

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY ORANGE
APPELLATE DIVISION

OCT 23 2009

ALAN CARLSON, Clerk of the Court

A. Thau
BY A. THAU A

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff/Respondent

Appellate Number: 30-2009-00304893

Vs.

██████████ KHALED

Case No.: SA128676PE

Defendant/Appellant

APPELLANT ██████████ KHALED'S OPENING BRIEF

On Appeal from the Superior Court of California – County of Orange

HONORABLE Commissioner Daniel Ornelas Presiding

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APPELLANT'S OPENING BRIEF

FACTUAL BACKGROUND AND JUDICIAL PROCEEDINGS

On August 2, 2008 an Automated Enforcement System, operated by the City of Santa Ana and its Police Department, located at the intersection of Seventeenth Street and Tustin Ave. in the City of Santa Ana, recorded an alleged violation of Vehicle Code §21453(a). This incident resulted in a Notice of Violation being issued to, and criminal charges filed in court against, Appellant [REDACTED] Khaled. On December 10, 2008 Defendant requested and was granted traffic school. On February 6, 2009 Defendant requested that he be allowed to withdraw his no contest plea, and enter a plea of not guilty. The Court granted his request and trial was set for April 1, 2009. Through Counsel, Appellant entered a plea of not guilty, and the matter was set for trial on April 1, 2009. At trial, Counsel represented Appellant pursuant to Penal Code §977(a), and stipulated to the identity of Appellant as the defendant. By stipulation of the parties the Court agreed that the same evidence would be presented and objections made as the previous trial in case number SA 123981PE, *People v. [REDACTED] Romero*. Defendant was found guilty.

STATEMENT OF APPEALABILITY

This appeal is taken from a judgment of Orange County Superior Court and is authorized by California Code of Civil Procedure §904.1 (a)(1).

ISSUES PRESENTED

1. Requirement that City issue warning notices for thirty days prior to use of Automated Enforcement System (AES) to issue citations.

Does Vehicle Code §21453.5 (b)'s prohibition on operation of an Automated Enforcement System without having first issued warning notices during the system's first 30 days of use apply to each individual intersection approach?

2. Admissibility of evidence purporting to prove City had complied with Vehicle Code §21455.5(b)

Did the People provide adequate foundation for the documents admitted into evidence such that they would fall within any exception to the hearsay rule?

3. Substantiality of evidence supporting the Court's finding that the City had complied with Vehicle Code §21455.5(b).

Did substantial evidence support the Court's finding that the City's had complied with the warning notice requirement of Vehicle Code §21455.5(b)?

STANDARD OF REVIEW

Whether substantial evidence supports the conclusion of the trier of fact. (*People v.*

Crittenden (1994) 9 Cal.4th 83, 139 [36 Cal.Rptr.2d 474, 885 P.2d 887]; *People v. Johnson* (1980) 26 Cal.3d 557, 575-577 [162 Cal.Rptr. 431, 606 P.2d 738, 16 A.L.R.4th 1255].)

To be “substantial,” evidence must be reasonable, credible, and of solid value. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767 [60 Cal.Rptr.2d 1, 928 P.2d 485].)

ARGUMENT

I

THE REQUIREMENT THAT WARNING NOTICES BE ISSUED FOR THIRTY DAYS PRIOR TO ISSUING CITATIONS PURSUANT TO VEHICLE CODE §21455.5(B) APPLIES TO EACH INTERSECTION APPROACH WHERE AN AES IS INSTALLED.

Vehicle Code 21455.5 reads in pertinent part:

(a) The limit line, the intersection, or a place designated in Section 21455, where a driver is required to stop, may be equipped with an automated enforcement system if the governmental agency utilizing the system meets all of the following requirements:

(1) Identifies the system by signs that clearly indicate the system's presence and are visible to traffic approaching from all directions, or posts signs at all major entrances to the city, including, at a minimum, freeways, bridges, and state highway routes.

(2) If it locates the system at an intersection, and ensures that the system meets the criteria specified in Section 21455.7.

(b) Prior to issuing citations under this section, a local jurisdiction utilizing an automated traffic enforcement system shall commence a program to issue only warning notices for 30 days. The local jurisdiction shall also make a public announcement of the automated traffic enforcement system at least 30 days prior to the commencement of the enforcement program.

a. As used in the statute, the term “system” refers to the electronic and mechanical equipment which is necessary to monitor a particular intersection approach for red light violations.

As used throughout the statute, the term system is used to describe the electronic and/or mechanical equipment installed at an intersection. For example:

First: 21455.5 (a) states: “The limit line, the intersection, or a place designated ... may be equipped with an automated enforcement system...” Here, the statute refers to the limit line, intersection or place designated in the singular, not the plural. This clearly indicates that automated enforcement equipment monitoring each limit line, intersection or place designated constitutes a system in and of itself.

Second: 21455.5 (a)(1) states: “Identifies the system by signs that clearly indicate the system's presence and are visible to traffic approaching from all directions...” Here, the statute clearly refers to the presence and use of automated enforcement equipment at a particular intersection. While the statute certainly allows for the placement of signs at only the major endurances to the city, this cannot reasonably be read to mean that the use of AES equipment at several intersections constitutes a single system under the meaning of the statute.

Third: 21455.5(a)(2) states: “If it locates the system at an intersection, and ensures that the system meets the criteria” Here, the statute clearly indicates that an intersection equipped with automated enforcement equipment constitutes a system.

Fourth: 21455.5(b) states: “Prior to issuing citations under this section, a local jurisdiction utilizing an automated traffic enforcement system shall commence a program to issue only warning notices for 30 days. The local jurisdiction shall also make a public announcement of the automated traffic enforcement system at least 30 days prior to the commencement of the enforcement program.” Here, in keeping with the use of the term “system” in the authorizing statute, “system” can only be read to mean each system or intersection at which automated enforcement equipment is to be used to issue citations for red light violations.

Fifth 21455.5 (c) states: “Only a governmental agency, in cooperation with a law enforcement agency, may operate an automated enforcement system.” Here, there is nothing to infer that the term “system” refers to a city’s over all automated enforcement program or plan. This section is most reasonable read to mean that a government agency, in cooperation with law enforcement may operate one or several automated enforcement systems. The statute then goes on to define the term “operate”.

Additionally, Vehicle Code §21455.7 states: “At an intersection at which there is an automated enforcement system in operation...” Again, the terms system and intersection are used in the singular, indicating that a “system” is intended to apply to “an intersection”.

The interpretation of system is consistent throughout the statutory scheme implemented by Vehicle Code 21455.5 *et. seq.* The clear meaning intended by the legislature is that Automated Enforcement System refers to the system in operation at an individual intersection; not the overall use of one or more systems.

The legislature in 2003 rejected an amendment to Senate Bill 780 (2003-2004 Reg. Sess.) which would have expressly provided for the warning period of section 21455.5(b) to occur “during the first 30 days after the first recording unit is installed.” The City may dispute the legal value and importance of this fact. However, it clearly shows that Appellant’s interpretation of the statute is correct. Otherwise, the legislature would have had no reason to introduce such language as to change the thirty day warning requirement to apply only to the first installation.

- b. The term “program” refers to the actions of the City necessary to implement and continue operation of an AES system or systems that may be placed at intersection approaches within the City.

In reading §21455.5(b) , the term “program” is used in the context of the actions the city must take to meet the requirements the legislature imposed to gain lawful authority to operate an automated enforcement system and commence its actual enforcement program.

Again, 21455.5(b) states: Prior to issuing citations under this section, a local jurisdiction utilizing an automated traffic enforcement system shall commence a program to issue only warning notices for 30 days. The local jurisdiction shall also make a public announcement of the automated traffic enforcement system at least 30 days prior to the commencement of the enforcement program.

Taken in context, the terms system and program are not synonymous. The term system refers to a set of equipment necessary to monitor the intersection approach for red light violations, independent of other intersection approaches that may or may not be so equipped. This is in keeping with the “dictionary” definition of the word “system” (see, e.g., Merriam-Webster’s Collegiate Dictionary (10th ed.1993) p. 1194). Each set of monitoring equipment (cameras, photo flash lights etc.) constitutes a single system, which does not rely on the functioning of other such systems in order to perform its function.

- c. Legislative intent is clear that warning notices are required prior to commencing operation of AES.

The legislature clearly intended that motorists be provided with fair warning that the government intends to use AES technology to enforce red light violations. This is analogous to the requirement set out in Vehicle Code §40800 that police enforcing the traffic laws use marked cars and are in uniform. This is indicated by the requirements that the city hold a public hearing, issue only warning notices for thirty-days prior to issuing citations, post signs and make a public announcement thirty-days prior to issuing citations. The legislature clearly expressed its intent that the driving public not be taken by surprise by the installation and use of an automated enforcement system at each intersection where the city installs such a system.

- d. Absent compliance with thirty day warning notice requirement, City exceeded the scope of authority granted by legislature.

The legislature also made it perfectly clear that the authority to operate an AES is contingent upon compliance with §§ 21455.5 (a)(1), (a)(2) and (b). "Prior to issuing citations under this section, a local jurisdiction utilizing an automated traffic enforcement system shall...." The term "prior to" can mean nothing other than its plain meaning and "shall" is defined by Vehicle Code §15: "Shall" is mandatory....

Where the police act in excess of the authority granted to them by the legislature, the conviction must be overturned. Just as in *People v. Landis*, the City of Santa Ana and the Santa Ana Police Department exceeded its jurisdiction. (*People v. Landis* (2007)156 Cal.App.4th Supp. 12, 78Cal.Rptr.3d 267)

- e. City would not be burdened or prejudiced if made to comply with warning notice requirement.

If made to comply with the thirty-day warning notice requirement, the City would simply have to stop issuing citations for thirty days, issue warning notices for that period, and resume issuing citations when compliance had been accomplished. The City would likely lose revenue, but this is not a new issue. This Appellate Division has ruled on three separate occasions that the City must issue warning notices for thirty days prior to issuing citations for each camera installation. Out of an abundance of caution, the City should have complied at least four years ago.

II

THE COURT IMPROPERLY ADMITTED EVIDENCE THAT LACKED FOUNDATION AND CONSTITUTED HEARSAY NOT FALLING WITHIN ANY EXCEPTION TO THE HEARSAY RULE

- a. People's exhibit number 4 was admitted in spite of the People's failure to lay a foundation for the admissibility of the document.

People's Exhibit #4: Two single-sided pages entitled "City of Santa Ana's automated Red Light Enforcement System" This document purports to prove that the City of Santa Ana had complied with the various sections of the Vehicle Code which grant statutory authority for the City's operation of its several automated enforcement systems. The document contains the following statement. "Prior to issuing citations, the city of Santa Ana initiated a warning period that began May 18th 2003 and concluded on June 30th 2003. This warning period lasted 44 days, exceeding the statutory requirement of 30 days." This is clearly an out of court statement intended to prove the truth of the matter asserted; that the city issued warning notices during the period from May 18, 2003 to June 30, 2003. Absent testimony of a witness with personal knowledge of the facts stated, it is hearsay and therefore inadmissible. Defense counsel objected to the admissibility of the document for lack of foundation and that the document was hearsay. The objection

was overruled. (SS page 3, line 9)

People's exhibit 4 should not have been admitted into evidence. First, it could not be admitted as a business record of the City or its AES contractor, Redflex, under Evidence Code §1271. The document is not certified by the custodian of records of either the City of Santa Ana, or Redflex.

Evidence Code § 1271 has four requirements that must be met before a document can be admitted under the business records exception to the hearsay rule. There is nothing in the court record to indicate that People's Exhibit 4 met any of the following:

- (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.

On Cross-examination, Officer Berg testified that He had not personally issued any warning notices for the first 30 days of operation of any of the automated enforcement systems located in Santa Ana, or for the system located at the intersection of Seventeenth Street and Tustin Ave. He also testified that he did not have personal knowledge of any warning notices having been issued for the first 30 days of operation of any of the automated enforcement systems located in Santa Ana or the system located at the intersection of Seventeenth Street and Tustin Ave. (SS page 3, line 9)

There was no testimony at trial regarding; when the writing was made, or by whom; that it was made in the regular course of business; or, what the source of the information was. Clearly, Officer Berg could not and did not provide a foundation for the admissibility of People's Exhibit 4, as he was not the custodian of records and could not testify as to the documents identity and mode of its preparation.

Evidence Code §1280 has three requirement that must be met before a document may be admitted under the official records exception to the hearsay rule. There is nothing in the court record to indicate that People's Exhibit 4 met any of the following:

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

Again, considering the testimony of Officer Berg as stated above, there was nothing before the Trial Court that could have, even under the most liberal interpretation of any exception to the hearsay rule, laid a foundation for admitting People's Exhibit 4.

Absent proper foundation for the document, People's Exhibit 4 was inadmissible. (Evidence Code §403(a) . Clearly, Officer Berg could not provide a foundation for the document, nor could he testify to the City's compliance with the warning notice

requirement based on his personal knowledge.

- b. People's exhibit number 3 was admitted in spite of the People's failure to lay a foundation for the admissibility of the document.

People's exhibit 3 consists of not only statement concerning the fact that the documents, photographs and video are obtained and kept in the regular course of business at Redflex, but goes beyond that. The document also contains statements of fact as to how the data is processed etc. This information is more that what can be admitted simply as business records. As can be readily seen from Officer Berg's testimony concerning People's exhibit 3, the no one was available to testify at trial that could provide testimony that would provide a foundation for the information provided in the document. (SS page 2, line 9 – page 3 line 2

Additionally, the trial court was left to wonder which of the three "Co-Custodian's" of records actually prepared People's exhibit 3, if any of them, in fact did. None of the three individuals were present in court to testify about the purported business records, as is required by Evidence Code §1271. Since People's exhibit 3, which purported to provide a foundation for all other exhibits, should have been excluded, then all of the people's documents, photographs and video should have been excluded as well.

III

SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE COURT'S FINDING THAT THE CITY HAD COMPLIED WITH VEHICLE CODE §21455.5(B)

- a. Even if evidence were properly admitted, it does not constitute substantial evidence to support the Court's finding of compliance.

At trial, the only evidence of the City's compliance with the thirty-day warning mandate was the following statement in People's Exhibit 4:

Prior to issuing citations, the city of Santa Ana initiated a warning period that began May 18th 2003 and concluded on June 30th 2003. This warning period lasted 44 days, exceeding the statutory requirement of 30 days.

This statement fails to provide any information as to which if any intersection the warning period relates to (not even the first intersection where an AES was installed). It certainly does not indicate that the warning period was complied with at the intersection of Seventeenth St. and Tustin Ave., where Appellant received his citation.

Therefore, even if People's Exhibit 4 were properly admitted into evidence, The statement purporting to prove compliance with the warning period requirement is not reasonable, credible, and of solid value, and was thus insufficient to support the courts finding that the City had complied with the legislative mandate.

CONCLUSION

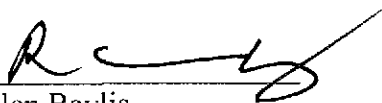
The only reasonable interpretation of the term system as used in the statute is that it refers to each installation of intersection monitoring equipment at an intersection as a system, separate and apart from other systems that may be in use in the city. As this Court has ruled in the past, the legislatively mandated thirty-day warning notice requirement of Vehicle Code §21455.5(b) applies to an automated enforcement system installed at each intersection where it is installed. As new systems are installed, the city must issue only warning notice for thirty days prior to issuing citation through use of that system.

The evidence presented to the court did not provide sufficient evidence to support the court's finding that the city complied with the thirty-day warning notice requirement at any intersection; and certainly not the intersection of Seventeenth St. and Tustin Ave., as mandated by Vehicle Code §21455.5(b).

People failed to lay a proper foundation for its exhibits, particularly exhibits #s 3 and 4. Both of these documents lacked foundation and consisted of hearsay statements that were not subject to any exception to the hearsay rule.

This Court should overturn the conviction.

Dated: October 23, 2009

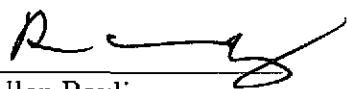


R. Allen Baylis
Attorney for Defendant/Appellant

CERTIFICATE OF COMPLIANCE

I Certify that the attached OPENING BRIEF contains 3,584 words as determined by Microsoft Word.

Dated: October 22, 2009



R. Allen Baylis
Attorney for Defendant/Appellant

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

THE UNDERSIGNED DECLARES AS FOLLOWS:

I AM EMPLOYED IN THE County of Orange, State of California. I am over the age of eighteen and not a party to the within action. My business address is 9042 Garfield Ave., Suite 306, Huntington Beach, CA 92646, County of Orange, State of California.

On 10-22, 2009, I served the following documents describe as:
DEFENDANT [REDACTED] KHALED'S OPENING BRIEF, APPEAL CASE # 30-2009-00304893,
TRIAL COURT CASE # SA128676PE
Addressed as follows:

See Service list - attached

By Placing the true copies thereof enclosed in sealed envelope addressed as stated on the attached mailing list.

(BY MAIL) I caused such envelope(s) with postage fully prepaid thereon to be placed in the United States Mail at Huntington Beach, California.

(BY PERSONAL SERVICE) I caused such envelope to be hand-delivered to the address listed above.

(BY FACSIMILIE MACHINE) I caused the above-referenced document(s) to be transmitted to the above named person(s) at the following telecopier number:

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with U. S. Postal Service on the same day in the ordinary Course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on 10-22, 2009 at Huntington Beach, California.


R. Allen Baylis

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Trial Court Case No. SA128676PE

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