## SUPERIOR COURT OF THE STATE OF CALIFOR IN AND FOR THE COUNTY OF ALAMEDA

Date:

May 03, 2010

People of the State of California

Hon.

Judge John True III

, Presiding Judge

Marie Mayupao Not Reported

, Deputy Clerk , Reporter

Judge Wynne Carvill

Judge Michael Gaffey

Counsel appearing

for Plaintiff

Plaintiff/Respondent

VS

No Appearance

Counsel appearing for Defendant

Blankenship

Defendant/Appellant

No Appearance

NATURE OF PROCEEDINGS:

**RULING RE: HEARING ON** APPEAL

Action No. Trial Court WWM TRF

5017 50179419

In the above - entitled action, matter having been taken under submission, the Court orders the following:

The judgment of the trial court is reversed 3-0. See, Melendez-Diaz v. Massachusetts (2009) 129 S.Ct. 2527. Here, as in that case, there was no live testimony by any person actually involved in the preparation or production of the crucial evidence. Like the affidavits in Melendez-Diaz, the Redflex Traffic Systems Court Evidence Package (the "Redflex Packet") consists of after-the-fact documentation of an alleged infraction: e.g., the Redflex co-custodian's declaration that the Redflex Packet was prepared in the normal course of business and according to certain protocols. In this case, as in Melendez-Diaz, the co-custodian was not present in court or otherwise available for cross examination. Moreover, the sole testifying witness here, Ms. Sylvester, admitted that she did not know any of the following: " how many technicians at Redflex were assigned to process Emeryville cases", "who the technicians were who created the system for Emeryville, nor who installed it", or who the technicians at Redflex were who reviewed this particular violation." (See Settled Statement, CT 15 p.3) Because the defense was not able to freely and adequately cross-examine the testifying witness on any of these issues, and because of the absence of a witness who could have testified as to the facts underlying the Redflex Packet, Appellant's Sixth Amendment rights were violated, and the judgment below must be reversed.

Remittitur to issue.

Copies of this minute order mailed this date: May 06, 2010

Sherry Gendelman, Esq. 421 Grand Ave. Suite A S. San Francisco, CA 94080

**APPELLANT'S ATTORNEY** 

Scott Jackson, DDA District Attorney's Office 1225 Fallon St. 9th Floor Oakland, CA, 94612 RESPONDENT'S ATTORNEY

CC: WWM traffic division

SHERRY GENDELMAN, SBN 64757 Law Office of Sherry Gendelman 421 Grand Ave., Suite A South San Francisco, CA 94080 (650) 615-0117 (650) 589-3980 FAX FILED ALAMEDA COUNTY

OCT 19 2009

Attorneys for Appellant/Defendant,
BLANKENSHIP

6

7

8

9

10

11

12

13

14 15

16

17

18

19 20

21

2223

24

2526

27

28

/ ||

SUPERIOR COURT, STATE OF CALIFORNIA

#### IN AND FOR THE COUNTY OF ALAMEDA APPELATE DIVISION

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

BLANKENSHIP,

vs.

Defendant and Appellant

APPEAL NO 5017 Case No.5001179419

APPELLANT'S OPENING BRIEF

Date: TBD
Time TBD

Appellant Dept. TBD

CASE SUMMARY: This case is derived from a Red Light Camera System, which was installed in the city of Emeryville, County of Alameda, for the sole purpose of prosecuting red light runners. The County installed the system in conjunction with a private contractor, Redflex Traffic Systems, Inc., (Herein after Redflex)

On September 16, 2008, an alleged violation of CVC § 21453(a), a photo enforced red-light camera violation occurred. The citation was issued to the defendant, Blankenship, who is the registered owner of the vehicle. Trial in



Blankenship Opening Brief

. 

this matter commenced on July 20, 2009, in Dept. 103 of the above-entitled court. At the outset of the trial defendant moved to dismiss the case pursuant to Vehicle Code § 210, which requires the establishment of

"An "automated enforcement system" ...that photographically records a driver's responses to ... an official traffic control signal described in Section 21450, and is designed to obtain a clear photograph of a vehicle's license plate and the driver of the vehicle."

In the subject case the photograph of the driver is not clear, and therefore violates the requirement of the Vehicle Code. The Court denied the motion, stating a clear photograph was not required, only the establishment of a system that could take a clear photo.

Emeryville Police Department employee, Ms. Sylvester, then testified that she is a Service
Technician for Emeryville Police Department. Her job is to review Redflex, Inc.
photo enforcement materials. She has had classes and field training and she cited
Vehicle Code sections 21455.5-7 which she claims authorize non-sworn police
officers to issue citations. Ms. Sylvester said that she issued citation ER26976 after
reviewing photographs and determining that a violation had occurred. Counsel
made hearsay and foundational objections. Ms. Sylvester testified that she was
trained how to use the program and how to view the video and photos on the
Redflex website. Reviewing the photographs is part of her duties. Ms. Sylvester
testified she compared the photograph to Mr. Blankenship DMV records and then
issued this citation. Ms. Sylvester did provide, nor introduce, a copy of Mr.
Blankenship's DMV photograph into evidence. Defendant again made a motion to
dismiss pursuant to V.C. § 210.

Blankenship Opening Brief

10

11 12

13 14

15

16 17

18

19

20 21

22

23

24 25

26

27

28

Blankenship Opening Brief

The Court asked Ms. Sylvester if Mr. Blankenship has submitted an affidavit of non-liability stating he was not the driver. Counsel objected to the court's inquiry. The Court's inquiry impliedly commented upon Mr. Blankenship's Fifth Amendment right to remain silent. Counsel also raised foundation and hearsay objections to Ms. Sylvester's testimony, all of which were overruled.

**MOTIONS:** 

Counsel did not have any evidence to present on defendant's behalf. On closing counsel moved for a dismissal Pursuant to Penal Code §1118, and/or judgment of acquittal, based upon defendant's hearsay and foundation objections; and pursuant to recent Supreme Court decision in Crawford v. Washington, (2004) 541 U.S. 36, and in Melendez-Diaz v. Massachusetts. (2009) 129 S. Ct. 2527, The Sixth Amendment of the US Constitution guarantees defendant's the right to confront all the witnesses against them. Counsel believes this holding extends to the Redflex employees who operate the system and who had assembled and forwarded the information to the Emeryville Police Department used solely to convict defendant. Defendant also moved for an acquittal based upon the grounds that V.C. §210 requires a clear photograph of the driver, and none was introduced in this case. Defendant also moved for an acquittal because the Court's commenting upon defendant's silence because defendant had not submitted an Affidavit of Non Liability. Commissioner Carter overruled all of defense objections, denied the P. C. § 1118 motion, admitted the packet, along with the DVD and all documents into evidence.

#### **VERDICT AND SENTENCE:**

The court found the defendant guilty and imposed a fine of \$391.00.

#### **ARGUMENT:**

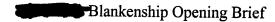
### I. QUESTIONS PRESENTED:

#### 1. WAS DEFENDANT DENIED HIS RIGHT TO CROSS-EXAMINE WITNESS PURSUANT TO THE SIXTH AMENDMENT

In both the <u>Crawford v. Washington</u>, (2004) 541 U.S. 36 and <u>Melendez-Diaz v. Massachusetts</u> (2009) 129 S.Ct. 2527 cases the Supreme Court addressed defendants' right under the Sixth Amendment's Confrontation Clause in <u>Melendez-Diaz v. Massachusetts</u> (2009) 129 S.Ct. 2527. This case involved the admission of certificates of analysis sworn by analysts at state laboratories, without requiring in court testimony from said analysts. The question presented to the court was "whether the affidavits are 'testimonial,' rendering the affiants 'witnesses' subject to the defendant's right of confrontation under the Sixth Amendment.

The court using a <u>Crawford</u>, supra, analysis found that the documents were "testimonial" evidence and as such were inadmissible absent the opportunity to cross-examine the witness. Analysis of the Melendez-Diaz case has been stated as follows:

- "1. analysts' certificates of analysis were affidavits within core class of testimonial statements covered by Confrontation Clause
- 2. analysts were not removed from coverage of Confrontation Clause on theory that they were not "accusatory" witnesses;
- 3. analysts were not removed from coverage of Confrontation Clause on theory that they were not conventional witnesses
- 4. analysts were not removed from coverage of Confrontation Clause on theory that their testimony consisted of neutral, scientific testing



28

5. certificates of analysis were not removed from coverage of Confrontation Clause on theory that they were akin to official and business records and

6. defendant's ability to subpoena analysts did not obviate state's obligation to produce analysts for cross-examination." *Id*, at 2527, 129 S.Ct. 2527.

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

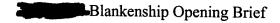
records, the presence of the technician as a witness is required under <u>Diaz-Melendez</u>.

Without the right to cross-examine these witnesses there is no way to determine whether the pictures are enhanced, whether the system was functioning properly, who at Redflex may have processed the images, or who maintained the system, and who at Redflex determined that the subject DVD and photos constituted a violation of C.V.C. § 21453a. Defendant has a right to cross-examine these witnesses pursuant to the Sixth Amendment and the Court's rulings in <a href="Diaz-Menlendez">Diaz-Menlendez</a> and <a href="Crawford">Crawford</a>, supra. Defendant has been denied that right.

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

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

We emphasize that the only purpose for the existence of the Redflex Cameras is for the criminal prosecution of red light runners. Redflex generates all of the documents contained in the Redflex Packet with the knowledge that in every single case they may be needed in court for the prosecution of the alleged violator. Furthermore, every document contained in the Red Light Camera Packet is sent to the Emeryville Police Department who in turn reviews the documents, in this case



Ms. Sylvester, and issues a citation for the prosecution of the alleged violators. That is sole purpose for this information, i.e. prosecutorial.

Counsel is requesting a dismissal in this case based on the fact that defendant has been denied the right to cross-examine witnesses under the Confrontation Clause of the Sixth Amendment.

# 2. <u>VEHICLE CODE SECTION 210 REQUIRES A CLEAR PHTOGRAPH OF THE DRIVER AND NONE WAS INTRODUCED.</u>

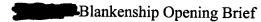
Vehicle Code §210 defines the requirements of a photo-enforced system as follows:

An "automated enforcement system" is any system operated by a governmental agency, in cooperation with a law enforcement agency, that photographically records a driver's responses to a rail or rail transit signal or crossing gate, or both, or to an official traffic control signal described in Section 21450, and is designed to obtain a clear photograph of a vehicle's license plate and the driver of the vehicle.

In the case at hand no clear photograph of the driver was introduced. The photograph included in the four-photograph citation is blurry. No one can be identified from that photo. If there is not evidence to identify who the driver was, man or woman, young or old, not conviction can be entered against the defendant. In this case the requirements of V.C. § 210 were not met and the matter should have been dismissed. People's witness testified that she had compared the face photo to the picture of Mr. Blankenship at the DMV. However, no DMV photograph was introduced. Defendant objected to the testimony as hearsay.

### 2. <u>DID THE COURT VIOLATE DEFENDANT'S RIGHTS</u> <u>UNDER THE FIFTH AMENDMENT TO REMAIN SILENT?</u>

Defendant moved for a dismissal pursuant to Vehicle Code § 210, arguing that no clear photograph of the driver was presented, and therefore there was no clear and convincing evidence that Mr. Blankenship was the driver of the vehicle on the date of the alleged violation. The Court asked People's witness Ms. Sylvester whether the defendant had submitted an Affidavit of Non-Liability alleging he was not the driver. Ms. Sylvester answered that he had not. Counsel objected, and moved for a dismissal. Defendant has a right to remain silent and a right against self-incrimination, and his exercising that right cannot be interpreted to mean a confession of guilt. See Franklin v. Duncan (9th Cir. 1995) 70 F.3d 75, 76, holding that a comment on defendant's post-arrest silence and an instruction that jury could construe that silence as an adoptive admission violated petitioner's Fifth Amendment privilege against self-incrimination; and Mahorney v. Wallman (10th Cir. 1990) 917 F.2d 469, which held a prosecutor's comments that a presumption of innocence was designed to protect only the innocent and that it had been removed in this case violated the Fifth Amendment. Mr. Blankenship did not have to submit an Affidavit that he was not driving. The People had the burden to prove him guilty beyond a reasonable doubt, including by introducing a clear photograph of the face of the driver of the vehicle, the face of the alleged traffic violator. The People failed to carry their burden, and the case should have been dismissed. The Court was in error to comment upon Mr. Blankenship's not having provided the Emeryville Police Department with an affidavit of non-



1 2

3 4

> 5 6

7 8

10

9

12

13

11

14

16

15

17 18

19

2021

22

23

2425

26

26

27

28

liability stating he was not the driver. Mr. Blankenship had a right to remain silent.

#### **CONCLUSION:**

No conviction of VC Section 21453(a) can be sustained unless the record contains substantial evidence supporting each element of the charged offense. Absent the Custodian of Records of Redflex, or other Redflex employees, the entire photo packet and video, and testimony of Ms. Sylvester, lacked foundation, were inadmissible hearsay, violated Defendant's Sixth Amendment right, and the lack of a clear photo violated Vehicle Code Section 210; and the Court's inquiry as to whether defendant denied the allegation violated Defendant's Fifth Amendment right to remain silent.

DATED: October 15, 2009

SHERRY GENDELMAN Attorney for Appellant.

Respectfully submitted,