

JAN 28 2010

ALAN CARLSON, Clerk of the Court

*H. Potter*  
BY H. POTTER

APPELLATE DIVISION  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ORANGE

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7 PEOPLE OF THE STATE OF )  
CALIFORNIA, )

CASE NO. 30-2009-00270637

8 Plaintiff and )  
Respondent, )

JUDGMENT ON APPEAL  
from the  
SUPERIOR COURT  
of

9 vs. )

ORANGE COUNTY

10 MUSTAPHA B. [REDACTED] )

CENTRAL JUSTICE CENTER

11 Defendant and )  
12 Appellant. )

HON. DANIEL M. ORNELAS  
COMMISSIONER

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14 This appeal involves a far too often issue presented to  
15 this court, namely the admissibility and the statutory  
16 compliance with the procedures employed by several  
17 municipalities in this county in what have come to be known as  
18 "photo enforcement" citations.  
19

20 This judgment must be reversed in light of the total lack  
21 of admissible evidence to sustain the conviction. Appellant and  
22 real party in interest, the City of Santa Ana address issues  
23 regarding the prosecution of photo-enforcement cases in general  
24 and the lack of notice in this case, that we find unnecessary to  
25 address in light of the insufficiency of the evidence to sustain  
26 the trial court's finding.  
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28 The underlying facts in this case are fairly simple. No

1 police officer witnessed the alleged violation. Instead, a  
2 police officer testified about the general area depicted in a  
3 photograph taken from a camera installed at an intersection in  
4 Santa Ana. A particular private company contracts with the  
5 municipality to install, maintain, store this digital  
6 photographic information. The officer testified these  
7 photographs are then periodically sent back to the police  
8 department for review as possible driving violations.  
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10 To be more specific, the photographs contain hearsay  
11 evidence concerning the photograph allegedly indicating the  
12 date, time, and other information. The person who entered that  
13 information into the camera-computer system did not testify. The  
14 person who entered that information was not subject to being  
15 cross-examined on the underlying source of that information.  
16 The person or persons who maintain the system did not testify.  
17 No one with personal knowledge testified about how often the  
18 system is maintained. No one with personal knowledge testified  
19 about how often the date and time are verified or corrected.  
20 The custodian of records for the company that contracts with the  
21 city to maintain, monitor, store, and disperse these photographs  
22 did not testify. The person with direct knowledge of the  
23 workings of the camera-computer system did not testify.  
24 Instead, the prosecution chose to submit the testimony of a  
25 local police officer, Santa Ana Police Officer Alan Berg. This  
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1 witness testified that sometime in the distant past, he attended  
2 a training session where he was instructed on the overall  
3 working of the system at the time of the training (See Settled  
4 Statement, page 1, lines 24-26 (hereafter SS 1:24-26). Officer  
5 Berg was unable to testify about the specific procedure for the  
6 programming and storage of the system information.  
7

8         These photo enforcement cases present a unique factual  
9 situation to the courts regarding the admissibility of  
10 videotapes and photographs. There are two types of situations  
11 where a videotape or photographs are typically admitted into  
12 evidence where the photographer did not testify. The first  
13 involves a surveillance camera at a commercial establishment  
14 (often times a bank or convenience/liquor store). In those  
15 situations, a person testifies to being in the building and  
16 recounts the events depicted in the photographs. Courts have  
17 consistently held that such testimony establishes a sufficient  
18 foundation if the videotape is a "reasonable representation of  
19 what it is alleged to portray." (See generally People v.  
20 Gonzalez (2006) 38 Cal.4<sup>th</sup> 932, 952-953, People v. Carpenter  
21 (1997) 15 Cal.4<sup>th</sup> 312, 385-387; People v. Mayfield (1997) 14  
22 Cal.4<sup>th</sup> 668, 745-747; Imwinkelried, California Evidentiary  
23 Foundations, p. 115, 117 (3<sup>rd</sup> ed. 2000); also United States v.  
24 Jernigan (9<sup>th</sup> Cir. 2007) 492 F.3d 1050 (en banc).)  
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27         The second situation involves what has commonly come to be  
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1 known as a "nanny cam." In that situation, a homeowner hides a  
2 surveillance camera in a room and then retrieves the camera at a  
3 later time. That person establishes the time and placement of  
4 the camera. This person also has personal knowledge of when the  
5 camera was initially started and when it was eventually stopped  
6 and retrieved.  
7

8 Neither of these situations is analogous to the situation  
9 at bar. Here the officer could not establish the time in  
10 question, the method of retrieval of the photographs, or that  
11 any of the photographs or the videotape was a "reasonable  
12 representation of what it is alleged to portray." A very  
13 analogous situation to the case at bar, however, is found in  
14 Ashford v. Culver City Unified Sch. Dist. (2005) 130 Cal.App.4<sup>th</sup>  
15 344, 349-450, where the court held that the unauthenticated  
16 videotape allegedly showing employees actions lacked sufficient  
17 foundation to be admitted at an administrative hearing. And in  
18 so holding the court noted that without such a laying of  
19 foundation, the videotape was inadmissible.  
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22 In lieu of establishing the necessary foundation by direct  
23 testimony, the proponent of the evidence, respondent, argues  
24 that independent hearsay exceptions justify admission of the  
25 photographs under either the "Official Records Exception" or the  
26 "Business Records Exception" of the Evidence Code.<sup>1</sup> Neither of  
27 these sections support their contention. The trial court is  
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1 Appellant's Opening Brief, pages 5-7; Respondent's Opening Brief, pages 6-10.

1 vested with "wide discretion" in determining whether sufficient  
2 foundation is laid to qualify evidence under these hearsay  
3 exceptions. "On appeal, exercise of that discretion can be  
4 overturned only upon a clear showing of abuse." People v. Beeler  
5 (1995) 5 Cal.4<sup>th</sup> 953, 978-979.  
6

7 **Official Records Exception - Evidence Code section 1280**

8 To support establishing the foundation and ultimate  
9 admissibility of these various photographs, videotape and  
10 documents, the prosecution relied on a document entitled  
11 "Declaration of Custodian of Records - California Evidence Code  
12 1280" which was marked as People's Exhibit #3 (SS 2:23-24).  
13 However, the trial court erred in admitting such documents as  
14 either an official record or a business record. By the expressed  
15 language of Evidence Code section 1280, the writing must be  
16 "made by and within the scope of duty of a public employee"  
17 (subd. (a)) (e.g., Shea v. Department of Motor Vehicles (1998)  
18 62 Cal.App.4<sup>th</sup> 1057 (forensic laboratory trainee did not qualify  
19 as a "public employee").) And the public employee must be under  
20 a legal duty to make such reports (e.g., People v. Clark (1992)  
21 3 Cal.4<sup>th</sup> 41, 158-159 (autopsy report originally performed and  
22 prepared by now deceased coroner properly admitted through  
23 testimony of another coroner). The signator of the document,  
24 Exhibit #3, states they are employees of the "Redlex Traffic  
25 Systems" and hence is not a public employee. And 1280 goes on  
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1 to require "[t]he sources of information and method and time of  
2 preparation were such as to indicate its trustworthiness (subd.  
3 (c)). There is a total lack of evidence to establish this  
4 element either, except for the written contents of Exhibit #3.  
5 Like business records, public records such as Exhibit #3 can  
6 present multiple hearsay problems. Each layer of hearsay must  
7 meet the foundational elements of this exception or another  
8 hearsay exception, or the writing is inadmissible. (People v.  
9 Reed (1996) 13 Cal.4<sup>th</sup> 217, 224-225 ("As with all multiple  
10 hearsay, the question is whether each hearsay statement fell  
11 within an exception to the hearsay rule."), People v. Ayers  
12 (2005) 125 Cal.App.4<sup>th</sup> 988; People v. Baeske (1976) 58 Cal.App.3d  
13 775 (police report containing contents of phone call to police  
14 department inadmissible under official record exception).)

17 "Although similar to the business records exception  
18 (Evid. Code, §1271), the official records exception differs  
19 in one important respect. Evidence Code section 1271  
20 'requires a witness to testify as to the identity of the  
21 record and its mode of preparation in every instance. In  
22 contrast, [Evidence Code] [s]ection 1280 . . . permits the  
23 court to admit an official record or report without  
24 necessarily requiring a witness to testify as to its  
25 identity and mode of preparation if the court takes  
26 judicial notice or if sufficient independent evidence shows  
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1 that the record or report was prepared in such a manner as to  
2 assure its trustworthiness.'" (Bhatt v. State Dept. of Health  
3 Services (2005) 133 Cal.App.4<sup>th</sup> 923, 929 [citations omitted].)  
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6 **Business Records Exception - Evidence Code section 1271**

7       These exhibits also do not comply with the admissibility  
8 requirements of the business record exception under section  
9 1271. In order to establish the proper foundation for the  
10 admission of a business record, an appropriate witness must be  
11 called to lay that foundation (Bhatt, supra). The underlying  
12 purpose of section 1270 is to eliminate the necessity of calling  
13 all witnesses who were involved in a transaction or event  
14 (People v. Crosslin (1967) 251 Cal.App.2d 968). Generally, the  
15 witness who attempts to lay the foundation is a custodian, but  
16 any witness with the requisite firsthand knowledge of the  
17 business's record-keeping procedures may qualify. The proponent  
18 of the admission of the documents has the burden of establishing  
19 the requirements for admission and the trustworthiness of the  
20 information. (People v. Beeler, supra, 9 Cal.4<sup>th</sup> at p. 978.)  
21  
22 And the document cannot be prepared in contemplation of  
23 litigation. (Palmer v. Hoffman (1943) 318 U.S. 109; Gee v.  
24 Timineri (1967) 248 Cal.App.2d 139.) Here, Officer Berg did  
25 not qualify as the appropriate witness and did not have the  
26 necessary knowledge of underlying workings, maintenance, or  
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1 record keeping of Redflex Traffic System. The foundation for  
2 the introduction of the photographs and the underlying working  
3 of the Redflex Traffic System was outside the personal knowledge  
4 of Officer Berg. If the evidence fails to establish each  
5 foundational fact, neither hearsay exception is available  
6 (People v. Matthews (1991) 229 Cal.App.4<sup>th</sup> 930, 940).2

8 Accordingly, without such foundation, the admission of  
9 Exhibits #1 and 3 was erroneous and thus the trial court abused  
10 its discretion in admitting these exhibits. Without these  
11 documents, there is a total lack of evidence to support the  
12 vehicle code violation in question.  
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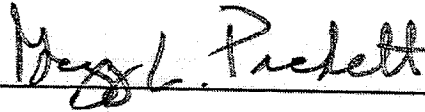
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2 This is not a situation where, in compliance with a lawfully issued subpoena duces tecum, the custodian submitted a declaration attesting to the necessary foundation facts (Evid. Code, §1560 et. seq.). See also Taggart v. Super Seer Corp. (1995) 33 Cal.App.4<sup>th</sup> 1697. No such subpoena duces tecum was issued or introduced here.



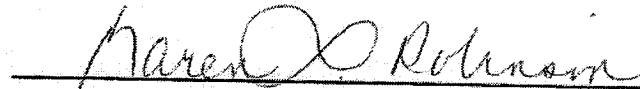
1           The judgment is reversed and with directions that the  
2 charge be dismissed.  
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6 GREGG L. PRICKETT, Acting Presiding Judge\*

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10 GREGORY H. LEWIS,

Judge

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15 KAREN L. ROBINSON,

Judge

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19 \* Sitting by assignment of the Chief Justice of the California  
20 Supreme Court.  
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