

FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
APPEALS DIVISION

DEC 21 2010

BY Karen Mueller
DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO
APPELLATE DIVISION

PEOPLE OF THE STATE OF
CALIFORNIA,
Plaintiff and Respondent,

v.

MACIAS,
Defendant and Appellant.

Case No: ACRAS 900155
(Trial Court: V016329BJM)

PER CURIAM
OPINION

Appeal from judgment of conviction after court trial, San Bernardino County Superior Court, Victorville District, Patrick L. Singer, Commissioner. Reversed.

Robert D. Conaway, Esq., for defendant and appellant.

No appearance for plaintiff and respondent.

THE COURT:

FACTS¹

Appellant MACIAS received a Notice to Appear issued by the Victorville Police Department charging him with failing to stop for a red light (Veh.

¹ The facts are taken from the clerk's transcript and the settled statement on appeal filed by the trial court on May 7, 2010. (Cal. Rules of Court, rule 8.836.) An audio recording was made of the court trial, but no court reporter was present. Appellant's opening brief contains what purports to be a transcript of the audio recording of the trial, prepared at appellant's direction by a private party. However, such transcripts are not admissible on appeal because (1) the electronic recording of the trial proceedings is not an official record under Cal. Rules of Court, rules 2.952 and 8.917; and (2) the transcript was not made by or under the direction of the clerk or a person designated by the court, as required by rule 2.952(g)(1). Accordingly, appellant's privately-prepared transcript has not been read or considered in ruling on this appeal.

Code, § 21453, subd. (a)).² The violation had been recorded by an automated traffic enforcement system camera (commonly known as a "red light camera"). (Veh. Code, § 21455.5.) Appellant entered a plea of not guilty and the matter was set for trial.³ The matter came on for court trial on May 26, 2009. At trial, appellant brought a motion to suppress the photographic and video evidence gathered by the red light camera, and the testimony of the police officer based on that evidence, on the grounds the evidence was unlawfully gathered, the photos were inadmissible hearsay and lacked foundation, and the officer's testimony constituted improper opinion evidence and lacked personal knowledge.⁴

The trial court denied appellant's motion and proceeded with trial. The prosecution presented its case-in-chief, after which appellant rested without presenting a defense. The court found appellant guilty and imposed a fine of \$200.00. Appellant's request to attend traffic school was denied.⁵ This appeal from the judgment followed.

Issues on Appeal

The grounds for appeal, as stated in appellant's proposed statement of appeal (Cal. Rules of Court, rule 8.837(a)), are as follows:

(1) The testifying officers could not authenticate the photographic evidence from the red light camera, upon which their testimony was based;

² CT 1

³ CT 2

⁴ CT 4-27

⁵ CT 28

(2) The declaration of the agents of Redflex, the out-of-state company managing the automated traffic enforcement camera, was inadmissible hearsay that was erroneously admitted;

(3) The testimony of the officers based on the declaration of the Redflex employees in (2) was erroneously admitted;

(4) The photographic and video evidence gathered by the red light camera was inadmissible hearsay that was erroneously admitted;

(5) The photographic and video evidence gathered by the red light camera was illegally gathered because Redflex not licensed as a private investigator in this state.⁶

Standard of Review

A trial court's decision regarding the admission of evidence is reviewed for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1167.) The trial court's exercise of discretion will be disturbed on appeal only if the court's decision exceeded the bounds of reason. (*People v. Osband* (1996) 13 Cal.4th 622, 666; *People v. Mobley* (1999) 72 Cal.App.4th 761, 792-793.)

No judgment will be reversed because of erroneous admission of evidence unless the appellant can show the error resulted in a miscarriage of justice. (Evid. Code, § 353, subd. (b); see *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385.) That is, the appellant must show that, absent the

⁶ CT 41-42

error, it is reasonably probable a more favorable result would have been reached at trial. (*People v. Page* (2008) 44 Cal.4th 1, 42; *People v. Jordan* (2003) 108 Cal.App.4th 349, 366; *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 843.) Prejudice is never presumed; it must be affirmatively demonstrated. (*Brokopp, supra* at p. 843.)

The Evidence at Trial

The chief⁷ prosecution witness was Deputy⁸ Baker of the San Bernardino County Sheriff. He testified the photographic evidence was collected by means of an automated red light camera. Deputy Baker testified as to the contents of five photographs generated by the red light camera system. He testified the first of those photographs depicted appellant's vehicle at 1365 hours on January 10, 2009, approaching the intersection at 16 miles per hour when the traffic light had been red for .36 seconds. Another photo depicted appellant's vehicle making a right turn at

⁷ There is some discrepancy in the record on appeal as to whether Deputy Rose (the officer who signed appellant's citation) also testified at trial. The minute order from the trial states: "People's Witness OFFICER BAKER/OFFICER ROSE sworn and testifies." (CT 28.) However, the certified settled statement on appeal, to which appellant did not object, is devoid of any mention of any testimony by Deputy Rose. We accept the settled statement as correct, because the trial judge is the final arbiter of that issue. (*People v. Beltran* (1981) 124 Cal.App.3d 335, 340; *In re Apperson* (1961) 188 Cal.App.2d 830, 832; *Burns v. Brown* (1946) 27 Cal.2d 631, 636.) Even if Deputy Rose did testify, the record on appeal (not including the inadmissible trial transcript offered by appellant) does not include any record of that testimony. Accordingly, the only testimony considered on appeal is that of Deputy Baker, and only to the extent it is documented in the settled statement.

⁸ The settled statement and the minute order consistently refer to Deputy Baker as "Officer" Baker. Moreover, the citation issued to appellant bears the name of the Victorville Police Department. However, on the basis of Baker's testimony that he was employed by the San Bernardino County Sheriff's Department, we conclude he is a Sheriff's Deputy, not a Victorville Police officer, and we therefore refer to him as "Deputy."

the intersection at 16 miles per hour with the traffic light having been red for 1.79 seconds. The other three photographs were of the interior of appellant's vehicle showing appellant's face, the rear license plate of appellant's vehicle, and the photo of appellant from his driver's license.⁹ Deputy Baker also showed the court a twelve-second video showing the traffic signal changing from green to yellow to red, and appellant's vehicle approaching the light and turning right without stopping.¹⁰

Deputy Baker testified he was assigned to the Traffic Division in the Victorville Division of the Sheriff's Department, and had been trained in the operation and procedures involving the Redflex Automated Red Light Traffic Enforcement System in a 20-hour course provided by Redflex. He is aware the video feed is a digital process, but is not sure at what speed (frames per second) the system operates. Baker believes the feed shows events in real time. The cameras are not calibrated, but are tested automatically each morning via computer feeds. There is a technician available in Victorville if a problem arises. The digital feeds are provided to Redflex via the internet. Deputy Baker does not know if the images are encrypted or compressed. He was aware the Redflex operators provided a certification of the records, and that defense counsel offered the certification and the first photograph in the sequence into evidence.¹¹

⁹ Suppl. CT 1

¹⁰ Suppl. CT 1

¹¹ Neither the photographs nor the declaration are found in the record on appeal

Deputy Baker does not know any of the three Redflex employees who signed the certification and is not aware of their qualifications or background.¹²

Deputy Baker did not review the records at Redflex at any time; he only reviewed the records that were sent to Victorville. He or another officer reviewed all photographic evidence and returned it to Redflex before the citation was authorized by the local authorities. Deputy Baker did not review the original video feed, as that was transmitted directly to Redflex.¹³

1. The Photographs and Videotape are Writings

Under the Evidence Code, photographs and videotapes are considered "writings." (Evid. Code, § 250; see *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 416 [photographs]; *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440 [videotapes].)

2. The Photographs and Videotape Required Authentication

A writing, including a photograph or videotape, must be authenticated before it can be received in evidence. (Evid. Code, § 1401, subd. (a).) Further, the writing must be authenticated before secondary evidence of its content can be received in evidence. (Evid. Code, §1401, subd. (b).)

¹² Suppl. CT 1

¹³ Suppl. CT 1

"Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.) It is not necessary to present testimony of the individual who made the videotape or photograph in order to authenticate it. "[T]he testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is legally sufficient foundation for its admission into evidence." (Evid. Code, § 1413; *Jones v. City of Los Angeles*, *supra*, 20 Cal.App.4th at p. 440, quoting *People v. Bowley* (1963) 59 Cal.2d 855, 859; see also *People v. Doggett* (1948) 83 Cal.App.2d 405, 409-410.)

3. Respondent Failed to Authenticate the Evidence

Here, no employees of Redflex testified at trial. Instead, the prosecution relied on the testimony of Deputy Baker to lay the foundation for the "red light" photographs and videotape. Deputy Baker did not testify he made the photographs or videotape himself. He did not testify he was present at the time of appellant's alleged vehicle code violation, and witnessed the events depicted in the photographs. He did not testify to any personal knowledge of the contents of the photographic images or the method of their creation, storage or transmission. He did not testify regarding the background, training or qualifications of any of the Redflex

employees involved in any of those activities and, in fact, testified he did not know any of them.¹⁴

At most, Deputy Baker testified he had undergone training in the past in the operation and procedures involving the "red light" camera system, and that he was aware of some of the general operating procedures for the system. He did not, and could not, attest that the photos or videos were true representations of what they purported to depict because he had no such personal knowledge. In short, Deputy Baker failed to provide any of the evidence necessary to lay a foundation for the admission of the photographs or the videotape into evidence.

We note a striking similarity between the facts of this case and the facts in *People v. Khaled* (2010) 186 Cal.App.4th Supp. 1, a recent decision by the appellate division of the Orange County Superior Court. In that case, the appellant was given a traffic citation generated by a red light camera system operated by the same company involved in this case. The only prosecution witness was a local police officer, who testified about the general process by which "red light" camera photographs are used to generate traffic citations.

After noting the prosecution bore the burden of establishing the admissibility of the evidence in support of its case, the appellate division

¹⁴ CT 1

held the police officer was not competent to lay a foundation for the admission of the photographs into evidence:

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.

(Khaled, supra, at p. 8.)

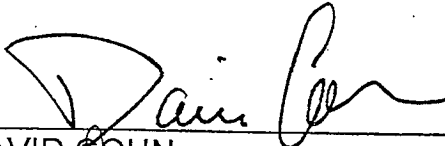
In the absence of a proper foundation, the photographic evidence was held inadmissible. Because the sole evidence supporting the conviction was the inadmissible photographs, the court reversed the judgment and ordered the charges dismissed. *(Id. at pp. 8-9.)*

The same holds true in this case. The settled statement establishes that the only evidence supporting the conviction was the photographs and videotape from the red light camera system. The sole foundation offered for the admissibility of that evidence was the testimony of Deputy Baker, who was not competent to lay that foundation. Accordingly, the evidence was inadmissible under Evidence Code section 1401, and the trial court abused its discretion by admitting it. In the absence of any admissible evidence to support the conviction, the judgment must be reversed.

Disposition

The judgment is reversed and the matter is remanded to the trial court with directions to dismiss the charges. (*People v. Bighinatti* (1975) 55 Cal.App.3d Supp. 5, 7.)





DAVID COHN
Presiding Judge of the Appellate Division



JOSEPH BRISCO
Judge of the Appellate Division



WM. JEFFERSON POWELL, IV
Judge of the Appellate Division

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