

# Recent Case Report

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## People v. Nelson

(2011) \_\_ Cal.App.4<sup>th</sup> \_\_ [2011 WL 5515547]

### Issue

Is a motorist in violation of Vehicle Code section 23123 if he uses a cell phone while stopped at a traffic light?

### Facts

While waiting at a traffic signal in Richmond, Carl Nelson dialed a number on his cell phone and held the phone up to his ear. Unbeknownst to him, a Richmond motorcycle officer had stopped next to him and saw the whole thing. When Nelson realized that the officer was watching him, he put the phone away, but it was too late: When the light turned green, the officer stopped him.

Nelson tried to convince the officer that he did not violate the cell phone prohibition because his car was not actually moving when he used the phone and, thus, he was not technically “driving” his car at the time. The officer was unconvinced; he wrote him a ticket and Nelson contested it in traffic court. He lost, and he also lost his appeal to the Superior Court in Contra Costa County, but the court certified the matter to the Court of Appeal for review.

### Discussion

Vehicle Code section 23123 states: “A person shall not drive a motor vehicle while using a wireless telephone unless that telephone is specifically designed and configured to allow hands-free listening and talking, and is used in that manner while driving.” As noted, Nelson argued that he did not violate the statute because he was not “driving” his vehicle at the time. He pointed out that a contrary conclusion would lead to absurd results, such as a driver being cited if he used a cell phone while at a dead stop for hours because of a serious traffic accident up ahead.

While such a situation would constitute a technical violation, the court noted that it was ruling only on whether Nelson’s actions were prohibited by the statute—and it ruled they were. As the court pointed out, if it adopted Nelson’s interpretation “we would open the door to millions of people across our state repeatedly picking up their phones and devices to place phone calls and check voicemail (or text-based messages) every day while driving whenever they are paused momentarily in traffic, their car in gear and held still only by their foot on the brake, however short the pause in the vehicle’s movement. This could include fleeting pauses in stop-and-go traffic, at traffic lights and stop signs, as pedestrians cross, as vehicles ahead navigate around a double-parked vehicle, and many other circumstances.”

In a concurring opinion, Justice Richman explained that he agreed with the ruling, but for the following reason: “A shopper driving to a store near Lake Merritt in Oakland may have to stop while a gaggle of geese crosses the street. A couple going for a Sunday drive in West Marin County may have to stop for a cattle crossing. And, of course, all of

us are expected to stop for red lights, stop signs, crossing trains, and funeral processions. In short, all drivers may, and sometimes must, stop. But they do so while 'driving. Just like defendant."

Consequently, the court ruled that Nelson had, in fact, violated the statute because "there was substantial evidence that he listened to a hand-held wireless telephone during his fleeting pause at a traffic light." POV