Elizabeth Aronson, Esq., SBN 167869

Attorney for Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

MINOR OFFENSE DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

Vs.

SALMA P Et Al,

Defendants.

IN RE 8 SDPD PHOTO RED LIGHT CASES

HEARD 06-23-2010

B16464A; B16681A, B16772A, B17833A, B17968A, B17983A, B18095A, B18404A

1.

Background

Based upon evidence obtained via an automated photographic enforcement system within the City of San Diego, Defendants in the above-referenced cases were cited with failing to stop for a red signal in violation of Vehicle Code §21453. At the trial on the matters, San Diego Police Officer Graves testified as the only witness on behalf of the prosecution. Upon cross-examination, Officer Graves testified that he did not witness the alleged traffic violation. Rather, a private company contracts with the city to install, maintain and store all evidence against Defendants regarding the alleged violation. The person who entered the relevant information into the camera computer system did not testify nor

were they subject to cross-examination regarding the underlying source of that information. The person or persons who maintain the system did not testify. No one with personal knowledge testified about how often the system is maintained. No one with personal knowledge testified regarding how often the date and time imprinted on the photographic and video materials produced by the company are verified or corrected. The custodian of records for the company that contracts with the city to maintain, monitor, store and disperse these photographs did not testify. The person with direct knowledge of the workings of the camera-computer system did not testify. Further, Officer Graves testified that he sometime in the distant past attended a training session where he was instructed on the overall working of the system at the time of the training. Officer Graves was unable to testify about the specific procedure for programming and storage of the red light camera system information.

Based upon all of the foregoing, Defendants objected to the admissibility of all documents produced by ATS. The above cases were taken under submission June 23, 2010, Hon. Comm. Karen A. Riley presiding, for ruling on the defense attorneys' motions prior to trial to exclude the entire photo red light evidence packet for each case due primarily to inadmissibility under Melendez-Diaz v. Massachusetts (U.S. 2009) 129 S. Ct. 2527, People v. Khaled (App. Div. Orange County Superior Court May 2010) and the Confrontation Clause of the Constitution.

The motions were argued orally on behalf of the defendants, no deputy city attorney was present, no defendants appeared and only SDPD Graves appeared as a witness for the City.

Thereafter, in light of the impact of admissibility rulings on these cases and those to inevitably follow, and to avoid conflicting rulings if the cases are addressed piecemeal at this and other branch courts, the Court requested that counsel for both sides on all cases brief the evidentiary issues relied upon.

II.

Discussion

1. The Prosecution Failed to Provide Substantial Evidence That Warning Notices Were Issued For Thirty Days Prior to Issuing Citations Pursuant to Vehicle Code §21455.5(B).

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.

No evidence was presented at trial regarding whether or not a public announcement of the automated traffic enforcement system was made at least thirty days prior to the commencement of the program. The Declaration of Custodian of Records may have included language purporting to prove that the City of San Diego 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, including but not limited to a statement regarding whether or not, prior to issuing citations, the city of San Diego initiated a thirty day warning period. However, this is clearly an out of court statement intended to

prove the truth of the matter asserted. 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 portions of the document was hearsay and should be struck.

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 the Declaration of Custodian of Records 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 Graves 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 San Diego. 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 San Diego nor the system located at the relevant intersection.

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 Graves could not and did not provide a foundation for the admissibility of the information contained in the Declaration of Custodian of Records 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 Graves as stated above, there was nothing before the Court that could have, even under the most liberal interpretation of any exception to the hearsay rule, laid a foundation for admitting the statements made within the Declaration of Custodian of Records.

Absent proper foundation for the document, the statements made within the Declaration of Custodian of Records were inadmissible. (Evidence Code §403(a) . Clearly, Officer Graves 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.

2. The Prosecution Failed to Provide Substantial Evidence That Uniform Guidelines For Screening and Issuing Violations Pursuant to Vehicle Code §21455.5 Had Been Complied With.

VC 21455.5(2)(c)(1) requires uniform guidelines for screening and issuing violations. Yet citations are still regularly issued to registered drivers despite clear differences of race, sex, and/or age of the photographed driver. When asked whether Officer Graves was provided written uniform guidelines prior to his issuing Notices to Appear, Officer Graves simply stated that he compared the photographs captured by the automated system with the photos of the registered owners on file with the DMV. However, absolutely no evidence was provided that uniform guidelines were developed nor any procedure established to ensure that the guidelines were complied with. In fact, in one of the cases at bar, Officer Graves admitted that he did not have nor had he previously seen a DMV photograph to compare to the driver of the vehicle captured by the AES system. Accordingly, the prosecution failed to meet its burden of producing substantial evidence that this code section has been complied with.

3. The Prosecution Failed to Provide Substantial Evidence That the AES Equipment is Regularly Inspected.

Further, VC 21455.5(2)(c)(2)(B) requires ensuring that the equipment is regularly inspected. Here, there is no admissible evidence that the equipment is regularly inspected. The only evidence presented regarding this issue was the Maintenance Job Statistic purportedly prepared by an AES technician.

The maintenance record itself does not state how often the technician inspects the equipment. Further, although the record contains a check list of maintenance duties that the technician purportedly performs, Defendants are unable to cross-examine the technician to insure that the inspection and maintenance was properly conducted.

Perhaps most interestingly, the Maintenance report is purportedly signed under oath by the technician. As such, it clearly evidences that the document was prepared for use at subsequent trial. In Melendez-Diaz v. Massachusetts 129 S. Ct. 2527 (2009), the Supreme Court concluded that certificates are affidavits which fall within the 'core class' of testimonial statements covered by the Confrontation Clause of the Sixth Amendment.

"Various formulations of the core class of testimonial statements exist: ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements...contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 2529-30, quoting Crawford v. Washington 541 U.S. 36 (2004) at 51-52 (internal quotation marks and citations omitted).

Here, as evidenced by the technician's signature under oath, the maintenance reports are incontrovertibly a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." Accordingly, absent a showing that the technician was unavailable to testify at trial **and** that Defendants had a prior opportunity to cross-examine him, Defendants were entitled to "be confronted with" the technician at trial. Id. at 2531.

The People may argue that the technician's affidavit is admissible without confrontation because they are a type of official or business record properly subpoenaed. However, the maintenance records do not qualify as traditional official or business records, and even if they did, its author would be subject to confrontation nonetheless.

"Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is the production

of evidence for use at trial. The Supreme Court's decision in Palmer v. Hoffman 318 U.S. 109 (1943) made that distinction clear. There the Court 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. Here, by signing under oath, the Technician has made clear that he prepared the report knowing it would later be used at trial.

The prosecution may further argue that there was no Confrontation Clause violation in this case as Defendants had the ability to subpoena the technician. But that power—whether pursuant to State law or the Compulsory Process Clause—is no substitute for the right of confrontation. Rather, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses to court. Melendez-Diaz at 2546.

However, even if this document were admissible, it fails to state that the equipment is regularly inspected. Moreover, Officer Graves cannot testify as to whether or not the equipment is regularly inspected as he admittedly does not inspect the equipment itself.

4. The Prosecution Failed to Provide Substantial Evidence That the AES Equipment Was properly Installed and Calibrated.

Moreover, VC 21455.5(2)(c)(2)(C) requires certification that the equipment is properly installed and calibrated and is operating properly. Here, there is no evidence that the equipment is calibrated. The system determines the speed of vehicles approaching the intersection, the time lapse of the signals, and the time and date of violation. However, the system is not checked or calibrated to ensure that these timing devices are accurate. Further, as more fully discussed above, there is no evidence that the equipment was operating properly. Officer Graves admittedly was not present at the time of the alleged violation and any testimony he had given regarding this issue was hearsay.

Based upon all of the foregoing, the prosecution failed to meet its burden of proving that C.V.C. 21455.5 was complied with.

5. There is No Evidence that V.C. §21455.7 Has Been Complied With Regarding Minimum Yellow Light Change Intervals.

Pursuant to VC 21455.5(d) and 21455.5(E), the overseeing of the establishment or change of signal phases and the timing thereof may not be contracted out by the governmental agency. Therefore, the City must provide evidence that, among other things, pursuant to VC 21455.7, the minimum yellow light change interval was established in accordance with the Traffic Manual of the Department of Transportation.

Subsection (b) states that the "yellow light change intervals relating to designated approach speeds provided in the Traffic Manual of the Department of Transportation are mandatory minimum yellow light intervals. However, here there is no admissible evidence that the governmental agency complied with V.C. §21455.7. Rather, the only evidence regarding the yellow light interval is alleged at the bottom of the maintenance report and on the digital bar of the photographic evidence. However, besides the fact that such evidence is hearsay, it is further contained only in documents prepared by employees of the AES. Since, pursuant to statute, the timing of the yellow light interval cannot be contracted out to the AES, only a governmental agency employee may present evidence of the yellow light timing.

Here, Officer Graves admittedly has no personal knowledge regarding the timing of the yellow light change intervals. Accordingly, the prosecution failed to meet its burden of proof.

IV.

CONCLUSION

Based upon any and all of the foregoing, the prosecution has failed to meet its burden of proof beyond a reasonable doubt regarding the alleged violations and the citations should be dismissed.

LAW OFFICE OF ELIZABETH ARONSON

Dated: July 15, 2010

By: _____

Elizabeth Aronson, Esq.
Attorney for Defendants

People
v.
P et al.

DECLARATION OF PERSONAL SERVICE

I, the undersigned individual, declare: That I am, and was at the time of service of the papers herein referred to, over the age of eighteen years, and not a party to the action and am employed in the County of San Diego, California. My business address is 2139 First Avenue, San Diego, California 92101.

I personally served the following documents:

IN RE 8 SDPD PHOTO RED LIGHT CASES HEARD 6-23-2010: B16464A; B16681A; B16772A; B17833A; B17968A; B17983A; B18095A; B18404A,
of which the original document, or a true and correct copy, is attached, by facsimile at 8:04 a.m. to the City Attorney's Office at Facsimile Number 619.236.7215 and personally serving a copy at::

San Diego City Attorney
1200 Third Avenue, Suite 1620
San Diego, California 92101

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Executed on July 16, 2010.

Elizabeth Aronson