence packet prepared for the prosecution of Vehicle Code Section 21453(a) constituted a testimonial evidence that subject to Confrontation Clause?

2. Is the Court required to examine the municipality's compliance of Vehicle Code Section 21455.5 before convicting an alleged violation of Vehicle Code 21453(a)?

Vehicle Code Section 21455.5 governs the use of AES for the prosecution of Vehicle Code Section 21453(a). As the key element of conviction - legitimacy of the use of AES, the Court often fails to neither examine legitimacy of the use of AES, nor request the prosecution to substantiate the legitimacy of the use of AES in the mean of prosecuting Vehicle Code 21453(a). In the interest of the justice, is the Court required to examine the municipality's compliance of Vehicle Code Section 21455.5 before convicting an alleged violation of Vehicle Code 21453(a)?

3. Is the current penalty assessment of Vehicle Code Section 21453(a) constitutes a violation of Excessive Fines Clause under the Eighth Amendment by allowing disproportional fine assessed to defendant/appellant?

The total fine of the alleged violation of Vehicle Code 21453(a) imposed was \$446 with Traffic School. However, in the \$446 fine imposed, about 75% of the fine, known as penalty assessment, is not related with the violation itself. In other word, the penalty assessment has nothing to do with the alleged act of violation, but an additional assessment of fine itself. By the interpretation of the Eighth Amendment, assessing such amount of fine with no mean of preventing violation of Vehicle Code Section 21453(a) was unjustified.

4. What is the definition of “excessive” when the Court determines excessive delay in appeal?

People v. Bighinatti (1975) 55 Cal.App.3d Supp. 5, *People v. Jenkins* (1976) 55 Cal.App.3d Supp. 55, and *People v. Ruhl* (1976) 63 Cal.App.3d 6 addresses the Court's interpretation of case dismissal on the ground of excessive delay in the process of appeal. However, none of these cases has set guidance on how such "excessive" was determined. In the interest of justice and uniformity of decision, this issue needs to be decided.

Conclusion

Defendant/appellant requests certification of this case to the First District Court of Appeal for decision on the above issues. Certification and transfer is necessary in order to secure uniformity of decision and to settle important questions of law in the interest of justice.

DATED: May 4, 2011

Respectfully submitted,

[Redacted signature]

[Redacted] KUNG

Defendant/Appellant, IN PRO PER