Recent Cases on
Red Light Enforcement

September 2010

THE PEOPLE, Plaintiff and Respondent, v. TAREK KHALED, Defendant and Appellant.

CASE NO. 30-2009-304893

APPELLATE DIVISION, SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY

186 Cal. App. 4th Supp. 1*; *2010 Cal. App. LEXIS 1144

May 21, 2010, Filed

PRIOR HISTORY: [1]**
Judgment on Appeal from the Orange County, Central Justice Center, No. SA128676PE, Daniel M. Ornelas, Commissioner.

COUNSEL: Richard Allen Baylis for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Joseph W. Fletcher, City Attorney, and Ryan O'Connell Hodge, Deputy City Attorney, for City of Santa Ana as Amicus Curiae on behalf of Plaintiff and Respondent.

JUDGES: Gregg L. Prickett, Acting P. J., Gregory H. Lewis, J., and Karen L. Robinson, J.

OPINION

THE COURT.[*]--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.

* Gregg L. Prickett, Acting P. J.,[+] Gregory H. Lewis, J., and Karen L. Robinson, J.

+ Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

[*4]

On August 2, 2008, the police department of the City of Santa Ana issued a traffic citation to the appellant, Tarek Khaled, alleging a violation of *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 introduction of the photographs and declaration as inadmissible hearsay, and violative of appellant's confrontation rights. The objection was overruled and the trial judge admitted **[**2]** the photographs as business records, official records, and because a proper foundation for the admission had been made based on the submitted declaration.

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

1 Appellant and amicus curiae 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.

I. *Factual Summary*

The underlying facts in this case are fairly simple. No police officer witnessed the alleged traffic violation. Instead, a police officer testified about the general area depicted in a photograph taken from a camera installed at an intersection in Santa Ana. A particular private company contracts with the municipality to install, maintain, and store this digital photographic information. The officer testified these **[**3]** photographs are then periodically sent back to the police department for review as possible driving violations.

To be more specific, the photographs contain hearsay evidence concerning the matters depicted in the photographs including the date, time, and other information. The person who entered that relevant information into the camera-computer system did not testify. The person who entered that information was not subject to being cross-examined on 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 about how often the date and time 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 **[*5]** workings of the camera-computer system did not testify. Instead, the prosecution chose to submit the testimony of a local police officer, Santa Ana Police Officer Alan Berg. This witness testified that sometime in the distant past, he attended a training session where **[**4]** he was instructed on the overall workings of the system at the time of the training. Officer Berg was unable to testify about the specific procedure for the programming and storage of the system information.

II. *Analysis*

A. *Admissibility of videotape and photographic evidence*

(1) These photo enforcement cases present a unique factual situation to the courts regarding the admissibility of videotapes and photographs. There are two types of situations where a videotape or photographs are typically admitted into evidence where the photographer or videographer does not testify. The first involves a surveillance camera at a commercial establishment (often times a bank or convenience or liquor store). In those situations, a person testifies to being in the building and recounts the events depicted in the photographs. Courts have consistently held that such testimony establishes a sufficient foundation if the videotape is a " 'reasonable representation of that which it is alleged to portray ... .' " (*People v. Gonzalez (2006) 38 Cal.4th 932, 952 [44 Cal. Rptr. 3d 237, 135 P.3d 649]*; see generally *id. at pp. 952-953*; *People v. Carpenter (1997) 15 Cal.4th 312, 385-387 [63 Cal. Rptr. 2d 1, 935 P.2d 708]*; *People v. Mayfield (1997) 14 Cal.4th 668, 745-747 [60 Cal. Rptr. 2d 1, 928 P.2d 485]*; **[**5]** Imwinkelried, Cal. Evidentiary Foundations (3d ed. 2000) pp. 115, 117; see also *U.S. v. Jernigan (9th Cir. 2007) 492 F.3d 1050* (en banc).)

The second situation involves what is commonly known as a "nanny cam." In that situation, a homeowner hides a surveillance camera in a room and then retrieves the camera at a later time. At the court proceeding, that person establishes the time and placement of the camera. This person also has personal knowledge of when the camera was initially started and when it was eventually stopped and retrieved.

Neither of these situations is analogous to the situation at bar. Here the officer could not establish the time in question, the method of retrieval of the photographs, or that any of the photographs or the videotape were a " 'reasonable representation of that which it is alleged to portray ... .' " *People v. Gonzalez, supra, 38 Cal.4th at p. 952*.) A very analogous situation to the case **[*6]** at bar, however, is found in *Ashford v. Culver City Unified Sch. Dist. (2005) 130 Cal.App.4th 344, 349-350 [29 Cal.Rptr.3d 728]*, where the court held that the unauthenticated videotape allegedly showing employee's actions lacked sufficient foundation to be admitted at an administrative hearing. And in so holding, the court noted that without **[**6]** establishing such a foundation, the videotape was inadmissible.

B. *Exceptions to the hearsay rule are not applicable here*

In lieu of establishing the necessary foundation by direct testimony, the proponent of the evidence, respondent, argues that independent hearsay exceptions justify admission of the photographs under either the "official records exception" or the "business records exception" of the Evidence Code. (*Evid. Code, §§ 1280*, *1271*.) Neither of these sections supports respondent's contention. We recognize that the trial court is vested with " 'wide discretion' " in determining whether sufficient foundation is laid to qualify evidence under these hearsay exceptions. (*People v. Beeler (1995) 9 Cal.4th 953, 978 [39 Cal.Rptr.2d 607, 891 P.2d 153]*.) And " '[o]n appeal, exercise of that discretion can be overturned only upon a clear showing of abuse.' " (*Id. at pp. 978-979*.)

1. *Official records exception (Evid. Code, § 1280)*

(2) The prosecution argues that these documents were properly admitted under *Evidence Code section 1280* (*section 1280*), the official records exception to the hearsay rule. [2] A plain reading of this section cannot support the prosecution's position. Not only does this section require that the writing **[**7]** be "made by ... a public employee" (*§ 1280, subd. (a)*; see, e.g., *Shea v. Department of Motor Vehicles (1998) 62 Cal.App.4th 1057, 1059 [72 Cal. Rptr. 2d 896]* [forensic laboratory trainee did not qualify as a "public employee"]), but the public employee must be under a legal duty to make such reports (*§ 1280, subd. (a)*; see, e.g., *People v. Clark (1992) 3 Cal.4th 41, 158-159 [10 Cal. Rptr. 2d 554, 833 P.2d 561]* [autopsy report prepared by now deceased coroner of autopsy he performed properly admitted through testimony of another coroner]).

2 *Section 1280* provides: "Evidence of a writing made as a record of an act, 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:

"(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."

[*7]

Here, the signator of the document, Exhibit No. 3 states he or she is an employee of the "Redlex Traffic Systems." At no point does the signatory state that Redflex Traffic Systems is a public entity or that he or she is otherwise employed **[**8]** by a public entity. Absent this critical foundational information, the document that was created cannot be and is not an "official record" under *section 1280*.

(3) In addition, *section 1280* requires that "[t]he sources of information and method and time of preparation [of the record] [be] such as to indicate its trustworthiness" (*id*., *subd. (c)*). Except for the written content of exhibit No. 3, which presents another layer of hearsay, there is a total lack of evidence to establish this element of *section 1280* hearsay exception. Each layer of hearsay must meet the foundational elements of this exception or another hearsay exception, or the writing is inadmissible. (*People v. Reed (1996) 13 Cal.4th 217, 224-225 [52 Cal. Rptr. 2d 106, 914 P.2d 184]* ["As with all multiple hearsay, the question is whether each hearsay statement fell within an exception to the hearsay rule."]; *People v. Ayers (2005) 125 Cal.App.4th 988, 995 [23 Cal.Rptr.3d 242]*; *People v. Baeske (1976) 58 Cal.App.3d 775 [130 Cal. Rptr. 35]* [police report containing contents of phone call to police department inadmissible under official record exception].)

However, *section 1280* does permit the court to admit an official record or report without necessarily requiring a witness to testify as to its identity **[**9]** and mode of preparation " ' "*if the court takes judicial notice or if sufficient independent evidence shows that the record or report was prepared in such a manner as to assure its trustworthiness*." [Citations.]' " (*Bhatt v. State Dept. of Health Services (2005) 133 Cal.App.4th 923, 929 [35 Cal. Rptr. 3d 335]* (*Bhatt*).)

Here, the record is totally silent as to whether the trial court took judicial notice of anything, nor does it show " ' "sufficient independent evidence ... that the record or report was prepared in such a manner as to assure its trustworthiness." ' " (*Bhatt, supra, 133 Cal.App.4th at p. 929*, italics omitted.) The only evidence outside of the contents of exhibit No. 3 describing the workings of the photo enforcement system and recordation of information from that system came from Officer Berg who, admittedly, was unable to testify about the specific procedure from the programming and storage of the system information. Consequently, the trial court erred in admitting this evidence as an official record. **[*8]**

2. *Business records exception (Evid. Code, § 1271.)*

(4) These exhibits also do not fall under the business records exception of *Evidence Code section 1271* (*section 1271*). [3] In order to establish the proper foundation for the admission of a business record, an appropriate witness must be called to lay **[**10]** that foundation (*Bhatt, supra, 133 Cal.App.4th 923, 929*). The underlying purpose of *section 1271* is to eliminate the necessity of calling all witnesses who were involved in a transaction or event. (*People v. Crosslin (1967) 251 Cal.App.2d 968 [60 Cal. Rptr. 309]*.) Generally, the witness who attempts to lay the foundation is a custodian, but any witness with the requisite firsthand knowledge of the business's recordkeeping procedures may qualify. The proponent of the admission of the documents has the burden of establishing the requirements for admission and the trustworthiness of the information. (*People v. Beeler, supra, 9 Cal.4th at p. 978*.) And the document cannot be

prepared in contemplation of litigation. (*Palmer v. Hoffman (1943) 318 U.S. 109 [87 L. Ed. 645, 63 S. Ct. 477]*; *Gee v. Timineri (1967) 248 Cal.App.2d 139 [56 Cal. Rptr. 211]*.)

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

"(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 **[**11]** method and time of preparation were such as to indicate its trustworthiness." (*§ 1271*.)

(5) Here, Officer Berg did not qualify as the appropriate witness and did not have the necessary knowledge of underlying workings, maintenance, or recordkeeping of Redflex Traffic System. The foundation for the introduction of the photographs and the underlying workings of the Redflex Traffic System was outside the personal knowledge of Officer Berg. If the evidence fails to establish each foundational fact, neither hearsay exception is available. (*People v. Matthews (1991) 229 Cal.App.4th 930, 940 [280 Cal.Rptr. 134]*.) [4] Accordingly, without such foundation, the admission of exhibits Nos. 1 and 3 was erroneous and thus the trial court abused its discretion in admitting these exhibits. Without these documents, there is a total lack of evidence to support the Vehicle Code violation in question.

4 This is not a situation where, in compliance with a lawfully issued subpoena duces tecum, the custodian submitted a declaration attesting to the necessary foundational facts. (*Evid. Code, § 1560 et seq.*; see also *Taggart v. Super Seer Corp. (1995) 33 Cal.App.4th 1697 [40 Cal. Rptr. 2d 56]*.) No such subpoena duces tecum was issued or introduced here.

[*9]

The judgment is reversed **[**12]** and with directions that the charge be dismissed. (*People v. Bighinatti (1975) 55 Cal.App.3d Supp. 5, 7 [127 Cal. Rptr. 310]*.)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE – CENTRAL JUSTICE CENTER

People of the State of California, Plaintiff vs. Marcela Olivia Soriano Defendant	CASE NO. SA151252PE ORDER RE: Motion for Reconsideration Hon. Carmen R. Luege Dept. C-54

This matter came on regularly for trial on May 12, 2010 and the court took the case under submission to consider defense counsel's evidentiary objections. On or about May 25, 2010, this court issued a ruling on the case overruling most of defendant's evidentiary objections and finding defendant guilty of the offense. At the time the court issued its ruling, the court did not have available the decision of the Central Justice Center Appellate Panel in People v. Khaled (May 21, 2010), Case No. 30-2009-304893. On June 15, 2010, defense counsel orally made a motion for reconsideration of this court's May 25th decision based on Khaled. After considering Khaled, this court concludes that Khaled does not affect this court's May 25th ruling.

In Khaled the court addressed the question of whether the police officer who testified at trial laid a proper foundation for the admissibility of the automatic traffic enforcement (ATE) photos and video that established defendant's culpability. In Khaled, the court found that the officer who testified at trial did not provide sufficient information about the capabilities of the ATE system to lay a proper foundation for the admissibility of the photos and video. The court also explained that the officer did not know and could not explain how the computer collected and stored the evidence gathered by the equipment at the

intersection. Unlike Khaled, the officer who testified in this case explained in detail the training he received at Redflex and the information he learned about the operations of the ATE system as a result of that training. This court's May 25th ruling sets forth in detail the testimony of the officer regarding the operation of the ATE system. Just because in Khaled the officer failed to provide sufficient information about the operation and capabilities of the ATE system to lay a proper foundation for the admission of the photos and video, it does not mean that in every future case involving ATE photos and video the testimony will be insufficient to lay a proper foundation. Whether there is sufficient foundation to admit the ATE photos and video into evidence is an issue that has to be decided based on the testimony provided in each individual case.

Defense counsel argued that based on Khaled the ATE photos and video are hearsay evidence. Khaled does not support this position. Photographs are not writings that contain out of court statements subject to a hearsay objection. Evidence Code § 1200 defines hearsay evidence as "a statement that was made other than by a witness while testifying at the hearing . . ." A photo and/or a silent video does not contain a "statement" made by a "witness." In Khaled the court expressed concern that the ATE photos contain hearsay statements because the photos have a data bar stating the date, time, and location of the incident captured in the photos. However, in Khaled the court believed that the information contained in the data bar had been entered by a person who did not testify at trial. The court stated that the officer who testified at trial did not know "who entered" the information that is contained in the data bar located in the ATE photos and that "no one with personal knowledge testified about how often the date and time (information contained in the data bar) are verified and corrected." This is not the evidence before the court in this particular case. The evidence presented at trial here established that there is no witness encrypting the data bar information on the photographs. Officer Bell testified that the data bar is encrypted on the photograph by the computer at the time the cameras take the photos. He also testified that the computer software runs an internal check to verify the accuracy of the time and date entry. In People v. Hawkins (2002) 99 Cal. App. 4th 1333A,

1449, the court explained that when a computer is programmed to generate information on its own, a hearsay analysis does not apply to that information because it is not a statement by a person. The court explained that the only issue to determine admissibility of that type evidence is whether the computer was operating properly. Moreover, Evidence Code § 1552 states that a "printed representation of computer information . . . is presumed to be an accurate representation of the computer information . . ." unless a party introduces evidence that the information is inaccurate or unreliable. In this case, defendant did not present any evidence that the information contained in the data bar is unreliable or inaccurate.

Having decided that the officer who testified at trial failed to provide sufficient information to authenticate the ATE photos and video, the Khaled court then considered the issue of whether a declaration signed by Redflex employees was sufficient to lay the foundation for the admissibility of the photos and the video. The Redflex declaration discussed in Khaled is probably similar to the document identified in this case as Exhibit 2. In Khaled the court found that Evidence Code § 1280, the public record exception to the hearsay rule, did not apply and on that basis found the declaration inadmissible. For a document to be admissible under Section 1280 the proponent of the evidence must show that: (1) the writing was made by a public employee within the scope of his duties; (2) the writing was made at or near the time of the act, condition, or event; and (3) the sources of information and methods were such as to indicate trustworthiness. In Khaled the court found that the proponent of the evidence did not show the declaration was signed by a "public employee" and that "the record [was] totally silent as to whether the trial court took judicial notice of anything" that would satisfy the elements of Section 1280. Unlike Khaled, here Officer Bell testified that Redflex has a contract with the City of Santa Ana to install, operate, and maintain the ATE system within the City. Officer Bell further explained that Redflex maintains and stores in its computers the ATE photos and video captured at the Santa Ana intersections. Based on these fact, the court takes judicial notice that the City of Santa Ana entered into a contract with Redflex to maintain and operate the ATE system. Accordingly, the court finds that the Redflex employees who signed Exhibit 2 as custodian

of records are "public employees" as that term is used in Evidence Code Section 1280. Khaled does not overrule cases that have held that to be a "public employee" under Section 1280, the person does not have to work for a public entity; it is sufficient that the private entity have a contract with the public entity to perform duties of the public entity. Imachi v. DMV (1992) 2 Cal. App. 4th 809, 816-817 (blood test report prepared by a private lab technician would be admissible under the public record exception because the lab technician acts as an agent of the public entity and thus meets the definition of public employee); Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 547 fn 6 ("we further note that whether or not the forensic laboratory in question was itself a public entity, the analyst performing chemical tests for a law enforcement agency would be a public employee within the statutory definition of the term, which includes an officer, agent, or employee of a public entity").

Addressing the trustworthiness prong of Section 1280, the court noted that in Khaled the record lacked evidence from which a court could find the elements of trustworthiness. Here, Officer Bell testified that the photos and video captured at the Santa Ana intersection are sent, via a secured internet server, to Redflex and that Redflex maintains the photos and video in its computer system. Officer Bell testified that he received Exhibits 1 through 3, and Exhibit 5 from Redflex and that those exhibits came with the declaration identified in this case as Exhibit 2. Based on the evidence presented at trial, the Redflex employees who signed the declaration as custodians of record are qualified to attest that the photos and video presented at trial were obtained from data stored at Redflex computers and brought to trial in a medium that makes it possible for the court to view the evidence. Thus, the court finds that those portions of Exhibit 2 that authenticate the photos and video are trustworthy. See People v. Parker (1992) 8 Cal. App. 4th 110 (trustworthiness requirement is established by showing that the written report is based upon observations of a public employee who have a duty to observe the facts and report them correctly; it is a matter within the trial court's discretion).

The court recognizes that even if a document satisfies a hearsay exception, the document may become inadmissible if admitting the evidence violates defendant's right to cross-examination under the Sixth Amendment. See Melendez-Diaz v. Massachusetts 129 S.Ct 2527 (2009). The court's May 25th ruling addressed the Sixth Amendment issue and determined that Exhibit 2 does not constitute "testimonial hearsay" as that term is used in Crawford v. Washington, 541 U.S. 36 (2004) and Melendez-Diaz. Khaled did not address the right to confrontation issue; thus, it does not affect this court's original ruling on this issue. Moreover, the court notes that recently the Fourth Appellate District issued an opinion, People v. Chikosi (May 6, 2010) __, Cal. App. 4th __, 2010 WL 1804679, analyzing the effect of Melendez-Diaz. In Chikosi the appellate court explained that under Melendez-Diaz not everyone whose testimony is relevant to establishing chain of custody, authenticity, or accuracy of a testing device must testify in person to protect defendant's right to cross-examine witnesses because "collateral facts" that do not speak to a defendant's guilt or innocence have been excepted from the Sixth Amendment. Based on this analysis the Chikosi court ruled that the prosecution was not required to call as a witness the police officer who tested the Alco-Sensor breathalyzer machine for accuracy and maintained the record of those test results. It was sufficient that defendant cross-examined the police officer who testified, based on his review of the test result (records obtained and maintained by the non-testifying officer), that he believed the device was accurate. The court explained that the records of the accuracy tests performed by the non-testifying witness were "neutral" and did not fall within the definition of testimonial hearsay. Here, Exhibit 2 contains "neutral" or "collateral" facts that do not speak to defendant's guilt or innocence. The declaration simply establishes that Redflex has cameras at the intersection that captures the incident, the data is stored at Redflex computers, and the data is printed in a medium that allows the court to review the evidence at trial (Exhibits 1 through

3, and Exhibit 5). In sum, under the Chikosi analysis, the prosecution is not required to bring a custodian of record from Redflex to testify that the photos and video presented at trial come from Redflex computers.

For all the foregoing reasons, defendant's motion for reconsideration is denied.

Date: June 18, 2010

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_____
Carmen R. Luege
Commissioner of the Superior Court

THE PEOPLE, Plaintiff and Respondent, v. MARSHALL FRANK CHIKOSI, Defendant and Appellant.

G041014

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

185 Cal. App. 4th 238*; *110 Cal. Rptr. 3d 464*; *2010 Cal. App. LEXIS 795

May 6, 2010, Filed

NOTICE:

NOT CITABLE--SUPERSEDED BY GRANT OF REVIEW

SUBSEQUENT HISTORY: [*1]**

The Publication Status of this Document has been Changed by the Court from Unpublished to Published June 2, 2010. Review granted, Depublished by *People v. Chikosi (Marshall Frank), 2010 Cal. LEXIS 7753 (Cal., Aug. 11, 2010)*

PRIOR HISTORY: Appeal from a judgment of the Superior Court of Orange County, No. 08CF1709, Peter J. Polos, Judge.

DISPOSITION: Affirmed as modified.

COUNSEL: Heather R. Rogers and Beatrice Tillman, under appointments by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES: Opinion by Bedsworth, J., with Sills, P. J., and Ikola, J., concurring.

OPINION BY: Bedsworth

OPINION

[465] BEDSWORTH, J.**--Appellant was convicted of driving under the influence of alcohol, driving with a blood-alcohol level of 0.08 percent or more, and evading the police. He contends the trial court erred in admitting his Breathalyzer test results, because the prosecution's witnesses relied on hearsay in forming their opinions about the accuracy of those results. We find no error in this regard. Although we modify the judgment to correct an undisputed sentencing error and properly reflect the court's sentencing **[***2]** decision, we affirm the judgment in all other respects.

FACTS

Around midnight, Tustin Police Officer Matthew Nunley noticed appellant driving through a parking lot at a high rate of speed. He shined his spotlight on appellant's car, hoping that would slow him down, but appellant sped up and made his way onto the roadway. Nunley followed, and upon seeing appellant run a red light, he activated his overhead lights and siren. In the mile-long pursuit that followed, appellant ran another red light and reached speeds of 60 to 70 mph before eventually pulling over. **[*241]**

When he did, Nunley stopped behind him and ordered him out of his car. Appellant was slow to comply and unsteady on his feet. He also muttered something about having "already poured the drink." Nunley handcuffed him and placed him in the back of his police car, at which point appellant admitted he had "too much" to drink that night. Consistent with this admission, his breath smelled of booze, his speech was slurred, and his eyes were watery and bloodshot. After finding a half-empty bottle of vodka in appellant's car, Nunley arrested him and took him to the police station.

There, he gave appellant a series of sobriety tests to determine **[***3]** the extent of his impairment. After appellant performed poorly on the tests, Nunley gave him a Breathalyzer test using a machine called the Alco-Sensor IV-XL (Alco-Sensor). Appellant provided two breath samples for the test, and they both yielded a blood-alcohol level of 0.18 percent.

At trial, appellant challenged the accuracy of those readings. More particularly, he challenged the accuracy of the Alco-Sensor machine that Nunley used to test his blood-alcohol level. Nunley testified he is certified to use the Alco-Sensor in the field and also qualified to conduct accuracy tests on the machine. However, he was not involved in testing the accuracy of the particular machine he used in appellant's case. Rather, that machine was tested by Tustin Police Officer Bernie **[**466]** Rowe. Although Rowe did not testify at trial, the court allowed Nunley to rely on the accuracy records that Rowe produced. Based on his review of those records, Nunley opined the machine was working accurately at the time he used it on appellant.

Kari Sterling also testified to the accuracy of the machine. A forensic alcohol analyst at the county's crime lab, she explained the Alco-Sensor operates using fuel cell technology. **[***4]** When alcohol is introduced into the cell, a chemical reaction occurs. That reaction releases electricity, which is converted by the instrument into a blood-alcohol reading.

Sterling said that, by law, the Alco-Sensor machines must be tested for accuracy at least once every 10 days. This is done by placing an air sample with a known alcohol value in the machine. If the machine reads the sample within 0.01 percent of that value, the machine is deemed to be accurate. If it does not read the sample within that range, the machine will automatically "lock out" and become inoperable. When that occurs, the machine is taken out of service and has to be recalibrated before it can be used again.

Sterling said accuracy records are kept for each machine and are made at or near the time the machines are tested. The accuracy records are kept in a database at the crime lab, and there are also handwritten maintenance logs that correspond to the electronic files. To generate an accuracy record, all the **[*242]** tester has to do is enter his name and the value of the alcohol sample into the machine, and the machine will automatically conduct the test and produce a result; no human analysis is involved in the process.

Like **[***5]** Nunley, Sterling reviewed the records of the testing that Rowe conducted on the machine in question. She said those records show the machine was tested one day before, and five days after, appellant's arrest, and on both occasions, the machine tested within the acceptable margin of error of 0.01 percent. She therefore believed the machine was working accurately when Nunley used it on appellant.

I

Because Rowe did not testify, appellant contends the court erred in allowing Nunley and Sterling to rely on his records to establish the reliability of the subject machine. He contends this procedure violated his *Sixth Amendment* right of confrontation, and therefore the results of his breath test should not have been admitted into evidence. We disagree.

(1) Under the *Sixth Amendment*, the defendant in a criminal case has the right "to be confronted with the witnesses against him." (*U.S. Const., 6th Amend.*) That right protects the defendant against the admission of "testimonial" hearsay unless the declarant is unavailable at trial and the defendant has had a prior opportunity to cross-examine him. (*Crawford v. Washington (2004) 541 U.S. 36, 53-54 [158 L. Ed. 2d 177, 124 S. Ct. 1354]*.)

Speaking to the issue of when police statements are **[***6]** testimonial for purposes of the *Sixth Amendment*, the United States Supreme Court in *Davis v. Washington (2006) 547 U.S. 813 [165 L. Ed. 2d 224, 126 S. Ct. 2266]* ruled, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the

primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id. at p. 822*, fn. omitted.)

[467]** Just last year, in *Melendez-Diaz v. Massachusetts (2009) 557 U.S. ___ [174 L.Ed.2d 314, 129 S.Ct. 2527]* (*Melendez-Diaz*), the United States Supreme Court determined information contained in lab reports can constitute testimonial hearsay in some circumstances. The reports at issue there were actually "certificates of analysis" showing that a substance found in the defendant's possession had tested positive for cocaine. (*Id. at p. ___ [129 S.Ct. at p. 2531]*.) Because the certificates constituted sworn affidavits and were **[*243]** prepared for the sole purpose of proving the defendant's guilt **[***7]** at trial, the court determined the defendant had the right to confront the analysts who prepared them. (*Id. at pp. ___-___ [129 S.Ct. at pp. 2532-2533]*.)

Our case is different from *Melendez-Diaz* in that appellant was allowed to confront and cross-examine the person who obtained the test results that incriminated him, i.e., Officer Nunley. The question we must decide is whether appellant had the right to confront the person who tested the accuracy of the machine Nunley used, i.e., Officer Rowe. As to that issue, the Supreme Court's decision in *Melendez-Diaz* is informative.

(2) Responding to the fears that requiring live testimony from everyone involved in the testing process would overburden the states, the majority in *Melendez-Diaz* made clear that not everyone "whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." (*Melendez-Diaz, supra, 557 U.S. at p. ___, fn. 1 [129 S.Ct. at p. 2532, fn. 1]*.) As particularly relevant here, the majority noted "documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records. [Citation.]" (*Ibid.*)

That makes good sense because while **[***8]** cross-examination of those who conduct substantive analysis of key evidence, like the drug analysts in *Melendez-Diaz*, may be useful in terms of testing their "honesty, proficiency, and methodology" (*Melendez-Diaz, supra, 557 U.S. at p. ___ [129 S.Ct. at p. 2538]*), testimony from technicians who merely test the accuracy of machines or other equipment is not as likely to produce fruitful evidence for the defense. Take Rowe, for example. His job in testing the accuracy of an Alco-Sensor is simply to enter his name and the value of the subject alcohol sample into the machine. After that, the machine, not Rowe, analyzes the sample and produces a reading. If the reading is not within the acceptable margin of error, the machine automatically becomes inoperable and will be taken out of service. This not only helps ensure the accuracy of the machines, it largely removes the human element from the testing process, thereby lessening the value of cross-examination.

(3) In the wake of *Melendez-Diaz*, courts have recognized testing technicians such as Rowe generally do not play such an important role in the adversarial process so as to mandate their appearance at trial. For instance, in *U.S. v. Bacas (E.D.Va. 2009) 662 F.Supp.2d 481*, **[***9]** the defendant challenged his conviction for speeding on the grounds the prosecution failed to produce the technician who tested the accuracy of certain tuning forks. He argued the technician's presence at trial was required under the *Sixth Amendment* because the tuning forks were used by the arresting officer to calibrate the **[*244]** radar that detected his driving speed. In other words, akin to appellant here, the defendant "sought live testimony about the test applied to the [subject] equipment to show that it performed correctly. [Citation.]" (*662 F.Supp.2d at p. 484*.)

However, the court ruled, "Collateral facts that do not speak to a defendant's **[**468]** guilt or innocence have been excepted from *Sixth Amendment* protection. [Citation.] Neutral statements that relate only to the operation of a machine constitute such collateral facts. [Citations.] [¶] Unlike the certificates at issue in *Melendez-Diaz*, in the instant case [the calibration test results] propound neutral information relating only to the proper operation of the radar equipment. Such calibration results do not pertain to any particular defendant or specific case. [Citation.]" (*U.S. v. Bacas, supra, 662 F.Supp.2d at p. 485*.) Therefore, they **[***10]** "lack the essential 'primary purpose' of 'establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution' that would render them 'testimonial.' [Citation.]" (*Ibid.*)

Like the testing results at issue in *Bacas*, the records Rowe produced reflect information relating to the proper functioning of a machine that is commonly used in law enforcement. The information is neutral in that it is not generated for use against a specific defendant or a particular breath test. Moreover, unlike the reports at issue in *Melendez-Diaz*, which "were completed almost a week after the tests were performed" (*Melendez-Diaz, supra, 557 U.S. at p. ___ [129 S.Ct. at p. 2535]*) the records Rowe generated were produced contemporaneously with his testing. Because they were not produced to establish a past fact relevant to appellant's prosecution, they do not fit within the United States Supreme Court's definition of testimonial hearsay. (See *People v. Geier (2007) 41 Cal.4th 555, 607 [61 Cal. Rptr. 3d 580, 161 P.3d 104]* [the *confrontation clause* does not apply to lab reports that merely represent the "contemporaneous recordation of observable events"].) [1]

1 Given that *Geier* preceded *Melendez-Diaz* by two years, courts have debated the extent to which **[***11]** it remains good law. The California Supreme Court is currently considering that issue and, in the process, has agreed to review some of the cases appellant has cited in his supplemental brief. (See *People v. Lopez (2009) 177 Cal.App.4th 202 [98 Cal. Rptr. 3d 825]*, review granted Dec. 2, 2009, S177046; *People v. Dungo (2009) 176 Cal.App.4th 1388 [98 Cal. Rptr. 3d 702]*, review granted Dec. 2, 2009, *S176886; People v. Rutterschmidt (2009) 176 Cal.App.4th 1047 [98 Cal. Rptr. 3d 390]*, review granted Dec. 2, 2009, *S176213*.) Because the Supreme Court has granted review of those decisions, we may not consider them. (*Cal. Rules of Court, rules 8.1105(e)*, *8.1115(a)*.)

Another point of distinction between this case and *Melendez-Diaz* is that appellant had the opportunity to cross-examine the state's witnesses about the records and testing procedures that were utilized on the subject machine. Although appellant was not afforded the opportunity to cross-examine the **[*245]** actual tester, Rowe, he was given considerable latitude in terms of cross-examining Nunley and Sterling about Rowe's records. In this regard, it is significant that Nunley and Sterling have considerable experience in the very testing Rowe conducted. They were able to explain how the Alco-Sensor works, how accuracy **[***12]** tests are performed and what Rowe's results signified. This afforded appellant a greater opportunity for cross-examination than if, as in *Melendez-Diaz*, the prosecution had relied solely on documentary evidence to establish the accuracy of the testing results at issue. (Accord, *People v. Bowman (2010) 182 Cal.App.4th 1616, 1624, fn. 2 [107 Cal.Rptr.3d 156]* ["recognizing a significant distinction between hearsay used by an expert to form an opinion, on the one hand, and the hearsay document itself"]; but see *People v. Benitez (2010) 182 Cal.App.4th 194 [106 Cal. Rptr. 3d 39]*, review granted May 12, 2010, *S181137* [finding this distinction immaterial for purposes of the *6th Amend. confrontation clause*].)

[469] (4)** For all these reasons, we hold the statements contained in Rowe's accuracy records were nontestimonial in nature. Therefore, the trial court did not err in allowing Nunley and Sterling to rely on them in forming their opinions. This procedure did not violate appellant's rights under the *Sixth Amendment*. (Accord, *U.S. v. Griffin (E.D.Va., Sept. 22, 2009, No. 3:09MJ308) ___ F.Supp.2d ___* [accuracy testing results for Breathalyzer machine deemed nontestimonial]; *State v. Bergin (2009) 231 Ore. App. 36 [217 P.3d 1087]* [same].)

II

Turning to appellant's sentencing claims, the record shows **[***13]** the trial court sentenced him to 16 months in prison for driving under the influence, and a concurrent term of 16 months for driving with a blood-alcohol level of 0.08 percent or more. However, as the Attorney General concedes, the sentence on the latter count must be stayed under *Penal Code section 654* because both offenses arose from a single episode of driving. (*People v. Martinez (2007) 156 Cal.App.4th 851, 857 [67 Cal. Rptr. 3d 670]*.)

(5) In addition, the abstract of judgment must be modified to conform to the court's oral sentencing decision. (*People v. Mitchell (2001) 26 Cal.4th 181, 185-186 [109 Cal. Rptr. 2d 303, 26 P.3d 1040]* [where there is a discrepancy between the oral pronouncement of judgment and the minute order or abstract of judgment, the oral pronouncement controls].) Particularly, the abstract should reflect that, in pronouncing sentence, the court imposed a $ 50 "alcohol **[*246]** abuse fee" pursuant to *Vehicle Code section 23645* and a $ 30 "D.U.I. lab fee" under *Penal Code section 1463.14*. We will modify the judgment accordingly. [2]

2 Appellant complains that, in imposing these fees, the court did not determine whether he had the ability to pay them. However, appellant waived this claim by failing to raise it in the trial court. (*People v. Forshay (1995) 39 Cal.App.4th 686, 689 [46 Cal. Rptr. 2d 116]*; **[***14]** *People v. Gibson (1994) 27 Cal.App.4th 1466, 1468-1469 [33 Cal. Rptr. 2d 217]*.)

DISPOSITION

The judgment is modified to stay appellant's sentence on count 2 for driving with a blood-alcohol level of 0.08 percent or more. (*Pen. Code, § 654*.) In addition, appellant is ordered to pay a $ 50 penalty under *Vehicle Code section 23645* and a $ 30 penalty under *Penal Code section 1463.14*. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting these changes and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

Sills, P. J., and Ikola, J., concurred.

IN THE SUPERIOR COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. STEVEN EDWARD GRAY, Defendant,	Case No. C165383 FINDINGS AND ORDER RE: DEFENDANT'S DISMISSAL MOTION FOR FAILURE TO COMPLY WITH ENABLING STATUTES Hearing Held: February 9, 2010

I

FACTS & PROCEDURAL HISTORY

This case involves a red light camera ticket issued to defendant for allegedly running a red light in the City of Culver City on November 21, 2008. Defendant files this motion to dismiss the complaint for Culver City's failure to comply with enabling statutes Vehicle Code §§ 21455.5(B) and 21455.5(g) which sets forth prerequisite conditions before a city can install and use an automated relight enforcement system ("ARLES"). After a full hearing was conducted at which the People were represented by William Litvack, Esq., and defendant was represented by Sherman Ellison, Esq., this Court makes the following findings of fact and conclusions of law:

II

ORDER

A. **Public Announcements and Warning Notices**

Vehicle Code § 21455.5(b) mandates the following before a city can implement an ARLES system:

> 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.

Id. (**emphasis** added).

Defendant urges this Court to interpret the term "system" in that provision to mean the physical camera equipment installed at each traffic intersection and that therefore such warning notices and public announcements must be conducted for each and every intersection in which Culver City has installed such equipment. It has been stipulated by the parties that Culver City has only conducted such warning notices and public announcements prior to the commencement of the entire program in Culver City in 1998, and that no such notices or announcements were done specifically for the intersection (at the intersection of Washington Blvd. and Helm Avenue, Culver City) at which defendant was photographed allegedly running a red light. The People urge this Court to interpret the term "system" in this provision to mean the overall ARLES program encompassing all the equipment at all the intersections implemented throughout the city. If this Court adopts defendant's intersection-specific interpretation, then dismissal should be granted, whereas if this Court adopts the People's programmatic

interpretation, the motion should be denied.

Analyzing the context of § 21455.5(b) and other provisions of the ARLES enabling statutes, this Court concludes that the term "system" as utilized in that subsection refers to the overall ARLES program and not to each intersection-specific equipment group. First, the subsection itself provides that public announcements be made at least 30 days "prior to the commencement **of the law enforcement program** (emphasis added)," clearly indicating that such announcements need only be made once before commencement of the overall ARLES program. Secondly, other provisions of the enabling statutes illustrate that the legislature would explicitly use the term "intersection" when a prerequisite condition was intersection specific.1 The absence of any reference to intersection in § 21445.5(b) further bolsters the position that the warning periods and public announcements are programmatic and not intersection specific. Thirdly, in an analogous subsection of the enabling statutes which requires a public hearing prior to implementation of the ARLES program, it is clear that the legislature intended for the public hearing to apply as a prerequisite to the overall program itself and not for each individual intersection in which camera equipment is installed.2 In finding that the warning periods and public announcements required under § 21445.5(b) need only be done prior to implementation of the overall ARLES program, defendant's motion for dismissal/acquittal is DENIED.

B. **Contingency Fee Prohibition on Vendor Contracts**

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1 "[T]he **intersection** . . . may be equipped with an automated enforcement system if . . . [such intersection] identifies the system by signs that clearly indicate the system's presence . . . ." VC § 21455.5(a)(requiring warning signs to be posted before each ARLES equipped intersection).

"At an **intersection** at which there is an automated enforcement system in operation, the minimum yellow light interval shall be . . . ." VC § 21455.7.

2 "A city council or county board of supervisors shall conduct a public hearing on the proposed use of an automated enforcement **system** . . . prior to authorizing the city or county to enter into a contract for the use of the

Defendant moves for dismissal of the complaint on the grounds that the applicable contract between Culver City and the ARLES service provider Redflex Traffic Systems violates a statutory prohibition against a contingency fee based contract in which the third party vendor compensation is tied to the number of tickets issued or revenue generated therefrom:

> A contract between a governmental agency and a manufacturer or supplier of automated enforcement equipment may not include provision for the payment of compensation to the manufacturer 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.

VC § 21455.5(g).

Defendant alleges that the following provisions of the Redflex/Culver City contract to be in violation of the prohibition above:

1. Exhibit "B" to the contract entitled "Compensation" which requires that Redflex receive a "fixed fee of $4,150 per month for each Designated Intersection Approach as full compensation for all services contemplated in this agreement." It further provides that "[a]ll newly constructed red light camera systems beyond the existing twenty systems be charged at $6,030 per monitored approach."
2. Exhibit "C" to the contract entitled "Appeals" which requires Redflex to pay half of any legal expenses incurred in defending any legal challenge to the system up to $7,500.
3. Paragraph 10 of the contract entitled "Dispute Resolution" which requires that the parties engage in good faith discussions to resolve any disputes that arise over the contract and that the parties may agree to arbitration or mediation.

Upon review of each of these provisions, this Court finds that none of the above violate

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system." VC § 21455.6(a).

the contingency fee prohibitions of § 21455.5(g) and therefore defendant's motion to dismiss/acquit on this basis is also DENIED.

C. Trial Setting

Both parties stipulated to continue the trial in this matter to March 25, 2010 at 10:30am, with defendant specifically waiving time for purposes of the speedy trial act until that date. All parties are ordered back at that time for trial.

Dated: February 18, 2010

_____
HON. LAWRENCE H. CHO
Los Angeles County Superior Court

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IN THE SUPERIOR COURT OF LOS ANGELES JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. STEVEN EDWARD GRAY, Defendant,	Citation No. C165383 ORDER AND JUDGMENT Re: EVIDENTIARY OBJECTIONS AND TRIAL VERDICT Trial: May 13, 2010 June 1, 2010 June 22, 2010

I

FACTS & PROCEDURAL HISTORY

This case involves a red light camera ticket issued to defendant for allegedly running a red light in the City of Culver City on November 21, 2008. After extensive pretrial motions, trial began on May 13, 2010, proceeded again on June 1, 2010, and concluded on June 22, 2010. During the course of trial, several defense objections to evidence were made and taken under submission for written ruling herein. The evidence objected to are:

(a) People's Exhibit 1, a document entitled Notice of Traffic Violation which depicts four photographs[1] taken by the Automated Red Light Enforcement System

[1] The four photographs are alleged to show defendant's vehicle before entering the intersection against the red light at 6:03:12 pm on

("ARLES");

(b) People's Exhibit 2, a photograph of the driver taken by the ARLES system;

(c) a video clip of the offense taken by the same system, and

(d) data information recorded by the ARLES system including the time of the alleged offense, the defendant's speed at the time of the offense, and how long the light had been red when defendant crossed into the intersection. Defendant has stipulated to the identity of the driver depicted as himself. This evidence, if admitted, firmly establishes defendant's guilt in entering the intersection against a solid red light in violation of VC § 21453(a).

For the reasons set forth below, each of the objections are overruled and defendant is adjudged guilty of a violation of Vehicle Code § 21453(a).

II

EVIDENTIARY OBJECTIONS

A. Lack of Foundation

Defendant objected to the introduction of the evidence listed above as lacking in foundation. The foundational testimony was provided by the one and only witness for the People, Sergeant Omar Corales of the Culver City Police Department who testified as follows:

Sgt. Corales has been a police officer with the City of Culver City for 29 years and is currently the Sergeant in charge of the ARLES program for the City of Culver City. He has been personally involved with the Culver City Council's decision to

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November 21, 2008, crossing the same intersection at 6:03:13 pm, a picture of defendant driving the car, and a picture of the rear license plate of defendant's car.

implement an ARLES system in the City of Culver City in 1998 and was working as a police officer for the City during the selection and installation of the ARLES system that same year. Subsequent to installation, Sgt. Corales personally reviewed and issued warning notices pursuant to statute in February 1999, and has continued to review and issue citations from that time until current day. Sgt. Corales is familiar with each of the intersections at which the ARLES system is installed, including the intersection of Washington and Helms which is where the violation at issue in this case occurred.

Sgt. Corales is knowledgeable about how the ARLES system functions and describes it as an automated camera system designed to shoot photographs and record video of suspected vehicles running red lights at each intersection the ARLES system is installed. The system itself is comprised of several "loop" metal detectors buried underneath the roadway that sense the presence of vehicles approaching the lighted intersection, and a series of cameras that are programmed to take still photographs and a video of any suspected violator. The cameras are strategically placed to capture photos of (1) the suspect approaching the red lit intersection with the phasing of the traffic light showing in the background, (2) the same suspect vehicle as it passes the limit line of the intersection again with the traffic light showing in the background, (3) a photograph of the driver of the suspect vehicle, (4) the rear license plate of the suspect vehicle, and (5) a video clip of the suspect vehicle entering into and passing through the intersection with the traffic light phasing in the background. The ARLES system is linked to the traffic light at the intersection and is activated when the light turns red for oncoming traffic. The sensors detect the presence of oncoming cars, calculate their speed of travel, and send timed signals to the fixed cameras to shoot the photos and videos to capture

evidence of the suspected offender. The ARLES system also has a date and time stamp on the photographs and video along with recorded electronic data showing the speed of the suspect as calculated by the loop sensors in the roadway, the amount of time the light had been red when each photograph is taken, and the time each photograph is taken.

All of this information is captured and stored digitally and is transmitted through the internet to a private company called Redflex Traffic Systems in Phoenix, Arizona, which is contracted by Culver City to operate and maintain the ARLES system. The information is reviewed by Redflex employees and transmitted to police officers in Culver City to review for red light violations. Each of the ARLES systems are remotely checked everyday by Redflex operators, and the traffic lights at each intersection that the ARLES is installed are checked daily by Culver City Police Officers including Sgt. Corales.

Sgt. Corales reviewed People's Exhibits 1 and 2, the video of the violation, and the data imprinted on both and testified that he recognized these items as having been produced by the ARLES system at the intersection of Washington and Helms in Culver City. He testified that he was familiar with that intersection and recognized the intersection in each of the photographs and video at issue.

Given the testimony above, defendant's objection to the photographs, video, and data on lack of foundation grounds is overruled.

B. Authentication of the Photographs and Video

Defendant objects to the introduction of the photographs and video on the grounds that the People have failed to establish the authenticity of that evidence in violation of Evidence Code Section 1401(a) ("authentication of a writing is required before it may be received into evidence"). Under Evidence Code Section 1400, "authentication of a writing means the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is." Id. Evidence Code § 250 defines the term "writing" to include "photographing . . . and every other means of recording upon any tangible thing," including videotape recordings. Ashford v. Culver City Unified School, 130 Cal.App.4th 344, 349 (2005). Thus, before this Court can admit the proposed evidence, there must be sufficient evidence presented by the People to establish that the evidence is what they claim it is; that is, photographs, video, and data depicting defendant running the red light at this intersection on the alleged date and time in question.

As stated by the California Supreme Court in People v. Bowley, 59 Cal.2d 855 (1963), "[i]t is well settled that the testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is a legally sufficient foundation for its admission into evidence." Id. at 859 (person depicted in sex video identified herself in video and testified that it was an accurate depiction of events captured); see also Jones v. City of Los Angeles, 20 Cal.App.4th 436, 530 (1993) (nurse witness to filming of accident victim "Day in Life" video sufficient to establish authentication).

More problematic is the situation, as in the case at bar, where there is no percipient witness to the recording to testify as to the accuracy of the reproduction.

Defendant relies on Ashford v. Culver City Unified School District, 130 Cal.App.4th at 349, in which the Culver City School District tried to introduce a videotape of their city worker doing private work on a workday in which he claimed to have been ill. Id. at 348. The Court of Appeals held that such evidence, although relevant, was inadmissible because of the City's failure to authenticate the video:

> The sole witness at the administrative hearing was the District's assistant superintendant of human resources. She admitted that she herself had not made the videotapes, was not present when they were made, and did not know the person who made them. Further, she did not know if the person who made the videotapes was at any particular site on any particular date, nor could she say that the dates on the videos were accurate. Petitioner's attorney noted that the dates on the videotapes skipped around and that the videotapes had time lapses. The District's witness admitted she had no knowledge as to whether the videotapes had been edited, spliced, or pieced together.

Id. Defendant urges this Court to similarly suppress the photographs and videotape in this matter because the People's sole witness in this matter, Sgt. Corales, also had no personal knowledge of the events depicted in them and was not present during their production. See also People v. Beckley, 185 Cal.App.4th 509, 2010 WL 2293410 (June 9, 2010) (internet MySpace photo of defendant flashing gang signs inadmissible as no percipient witness to that action and no indicia of reliability as to circumstances of the downloaded photo). As such, defendant argues that Sgt. Corales has failed to authenticate such evidence.

However, the California Supreme Court in Bowley, supra, approved another method of authentication which can be accomplished by expert testimony as to the reliability of the circumstances under which the recording was made rather than first hand

percipient witness testimony as to the accuracy of the recording. Bowley, 59 Cal.2d at 860-863. The California Supreme Court cited with approval the case of People v. Doggett, 83 Cal.App.2d 405 (1945), in which the prosecution attempted to introduce photographs of defendants engaging in prohibited sexual acts. The photographs were found in the apartment of the defendants and the prosecution was unable to produce any percipient witness to the events depicted. The prosecution did present testimony from defendants' landlord that the persons depicted in the photos were the defendants, as well as testimony from officers at defendant's apartment that the furniture and surroundings depicted in the photos matched that found in the apartment and that photographic equipment used to take the photographs were also found in the same apartment. In addition, there was expert testimony that the photographs were genuine and not faked. Doggett, 83 Cal.App.2d at 407-09. Given this non-percipient testimony, the Court of Appeals found that:

> [i]t would seem that the verification or authentication was as satisfactory and reliable, to say the least, as that in the ordinary case where it depends upon the memory and integrity of a third party who may be directly interested in the result. In such a case, it can neither be said that other evidence is entirely lacking nor that proof of the requisite element is not sufficient to support a trial court's action in receiving such pictures in evidence.

Id. at 410-411.

The Supreme Court in Bowley adopted the reasoning in Doggett in an analysis which seems particularly applicable in the instant ARLES context:

> Since no eyewitness laid the foundation for the picture's admission in the Doggett case, the picture necessarily was allowed to be a silent witness; to 'speak for itself.' It was not illustrating the testimony of a witness. This seems to be

> a sound rule. Similarly, X-ray photographs are admitted into evidence although there is no one who can testify from direct observation inside the body that they accurately represent what they purport to show.
>
> There is no reason why a photograph or film, like an X-ray, may not in a proper case, be probative in itself. To hold otherwise would illogically limit the use of a device whose memory is without question more accurate and reliable than that of a human witness. It would exclude from evidence the chance picture of a crowd which on close examination shows the commission of a crime that was not seen by the photographer at the time. It would exclude from evidence pictures taken with a telescopic lens. It would exclude from evidence pictures taken by a camera set to go off when a building's door is opened at night.

Id. at 860-62. Several other courts have also accepted this alternate theory of authentication, sometimes referred to as the "silent witness" theory, particularly in the realm of unmanned surveillance systems. See United States v. Taylor, 530 F.2d 639, 641-42 (5th Cir. 1976) (in absence of percipient witnesses, bank vault surveillance photos of armed robbery admissible when installer of camera testifies as to prior installation of system and subsequent removal of film); United States v. Rembert, 863 F.2d 1023, 1026-29 (D.C. Cir. 1988) (photos of ATM robberies taken by automatic camera system admissible via testimony of bank employee who described the workings of the surveillance system and corroboration of robberies by actual victims).

In light of the Supreme Court's reasoning in Bowley, and comparing the facts and circumstances in the case at bar with those of Ashford and Doggett, this Court finds that the reasoning and applicability of Doggett to be governing. First, unlike Ashford, this case is not one in which the origin of the videotape at issue is a wholesale enigma which appeared to have simply dropped from the sky without explanation; the witness in Ashford had no idea whatsoever as to the circumstances of the creation of the video in

that matter or the matters depicted therein. In contrast, Sgt. Corales testified here that the photographs and videotape at issue were the direct result of a camera system that he has had personal experience with and which he has utilized to bring hundreds of prosecutions before. Second, as in Doggett, Sgt. Corales also testified as to his personal knowledge of the surroundings at the intersection in which the photos and video of the defendant were shot and his recognition thereof in the photos and video. Furthermore, unlike the witnesses in both Ashford and Doggett, Sgt. Corales was able to not only definitively identify the cameras responsible for the photos/video, he also testified at great length as to his personal knowledge of how the camera system works, giving detailed testimony regarding the use of the underground loop sensors, the location of each of the cameras and their respective duties, and the timing of the system and its specific programmed purpose. In short, the evidence presented here supporting authentication was much stronger than that of Ashford and Doggett in that Sgt. Corales knew exactly where, when, and a very detailed how the evidence depicting the violation had been produced. Lastly, he testified as to the chain of custody of the photo/video evidence and how it was electronically transmitted to the Redflex vendor and then to the Culver City Police Department only. Moreover, he testified that the data captured by the system and indicated on the videotape depicting time, speed, and relative distances of the violation were corroborated by the images themselves.

Given the above, this Court finds that the circumstantial evidence provided was sufficient to establish authentication under Evidence § 1401 and overrules defendant's objection as to lack of authentication.

C. Hearsay

Defendant objects to the admission of the photos, video, and data information contained thereon on hearsay grounds. The general rule is that hearsay evidence is inadmissible unless there is a specific exception that allows it. Evid § 1200(b).

The threshold question is whether this evidence is hearsay at all. Evid § 1200 defines "hearsay evidence" as "evidence of a *statement* that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted." Id. (*emphasis* added). The term "statement" is in turn defined under Evid § 225 as "(a) oral or written verbal expression or (b) nonverbal conduct *of a person* intended by *him* as a substitute for oral or written verbal expression." Id. (*emphasis* added).

Given these straightforward definitions, it is obvious that the photos, videotape, and the data contained thereon do not originate from any person at all, but rather from a machine made up of cameras, sensors, and programming. As such, it cannot qualify as a "statement," which therefore disqualifies such evidence as hearsay. The evidence at issue here is no more hearsay than the time of day derived from a clock face, the speed of travel derived from a speedometer, or the temperature reading from a thermometer.[2] All of these are examples of data derived from instruments designed by man to be interpreted by man, just as the images and data from the ARLES system were captured by

[2] Nor is the evidence at issue any more improper than the examples given by the Supreme Court in Bowley of a properly authenticated X-Ray, telescopic image, chance photograph of a crowd, or photos taken by an automatic door camera. Bowley, 59 Cal.2d at 862.

a machine and interpreted by a live witness, Sgt. Corales. The images and data are clearly not the statements of a person or "oral or written verbal *expression*" and therefore not barred by the hearsay rule.

D. Confrontation Clause

Finally, defendant objects to the introduction of the photographs, video, and data contained thereon as violating his 6th Amendment Constitutional right to confront witnesses against him. Defendant cites the recent Supreme Court decision of Melendez-Diaz v. Massachusetts, 129 S. Ct 2527 (2009), in which the Court found that the introduction of sworn chemist affidavits introduced to establish defendant's possession of cocaine violated defendant's right of confrontation.

However, in contrast to Melendez-Diaz, in this instance there was no third party hearsay testimony admitted or relied upon to establish an element of the offense; the sole witness accusing defendant is Sgt. Corales, who read and interpreted the data and images captured by the ARLES system. For the same reasons that the ARLES images and data cannot constitute "statements" in violation of the hearsay prohibition, that same evidence cannot constitute "testimonial" evidence by a witness that defendant is entitled to confront and cross-examine. In other words, notwithstanding the previously mentioned label of "silent witness," the ARLES system is simply not a witness encompassed within the meaning of the Sixth Amendment Confrontation Clause. See People v. Chikosi, 185 Cal.App.4th 238 (May 6, 2010) (no Confrontation Clause violation when officer who used breathalyzer testified at trial and was subject to cross examination).

Because Sgt. Corales was the sole accuser who collected and interpreted the data and images captured by the ARLES system, and was available for cross-examination at the trial, defendant's Confrontation Clause objection is overruled.

III

VERDICT AND ORDER

Given this Court's overruling of defendant's objections to the photographs, video, and data information contained thereon, an examination of such evidence leads this Court to conclude that the People have proven the infraction of failure to stop for a red light beyond a reasonable doubt. Even without considering any of the data information contained on the video, the photos and video show beyond a reasonable doubt that defendant drove through the intersection of Washington Blvd. and Helms in Culver City against a solid red light. As such, defendant is hereby adjudged guilty and is ordered to appear for sentencing before this Court on July 22, 2010 at 3:30pm.

IT IS SO ORDERED,

July 7, 2010

HON. LAWRENCE H CHO
Los Angeles County Superior Court
Dept. S, Santa Monica Court

Wed. 7/7/10 @ 12:45pm.