

MAY 31 2011

ALAN CARLSON, Clerk of the Court

*[Signature]*  
BY J. GONZALEZ

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IN THE  
APPELLATE DEPARTMENT OF THE SUPERIOR COURT  
FOR THE COUNTY OF ORANGE  
NO. 30-2011-00457710

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

V.

BLUMENTHAL,

Defendant and Appellant

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**APPELLANT'S OPENING BRIEF**  
Appeal From a Judgment  
Of The Superior Court, County of ORANGE on Case SA156171PE  
Commissioner Carmen R. Luege

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**QUESTIONS PRESENTED**

I. WHETHER THE TRIAL COURT PROPERLY INTERPRETED CALIFORNIA EVIDENCE CODE SECTION WHEN IT RULED THAT PHOTOGRAPHS AND VIDEO SUBMITTED AS TRIAL EXHIBITS BY THE PROSECUTION WERE NOT HEARSAY AND THUS ADMISSIBLE?

II. WHETHER THE COURT PROPERLY INTERPRETED CALIFORNIA VEHICLE CODE SECTION 21455.5 WHEN IT RULED THAT THE CONTRACT BETWEEN SANTA ANA AND REDFLEX WAS NOT ILLEGAL?

III. WHETHER THE COURT PROPERLY INTERPRETED CALIFORNIA VEHICLE CODE 21455.5 WHEN IT RULED THAT THE CITY OF SANTA ANA HAD COMPLIED WITH THE WARNING NOTICE REQUIREMENT FOR THE AUTOMATED TRAFFIC ENFORCEMENT SYSTEM INSTALLED AT THE SUBJECT INTERSECTION OF BRISTOL AND SEGRESTROM?

1 **STATEMENT OF APPEALABILITY**

2 This appeal is taken from a judgment of Orange County Superior Court and is  
3 authorized by California Code of Civil Procedure section 904.1 subsection (a)(l).

4 **STANDARD OF REVIEW**

5 Review of this matter is de novo because the trial court's order and judgment  
6 disregarded California Vehicle Code Section . According to established case law, such  
7 as the case of Ghirardo v. Antoniolo (1994) 8 Cal.App.4<sup>th</sup> 791, 800 which states in  
8 pertinent part, "When the decisive facts are undisputed, we are confronted with a question  
9 of law and are not bound by the findings of the trial court." See also, People ex rel.  
10 Lockyer v. Shamrock Foods Co. (2000) 24 Cal. 4th 415, 432. In our case, the facts are  
11 undisputed and what remains is the the issue of whether the trial court incorrectly  
12 interpreted and failed to apply to the applicable case law to the Respondent at the trial.  
13 Because there is no dispute as to any material fact, and the interpretation of the law is the  
14 sole remaining issue, the standard of review of the trial court's decision is de novo.

15 **STATEMENT OF THE CASE**

16 Appellant was cited on May 03, 2010 for an infraction violation of California  
17 Vehicle Code section 21453 subsection (a) (recorded by an Automated Traffic  
18 Enforcement System ("ATE" i.e. a red light camera) that was owned and operated by  
19 Redflex Inc.) that occurred in the City of Santa Ana California at the intersection of  
20 Bristol and Segrestrom.

21 On August 09, 2010, Appellant requested a trial by written declaration. On  
22 September 16, 2010, the Court rendered a decision in favor of the Respondent (signed by  
23 Commissioner Carmen R. Luege). Appellant requested a trial de novo and a new trial  
24 was held on January 26, 2011 before Commissioner Carmen R. Luege. Appellant was  
25 represented by Jeffrey P. Ousley Esq., and Respondent was represented by Melissa M.  
26 Croswaithe Esq. of the Santa Ana City Attorney's Office. Respondent produced two  
27 witnesses, Santa Ana police officer, Alan Berg, and Redflex employee, John Burnette .  
28

1 Appellant's counsel of record appeared for the Respondent. There were no witnesses for  
2 the Appellant. At the trial, the Appellant objected and sought a dismissal of the citation.  
3 The trial court ruled in favor of the Respondent. Appellant reasoned that the judgment of  
4 the court was incorrect due to an incorrect interpretation of the law, and was thus  
5 appealed.

6  
7 **ARGUMENTS**

8 I. WHETHER THE TRIAL COURT PROPERLY INTERPRETED CALIFORNIA  
9 EVIDENCE CODE SECTION WHEN IT RULED THAT PHOTOGRAPHS AND  
10 VIDEO SUBMITTED AS TRIAL EXHIBITS BY THE PROSECUTION WERE  
11 NOT HEARSAY AND THUS ADMISSIBLE?

12  
13 Key to the prosecution's case were the various photographs (Exhibits 1-7) and a video  
14 (Exhibit 8) which the prosecution purported to be evidence of appellant's crime. Such a  
15 supposition is not in accordance with established case law. In short, photographs and  
16 videos ARE hearsay and as such... inadmissible. Furthermore, admission of hearsay  
17 violated the Appellant's right to confront the accuser under the Sixth Amendment of the  
18 United States Constitution.

19 The controlling authority on admissibility of photographs and videos from a red light  
20 camera is the case of People v. Khaled (2010) 186 Cal.App.4<sup>th</sup> Supp. 1, 113 Cal.Rptr.3d  
21 796. In Khaled, the admissibility of photographs and a video were in issue. (Supra, at  
22 798). No police officer witnessed the alleged traffic violation. (Supra, at 799). Instead,  
23 a police officer testified about the general area depicted in a photograph taken from a  
24 camera installed at an intersection in Santa Ana. (Supra). A particular private company  
25 contracted with the municipality to install, maintain, and store this digital photographic  
26 information. (Supra). The officer testified these photographs are then periodically sent  
27 back to the police department for review as possible driving violations. (Supra). The  
28 person who entered relevant information into the camera-computer system did not testify.

1 (Supra). The person or persons who maintain the system did not testify. (Supra). No one  
2 with personal knowledge testified about how often the system is maintained. (Supra) No  
3 one with personal knowledge testified about how often the date and time are verified or  
4 corrected. (Supra). The person with direct knowledge of the workings of the camera or  
5 computer system did not testify. (Supra).

6 The Khaled court ruled that the pictures and video were inadmissible. (Supra, at 800)

7 The Khaled court reasoned that There are two types of situations where a videotape  
8 or photographs are typically admitted into evidence where the photographer or  
9 videographer does not testify. (Supra, at 799). The first involves a surveillance camera  
10 at a commercial establishment (oftentimes a bank or convenience or liquor store).

11 (Supra). In those situations, a person testifies to being in the building and recounts the  
12 events depicted in the photographs. (Supra). Courts have consistently held that such  
13 testimony establishes a sufficient foundation if the videotape is a” ‘reasonable  
14 representation of what it is alleged to portray....’ “(People v. Gonzalez (2006) 38 Cal.4th  
15 932, 952, 44 Cal.Rptr.3d 237, 135 P.3d 649; see generally, id. at pp. 952—953, 44  
16 Cal.Rptr.3d 237, 135 P.3d 649; People v. Carpenter (1997) 15 Cal.4th 312, 385-387, 63  
17 Cal.Rptr.2d 1, 935 P.2d 708; People v. Mayfield (1997) 14 Cal.4th 668, 745-747, 60  
18 Cal.Rptr.2d 1, 928 P.2d 485; Imwinkelried, Cal. Evidentiary Foundations (3d ed. 2000)  
19 pp. 115, 117; see also United States v. Jernigan (9th Cir.2007) 492 F.3d 1050 (en banc).

20 (Khaled, at 799-800) The second situation involves what is commonly known as a  
21 “nanny cam.” (Supra, at 800)). In that situation, a homeowner hides a surveillance  
22 camera in a room and then retrieves the camera at a later time. (Supra). At the court  
23 proceeding, that person establishes the time and placement of the camera. (Supra). This  
24 person also has personal knowledge of when the camera was initially started and when it  
25 was eventually stopped and retrieved. (Supra). Neither of these situations is analogous  
26 to the situation at bar. (Supra). Here the officer could not establish the time in question,  
27 the method of retrieval of the photographs, or that any of the photographs or the  
28 videotape were a” ‘reasonable representation of what it is alleged to portray....’ “(People

1 v. Gonzalez, supra, 38 Cal.4th at p. 952, 44 Cal.Rptr.3d 237, 135 P.3d 649.) (Supra). A  
2 very analogous situation to the case at bar, however, is found in Ashford v. Culver City  
3 Unifed School Dist. (2005) 130 Cal.App.4th 344, 349—350, 29 Cal.Rptr.3d 728, where  
4 the court held that the unauthenticated videotape allegedly showing an employee's  
5 actions lacked sufficient foundation to be admitted at an administrative hearing. And in  
6 so holding, the court noted that without establishing such a foundation, the videotape was  
7 inadmissible. (Khaled, at 800).

8 The Khaled court likewise summarily dispensed with the business records or official  
9 records exceptions to the hearsay rule as well. (Supra). The court reasoned that  
10 California Evidence Code section 1280 precluded any documents under an official  
11 records exception because Redflex prepared the documents, and are not public  
12 employees. (Supra, at 801). Business records exceptions pursuant to California  
13 Evidence Code section 1271 were equally brushed aside (supra), as the individual who  
14 prepared the documents (photographs and video) did not testify, and a foundation could  
15 not be laid by individuals who did not have personal knowledge of how the photographs  
16 and video were prepared. (Supra, at 802) . The court also noted that "the document  
17 cannot be prepared in contemplation of litigation" (Supra).

18 In summary, photographs and videos are subject to a two part analysis. First is an  
19 analysis to see whether the photographs or video may be admissible under a nanny cam  
20 or surveillance exception, and if not, they are considered hearsay, and an exception such  
21 as business record or official records exception may be applicable to allow admission.

22 In our case, the prosecution introduced nine exhibits (Clerk's Transcript at 8) and the  
23 Appellant introduced three exhibits. (Supra). Exhibits 1-7 were offered by the  
24 Prosecution and were photographs, Exhibit 8 was prosecution exhibit and was a video  
25 (Supra at 6-7), and Exhibit 9 was a prosecution exhibit that was an "incident report log"  
26 (Supra at 5). Appellant introduced three exhibits. Exhibit 12, a copy of the Contract  
27 between Redflex and the City of Santa Ana, Exhibit 13, an informal discovery request,  
28 and Exhibit 14, correspondence from the City of Santa Ana Attorney's office.



1 For exhibits 1-8 witness Officer Berg testified all about what the photographs and videos  
2 depicted, but he never indicated that he had been there when they were taken, that he had  
3 been the person to take them, that he had been the individual to service the cameras that  
4 took them that day, or that he had ran the computers that processed the data taken or that  
5 he had turned the cameras off on the day of the citation. What was apparent was that  
6 Officer Berg had only secondhand knowledge and that no person could testify as to  
7 whether the photographs (exhibits 1-8).

8 The Redflex employee John Burnette likewise did not testify that he was there when  
9 when the photos and video were taken, that he had been the person to take them, that he  
10 had been the individual to service the cameras that took them that day, or that he had ran  
11 the computers that processed the data taken or that he had turned the cameras off on the  
12 day of the citation . Redflex employees apparently had exclusive access to the data and  
13 photographs. (Settled Statement of facts, Order re Admissibility of ATE Evidence at 4:8-  
14 23). The automated traffic enforcement system only records images of people who are  
15 deemed to have violated the law. (Supra at 3:10-25).

16 In our case, it is clear that Exhibits 1-8 were relied upon by the prosecution to prove their  
17 case up. Without these photos, there would be no evidence. The testimony of both  
18 witnesses indicates that neither were present at the intersection at the date and time the  
19 incident happened, and thus, they cannot testify that what is depicted in the photos or  
20 videos is an accurate representation of what happened. A surveillance exception is  
21 impossible. Neither witness turned on or turned off the camera or set it up either, so the  
22 nanny cam exception is inapplicable was well. What remains would be a business record  
23 exception or an official records exception to the hearsay rule. With regard to the business  
24 records exception, California Evidence Code Section 1271 states that

25  
26 "Evidence of a writing made as a record of an act, condition or event is not  
27 made inadmissible by the hearsay rule when offered to prove the act,  
28 condition, or event if:

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

- 1 (b) The writing was made at or near the time of the act, condition or  
event;  
2 (c) The custodian or other qualified witness testifies to its identity and  
the mode of its preparation;  
3 (d) The sources of information and method and time of preparation were  
4 such  
5 as to indicate its trustworthiness.”

6 And more importantly...the document cannot be prepared in contemplation of  
7 litigation. (See, Palmer v. Hoffman (1943) 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645; Gee  
8 v. Timineri (1967) 248 Cal.App.2d 139, 56 Cal.Rptr. 211.) In our case, it is clear that the  
9 Redflex computers and cameras only produce photographs in anticipation of a traffic  
10 citation. The exception fails.

11 Lastly, is the official records exception which is codified by California Evidence  
12 Code Section 1280 which states:

13 “Evidence of a writing made as a record of an act, condition, or event is not made  
14 inadmissible by the hearsay rule when offered in any civil or criminal proceeding  
to prove the act, condition, or event if all of the following applies:

- 15 (a) The writing was made by and within the scope of duty of a public  
employee.  
16 (b) The writing was made at or near the time of the act, condition or event.  
17 (c) The sources of information and method and time of preparation were such  
18 to indicate its trustworthiness.”

19 This issue has been considered before in the case of People v. Khaled, at 7, when it  
20 states

21 Here, the signatory of the document exhibit No. 3 states he or she is an employee  
22 of the “Redflex Traffic Systems.” At no point does the signatory state that Redflex  
23 Traffic Systems is a public entity or that he or she is otherwise employed by a  
24 public entity. Absent this critical foundational information, the document that was  
created cannot be and is not an “official record” under section 1280.

25  
26 In conclusion, the photographs and video were inadmissible as hearsay. They do not  
27 qualify for a surveillance or nanny cam exception. They are not official public records,  
28

1 or business records. The judgment of the court was based on this evidence which was  
2 improperly admitted.

3 Admission of hearsay evidence violates a defendant's right to confrontation under the  
4 Sixth Amendment of the United States Constitution. (See Melendez-Diaz v.  
5 Massachusetts (2009) 129 S. Ct. 2527). The judgment should be reversed.

6  
7 **II. WHETHER THE COURT PROPERLY INTERPRETED CALIFORNIA**  
8 **VEHICLE CODE SECTION 21455.5 WHEN IT RULED THAT THE CONTRACT**  
9 **BETWEEN SANTA ANA AND REDFLEX WAS NOT ILLEGAL?**

10  
11 Exhibit 12 is a copy of a contract that was in effect at the time of the citation between  
12 the City of Santa Ana and Redflex (who owns and operates the red light camera system in  
13 Santa Ana). Contracts such as these are controlled by California Vehicle Code Section  
14 21455.5 subsection (g)(1) which states "A contract between a governmental agency and a  
15 manufacturer or supplier of automated enforcement equipment may not include provision  
16 for the payment or compensation to the manufacturer or supplier based on the number of  
17 citations generated, or as a percentage of the revenue generated, as a result of the use of  
18 the equipment authorized under this section."

19 In the contract, (exhibit 12), section number 26 subsection (a) allows for a  
20 renegotiation of the contract "to ensure received revenue provides for sufficient cost  
21 recovery..." Such a provision infers that compensation to Redflex is dependent upon the  
22 number of citations issued. Redflex has considerable reason to issue as many citations as  
23 it can otherwise, the City of Santa Ana has the right to renegotiate the contract  
24 price...which would invariably mean less money for Redflex. The contract does contain  
25 a provision to adjust the costs based on revenue generated and violates California Vehicle  
26 Code Section 21455.5. The conviction should be reversed.

1 III. WHETHER THE COURT PROPERLY INTERPRETED CALIFONRIA  
2 VEHICLE CODE 21455.5 WHEN IT RULED THAT THE CITY OF SANTA ANA  
3 HAD COMPLIED WITH THE WARNING NOTICE REQUIREMENT FOR THE  
4 AUTOMATED TRAFFIC ENFORCEMENT SYSTEM INSTALLED AT THE  
5 SUBJECT INTERSECTION OF BRISTOL AND SEGRESTROM?  
6

7 California Vehicle Code section 21455.5 subsection (2)(b) states that "Prior to  
8 issuing citations under this section, a local jurisdiction utilizing an automated traffic  
9 enforcement system shall commence a program to issue only warning notices for 30 days.  
10 The local jurisdiction shall also make a public announcement of the automated traffic  
11 enforcement system at least 30 days prior to the commencement of the enforcement  
12 program." The warning requirement has been further specified as being "intersection  
13 specific", meaning that each intersection must comply with the above warning notice  
14 requirement (notices to be mailed for each intersection for the 30 days). Signage at the  
15 city limits and public legal notices in the local newspapers are insufficient.

16 The seminal case on this issue is People v. Park (2010) 187 Cal.App.4<sup>th</sup> Supp.9, 115  
17 Cal.Rptr.3d 337. The Park case is especially helpful as it regards the City of Santa Ana  
18 (Supra at 337). In Park, the respondent attempted to show compliance with California  
19 Vehicle Code section 21455.5 by demonstrating that warning notices published system  
20 wide were sufficient. (Supra at 338). The court ruled that the warning notices must be  
21 issued for each system...meaning each intersection. (Supra at 340). The court reasoned  
22 that intersection specific construction was consistent with the common definition of  
23 system and that issuance of new warnings and announcements were required to  
24 proximate users each time automated enforcement equipment commences operation at an  
25 intersection. (Supra)

26 ///

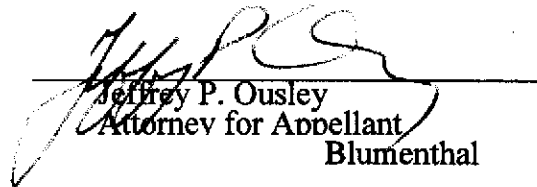
27 In our case, the intersection at issue was the intersection at Bristol and Segrestrom  
28 (Clerk's Notice at ) Despite substantial discussion about notices (Settled Statement of

1 facts, Order re Admissibility of ATE Evidence at 2:26-3:9), no actual warning notices  
2 from the system installed at Bristol and Segrestrom were produced, despite attempts by  
3 Appellant to secure any warning notices issued for this particular intersection (Exhibit 13,  
4 Informal Discover request at 2:14-17). None were ever produced.

5 The lack of any testimony from the witnesses concerning warning notices from this  
6 particular intersection and the lack of production (if any did exist) are substantial  
7 evidence that the warning notices were never sent for this intersection. The Respondent  
8 has violated California Vehicle Code section 21455.5 and this particular traffic camera  
9 system is illegal. The conviction should be reversed.

10  
11 Respectfully submitted on May 31, 2011

12 By:

13   
14 Jeffrey P. Ousley  
15 Attorney for Appellant  
16 Blumenthal

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**CERTIFICATE OF COMPLIANCE**

Pursuant to of the California Rules of Court rule 8.204 subsection (c), I hereby certify that this brief contains 3,463 words, including footnotes. In making this certification, I have relied on word count of a computer program used to prepare the brief. The brief has been typeset with one and a half line spacing and a 13 point font.

By 

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**PROOF OF SERVICE**  
STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of eighteen (18) and not a party to the within action. My business address is 316 W. 4<sup>th</sup> Suite 221, Street, Santa Ana, CA 92701.

On May 31, 2011 I served the foregoing document described as: **Appellant's Opening Brief** on all interested parties/persons by delivering the same to the address below by placing true copies thereof in a sealed envelope addressed as follows:

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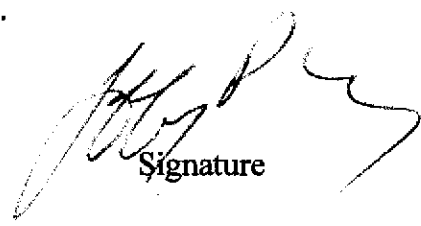
BY MAIL AS FOLLOWS: I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice, it is deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Ana, California in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true.

Executed May 31, 2011 at Santa Ana, California.

Jeffrey P Oushy

Printed name



Signature