DATE FILED: December 7, 2020 9:47 AM
FILING ID: AF9AE882D1A0D
CASE NUMBER: 2020CA1359

COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, CO 80202

District Court, Jefferson County
The Honorable Randall C. Arp
Case No. 20CV30008

Plaintiff-Appellant,
KELLY STACKPOOL,

v.

COLORADO DEPARTMENT OF REVENUE,
MOTOR VEHICLE DIVISION

Appellee.

▲COURT USE ONLY▲

Case Number: 20CA1359

Counsel for Plaintiff-Appellant
Abraham V Hutt, No. 14137
Andrew E. Ho, No. 40381
Recht Kornfeld, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
(303) 573-1900
Fax: (303) 446-9400
abe@rklawpc.com
andrew@rklawpc.com

OPENING BRIEF

CERTIFICATE OF COMPLAINCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

The Opening Brief contains 7043 words, excluding the table of contents and other portions not to be included in the word count pursuant to C.A.R. 28(g). This is within the 9,500 word limit for an Opening Brief.

*s/ Abraham V Hutt*_____
Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in upholding the Department of Revenue's decision to deny Appellant Stackpool early reinstatement of her driver's license with an ignition interlock restricted license under C.R.S. § 42-2-132.5(4)?

2. Did the District Court err in failing to grant Appellant Stackpool's Motion for Change of Judge, after it decided the case against her prior to any briefing?

STATEMENT OF THE CASE

This is an appeal of the decision by the District Court upholding the Department of Revenue's ("DOR") decision to deny Appellant Kelly Stackpool early reinstatement of her driver's license with an ignition interlock restricted license under C.R.S. § 42-2-132.5(4).

In August of 2018, Ms. Stackpool was charged with driving under the influence (DUI). CF, p. 54. Simultaneously, the DOR initiated a driver's license revocation matter based on her blood alcohol level registering .08 or higher under C.R.S. § 42-2-126. CF, p. 51. That action resulted in a revocation of Appellant Stackpool's license as this was her 2nd such revocation under the *per se* section of 42-2-126. She served that revocation and received early reinstatement with an ignition interlock restricted license on November 30, 2018 pursuant to C.R.S. § 42-

2-132.5(4). CF, p. 8. All of that action concerning her driver's license took place at the DOR while the felony DUI case (predicated on three prior convictions) arising from the very same offense was making its way through the court.

On or about September 18, 2019 Ms. Stackpool pled guilty to felony DUI and was subsequently sentenced. CF, p. 35. On October 31, 2019, the DOR issued Appellant Stackpool two notices revoking her driving privilege based on that conviction, both arising from C.R.S. § 42-2-125. One letter informed Appellant Stackpool of the revocation of her driver's license for having "been convicted of 3 or more alcohol and or drug violations." CF, p. 50. This letter stated that she "may be eligible to reinstate early with an ignition interlock restricted driving privilege after serving one (1) month under revocation." CF, p. 50. This revocation was under C.R.S. § 42-2-125(1)(b.5). The second letter informed Appellant Stackpool that her driver's license was being revoked because she had "been convicted of a felony in which a motor vehicle was used." CF, p. 16. This second letter did not provide language about early reinstatement with an ignition interlock restricted driving privilege and instead said that she was "not eligible for any type of driving privileges during the revocation period." CF, p. 16. This revocation was under C.R.S. § 42-2-125(1)(c).

Appellant Stackpool endeavored to have the DOR acknowledge the continued validity of the ignition interlock restricted license she had already been issued based on her *per se* revocation pursuant to § 42-2-126 in the very same case. When the DOR declined, she requested a hearing with the DOR's Hearings Division. That hearing was held on December 9, 2019. CF, p. 13-14. The primary issue at this hearing was the DOR's interpretation and application of § 42-2-125(1)(c), and its effect on § 42-2-125(1)(b.5) in light of the classification of DUI as a felony as a fourth or subsequent conviction. In other words, the hearing was to determine whether Appellant Stackpool qualified to reinstate early from her felony DUI conviction pursuant to C.R.S. § 42-2-132.5(4). Tr. (December 9, 2019), p. 4-8.

Appellant Stackpool and undersigned counsel attended the December 9, 2019 hearing and argued to the DOR's hearing officer that subsections (1)(b.5) and (1)(i), controlled her reinstatement. Counsel argued that the DOR should find Appellant Stackpool to be eligible for an interlock-restricted license pursuant to C.R.S. § 42-2-132.5(4) because the revocation was based solely on her conviction for DUI. Tr. (December 9, 2019), p. 4-7. The matter was taken under advisement at the close of argument. Tr. (December 9, 2019), p. 7-8. On December 13, 2019,

the DOR issued a written decision and order which denied an ignition interlock-restricted license. CF, p. 18-20.

On January 3, 2020, Appellant Stackpool timely filed a Complaint for Appellate Review of an Order of the Dept. of Revenue, Motor Vehicle Division ("Complaint") to review and reverse the DOR's order. CF, p. 1-3. On February 24, 2020, prior to receiving any legal arguments or briefs from either party, the District Court issued an order denying Appellant Stackpool's appeal. In its order, the District Court crafted an argument on behalf of the DOR, incorrectly asserted that the DOR had advanced this argument, and then ruled in favor of it and against Appellant Stackpool. CF, p. 35-37. On February 26, 2020, Appellant Stackpool filed a Motion to Rescind the District Court's order. CF, p. 38-39. The District Court did rescind the Order, but in so doing, *sua sponte* ordered that Appellant need not submit any Reply Brief to address arguments raised by the DOR. CF, p. 45. On March 26, 2020, the District Court issued another order regarding the briefing schedule again repeating that Appellant Stackpool would not need to submit a Reply Brief. CF, p. 49.

On April 21, 2020, Appellant Stackpool filed a Motion for Change of Judge and attached two supporting affidavits. CF, p. 77-86. The District Court denied

the Motion for Change of Judge on May 18, 2020 asserting "…the Court believes it has not shown prejudice or bias towards either party." CF, p. 96-97.

Appellant Stackpool timely filed her Opening Brief, the DOR filed its Answer Brief, and Appellant Stackpool responded by filing her Reply Brief (the District Court having ruled only in denying her Motion for a Change of Judge that she would be allowed to Reply to arguments made by the DOR). CF, p. 96-97; CF, p. 98-148. On June 26, 2020, the District Court issued a final order which again denied Appellant Stackpool's requested relief. CF, p. 149-151.

On August 7, 2020, Appellant Stackpool timely filed her notice of appeal pursuant to C.A.R. 4(a). CF, p. 155-160.

SUMMARY OF THE ARGUMENT

The District Court erred in upholding the DOR's refusal to issue Appellant Stackpool an interlock-restricted license pursuant to C.R.S. § 42-2-132.5(4). Several statutory provisions apply to the reinstatement of a driver's license following multiple DUI offenses. Those statutes are interpreted by the DOR to conflict with one another: two of them specifically providing for early reinstatement with an ignition interlock device and one being read by the DOR to disallow that early reinstatement. The statutes can be read harmoniously to allow for early reinstatement with the interlock device, however, the DOR chooses to

read one general provision to disallow interlock reinstatement and to override several more specific statutes which authorize it. That interpretation is contrary to the well-established rules of statutory construction. Consequently, this Court should overturn the DOR's interpretation and the District Court's ruling which gives it deference. Proper application of the rules of statutory construction requires the DOR to provide Appellant Stackpool early reinstatement through an interlock-restricted license.

The District Court applied an incorrect standard and abused its discretion in refusing to grant Appellant Stackpool's Motion for Change of Judge pursuant to C.R.C.P. 97. The Judge issued a ruling in the case before it was ever argued and had to be asked to withdraw the premature decision. Both in deciding the case before it was presented and in its statements afterwards, the District Court displayed a bent of mind or the appearance of a bent of mind against Appellant Stackpool that required recusal.

ARGUMENT AND AUTHORITIES

I. The District Court erred in upholding the Department of Revenue's improper interpretation that C.R.S. § 42-2-125(1)(c) conflicts with and overrides C.R.S. § 42-2-132.5(4) and C.R.S. § 42-2-125(1)(b).

A. Standard of Review.

Appellate courts review *de novo* agency determinations regarding questions of law. *Hanson v. Colorado Dep't of Revenue, Motor Vehicle Div.,* 2012 COA 143, ¶14 (2012). This standard applies in this court as it did to the District Court. *Baldwin v. Huber*, 223 P.3d 150, 152 (Colo. App. 2009).

The reviewing court's authority to review and reverse a determination by the DOR's Hearings Division pursuant to a ruling under C.R.S. § 42-2-125 is found within that statute and the State Administrative Procedure Act (APA):

> The department shall hold the hearing not less than thirty days after receiving such license and request through a hearing commissioner appointed by the executive director of the department, which hearing shall be conducted in accordance with the provisions of section 24-4-105, C.R.S. After such hearing, the licensee may appeal the decision of the department to the district court as provided in section 42-2-135.
>
> C.R.S. § 42-2-125(4).

The APA, in C.R.S. § 24-4-106, grants a reviewing court the authority to reverse an administrative agency's determination if the court finds that the agency acted in an arbitrary and capricious manner, made a determination that is unsupported by the evidence in the record, erroneously interpreted the law, or exceeded its constitutional or statutory authority. C.R.S. § 24-4-106(7); *McClellan v. Meyer*, 900 P.2d 24 (Colo. 1995). Here the agency erroneously interpreted the law, and the District Court erroneously upheld that interpretation. Appellant

Stackpool preserved this issue for appeal by raising it with the agency and in her Briefs to the District Court. CF, p. 98-124.

B. The DOR's interpretation of the statute requiring revocation for "any felony offense involving a motor vehicle" is in conflict with the statutes governing revocation for DUI convictions.

The District Court erred in finding the DOR's interpretation of C.R.S. § 42-2-125(1)(c) not to be in conflict with the more specific statutes governing Appellant Stackpool's license revocation: C.R.S. § 42-2-125(1)(b.5), § 42-2-125(1)(i), and C.R.S. § 42-2-132.5(4). CF, p. 153. "In determining whether two pieces of legislation conflict, the critical inquiry is whether [one] authorizes what the [other] forbids, or forbids what the [other] has expressly authorized." *Craig v. Hammat*, 809 P.2d 1034, 1036 (Colo. App. 1990) citing *Aurora v. Martin*, 507 P.2d 868 (Colo. 1973). Here, C.R.S. § 42-2-125(1)(b.5), the DUI revocation provision, expressly authorizes early reinstatement with an interlock license, and the DOR interpreted C.R.S. § 42-2-125(1)(c), the "any felony involving a motor vehicle" provision, to forbid it.[1] The DOR adopted an application of C.R.S. § 42-2-125(1)(c) (the "any felony involving a motor vehicle" statute) that places it in

[1] Nothing in the language of C.R.S. § 42-2-125(1)(c) or of any other subparagraph of 42-2-125, or of any other statute requires this interpretation. No statutory provision prohibits ignition interlock early reinstatement for a revocation under (1)(c). The DOR appears simply to have created this interpretation out of whole cloth. No authority for it has been offered by the Department or its counsel.

irreconcilable conflict with C.R.S. § 42-2-125(1)(b.5), C.R.S. § 42-2-125(1)(i) and C.R.S. § 42-2-132.5(4) (the statutes allowing interlock licenses for drivers with three or more DUI-type convictions).

The District Court refused to recognize this conflict, even though it was presented with a thorough and well-reasoned decision of another Jefferson County District Court judge considering the same issues and reaching the same conclusion set forth by Appellant Stackpool. *Starling v. Colo. Dep't of Revenue,* 17CV30955, CF, p. 118-124. Instead, the District Court relied on a conflicting decision of another Jefferson County District Court judge. *Kier v. Colo. Dep't of Revenue*, 19CV31407, CF, p. 133-135. As neither of those cases was binding upon the District Court, nor of course on this Court, counsel will not analyze them in detail in this brief. It is enough to say that *Starling* contains a thorough and on-point analysis while *Kier* is much more conclusory. In addition, *Kier* is distinguishable because it did not involve the DOR imposing revocations under several statutory sections for one conviction as happened in *Starling* and in this case, but rather imposing only the "any felony" revocation. In Appellant Stackpool's case, the District Court erroneously held that no statutory conflict existed in the license reinstatement requirements despite finding C.R.S. § 42-2-125(1)(c) to "forbid[] what [C.R.S. § 42-2-125(1)(b.5), § 42-2-125(1)(i), and C.R.S. § 42-2-132.5(4)

have] expressly authorized." *Craig v. Hammat*, supra at 1036. In so holding, the District Court concluded, without explanation, that a direct conflict in the license reinstatement requirements for two revocations arising from the same conviction somehow does not count as a statutory conflict. Consequently, it refused to apply the rules of statutory construction. Proper application of those rules requires that a driver revoked as a result of conviction for felony DUI may reinstate her license early with an ignition interlock license.

Under C.R.S. § 42-2-132.5(4), an individual who was convicted of any DUI-type of offense and subsequently had her license to drive revoked pursuant to C.R.S. §§ 42-2-125(1)(b.5) or 42-2-125(1)(i) is eligible to apply for early reinstatement with an interlock-restricted license. Indeed, C.R.S. § 42-2-125(1)(b.5) specifically grants eligibility for individuals who suffered a felony DUI-type conviction to apply for early reinstatement with an interlock-restricted license, so long as they are twenty-one years of age or older. Specifically, the statute reads:

> (1) The department shall immediately revoke the license or permit of any driver or minor driver upon receiving a record showing that the driver has:
>
> (b.5) In the case of a driver twenty-one years of age or older, been convicted of an offense described in section **42-4-1301(1)(a)** or (2)(a). **Except as provided in section 42-2-132.5,** the period of revocation based upon this paragraph (b.5) shall be

> nine months. The provisions of this paragraph (b.5) shall not apply to a person whose driving privilege was revoked pursuant to section 42-2-126(3)(a)(I) for a first offense based on the same driving incident.

C.R.S. § 42-2-125 (emphasis added).

The exception referenced (42-2-132.5) is the provision for early reinstatement with ignition interlock. The reference to C.R.S. § 42-4-1301(1)(a) is to both misdemeanor and felony DUI-type offenses.

Contrary to these statutory provisions, the "any felony involving a vehicle statute" (C.R.S. § 42-2-125(1)(c)) has been interpreted by the Motor Vehicle Division to prohibit an individual to apply for early reinstatement with an interlock-restricted license if the individual was convicted of a felony DUI-type offense. Thus, as expressed in the cases discussing statutory construction, DOR's interpretation of C.R.S. § 42-2-124(1)(c) "forbids what [C.R.S. § 42-2-132.5(4), C.R.S. §§ 42-2-125(1)(b.5), and 42-2-125(1)(i) have] expressly authorized." *Craig v. Hammat, supra* at 1036.

C. When analyzing conflicting statutes, the more specific statute prevails over the more general statute.

The DOR's application of C.R.S. § 42-2-125(1)(c) to Appellant Stackpool is an erroneous interpretation of the law, because it reads that general statute to conflict with other statutes more specifically applicable to Appellant Stackpool's

case. A resolution of this issue requires this Court to review and interpret the applicable statutes. In interpreting a statute, the court's primary responsibility "is to give effect to the General Assembly's purpose and intent in enacting the statute." *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1152 (Colo. 2001). "If the plain language of the statute clearly expresses the legislative intent, then the court must give effect to the ordinary meaning of the statutory language. Likewise, the court should avoid interpreting a statute in a way that defeats the obvious intent of the legislature." *Pediatric Neurosurgery, P.C. v. Russell*, 44 P.3d 1063, 1068 (Colo. 2002). In addition, "if a general provision conflicts with a special or local provision, it shall be construed, if possible, so that effect is given to both." C.R.S. §§ 2-4-204

Courts are required to read the statutes as a whole and to construe each provision consistently and in harmony with the overall statutory design if possible. C.R.S. §§ 2-4-204; *Whitaker v. People*, 48 P.3d 555, 558 (Colo. 2002); *People v. Carabajal*, 720 P.2d 991 (Colo. App. 1986); *People v. Perry*, 252 P.3d 45 (Colo. App. 2010); *People v. Atencio*, 219 P.3d 1080 (Colo. App. 2009); *Black Diamond Fund, LLLP v. Joseph*, 211 P.3d 727 (Colo. App. 2009). The rule that "if a general provision conflicts with a special or local provision, it shall be construed, if possible, so that effect is given to both" can be followed very easily here by

finding that the specific provisions of early reinstatement with an interlock license apply to the general "any felony involving a motor vehicle" revocation, so long as that revocation results from a felony DUI conviction. The DOR, however, is doing the opposite, going out of its way to adopt an application of C.R.S. § 42-2-125(1)(c) (the "any felony involving a motor vehicle" statute) that places it in irreconcilable conflict with C.R.S. § 42-2-125(1)(b.5), C.R.S. § 42-2-125(1)(i) and C.R.S. § 42-2-132.5(4) (the statutes allowing interlock licenses for drivers with three or more DUI-type convictions). If statutes conflict irreconcilably, courts must look to the rules of statutory construction to determine which statute will prevail. *See* C.R.S. §§ 2-4-204 to 2-4-207.

C.R.S. § 42-2-125(1)(b.5), C.R.S. § 42-2-125(1)(i) and C.R.S. § 42-2-132.5(4) apply very specifically, directly, and narrowly to Appellant Stackpool, whereas C.R.S. § 42-2-125(1)(c) is a general statute designed for cases very dissimilar to hers. The rules of statutory construction require that a more specific provision of a statute prevail over a more general one. *People v. Becker*, 55 P.3d 246, 251 (Colo. App. 2002); *see also* C.R.S. § 2-4-205. Reviewing courts are charged with carefully determining which provisions are general and which are specific to give a full and sensible effect to the entire statutory scheme. *People v. Becker, supra* at 251.

D. C.R.S. § 42-2-125(1)(b.5), 42-2-125(1)(i), and C.R.S. § 42-2-132.5(4) apply specifically, consistently and harmoniously.

The plain language of C.R.S. § 42-2-125(1)(b.5), C.R.S. § 42-2-125(1)(i) and C.R.S. § 42-2-132.5(4) apply very specifically to Appellant Stackpool. Those three statutes define the driver's license sanction for someone convicted of multiple DUI-type offenses. The plain language of subsection (1)(b.5) of C.R.S. § 42-2-125 requires the DOR to revoke the license of any driver "… convicted of an offense described in section 42-4-1301(1)(a) [DUI] or (2)[DUI per se]." The referenced DUI statute, 42-4-1301(1)(a), includes felony DUI based on a 4th or subsequent conviction:

> A person who drives a motor vehicle or vehicle under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, commits driving under the influence. Driving under the influence … is a class 4 felony if the violation occurred after three or more prior convictions.

When the General Assembly revised sections 42-2-1301(1)(a) and (2)(a) to create felony DUIs, it knew and understood that they would fall within the specific revocation provision of subsection (1)(b.5) and did nothing to treat felonies any differently than misdemeanors. *See Smith v. Miller*, 384 P.2d 738, 740 (Colo. 1963) (Legislature acts with full knowledge of its legislation).

The second applicable statute, C.R.S. § 42-2-125(1)(i) creates a license revocation for any person who has "[b]een convicted of DUI, DUI per se, or DWAI and has two previous convictions of any of those offenses." This statute is also applied by the DOR to individuals with more than 2 previous convictions, including routinely applying it multiple times to individuals when they suffer their 4th, 5th, 6th or subsequent misdemeanor convictions. In those circumstances, DOR applies the early reinstatement with ignition interlock statute, C.R.S. § 42-2-132.5(4).

The third applicable statute, C.R.S. § 42-2-132.5(4) provides that a person whose license has "been revoked for one year or more because of a DUI, DUI per se, or DWAI conviction…may apply for an early reinstatement with an interlock-restricted license under the provisions of this section after the person's privilege to drive has been revoked for one month." Read as a whole, the plain language of C.R.S. § 42-2-132.5 is that this ignition-interlock-related license will be issued to a multiple DUI offender who has satisfied the prerequisites for the program. The statute contains repeated references to how "first time offenders" are treated differently than multiple offenders. *See*, C.R.S. § 42-2-132.5(4)(a)(II)(A), (B), and (C). It also references the eligibility of "persistent drunk drivers" (C.R.S. § 42-2-132.5(4)(a)(I) and (II)(C)) and habitual offenders (C.R.S. § 42-2-132.5(4)(c)) so

long as they "have **at least** one conviction for DUI, DUI per se or DWAI" (emphasis added) but of course can have many more.

These three statutes create and define the exact situation presented by Appellant Stackpool's case: she was convicted of DUI, had previous convictions for similar offenses, was subject to license revocation for one year or more under C.R.S. § 42-2-125(1)(i), had served at least one month of the revocation, and satisfied the eligibility requirements of C.R.S. § 42-2-132.5(4)(b) at the time of the hearing. *See* Tr. (December 9, 2019), p. 6; CF, p. 8. While multiple offenders are not *required* to seek early reinstatement, (hence the words "may apply") there is no provision for the DOR to exercise any discretion to deny early reinstatement to a driver who has satisfied the prerequisites and chooses to apply as Appellant Stackpool did. The statutory scheme for imposing and lifting driver's license sanctions on multiple DUI offenders was designed by the legislature precisely for her situation. It is clearly meant to provide multiple DUI offenders with the opportunity to drive again with an ignition interlock restricted license after having served a short period of complete driving privilege revocation. The DOR, however, went out of its way not to apply those statutes. The DOR applied a much more general and broader catch-all statute that was designed to deal with cases very different from hers and do not involve impaired driving at all.

These three statutes do not contain any limiting words or phrases to exclude a felony DUI conviction. In fact, the revocation statute, 42-2-125(1)(b.5), directly incorporates the statute for the offense of felony DUI, 42-4-1301(1)(a). In addition, unlike the "any felony involving a vehicle" statute (C.R.S. § 42-2-125(1)(c)), these "multiple-DUI specific" statutes do not attempt to deal with myriad crimes where license reinstatement with a device preventing DUI would make no sense. The purpose of the multiple offense DUI scheme with interlock license eligibility is to prevent drunk driving while allowing DUI offenders to be able to drive. There is no such purpose for the provision to deprive car vandals, drive-by shooters, or automotive fraudsters of driver's licenses.

E. C.R.S. § 42-2-125(1)(c) is a very broad and general statute which conflicts and must yield to the more specific statutes.

In contrast to the three specific statutes discussed above which apply very specifically to Appellant Stackpool's case, the "any felony involving a motor vehicle" statute, C.R.S. § 42-2-125(1)(c) is a very broad and general statute designed for a wide variety of cases that have nothing to do with drunk driving and are not in any way similar to Appellant Stackpool's. This broad statute mandates license revocation for anyone who has "…been convicted of any felony in the commission of which a motor vehicle was used." C.R.S. § 42-2-125(1)(c). As revocations for specific kinds of felonies are covered under other specific statutes,

this section is clearly intended as a "catch-all" for non-specified crimes (*See* C.R.S. § 42-2-125(1)(o) covering motor vehicle theft and motor vehicle trespass; and C.R.S. § 42-2-125(1)(a) covering vehicular homicide and assault and criminally negligent homicide while driving a motor vehicle). The plain meaning of this "catch-all" statute's words is to encompass crimes as varied as robbery, drug distribution, murder, burglary, forgery, theft, and any other crime during the commission of which a car could be used, even if only to escape. While Appellant Stackpool's 4th DUI-type conviction is arguably captured in the statute's extremely broad reach, the fact that the legislature set forth very specific statutes for her precise situation (conviction of multiple DUI offenses) means that section (1)(c) must give way to those more specific statutes.

If C.R.S. § 42-2-125(1)(c) is read to prohibit ignition interlock restricted licenses, it cannot be construed harmoniously and consistently with C.R.S. § 42-2-125(1)(b.5), C.R.S. § 42-2-125(1)(i), and C.R.S. § 42-2-132.5(4), which are intended to provide interlock restricted licenses to multiple-DUI offenders while still preventing impaired driving. There is no such purpose for providing interlock restricted licenses to drivers revoked under 42-2-125(1)(c). Applying that "any felony involving a motor vehicle" statute to a DUI driver makes no more sense than would applying the interlock law to a drive-by shooter, a drug dealer

operating a meth lab out of an RV, or a bank robbery getaway driver. The conflict created by reading 42-2-125(1)(c) to prohibit an interlock restricted license and then applying that prohibition to a multiple-DUI offender, given the interlock license scheme, is irreconcilable.

Until a felony DUI offense was created during the 2015 legislative session, the long-existing general subsection, 42-2-125(1)(c), was never applicable to multiple-DUI offenders. For decades prior to that time, however, there were statutes that provided for driver's license sanctions for people with four or more DUI-type convictions. *See* § 42-2-125(1)(i), C.R.S. (1994)-(2015). Had the legislature desired to change how those sanctions applied when a 4th or subsequent conviction became a felony in 2015, it would have done so. (see further discussion *infra*).

Under Colorado's statute regarding statutory construction, in order for a general section to prevail over a more specific provision, the general section must be later adopted with the manifest intent that the general provision prevail. *See* C.R.S. § 2-4-205. The broad, pre-existing language of subsection 42-2-125(1)(c) was in effect as of 1994 and could only be read to apply to any DUI offense once felony DUI was implemented in 2015. Subsections (1)(b.5) and § 42-2-132.5(4) are the later adopted statutes, as the former was passed in 2008, and the latter in

2012. *See* ch. 278, sec. 1, 2012 Colo. HB. 1168; *See also* § 42-2-125(1)(b.5), C.R.S. (2008). Thus, the "any felony using a vehicle" statute, C.R.S. § 42-2-125(1)(c), is not the later adopted statute.

The plain language of C.R.S. § 42-2-132.5(4) is clear that the General Assembly did not intend to exclude individuals convicted of felony DUI from early reinstatement with an ignition interlock. Had it so intended, it would have included words and phrases to convey this intent. The General Assembly could have done this very easily by having that statute read as follows:

> **Except as provided in section 42-2-125(1)(c) applicable to a person convicted of felony DUI, [a]** person whose privilege to drive has been revoked for one year or more because of a DUI, DUI per se, or DWAI conviction or has been revoked for one year or more for excess BAC under any provision of section 42-2-126 may apply for an early reinstatement with an interlock-restricted license under the provisions of this section after the person's privilege to drive has been revoked for one month….

Similar logic applies when comparing subsection (1)(c) to subsection (1)(i) of C.R.S. § 42-2-125. The General Assembly could have chosen to have subsection (1)(b.5) read as follows:

> **Except as provided in section (c) of this statute or when the conviction is for felony DUI, [i]**n the case of a driver twenty-one years of age or older, been convicted of an offense described in section 42-4-1301(1)(a) of (2)(a). Except as provided in section 42-2-132.5, the period of revocation based upon this paragraph (b.5) shall be nine months…

The General Assembly, however, chose to exclude any such language or any other similar limiting language. *See Colo. Dep't of Pers. v. Alexander*, 970 P.2d 459, 465 (Colo. 1998) (When examining a statute's language, courts must give effect to the General Assembly's choice of wording.)

Courts may not add or subtract words from statutes that conflict in order to harmonize them. *People v. Rojas*, 2019 CO 86, ¶11 (2019). The only way to harmonize the DOR's reading of C.R.S. § 42-2-125(1)(c) with the interlock statute, C.R.S. § 42-2-132.5, would be to add words like those described above. Absent that added language to C.R.S. § 42-2-132.5(4) or C.R.S. § 42-2-125(1)(b.5), it is clear the statutes did not intend to limit eligibility for interlock-restricted licenses to individuals convicted of misdemeanors. Courts in Colorado have expressly prohibited reading limitations into a statute's application when the General Assembly did not include limiting language. *See Harvey v. Centura Health Corp.*, 2020 COA 18M ¶ 17 (2020) citing *Sooper Credit Union v. Sholar Grp. Architects, P.C.*, 113 P.3d 768, 772 (Colo. 2005) ("Had the General Assembly intended to limit [the statute's application], it would have said so. Accordingly, we will not read in such a requirement that the General Assembly plainly chose not to include.").

It should be noted that DOR's interpretation of § 42-2-125(1)(c), C.R.S. to prohibit interlock restricted license eligibility is also contrary to its own rules. 1 CCR 204-30 reads:

> 1.2. Alcohol-Related Revocation—A license revocation taken against a driving privilege *based at least in part on a violation of sections 42-2-126, 42-4-1301, or 42-4-1301.1, C.R.S.*
>
> 3. Early Reinstatement with an Interlock-Restricted License
> 3.1. A person whose license is subject to one or more Alcohol-Related Revocations and who is eligible for Early Reinstatement under section 42-2-132.5(4), C.R.S. may be issued an Interlock Restricted License upon completion of the required minimum period of revocation as set forth in 42-2-132.5(4)(a), C.R.S. if he or she:
>
> 3.1.1. Files an Owner Affidavit with the Department;
> 3.1.2. Provides Proof of Financial Responsibility to the Department in the person's name;
> 3.1.3. Satisfies all other conditions for reinstatement imposed by law; and
> 3.1.4. Satisfies all licensing conditions imposed by law.
>
> (emphasis added).

The DOR's own duly promulgated rules, derived from its authority under § 42-2-132.5, C.R.S. are clear: if drivers are revoked *at least in part* by a DUI conviction arising from § 42-4-1301, then they are eligible for reinstatement with an interlock restricted license after the one to two month period without driving privileges. The regulation, last amended and adopted some thirteen months after the passage of felony DUI into law, makes no distinction between misdemeanor or felony DUI convictions. Clearly, Appellant Stackpool was revoked "at least in

part" for a DUI conviction.

Lastly, even assuming *arguendo* that the General Assembly's intent remains obscured after utilizing the aforementioned aids of statutory construction, this Court should resolve the matter in Appellant Stackpool's favor on the basis of the rule of lenity. The rule of lenity requires courts strictly to construe any ambiguity in the meaning of a penal statute in favor of the accused. *People v. District Court, Second Judicial Dist.*, 713 P.2d 918 (Colo. 1986). The DOR's erroneous interpretation of C.R.S. § 42-2-125(1)(c) is being utilized to punish Appellant Stackpool for being convicted of a felony DUI rather than a misdemeanor DUI. The provision of subsection (1)(c) is penal in nature due to the prerequisite of a conviction prior to its application. By strictly construing the remaining ambiguity, if any, to the effects subsections (1)(b.5), (1)(c), and (1)(i) of C.R.S. § 42-2-125 has upon the plain language of C.R.S. § 42-2-132.5(4) in favor of Appellant Stackpool, it is clear that she must be deemed eligible for early reinstatement with an interlock-restricted license.

II. The District Court judge erred in failing to grant the Motion for Change of Judge

A. Standard of Review.

Appellate courts are to review a district court's refusal to grant recusal or disqualification pursuant to C.R.C.P. 97 for an abuse of discretion. *Goebel v.*

Benton, 830 P.2d 995, 999 (Colo. 1992); *Wright v. District Court*, 731 P.2d 661, 665 (Colo. 1987). The sufficiency of a motion to disqualify is a legal determination independently reviewed *de novo*. *Bocian v. Owner Ins. Co*, 2020 COA 98, *8 (2020); *Smith v District Court*, 629 P.2d 1055, 1056 (Colo. 1981).

This issue was preserved by Appellant Stackpool's Motion for Change of Judge and the District Court's May 18, 2020 Order – RE: Motion for Change of Judge. CF, p. 96-97.

B. The Motion for Change of Judge and supporting affidavits raised the inference of bias or prejudice.

Colorado Rules of Civil Procedure Rule 97 asserts "[a] judge shall be disqualified in an action in which he is interested or prejudiced…" The United States Supreme Court has held that "[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In re Murchison*, 249 U.S. 133, 136 (1955); *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 877 (2009); U.S. Const. amends. V, XIV; Colo. Const. art. II, secs. 23, 25. The Due Process Clauses apply to an appellant through the course of appellate review. *A.L.L. v. People ex rel. C.Z.*,226 P.3d 1054 (Colo. 2010). A party moving for a change of judge must support such a motion with an affidavit alleging conduct and statements on the part of the judge which, if true, show bias or prejudice or the appearance of bias or prejudice on the

part of the judge. *Johnson v. District Court*, 674 P.2d 952, 955-956 (Colo. 1984); C.R.C.P. 97.

The Colorado Supreme Court has held:

> The purpose of statutes and court rules which provide for the disqualification of a trial judge is to guarantee that no person is forced to litigate before a judge with a "bent of mind." (citations omitted) Although the trial judge is convinced of his or her own impartiality, if it nonetheless appears to the parties or to the public that the judge may be biased or prejudiced, the same harm to public confidence in the administration of justice occurs. (citations omitted).

Johnson v. District Court, 674 P.2d 952 at p. 956. That "bent of mind" has been further described as:

> "a leaning toward one side of a question involved, from other considerations than those belonging to it, or a bias in relation thereto which would in all probability interfere with fairness in judgment." *Walker v. People*, [126 Colo. 135, *146, 248 P.2d 287 at 294, (Colo. 1952)] quoting *People ex rel. Burke v. District Court*, 152 P. 149, 152-153 (Colo. 1915).

Smith v. District Court, supra at 1057 (Colo. 1981).

In this case, the District Court judge's apparent bent of mind caused him to lean so far toward one side of the question that he issued a detailed written ruling on the appeal before any briefs had been filed. By definition, this leaning towards the DOR's side of the question must have been based on considerations other than

those belonging to the case as no argument belonging to the case had yet been made.

The test of the legal sufficiency of a motion to disqualify a judge is whether the motion and affidavits state facts "from which it may reasonably be inferred that the respondent judge has a bias or prejudice that will in all probability prevent him or her from dealing fairly with the petitioner." *Smith v District Court*, *supra* at 1056 quoting *Carr v. Barnes*, 580 P.2d 803, 804 (Colo. 1978). Even the appearance of possible prejudice can dictate disqualification. *People v. District Court*, 560 P.2d 828 (Colo. 1977); *see also Goebel v. Benton*, 830 P.2d 995, 998 (Colo. 1992). In passing on the sufficiency of the motion for disqualification, the factual statements in the motion and affidavits are to be accepted as true, even if the judge believes them to be false or erroneous. *Bruce v. City of Colo. Springs*, 252 P.3d 30, 36 (Colo. App. 2010).

Appellant Stackpool's Motion for Change of Judge and its supporting affidavits are more than sufficient to raise the inference that the District Court judge behaved in a manner that indicated, or gave the appearance of, prejudice or bias against her. CF, p. 77-86. They assert facts that are not based upon mere "suspicion, surmise, speculation, rationalization, conjecture, [or] innuendo"; nor are they "statement of mere conclusions of the pleader." *Johnson v. District Court*,

674 P.2d 952, 956 (Colo. 1984) quoting *Carr v. Barnes*, 580 P.2d 803, 805 (Colo. 1978). They simply discuss the undisputed fact that the judge issued a detailed written ruling on the case before it had ever been argued to him. They point out that the judge's written ruling purported to agree with a specific argument made by the DOR, even though no such argument had been advanced. The District Court asserted in his Order denying the Motion for Change of Judge that his premature Order deciding the case was "based upon legal arguments made within the Appellants complaint and the Appellee's answer." CF, p. 96-97. However, the Appellee's Answer contained no legal arguments whatsoever. In fact, the Answer asserted in two of its three extremely short paragraphs, that it "need not respond to legal argument at this time." CF, p. 31-32. Thus, the premature order deciding the case could not have been "based upon arguments made within … the Appellee's answer," and the argument attributed to it had to have been conceived by the District Court. CF, p. 96-97.

The Motion for Change of Judge and supporting affidavits went on to relate that the District Court's premature Order deciding the case began by stating "The Court has reviewed the party's (sic) briefs…" even though no briefs had been filed. They also related that the District Court's premature ruling stated the appeal was governed by 42-2-126(9)(b) even though that statute does not apply to this case,

and the initiating Complaint asserted that the action was brought under a different statute, C.R.S. § 24-4-106. The Motion and supporting affidavits also set forth the District Court judge's two orders which *sua sponte* declared that there would be no need for the Appellant to submit a reply brief. CF, p. 45; CF, p. 49. Those orders violated C.R.S. § 24-4-106 which directs the parties to "file briefs within the time periods specified in the Colorado appellate rules." C.R.S. § 24-4-106(4). The Colorado Appellate Rules call for an Opening Brief, a Response Brief, and a Reply Brief. C.A.R. 28(c). Though the District Court was without either party's arguments on the issues, its ruling announced to Appellant Stackpool that it had no interest in hearing her reply to the DOR's arguments.

C. The District Court's decision to deny the Motion for Change of Judge applied the wrong legal standard and was an abuse of its discretion.

It is an abuse of discretion for a judge to deny a Motion for Change of Judge where even the appearance of bias or prejudice exist. *Johnson v. District Court*, *supra* at 955-956. The purpose of the disqualification requirement is to prevent a party from being forced to litigate a matter before a judge with a "bent of mind" against her. *Goebel v. Benton*, 830 P.2d 995, 998 (Colo. 1992) citing *Johnson v. District Court*, 674 P.2d 952, 956 (Colo. 1984). Additionally, a division of this Court has held:

> A judge should avoid "impropriety and the appearance of impropriety in all [his] activities," [Code of Judicial Conduct] Canon 2, and should "disqualify [himself] in a proceeding in which [his] impartiality might reasonably be questioned," C.J.C. Canon 3(C)(1). *See also Smith v. Beckman*, 683 P.2d 1214 (Colo. App. 1984). Even though the judge…may be convinced of his or her own impartiality, it is the **duty of the tribunal to eliminate all reasonable doubt** that a trial or hearing by a fair and impartial council may have been denied. (emphasis added) *See Zoline v. Telluride Lodge Ass'n*, 732 P.2d 635 (Colo. 1987).

Vernard v. Dep't of Corr., 72 P.3d 446, 449 (Colo. App. 2003).

In this case, the District Court both applied an incorrect legal standard and abused its discretion in denying the Motion for Change of Judge. As the Motion and supporting affidavits must be taken as true (and here contained only undisputed facts) the only question is whether they "… 'state facts from which it may reasonably be inferred that the judge has a bias or prejudice that will prevent him from dealing fairly' with the party seeking recusal." *Johnson v. District Court*, *supra* at 956 quoting *People v. Botham*, 629 P.2d 589, 595 (Colo. 1981). The District Court's ruling here did not apply the required objective standard of whether bias or prejudice or its appearance could reasonably be inferred. Rather, the ruling applied a subjective standard by asserting: "Based on the facts, the Court believes it has not shown prejudice or bias towards either party." "… Under the controlling case law, the judge's subjective belief about whether or not he has shown bias is irrelevant:

> "Even though the judge…may be convinced of his or her own impartiality, it is the duty of the tribunal to eliminate all reasonable doubt that a trial or hearing by a fair and impartial council may have been denied."

Vernard v. Dep't of Corr., 72 P.3d 446, 449 (Colo. App. 2003).

The question the District Court was required to rule upon was not "given these facts, do you think you are biased?" Instead, the question was "could a reasonable person, seeing that you had decided the case without hearing it, infer that there was bias or prejudice or the appearance of bias or prejudice?" The answer is clearly yes. That same reasonable observer could also conclude that the appearance of bias was created by the District Court advancing an argument on behalf of the DOR, ruling in favor of the argument, and then in retracting that premature ruling finding that Appellant Stackpool would have no need to reply to any argument advanced by the DOR. The resulting appearance that the judge had no interest in how Appellant would answer the DOR's arguments was not eliminated by the Court responding to the motion for recusal by stating that it would allow a reply brief to be filed. CF, p. 96-97.

Given the duty of the Court to avoid even the appearance of prejudice against one side of a case and its duty to eliminate all reasonable doubt that a fair and impartial hearing will be given, the appropriate response to the Motion for Change of Judge here was clear.

> Although the trial judge is convinced of his or her own impartiality, if it nonetheless appears to the parties or to the public that the judge may be biased or prejudiced, the same harm to public confidence in the administration of justice occurs."

Johnson v. District Court, 674 P.2d 952 at p. 956. Granting the Motion and having the case assigned to another judge would have very simply, cleanly, and immediately restored confidence that a fair hearing would be given. The District Court judge taking responsibility for the error of deciding the case before it was litigated and acknowledging that the error would leave any reasonable litigant feeling like her case was over before it started would also have been consistent with the judge's duty. Failing to do any of those things was both contrary to the law requiring application of an objective standard to a recusal motion and an abuse of the court's discretion.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court REVERSE the District Court's order affirming the decision of the Department of Revenue, reverse the decision of the Department and order that Appellant Stackpool was entitled to early reinstatement of her driver's license with an ignition interlock-restricted license pursuant to C.R.S. § 42-2-132.5(4).

Respectfully submitted this _7th_ day of December, 2020.

RECHT KORNFELD, P.C.

s/Abraham V Hutt

s/Andrew E. Ho

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of December, 2020, a true and correct copy of the foregoing was electronically filed and served, via ICCES, upon Laurie Rottersman, Senior Assistant Attorney General, 1300 Broadway, 8th Floor, Denver, Colorado 80203.

s/ Leni Charles
Legal Assistant