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8 TATYANA T [REDACTED]

FILED
SAN MATEO COUNTY

FEB 16 2011
Clerk of the Superior Court
By [Signature]
DEPUTY CLERK

9 **SUPERIOR COURT, STATE OF CALIFORNIA**
10 **IN AND FOR THE COUNTY OF SAN MATEO**
11 **APPELATE DIVISION**

12 PEOPLE OF THE STATE OF CALIFORNIA,
13 Plaintiff and Respondent,

14 vs.

APPEAL NO. AD-5235
Case No. C451458
APPELLANT'S OPENING BRIEF

15 TATYANA T [REDACTED]

16 Defendant and Appellant

Date: TBD
Time TBD
Appellant Dept . TBD

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19 **CASE SUMMARY:** On March 29, 2010, an alleged violation of CVC §
20 21453(a), a photo enforced red-light camera violation occurred. The citation was
21 issued to the defendant who is the not the registered owner of the vehicle. This case
22 came on for trial in the Traffic Department in the above-mentioned court on
23 September 10, 2010, before Commissioner Susan Greenberg. City of Millbrae
24 employee Pangalos testified for the prosecution. The officer submitted a
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28 [REDACTED] Opening Brief

1 Declaration. Defendant stipulated that Officer Pangalos would testify as stated in
2 his Declaration.

3 The officer testified to the contents of the court packet. Defense counsel
4 questioned Officer Pangalos regarding how the defendant was identified as the
5 driver of the vehicle when she was not the registered owner. He stated that he
6 identified the defendant by the Post Office database, locating people who live or
7 reside at the same address as the registered owner and then he matched the ID.
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9 Counsel asked whether or not Officer Pangalos knew what the registered owner,
10 A [REDACTED] looked like. Officer Pangalos replied that he did not. Counsel asked
11 Officer Pangalos if the registered owner was a man or a woman. Officer Pangalos
12 did not know.

13 Officer Pangalos testified that he is employed by the City of Millbrae
14 coordinating their red light camera program. He has been a police officer for 25
15 years. He is assigned to the Millbrae camera enforcement and he is the coordinator
16 for their program. He testified as to his training at Redflex and in Millbrae. He
17 testified to the date and time of the alleged violation and within 10 days notice was
18 sent to the registered owner. He testified to his experience reviewing citations and
19 then went over the four photographs contained in the packet. He stated that the
20 DMV photo matched the driver Tatyana T [REDACTED] and that the information was sent
21 over a secure website with DMV. The defendant was issued a citation for CVC
22 21453(a).
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25 Counsel then questioned Officer Pangalos. Counsel asked who produced the
26 camera log report contained in the packet and the officer did not know. Counsel
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1 asked who the camera technician was and Officer Pangalos replied with the
2 technicians name and stated that he was not present in court for cross-examination.

3 Counsel asked whether Officer Pangalos had a copy of the contract between
4 the City of Millbrae and ATS. He testified that he did not have a copy in court.

5 Counsel asked whether there were any terms of the contract that would lessen the
6 fees the City of Millbrae paid to ATS in relation to the number of citations issued.

7 He stated that there was a new contract as of December 2009 and that the contract
8 was cost neutral. Counsel objected that Officer Pangalos' statement was a legal
9 conclusion and on foundation grounds.
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12 **MOTIONS:**

13 Counsel had no evidence to submit. In closing counsel renewed the cost
14 neutrality argument, as well as foundation, hearsay, Sixth Amendment objections
15 citing People v. Khaled (2010) 186 Cal.App.4th Supp 1; People v. Beckley 2010
16 WL 2293410 (California Court of Appeals 2010; Crawford v. Washington, (2004)
17 541 U.S. 36 and Melendez-Diaz v. Massachusetts (2009) 129 S.Ct. 2527. Counsel
18 argued that the registered owner is not the defendant. The People did not introduce
19 a photograph of the registered owner at the trial. C.V. C. § 40518 requires notice
20 be sent to the registered owner within 15 days of the alleged violation. C.V.C. §
21 40520 (a), (b)(1)and (2) establish procedure to be followed if the registered owner
22 was not the driver of the vehicle. Those procedures were not followed in this case.
23 Officer Pangalos testified that he searched the DMV records and that the
24 defendant's records were associated with the address where the vehicle is
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1 registered. However, the registered owner was not present in court. Defendant had
2 no opportunity to cross-examine the registered owner, nor an opportunity to review
3 any photograph of the registered owner to determine whether or not that person
4 resembled defendant. Further, the cited vehicle code sections do not establish a
5 procedure whereby the police may search tge public records, as was done in this
6 case. It is significant that Officer Pangalos did not know what the registered owner
7 looks like and that she could look the same or closer to the driver than this
8 defendant does.

10 **VERDICT AND SENTENCE:**

11 The Court made a finding of guilt and ordered the defendant to pay a fined of \$446.00
12 by November 29, 2010.

14 **ARGUMENT:**

16 **QUESTIONS PRESENTED:**

- 17 **1. WHETHER THE COURT WAS IN ERROR TO DENY DEFENDANT'S**
18 **FOUNDATION AND HEARSAY OBJECTIONS REGARDING THE**
19 **REDFLEX PACKET AND DVD.**

20 The complaining witness, Officer Pangalos, has offered into evidence a
21 court packet that contains, photographs, certain maintenance and other camera
22 records, all purportedly to establish that the defendant allegedly failed to stop for a
23 steady circular red light. However, the People did not call to testify any
24 representative from ATS, the company that provides the camera equipment and
25 technology, to lay a foundation for the admissibility of the four photographs, the
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1 DVD or the other documents. A custodian of records or other qualified company
2 representative would be able to testify to the technology, where the equipment is
3 placed, the procedures for operating the system, the procedures for maintaining the
4 system and where records of the company are stored. Only a company employee,
5 i.e. custodian of records, could testify as to where ATS set up their equipment, how
6 they operate and maintain it, and the procedures followed to cause a Notice to
7 Appear to issue. Only an ATS employee can testify to as to whether or not the
8 subject packet and DVD were created in the "normal course of business."

10 In the case at hand no employee from ATS offered any testimony that he or
11 she is familiar with the operation of the cameras, computers and maintenance,
12 including troubleshooting problems. An ATS employee could address how the
13 image was transmitted to a location in Phoenix for processing, and then
14 retransmitted to the Millbrae Police department for the preparation of the "court
15 package". No ATS employee was present to testify how the image was downloaded
16 into a computer, and how that image may have been subjected to manipulation
17 within the computer to add information, or enhance or enlarge the image, and to add
18 information to the top center, and information as to the elapsed time of the yellow
19 and red lights. While Officer Pangalos submitted his training and experience as a
20 police officer, he has no special education or training on computers, photography,
21 or the system of red light camera technology, beyond the training offered by the
22 vendor, in this instance ATS.

25 Officer Pangalos testified that he reviewed the information contained in the
26 court packet prior to issuing the ticket. Officer Pangalos does not know how many
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1 ATS employees are assigned to process violations from Millbrae, who processed
2 the subject citation, whether or not it was process at or near the time of the
3 violation, in the regular course of ATS business.

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5 **II. WAS DEFENDANT DENIED HIS RIGHT TO CROSS-EXAMINE**
6 **WITNESS PURSUANT TO THE SIXTH AMENDMENT**

7 In both the Crawford v. Washington, (2004) 541 U.S. 36 and Melendez-
8 Diaz v. Massachusetts (2009) 129 S.Ct. 2527 cases the Supreme Court addressed
9 defendants' right under the Sixth Amendment's Confrontation Clause in Melendez-
10 Diaz v. Massachusetts (2009) 129 S.Ct. 2527. This case involved the admission of
11 certificates of analysis sworn by analysts at state laboratories, without requiring in
12 court testimony from said analysts. The question presented to the court was
13 "whether the affidavits are 'testimonial,' rendering the affiants 'witnesses' subject
14 to the defendant's right of confrontation under the Sixth Amendment.
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16 The court using a Crawford, supra, analysis found that the documents were
17 "testimonial" evidence and as such were inadmissible absent the opportunity to
18 cross-examine the witness. Analysis of the Melendez-Diaz case has been stated as
19 follows:
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- 21 "1. analysts' certificates of analysis were affidavits within core class of
22 testimonial statements covered by Confrontation Clause
23 2. analysts were not removed from coverage of Confrontation Clause on theory
24 that they were not "accusatory" witnesses;
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- 1 3. analysts were not removed from coverage of Confrontation Clause on theory
- 2 that they were not conventional witnesses
- 3 4. analysts were not removed from coverage of Confrontation Clause on theory
- 4 that their testimony consisted of neutral, scientific testing
- 5 5. certificates of analysis were not removed from coverage of Confrontation
- 6 Clause on theory that they were akin to official and business records and
- 7 6. defendant's ability to subpoena analysts did not obviate state's obligation to
- 8 produce analysts for cross-examination." *Id.*, at 2527, 129 S.Ct. 2527.

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10 "Business and public records are generally admissible absent confrontation, not
11 because they qualify under an exception to the hearsay rules but, because having
12 been created for the administration of an entity's affairs and not for the purpose of
13 establishing or proving some fact at trial, they are not testimonial. Whether or not
14 they qualify as business or official records, the analysts' statements here prepared
15 specifically for use at petitioner's trial were testimony against petitioner and the
16 analysts were subject to confrontation under the Sixth Amendment" *Id.*, at 2540; 129
17 S. Ct. 2527. In the case at hand, ATS has created, and maintains, a system of
18 cameras and computers that produce photographs, DVDs and documents that are
19 then used to charge defendant as being a traffic violator. No ATS employee,
20 including a custodian of records, ever appeared at the trial: not the camera
21 technician(s) who actually installed the camera/computer system, not the employee
22 who maintain said system, not the person who processes the images into the packet
23 introduced into evidence and which provide the sole basis for a conviction of the
24 defendant, and not the employee who determined the system was working, and that
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1 the defendant had violated the law. Although someone, like the camera technician,
2 may not be an “accusatory” witness, nonetheless that person’s presence is still
3 required under the Confrontation Clause. The same argument applies to the camera
4 technician not being a “conventional” witness. The technician’s findings may be
5 seen as neutral and scientific but these facts do not remove it from the protections of
6 the Confrontation Clause. And despite any resemblance to business or official
7 records, the presence of the technician as a witness is required under Melendez-
8 Diaz.

10 Without the right to cross-examine these witnesses there is no way to
11 determine whether the pictures are enhanced, whether the system was functioning
12 properly, who at ATS may have processed the images, or who maintained the
13 system, and who at ATS determined that the subject DVD and photos constituted a
14 violation of C.V.C. § 21453a. Defendant has a right to cross-examine these
15 witnesses pursuant to the Sixth Amendment and the Court’s rulings in Diaz-
16 Menlendez and Crawford, supra. Defendant has been denied that right.

18 The California Court of Appeals in, People v. Isaiah, (2004) 118
19 Cal.App.4th. 1396, expanded on the definition of what testimonial hearsay evidence
20 is by stating that the pertinent question is whether an objective observer would
21 reasonably expect the statement to be *available for use* in a prosecution (Id. at p.
22 1402).

23 It is indisputable that the records contained in the ATS Camera Packet are
24 hearsay. It is also clear that the exclusive reason these records are created and kept
25 is for the use in the prosecution of alleged red light violators. The defendant had a
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1 right to cross-examine the technicians who determined he had violated CVC
2 Section 21453(a).

3 We emphasize that the only purpose for the existence of the ATS Cameras is
4 for the criminal prosecution of red light runners. ATS generates all of the
5 documents contained in the ATS Packet with the knowledge that in every single
6 case they may be needed in court for the prosecution of the alleged violator.
7 Furthermore, every document contained in the Red Light Camera Packet is sent to
8 the Millbrae Police Department who in turn reviews the documents, in this case
9 Officer Pangalos, and issues a citation for the prosecution of the alleged violators.
10 That is sole purpose for this information, i.e. prosecutorial.

11
12 In addition, the defendant had the right to cross-examine all witnesses and
13 evidenced against her, which in this case would include the registered owner of the
14 vehicle. The People did not introduce a photograph of the vehicle owner, nor any
15 other information that would prove he or she was not the driver. There are not
16 provisions in the vehicle for citing a driver in the manner followed in this case.
17 Defendant's Sixth Amendment right to confront all witnesses against her was
18 violated in this case. Accordingly, counsel is requesting a dismissal in this case
19 based on the fact that defendant has been denied the right to cross-examine
20 witnesses under the Confrontation Clause of the Sixth Amendment.
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23 **III. DID THE PEOPLE VIOLATE THE PROCEDURES OUTLINED**
24 **IN THE VEHICLE CODE RELATED TO COST NEUTRALITY**
25 **AND ISSUANCE OF CITATIONS TO NON OWNERS**
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1 The prosecution bears the burden of proof in all criminal cases. In this case
2 Officer Pangalos was questioned regarding the contract between the City of
3 Millbrae and ATS. He failed to produce the contract that was in effect for the
4 date of the alleged violation. Officer Pangalos stated that the new contract,
5 entered into as of December 2009, requires that Millbrae pay a monthly flat fee
6 and that this fee does not change based on the amount of citations issued. The
7 problem is that this contract was never presented to the court and without the
8 production of the document any testimony from the officer regarding said
9 contract lacked foundation and was hearsay. The court could not determine
10 whether the requirements of CVC § 21455.5 (g)(1) had been met in this case,
11 when the contract was never presented to the court for review.
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15 Vehicle Code Section 21455.5(g)(1) States in pertinent part:

16 (g) (1) A contract between a governmental agency and a
17 manufacturer or supplier of automated enforcement equipment may not
18 include provision for the payment or compensation to the manufacturer
19 or supplier based on the number of citations generated, or as a
percentage of the revenue generated, as a result of the use of the
equipment authorized under this section.

20 Officer Pangalos was unable to prove the subject contract was in fact cost
21 neutral. The court overruled counsel's foundation objections.

22 This citation was not issued in compliance the procedures outlined in the
23 Vehicle Code.

24
25 Vehicle Code Sections 40518 and 40520 require, in pertinent part:

1 40518. (a) Whenever a written notice to appear has been issued by
2 a peace officer or by a qualified employee of a law enforcement
3 agency on a form approved by the Judicial Council for an alleged
4 violation of Section 22451, or, based on an alleged violation of
5 Section 21453, 21455, or 22101 recorded by an automated
6 enforcement system pursuant to Section 21455.5 or 22451, and
7 delivered by mail within 15 days of the alleged violation to the
8 current address of the registered owner of the vehicle on file with
9 the department, with a certificate of mailing obtained as evidence
10 of service, an exact and legible duplicate copy of the notice when
11 filed with the magistrate shall constitute a complaint to which the
12 defendant may enter a plea. Preparation and delivery of a notice to
13 appear pursuant to this section is not an arrest.

14 40520. (a) A notice to appear issued pursuant to Section 40518 for
15 an alleged violation recorded by an automatic enforcement system
16 shall contain, or be accompanied by, an affidavit of nonliability
17 and information as to what constitutes nonliability, information as
18 to the effect of executing the affidavit, and instructions for
19 returning the affidavit to the issuing agency.

20 (b) (1) If a notice to appear is sent to a car rental or leasing
21 company, as the registered owner of the vehicle, the company may
22 return the notice of nonliability pursuant to paragraph (2), if the
23 violation occurred when the vehicle was either leased or rented and
24 operated by a person other than an employee of the rental or
25 leasing company.

26 (2) If the affidavit of nonliability is returned to the issuing
27 agency by the registered owner within 30 days of the mailing of
28 the notice to appear together with the proof of a written rental
agreement or lease between a bona fide renting or leasing company
and its customer and that agreement identifies the renter or lessee
and provides the driver's license number, name, and address of the
renter or lessee, the agency shall cancel the notice for the
registered owner to appear and shall, instead, issue a notice to
appear to the renter or lessee identified in the affidavit of
nonliability.

Nothing in the Vehicle authorizes a police search of the DMV or Postal
records to locate potential red light violators. The Code only provides for the
registered owner to sign and Affidavit of Non Liability if the owner chooses to
identify whom they may think the driver is. The registered owner is not required to

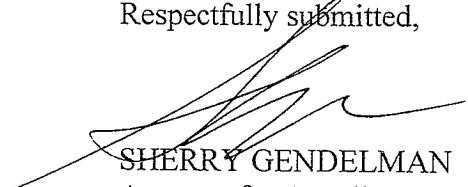
1 identify the driver however. The registered owner can appear in court or at the
2 issuing agency and state that they are not the driver. These procedures were not
3 followed in this case.

4
5 CONCLUSION:

6 No conviction of VC Section 21453(a) can be sustained unless the record
7 contains substantial evidence supporting each element of the charged offense.
8 Absent the registered owner of the vehicle and/or the Custodian of Records for of
9 ATS, or other ATS employees, the entire photo packet and video, and testimony of
10 Officer Pangalos, lacked foundation, were inadmissible hearsay, and violated
11 Defendant's Sixth Amendment rights. There was no evidence that the procedures
12 outlined in CVC § 21455.5(2)(B), CVC §21455.6, CVC § 40518(a) or CVC §
13 40520 (a)&(b)(1)&(2) were complied with. The Appellant respectfully requests this
14 court set aside the judgment of conviction, and dismiss the citation.
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17 DATED: February 16, 2011

Respectfully submitted,

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20 SHERRY GENDELMAN
Attorney for Appellant.