

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

JUSTICE CENTER: Central Justice Center
Civil Operations - Appellate Division
700 Civic Center Dr. West
Santa Ana, CA 92701

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MAY 25 2010

APPELLANT: **Khaled**

ALAN CARLSON, Clerk of the Court

RESPONDENT: **People**

BY: J. GOMEZ, DEPUTY

NOTICE OF FILING OF JUDGMENT/ORDER
Appellate Division

APPEAL CASE NUMBER:
30-2009-00304893
TRIAL COURT CASE NUMBER:
SA128676PE

To the above named parties and their attorneys of record:

You are notified that a **Judgment** in the above entitled matter was filed on: **May 21, 2010**

A Copy of the **Judgment** is attached for reference.

CLERK'S CERTIFICATE OF MAILING

R. Allen Baylis
9042 Garfiled Ave. #306
Huntington Beach, CA 92646

By Interoffice Delivery:

Central Justice Center – Traffic –

Hon. Daniel Ornelas, Commissioner - C/O JAG

Hon. Erick L. Larsh - Supervising Judge - Dept. C55

Anthony Rackauckas
O.C. District Attorney
P.O. Box 808
Santa Ana, CA 92701

I certify that I am not a party to this action and that this certificate was mailed in accordance with Section 1013a of the Code of Civil Procedure. A copy of this Notice of Filing of Judgment/Order with a copy of the Judgment/Order and Minute Order dated 5/25/10 were deposited in the United States mail, in a sealed envelope with postage fully prepaid addressed as shown above. The mailing and this certification occurred at Santa Ana, California, on **May 25, 2010**

ALAN CARLSON, Clerk of the Court

JORGE GOMEZ

J. Gomez, Deputy Clerk

NOTICE OF FILING OF JUDGMENT/ORDER

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

MAY 21 2010

ALAN CARLSON, Clerk of the Court
[Signature]
BY J. GOMEZ *[Signature]*

CERTIFIED FOR PUBLICATION

APPELLATE DIVISION

SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

PEOPLE OF THE STATE OF)
CALIFORNIA,)
)
Plaintiff and)
Respondent,)
)
vs.)
)
TAREK KHALED,)
)
Defendant and)
Appellant.)
_____)

CASE NO. 30-2009-304893

JUDGMENT ON APPEAL
from the
SUPERIOR COURT
of
ORANGE COUNTY
CENTRAL JUSTICE CENTER

HON. DANIEL M. ORNELAS
COMMISSIONER

This appeal involves an issue far too often presented to this court, namely the admissibility of evidence and the statutory compliance with the procedures employed by several municipalities in this county in what have come to be known as "photo enforcement" citations.

On August 2, 2008, the police department of the City of Santa Ana issued a traffic citation to the appellant alleging a violation of California Vehicle Code section 21453, subdivision (a). A traffic trial was held on the matter. The prosecution sought to establish the majority of the violation with a declaration that was intended to support the introduction of photographs purporting to show the appellant driving through an intersection against a red light. Appellant objected to the

1 introduction of the photographs and declaration as inadmissible
2 hearsay, and violative of appellant's confrontation rights. The
3 objection was overruled and the trial judge admitted the
4 photographs as business records, official records, and because a
5 proper foundation for the admission had been made based on the
6 submitted declaration.
7

8 We hold that the trial court erred in admitting the
9 photographs and the accompanying declaration over the
10 appellant's hearsay and confrontation clause objections. Absent
11 the photographs and content in the declaration, there is
12 insufficient evidence to support the violation. Accordingly we
13 reverse the judgment.¹
14

15 I. Factual Summary

16 The underlying facts in this case are fairly simple. No
17 police officer witnessed the alleged traffic violation.
18 Instead, a police officer testified about the general area
19 depicted in a photograph taken from a camera installed at an
20 intersection in Santa Ana. A particular private company
21 contracts with the municipality to install, maintain, and store
22 this digital photographic information. The officer testified
23 these photographs are then periodically sent back to the police
24 department for review as possible driving violations.
25
26

27
28 ¹ Appellant and real party in interest, the City of Santa Ana address issues regarding the prosecution of photo-enforcement cases in general and the lack of notice in this case, that we find unnecessary to address in light of the insufficiency of the evidence to sustain the trial court's finding.

1 To be more specific, the photographs contain hearsay evidence
2 concerning the matters depicted in the photograph including the
3 date, time, and other information. The person who entered that
4 relevant information into the camera-computer system did not
5 testify. The person who entered that information was not subject
6 to being cross-examined on the underlying source of that
7 information. The person or persons who maintain the system did
8 not testify. No one with personal knowledge testified about how
9 often the system is maintained. No one with personal knowledge
10 testified about how often the date and time are verified or
11 corrected. The custodian of records for the company that
12 contracts with the city to maintain, monitor, store, and
13 disperse these photographs did not testify. The person with
14 direct knowledge of the workings of the camera-computer system
15 did not testify. Instead, the prosecution chose to submit the
16 testimony of a local police officer, Santa Ana Police Officer
17 Alan Berg. This witness testified that sometime in the distant
18 past, he attended a training session where he was instructed on
19 the overall working of the system at the time of the training
20 (See Settled Statement, page 1, lines 24-26 (hereafter SS 1:24-
21 26)). Officer Berg was unable to testify about the specific
22 procedure for the programming and storage of the system
23 information.
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1 II. Analysis

2 **A. Admissibility of videotape and photographic evidence:**

3
4 These photo enforcement cases present a unique factual
5 situation to the courts regarding the admissibility of
6 videotapes and photographs. There are two types of situations
7 where a videotape or photographs are typically admitted into
8 evidence where the photographer or videographer does not
9 testify. The first involves a surveillance camera at a
10 commercial establishment (often times a bank or convenience-
11 liquor store). In those situations, a person testifies to being
12 in the building and recounts the events depicted in the
13 photographs. Courts have consistently held that such testimony
14 establishes a sufficient foundation if the videotape is a
15 "reasonable representation of what it is alleged to portray."
16 (See generally People v. Gonzalez (2006) 38 Cal.4th 932, 952-953,
17 People v. Carpenter (1997) 15 Cal.4th 312, 385-387; People v.
18 Mayfield (1997) 14 Cal.4th 668, 745-747; Imwinkelried, California
19 Evidentiary Foundations, p. 115, 117 (3rd ed. 2000); also United
20 States v. Jernigan (9th Cir. 2007) 492 F.3d 1050 (en banc).)

21
22
23 The second situation involves what is commonly known as a
24 "nanny cam." In that situation, a homeowner hides a
25 surveillance camera in a room and then retrieves the camera at a
26 later time. At the court proceeding, that person establishes
27 the time and placement of the camera. This person also has
28

1 personal knowledge of when the camera was initially started and
2 when it was eventually stopped and retrieved.

3
4 Neither of these situations is analogous to the situation
5 at bar. Here the officer could not establish the time in
6 question, the method of retrieval of the photographs, or that
7 any of the photographs or the videotape was a "reasonable
8 representation of what it is alleged to portray." A very
9 analogous situation to the case at bar, however, is found in
10 Ashford v. Culver City Unified Sch. Dist. (2005) 130 Cal.App.4th
11 344, 349-450, where the court held that the unauthenticated
12 videotape allegedly showing employee's actions lacked sufficient
13 foundation to be admitted at an administrative hearing. And in
14 so holding the court noted that without establishing such a
15 foundation, the videotape was inadmissible.
16

17 **B. Exceptions to the Hearsay Rule are not applicable here.**

18 In lieu of establishing the necessary foundation by direct
19 testimony, the proponent of the evidence, respondent, argues
20 that independent hearsay exceptions justify admission of the
21 photographs under either the "Official Records Exception" or the
22 "Business Records Exception" of the Evidence Code.² Neither of
23 these sections support Respondent's contention. We recognize
24 that the trial court is vested with "wide discretion" in
25 determining whether sufficient foundation is laid to qualify
26 evidence under these hearsay exceptions. And "[o]n appeal,
27
28

2 Appellant's Opening Brief, pages 5-7; Respondent's Opening Brief, pages 8-10.

1 exercise of that discretion can be overturned only upon a clear
2 showing of abuse." People v. Beeler (1995) 5 Cal.4th 953, 978-
3 979.

4
5 **1. Official Records Exception (Evid. Code, § 1280).**

6 The prosecution argues that these documents were properly
7 admitted under Evidence Code section 1280, the "Official
8 Records" exception to the hearsay rule.³ A plain reading of this
9 section cannot support their position. Not only does this
10 section require that the writing be "made by ... a public employee
11 (subd. (a)) (e.g., Shea v. Department of Motor Vehicles (1998)
12 62 Cal.App.4th 1057 (forensic laboratory trainee did not qualify
13 as a "public employee")), but the public employee must be under
14 a legal duty to make such reports (subd. (a); e.g., People v.
15 Clark (1992) 3 Cal.4th 41, 158-159 (autopsy report originally
16 performed and prepared by now deceased coroner properly admitted
17 through testimony of another coroner).

18
19 Here, the signator of the document, Exhibit #3, states they
20 are employees of the "Redflex Traffic Systems." At no point does
21 the signatory state that "Redflex Traffic Systems" is a public
22 entity or that they are otherwise employed by a public entity.
23
24

25

3 Section 1280 provides: "Evidence of a writing made as a record of an act,
26 condition, or event is not made 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:

- 27 (a) The writing was made by and within the scope or duty of a public
employee.
28 (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 to indicate its trustworthiness."

1 Absent this critical foundation information, the document that
2 they created cannot be and is not an "official record" under
3 Evidence Code section 1280.
4

5 In addition, section 1280 requires that "[t]he sources of
6 information and method and time of preparation [of the record]
7 were such as to indicate its trustworthiness" (subd. (c)).
8 Except for the written content of Exhibit #3, which presents
9 another layer of hearsay, there is a total lack of evidence to
10 establish this element of section 1280 hearsay exception. Each
11 layer of hearsay must meet the foundational elements of this
12 exception or another hearsay exception, or the writing is
13 inadmissible. (People v. Reed (1996) 13 Cal.4th 217, 224-225 ("As
14 with all multiple hearsay, the question is whether each hearsay
15 statement fell within an exception to the hearsay rule."),
16 People v. Ayers (2005) 125 Cal.App.4th 988,995; People v. Baeske
17 (1976) 58 Cal.App.3d 775 (police report containing contents of
18 phone call to police department inadmissible under official
19 record exception).)
20
21

22 However, section 1280 does permit the court to admit an
23 official record or report without necessarily requiring a
24 witness to testify as to its identity and mode of preparation if
25 the court takes judicial notice or if sufficient independent
26 evidence shows that the record or report was prepared in such a
27 manner to assure its trustworthiness. (Bhatt v. State Dept. of
28

1 Health Services (2005) 133 Cal.App.4th 923, 929 [citations
2 omitted].)

3
4 Here, the record is totally silent as to whether the trial
5 court took judicial notice of anything, nor does it show
6 "sufficient independent evidence ... that the record or report was
7 prepared in such a manner to assure its trustworthiness." The
8 only evidence, outside of the contents of Exhibit #3, describing
9 the workings of the photo enforcement system and recordation of
10 information from that system came from Officer Berg who,
11 admittedly, was unable to testify about the specific procedure
12 from the programming and store of the system information (SS
13 1:24-26). Consequently, the trial court erred in admitting this
14 evidence as an official record.
15

16 **2. Business Records Exception (Evid. Code, § 1271).**

17 These exhibits also do not fall under the business record
18 exception under section 1271.4 In order to establish the proper
19 foundation for the admission of a business record, an
20 appropriate witness must be called to lay that foundation
21 (Bhatt, supra). The underlying purpose of section 1270 is to
22 eliminate the necessity of calling all witnesses who were
23
24

25 4 "Evidence of a writing made as a record of an act, condition or event is
26 not made inadmissible by the hearsay rule when offered to prove the act,
condition, or event if:

- 27 (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
28 event;
(c) The custodian or other qualified witness testifies to its
identity and the mode of its preparation;
(d) The sources of information and method and time of preparation
were such as to indicate its trustworthiness."

1 involved in a transaction or event (People v. Crosslin (1967)
2 251 Cal.App.2d 968). Generally, the witness who attempts to
3 lay the foundation is a custodian, but any witness with the
4 requisite firsthand knowledge of the business's record-keeping
5 procedures may qualify. The proponent of the admission of the
6 documents has the burden of establishing the requirements for
7 admission and the trustworthiness of the information. (People v.
8 Beeler, supra, 9 Cal.4th at p. 978.) And the document cannot be
9 prepared in contemplation of litigation. (Palmer v. Hoffman
10 (1943) 318 U.S. 109; Gee v. Timineri (1967) 248 Cal.App.2d 139.)

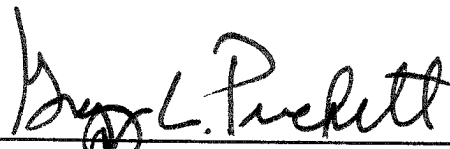
11
12 Here, Officer Berg did not qualify as the appropriate
13 witness and did not have the necessary knowledge of underlying
14 workings, maintenance, or record keeping of Redflex Traffic
15 System. The foundation for the introduction of the photographs
16 and the underlying working of the Redflex Traffic System was
17 outside the personal knowledge of Officer Berg. If the evidence
18 fails to establish each foundational fact, neither hearsay
19 exception is available (People v. Matthews (1991) 229 Cal.App.4th
20 930, 940).⁵

21
22 Accordingly, without such foundation, the admission of
23 Exhibits #1 and 3 was erroneous and thus the trial court abused
24 its discretion in admitting these exhibits. Without these
25
26

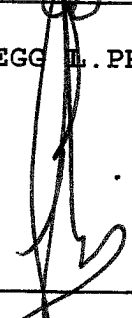
27
28 _____
5 This is not a situation where, in compliance with a lawfully issued
subpoena duces tecum, the custodian submitted a declaration attesting to the
necessary foundation facts (Evid. Code, § 1560 et. seq.). See also Taggart v.
Super Seer Corp. (1995) 33 Cal.App.4th 1697. No such subpoena duces tecum was
issued or introduced here.

1 documents, there is a total lack of evidence to support the
2 vehicle code violation in question.

3
4 The judgment is reversed and with directions that the
5 charge be dismissed (People v. Bighinatti (1975) 55 Cal.App.3d
6 Supp. 5, 7).

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11 _____
12 GREGG L. PRICKETT, Acting Presiding Judge*

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17 _____
18 GREGORY H. LEWIS, Judge

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21 _____
22 KAREN L. ROBINSON, Judge

23
24
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26
27 * Sitting by assignment of the Chief Justice of the California
28 Supreme Court.

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE**

MINUTE ORDER

Date: 05/25/2010

Time: 08:36:00 AM

Dept:

Judicial Officer Presiding: Appellate Panel

Clerk: Jorge A Gomez

Reporter/ERM:

Bailiff/Court Attendant:

Case No: **30-2009-00304893-CL-MC-CJC** Case Init. Date: 09/23/2009

Case Title: **People of the State of California vs. Khaled**

Case Category: Civil - Limited

Case Type: Misc Complaints - Other

APPEARANCES

Appellate Panel Judge(s):

Honorable Gregg L. Prickett, Assistant Presiding Judge

Honorable Gregory H. Lewis, Judge

Honorable Karen L. Robinson, Judge

Trial Court Case Number: SA128676PE

The court having reviewed and considered the matter finds the opinion meets the standards for certification for publication set forth in CRC Rule 8.1105(c)(2) and (c)(6). It applies existing rules governing the admissibility of evidence to the specific context of citations issued through an automated enforcement system. We are aware of no prior published authority which addresses specifically the requirements for admission of evidence in this context. The opinion addresses an issue of "continuing public interest," in that use of automated enforcement systems has become increasingly common in Orange County and throughout California. Published guidance on the admissibility of evidence in these cases is essential to trial courts hearing the cases, as well as law enforcement, municipalities employing automated enforcement systems and the motoring public. The opinion is therefore certified for publication.

Date: 05/25/2010

MINUTE ORDER

Page: 1

Dept:

Calendar No.: