

COURT OF APPEAL-4TH DIST DIV 3
FILED

JAN 29 2009

Deputy Clerk _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS FISCHETTI,

Defendant and Appellant.

G041501

(Super. Ct. No. 30-2008-00080937)

O R D E R

THE COURT:*

On January 22, 2009, this court received from the clerk of the Appellate Division of the Superior Court a copy of the opinion certified for publication and the record in this matter. (Cal. Rules of Court, rule 8.887(c)(2)(B).)

The Court DENIES transfer of the case. (Cal. Rules of Court, rule 8.1008.)

SILLS, P.J.

SILLS, P. J.

* Before Sills, P. J., Moore, J., and Fybel, J.

COPY

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8 APPELLATE DIVISION
9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF ORANGE
11

12 PEOPLE OF THE STATE OF
13 CALIFORNIA,

14 Plaintiff and Respondent,

15 vs.

16 THOMAS JAMES FISCHETTI,

17 Defendant and Appellant.

18
19 CITY OF SANTA ANA,

20 Real Party in Interest
21

Case No.: 30-2008-00080937

**PETITION FOR REHEARING, OR IN
THE ALTERNATIVE. REQUEST FOR
DEPUBLICATION**

22
23 TO THE COURT AND THE APPELLANT:

24 PLEASE TAKE NOTICE that Real Party in Interest, CITY OF SANTA ANA,
25 hereby files the instant Petition for Rehearing, or in the alternative, Request for
26 Depublication of its opinion in the above-captioned matter, pursuant to California *Rules of*
27 *Court*, Rule 8.889.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 The CITY OF SANTA ANA, seek a rehearing of the case at bar because the court
4 was presented with only one side of the issues involving the validity of the CITY OF
5 SANTA ANA's automated photo enforcement system. The CITY OF SANTA ANA did
6 not receive any notice or service of the arguments or proceedings in this matter, and as a
7 result the CITY OF SANTA ANA was not afforded the opportunity to participate in the
8 appeal of this matter. After a review of the record, it appears that the District Attorney
9 was receiving service of the documents, but the District Attorney never appeared in this
10 matter.

11 The underlying issue in this case is not only of great concern to the CITY OF
12 SANTA ANA, but also potentially affects other cities operating such systems. As such,
13 the CITY OF SANTA ANA herein petitions for the rehearing of this matter due to the
14 lack of due process in the proceedings, or in the alternative, requests the de-publication of
15 the Court's Judgment on Appeal.

16 **II. REHEARING OF THE INSTANT APPEAL IS NECESSARY AS A RESULT**
17 **OF THE DENIAL OF DUE PROCESS**

18 On January 28, 2009, the CITY OF SANTA ANA was first made aware of the
19 Orange County Superior Court Appellate Division's opinion in the above-captioned
20 matter written by Judge Steven L. Perk. It was also on that date that the CITY OF
21 SANTA ANA learned that the court had found the opinion meets the standard for
22 publication. These rulings were made even though the CITY OF SANTA ANA never
23 received an opportunity to brief or argue the issues in this case.

24 A review of the record shows that on June 26, 2008, the CITY OF SANTA ANA
25 filed an objection to the proposed statement on appeal in this matter, which was served on
26 the Appellant and filed with the court. A true and copy of the objection is attached hereto
27 as Exhibit "A" and incorporated herein by this reference.

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1 At no time thereafter was the City of Santa Ana provided notice of any further
2 proceedings, including any briefing schedule or oral argument. Even though both the
3 Appellant and the Appellate Division were aware of the response by the CITY OF
4 SANTA ANA as the Real Party in Interest, all notices and briefs from both the Appellant
5 and the Appellate Division were served on the District Attorney, who never made an
6 appearance, and not the City Attorney. In previous appeals involving the CITY OF
7 SANTA ANA's automated photo enforcement citation system, the City Attorney's office
8 received notice, briefing schedules and notification of oral argument.

9 The record before this Court is clear that the only submission, either written or
10 oral, before the Appellate Division of the Superior Court was by the Appellant. Such a
11 one-sided process should never lead to a published opinion.¹ The CITY OF SANTA
12 ANA was fundamentally denied notice and the opportunity to be heard on an issue that
13 has severe consequences for the CITY OF SANTA ANA, as well as other cities
14 throughout the state.

16
17 ¹ For example, the Appellate Division's opinion, at p. 2, lines 13-21, gives great import to the failure of a subsequent
18 bill to amend the relevant statute to add language which would have supported Real Party in Interest's statutory
19 interpretation. Had the CITY OF SANTA ANA been given notice and an opportunity to appear, it would have
20 argued that the Supreme Court has expressly rejected the assertion that legislative intent can be discerned by a
21 subsequent failure to amend a statute: "Unpassed bills, as evidences of legislative intent, have little value.
22 [Citations.]" *Dyna-Med, Inc. v. Fair Employment & Hous. Com.*, 43 Cal. 3d 1379, 1396 (1987). Where the
23 Legislature bottles up a proposed amendment up in Committee, as was the case with the 2003 bill the Appellate
24 Division's opinion relies upon, the Supreme Court has recently restated its explicit holding that it could not
25 determine legislative intent from such a failure: "we have declined to base such a conclusion on a bill's mere failure,
26 as here, to clear committee in the legislative chamber where it was introduced. (*Moradi-Shalal v. Fireman's Fund*
27 *Ins. Companies* (1988) 46 Cal.3d 287, 300.) As we have noted, 'failure of the bill to reach the [chamber] floor is
28 [not] determinative of the intent of the [chamber] as a whole that the proposed legislation should fail.' (Ibid.)"

Prachasaisoradej v. Ralphs Grocery Co., Inc., 42 Cal. 4th 217, 243-244 (2007).

1 Deciding a case of this nature with briefing and oral argument by only a single
2 party makes a sham of the adversarial system. As the United States Supreme Court has
3 noted, the adversarial system is a bedrock principle of the Anglo-American system of
4 justice. “[Truth],’ Lord Eldon said, ‘is best discovered by powerful statements on both
5 sides of the question.’ This dictum describes the unique strength of our system of
6 criminal justice. ‘The very premise of our adversary system of criminal justice is that
7 partisan advocacy on both sides of a case will best promote the ultimate objective that the
8 guilty be convicted and the innocent go free.’ *Herring v. New York*, 422 U.S. 853, 862
9 (1975).” *United States v. Cronin*, 466 U.S. 648, 655 (1984) (footnote omitted). The
10 Appellate Division was robbed of the opportunity in this case to utilize the adversarial
11 system to reach justice.

12 **III. LACK OF SERVICE ON THE CITY OF SANTA ANA VIOLATED THE**
13 **CALIFORNIA RULES OF COURT, WHICH MANDATES GRANT OF**
14 **THE CITY’S PETITION FOR REHEARING OF THE INSTANT APPEAL**

15 The Appellant served the Proposed Statement on Appeal to the City Attorney’s
16 Office on June 12, 2008. In response, the CITY OF SANTA ANA as the Real Party in
17 Interest served Appellant with an Objection to his proposed statement on appeal on June
18 26, 2008.

19 The court file in this matter further discloses that Appellant also served the CITY
20 OF SANTA ANA via the City Attorney’s Office with a Request for Stay of Execution on
21 June 25, 2008. After receipt of the Request for Stay of Execution, the CITY OF SANTA
22 ANA never received any other notice or filings in this matter.

23 The Court Rule in effect at that time, *California Rules of Court*, Rule 8.706(e)
24 required that the Appellant’s Opening Brief be served on all adverse parties who have
25 appeared separately. The Rule also states that the clerk shall not file any brief that does
26 not conform to the rule. The presiding judge may make an order to allow a non-
27 conforming filing, in his discretion, where the infraction of the rules is of minor character
28 and will not affect the rights of the parties or seriously hamper the court in its examination

1 of the appeal. However, the failure to allow the CITY OF SANTA ANA any opportunity
2 to be heard on the validity of its photo enforcement system is of major character. As
3 such, the failure to provide any service of the Appellant's Opening Brief, or even notice
4 of the hearing of argument on the same, is a significant violation of the Rules of Court
5 that deprived the CITY OF SANTA ANA of due process and should mandate the
6 Rehearing of the subject appeal.

7 **IV. THE INSTANT PETITION FOR REHEARING IS PROPER AND TIMELY**

8 *California Rules of Court*, Rule 8.889(a)(1) authorizes the filing of a petition to the
9 Appellate Division for the rehearing of a decision. Rule 8.889(b)(1)(B) requires that a
10 petition for rehearing be filed and served within fifteen (15) days after a publication order
11 restarting the finality period under Rule 8.888(b). In the instant matter, the Appellate
12 Division issued a minute order on January 15, 2009, certifying the court's opinion for
13 publication. Accordingly, the last day to file a Petition for Rehearing is January 30, 2009,
14 which means that the instant Petition is timely.

15 **V. IN THE ALTERNATIVE, THE CITY OF SANTA ANA REQUESTS**
16 **DEPUBLICATION OF THE OPINION**

17 Should this Honorable Court decline to order rehearing in this case, in the
18 alternative, as a result of the lack of due process afforded the CITY OF SANTA ANA in
19 the above-captioned matter, as detailed above, the CITY OF SANTA ANA
20 requests depublication of the Court's opinion. The CITY OF SANTA ANA was not
21 provided an opportunity to participate in the determination of this vital issue, the validity
22 of the City's automated photo enforcement system. Absent even a partial adversarial
23 process, this is not a proper opinion for publication, which could adversely affect not only
24 the CITY OF SANTA ANA, but also other cities with similar systems.

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1 **VI. CONCLUSION**

2 Based on the foregoing arguments, it is obvious that there was a fundamental
3 denial of due process. Accordingly, the CITY OF SANTA ANA respectfully petitions the
4 court for a rehearing of the instant appeal, or in the alternative requests the court to order
5 depublication of the opinion.

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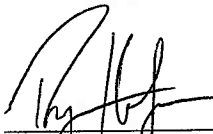
JOSEPH W. FLETCHER
City Attorney
City of Santa Ana

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11 Dated: January 30, 2009

By: 
RYAN O. HODGE
Deputy City Attorney
City of Santa Ana

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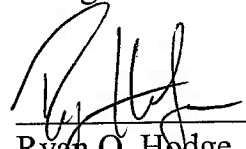
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1))

The text of this petition consists of 1,289 words, as counted by the Microsoft Office Word 2007 word-processing program used to generate the brief.

Dated: January 30, 2009



Ryan O. Hodge
Counsel for Plaintiff and Respondent,
PEOPLE OF THE STATE OF
CALIFORNIA