COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: March 15, 2021 4:03 PM FILING ID: 808CF5B7EC0E0 CASE NUMBER: 2020CA1359
Jefferson County District Court Honorable Randall C. Arp, Judge Case No. 20CV30008	
Appellant, KELLY DRIVER STACKPOOL, v. Appellee, COLORADO DEPARTMENT OF REVENUE, MOTOR VEHICLE DIVISION.	▲ **COURT USE ONLY** ▲ Case No. 20CA1359
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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 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 the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒It contains 7060 words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Laurie Rottersman

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Signature of attorney or party

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INTRODUCTION

The Department revoked Stackpool's privilege to drive based on two independent statutory provisions, sections 42-2-125(1)(c), C.R.S., (conviction of a felony in the commission of which a motor vehicle was used) and 42-2-125(1)(i), C.R.S. (DUI conviction with two previous DUI convictions). Both revocations were based on one offense and ran concurrently. CF, pp 16, 50. Stackpool appeals the Department's determination that she was ineligible for early reinstatement of her driving privilege with an interlock restricted license from her revocation under section 42-2-125(1)(c). She also appeals the district court's failure to recuse. The Department's determination was correct on the facts and the law. The district court's order should be affirmed.

STATEMENT OF THE ISSUES

1. The relief Stackpool requests in this suit is reinstatement of her privilege to drive with an interlock restriction. Her driving privilege has been reinstated with an interlock restriction. Is her appeal of the

Department's determination that she was ineligible for early reinstatement from her felony revocation moot?

2. Colorado law allows a person whose driving privilege has been revoked to request early reinstatement with an interlock device if the revocation occurred under certain statutory provisions. The Department determined these early reinstatement provisions did not apply to Stackpool's revocation under section 42-2-125(1)(c), C.R.S. Did the Department err in determining Stackpool was ineligible for early reinstatement with an interlock from her revocation under section 42-2-125(1)(c)?

3. The district court rejected Stackpool's request that the judge recuse himself. Did the district court err in denying Stackpool's Motion for Change of Judge?

STATEMENT OF THE CASE

Stackpool was stopped by a law enforcement officer after she failed to drive in a single lane. CF, p 056.[1] Ultimately, she was arrested for

[1] "CF" citations and "TR" citations are to the court file and to the administrative hearing transcript respectively.

driving under the influence of alcohol. Because Stackpool's breath test result of 0.197 grams of alcohol per 210 liters of breath exceeded the legal limit, the officer issued her a notice of revocation of her driving privilege. CF, pp 051, 053.

On October 31, 2019, the Department issued two orders of revocation. One Order of Revocation was based on Stackpool having three DUI convictions. CF, p 050. The order revoked Stackpool's privilege to drive in Colorado for two years under section 42-2-125(1)(i) but advised Stackpool that she may be eligible for reinstatement with installation of an ignition interlock device after one month of revocation. *Id.*[2]

The other Order of Revocation was based on Stackpool's conviction of felony DUI in a separate criminal case arising from the same offense. CF, pp 016, 025. Stackpool's felony revocation under section 42-2-

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[2] Stackpool's driving privilege was initially reinstated with interlock restrictions from this revocation but was thereafter revoked based on her felony driving conviction. TR 12/09/19, p 6:13–15.

125(1)(c) was for one year. CF, p 016; s*ee* § 42-2-125(2), C.R.S. The order advised Stackpool that she was ineligible "for any type of driving privilege during the revocation period." CF, p 016. The two Orders of Revocation ran concurrently. § 42-2-125(5), C.R.S.

Stackpool requested and received a hearing on the Department's determination that her felony revocation made her ineligible for early reinstatement with an interlock. TR 12/09/2019, pp 4:21–5:2. At the hearing, Stackpool argued she was eligible for early reinstatement with an interlock restricted license under section 42-2-132.5(4)(a)(I), C.R.S. TR 12/09/19, p 5:13–20.[3]

The hearing officer sustained the Department's felony revocation with no driving privileges. He concluded that section 42-2-125(1)(c), C.R.S., provides the Department "shall immediately revoke" the license of a person who has been "convicted of a felony in the commission of

[3] Although Stackpool did not cite a specific subsection of section 42-2-132.5(4), her statement that she was seeking a finding of eligibility "as a person whose privilege to drive has been revoked for a year or more as a result of a DUI, DUI per se, or DWAI conviction" tracks the wording of section 42-2-132.5(4)(a)(I).

which a motor vehicle was used." CF, p 019. He further concluded that section 42-2-132.5(4) did not provide him with the authority to review the Department's denial of an interlock restricted license. *Id*.

Stackpool appealed to district court. On February 24, 2020—and before the matter was briefed—the district court issued an order affirming the hearing officer's decision. CF, p 035. The court later rescinded its February 24, 2020 order, acknowledging the order was premature because briefing had not been completed, and issued a briefing schedule. CF, pp 045, 049. Even so, Stackpool moved to recuse, arguing that issuance of the February 24, 2020 order, together with a statement indicating that "[n]o Reply brief is required," demonstrated prejudice. CF, p 092. The court denied Stackpool's motion. CF, p 096.

After full briefing, the district court entered a second order. The district court affirmed the hearing officer, concluding that section 42-2-125(1)(c) was unambiguous and did not conflict with other statutory DUI provisions. CF, p 149. Stackpool appealed to this Court on August 7, 2020.

After entry of the district court's order, however, Stackpool's one-year revocation under section 42-2-125(1)(c) expired. Therefore, on October 1, 2020 the Department notified her that she was eligible for early reinstatement with an interlock device from her revocation under section 42-2-125(1)(i). On October 5, 2020, having satisfied the conditions for early reinstatement, Stackpool's driving privilege was reinstated with an interlock. See Affidavit of Benjamin Mitchell, attached hereto as "Attachment A."

SUMMARY OF THE ARGUMENT

This matter is moot, and the Court should dismiss it. The only relief Stackpool seeks in this action is the reinstatement of her license with an interlock restriction. But this has already happened, meaning she has received all the relief to which she would be entitled if she prevailed here. The Court need go no further to decide this case.

Even if this Court concludes this case is not moot, it should affirm the order below. Stackpool's arguments suffer from several problems.

First, Stackpool attempts to argue that either section 42-2-125(1)(b.5) or section 42-2-125(1)(i) (which are *other* grounds on which

to revoke a person's driving privileges and under which early reinstatement may be possible) control whether she can reinstate early with an interlock device because of alleged conflicts between those two sections and section 42-2-125(1)(c).

But Stackpool did not raise the assertion that sections 42-2-125(1)(b.5) and 42-2-125(1)(i) conflict with section 42-2-125(1)(c) below. Thus, this argument is not properly before this Court.

Second, Stackpool is incorrect that there is a conflict here. For example, early reinstatement with an interlock for revocations under section 42-2-125(1)(b.5) is limited to first-time offenders. § 42-2-132.5(4)(a)(II)(A), C.R.S. Therefore, section 42-2-125(1)(b.5) is inapplicable to Stackpool's revocation given her prior DUI convictions.

And while people who lose their driving privilege under section 42-2-125(1)(i) due to DUI, DUI per se, or DWAI convictions with two other previous convictions are allowed to reinstate their driving privilege early with an interlock restriction under section 42-2-132.5(4)(a)(I), it is Stackpool's eligibility for reinstatement from her revocation under section 42-2-125(1)(c) for felony DUI that is at issue.

Felony DUI is a specific offense, substantively different from the misdemeanor offenses of DUI, DUI per se, and DWAI that permit revocation under section 42-2-125(1)(i). Therefore, although section 42-2-132.5(4)(a)(I) allows early reinstatement after revocations premised on misdemeanor alcohol convictions, such as Stackpool's revocation under section 42-2-125(1)(i), it does not apply to Stackpool's felony conviction revocation under 42-2-125(1)(c). And there is no conflict between revocations under section 42-2-125(1)(c) and under section 42-2-125(1)(i).

Finally, Stackpool's assertion that the district court showed bias or prejudice by inadvertently issuing a decision prior to briefing is not supported by the record. When this oversight was brought to the court's attention, the court recognized its error, promptly rescinded its earlier order, and issued a briefing schedule. The court's final order was issued only after the matter was fully briefed. This order reflects the court's review and consideration of the parties' arguments, briefs, and the record.

Absent dismissal of this appeal for mootness, the Court should affirm the Department's determination that Stackpool was ineligible for early reinstatement.

ARGUMENT

I. This appeal is moot.

A. Preservation and Standard of Review

Because Stackpool's driving privilege was reinstated after entry of the district court's order, this issue was not raised below. And because Stackpool does not address mootness in her Opening Brief, her Opening Brief does not state a standard of review.

Whether this appeal is moot is a question of law. *People v. Fritz*, 356 P.3d 927, 930 (Colo. App. 2014). The Court reviews determinations of law de novo. *Fallon v. Colo. Dep't of Revenue*, 250 P.3d 691, 693 (Colo. App. 2010).

B. The Court should dismiss this appeal as moot because Stackpool has already received the relief she seeks here: early reinstatement with an interlock restriction.

"A case is moot when a judgment, if rendered, would have no practical legal effect upon the existing controversy." *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 426 (Colo. 1990). The relief Stackpool sought, issuance of an interlock restricted license, has occurred.

Stackpool was eligible to reinstate her driving privilege with an interlock restricted license as of September 29, 2020.[4] And because she took the necessary steps to do so, the Department reinstated with an interlock restriction on October 5, 2020.

Reinstatement of her driving privilege with an interlock device mooted her appeal. *See Potter v. State Farm Mut. Auto. Ins. Co.*, 21 P.3d 874, 876 (Colo. 2001) (holding that defendant's voluntary payment of a monetary judgment mooted appeal of the judgment).

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[4] The Department's notification stated Stackpool was eligible to reinstate (early from her two-year revocation for multiple misdemeanor DUI convictions) on September 29, 2020. The reinstatement date credited Stackpool with 36 days she served on her felony DUI against her one-year felony revocation. Therefore, her reinstatement eligibility date moved forward from November 4, 2020 to September 29, 2020. See Attachment A.

A determination by this Court on whether the Department erred in denying reinstatement with an interlock on her felony revocation would have no effect. And "[t]he general rule is that when issues presented in litigation become moot because of subsequent events, an appellate court will decline to render an opinion on the merits of an appeal." *Id*. at 426–27. Thus, dismissal of Stackpool's appeal as moot is appropriate.

II. The Court should affirm the Department's determination that Stackpool was ineligible for early reinstatement of her driving privilege from her felony revocation under section 42-2-125(1)(c) because there is no statutory provision for early reinstatement from felony DUI.

A. Preservation and Standard of Review

1. The issue of whether Stackpool was eligible for early reinstatement with an interlock from her revocation under section 42-2-125(1)(c) was preserved and is a question of statutory interpretation that this Court reviews de novo.

The Department agrees that whether Stackpool was eligible for early reinstatement of her driving privilege from her revocation under

section 42-2-125(1)(c) was before the district court and preserved for review. TR 12/09/19, p 7:17–21.

Whether Stackpool was eligible for early reinstatement raises a question of statutory interpretation. Statutory interpretation is a question of law that is reviewed de novo. *Long v. Colo. Dep't of Revenue*, 296 P.3d 329, 332 (Colo. 2012).

2. The issue of whether there is a statutory conflict between sections 42-2-125(1)(b.5), 42-2-125(1)(c), and 42-2-125(1)(i) was not preserved for review.

Stackpool did not raise section 42-2-125(1)(b.5) at the administrative hearing. Rather, she first asserted there was a conflict between section 42-2-125(1)(b.5) and section 42-2-125(1)(c) in district court. CF, p 104.

Likewise, Stackpool did not assert there was a statutory conflict between sections 42-2-125(1)(i) and 42-2-125(1)(c) at the administrative hearing. Although she referred to her revocation under section 42-2-125(1)(i) and that she had been issued an interlock restricted license from this revocation (TR 12/09/19, p 5:13–18), her argument was that

early restatement with an interlock applied to her revocation under section 42-2-125(1)(c).

Judicial review of administrative agency action is limited to the record before the agency. § 24-4-106(6), (7)(c), and (11)(c), C.R.S. Courts do not consider issues raised for the first time on review. *Poe v. Dep't of Revenue*, 859 P.2d 906, 909 (Colo. App. 1993).

If the Court decides to consider Stackpool's argument that section 42-2-125(1)(b.5) conflicts with section 42-2-125(1)(c), then the issue is one of statutory construction, and is reviewed de novo as set forth in section II.A.1. above.

B. The Department did not err in concluding Stackpool was ineligible for early reinstatement from her revocation under section 42-2-125(1)(c), because there is no statutory provision for early reinstatement from revocations under section 42-2-125(1)(c).

The Department revoked Stackpool's privilege to drive under two separate statutory provisions. CF, p 016. On October 31, 2019, the Department revoked her privilege for one year based on her felony

conviction. CF, p 010; *see* § 42-2-125(1)(c), C.R.S. (the Department "shall immediately revoke the license" of any driver upon receipt of a record showing that the driver has been "convicted of any felony in the commission of which a motor vehicle was used"); § 42-2-125(2), C.R.S. ("the period of revocation shall be not less than one year").

On the same date, October 31, 2019, the Department also revoked Stackpool's driving privilege for two years based on her three DUI convictions. CF, p 050; *see* § 42-2-125(1)(i) (the Department "shall immediately revoke the license" of any driver who has "been convicted of DUI, DUI per se, or DWAI and has two previous convictions of any of these offenses"). Because the two revocations arose from the same driving episode, they ran concurrently. § 42-2-125(5), C.R.S.

But while Stackpool was eligible for early reinstatement from her revocation for multiple misdemeanor DUI convictions, she was not eligible for early reinstatement from her felony DUI revocation for three reasons. First, there is no statutory provision for early reinstatement from a revocation under section 42-2-125(1)(c), C.R.S. Second, the reinstatement provision for multiple DUIs in section 42-2-132.5(4),

C.R.S., applies to misdemeanor DUIs and not to the distinct offense of felony DUI. Third, the reinstatement provision in section 42-2-132.5(4)(a)(II)(A) for revocations under section 42-2-125(1)(b.5) does not apply because it is only available to first-time DUI offenders and not to offenders with three or more prior DUI convictions.

1. A plain reading of section 42-2-132.5 does not support early reinstatement from revocations under section 42-2-125(1)(c).

Section 42-2-132.5, C.R.S., governs eligibility for early reinstatement. Nothing in the plain language of that section allows early reinstatement for revocations under section 42-2-125(1)(c). *McCoy v. People*, 442 P.3d 379, 389 (Colo. 2019) (noting that courts "look first to the language of a statute, giving its words and phrases their plain and ordinary meaning"). Given the absence of statutory language in section 42-2-132.5 permitting early reinstatement from revocation under section 42-2-125(1)(c), the Department correctly determined that Stackpool was ineligible for early reinstatement from revocation under section 42-2-125(1)(c).

2. Section 42-2-132.5(4)(I) explicitly concerns revocations based on DUI, DUI per se, and DWAI convictions and does not apply to felony DUI convictions.

Implicitly acknowledging that there is no provision addressing early reinstatement from her felony revocation under section 42-2-125(1)(c), Stackpool seeks to bring her felony revocation under section 42-2-132.5(4)(a)(I), which permits early reinstatement from DUI, DUI per se, and DWAI convictions. Thus, she asserts that section 42-2-132.5(4)(a)(I) applies not only to revocations under section 42-2-125(1)(i) but also to her felony revocation under section 42-2-125(1)(c). Stackpool is incorrect.

a. Convictions for felony DUI under section 42-2-125(1)(c) are distinct from convictions for misdemeanor DUI under section 42-2-125(1)(i).

In *Linnebur v. People*, 476 P.3d 734 (Colo. 2020), the court addressed whether felony DUI is an offense distinct from misdemeanor DUI. After reviewing amendments to section 42-4-1301 providing for felony DUI, the court concluded that felony DUI is a separate and

distinct offense. *Id*. at 739. In reaching this conclusion, *Linnebur* relied on two subsections added to section 42-4-1301 in 2015 simultaneously with the legislature's creation of felony DUI in section 42-4-1301.

One amendment was the addition of subsection (1)(j). Subsection (1)(j) requires the prosecution "set forth such prior convictions [DUI, DUI per se, or DWAI] in the indictment or information." *Id*. at 737. The second amendment, noted as "most telling," was the addition of subsection (1)(k). *Id*. at 738. Subsection (1)(k) provided that defendants convicted of a class 4 felony must be sentenced in accordance with the felony sentencing provisions of section 18-1.3-401, C.R.S.[5]

Thus, because felony DUI offenses are distinct from misdemeanor DUI offenses, Stackpool's felony DUI revocation under section 42-2-125(1)(c) did not come within section 42-2-125(1)(i), the revocation provision for misdemeanor DUI offenses.

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[5] In 2017, the legislature repealed subsection (1)(k), relocating the requirement for sentencing a person who commits felony DUI "in accordance with the provisions of section 18-1.3-401" to new subsection (6.5) in section 42-4-1307. HB 17-1288, 73rd General Assembly, 2017 Regular Session (Colo. 2017).

b. The legislature's intent that felony DUI convictions be treated as offenses distinct from misdemeanor DUI convictions is reflected in the disparity in penalties and is consistent with public policy.

The legislature's intent that felony DUI convictions be treated as offenses distinct from misdemeanor DUI convictions is demonstrated not only in the 2015 and 2017 statutory amendments to section 42-4-1301, but also by the disparity in sentencing provisions for felony and misdemeanor DUI convictions. While misdemeanor DUI convictions, including multiple misdemeanor DUI convictions, are punishable by imprisonment only in the county jail, a court has the discretion to sentence persons convicted of felony DUI to incarceration at the department of corrections. § 42-4-1307(4)(a)(I), (5)(a)(I), (6)(a)(I), and (6.5)(e), C.R.S. In addition, the mandatory minimum period of imprisonment for multiple misdemeanor DUI convictions ranges from 10 days to 60 days. § 42-4-1307(5)(a)(I) & (6)(a)(I). But the mandatory minimum period of incarceration for felony DUI is either 90 days or 120 days. § 42-4-1307(6.5)(b), C.R.S.

The minimum fines applicable also reflect legislative intent that multiple misdemeanor DUI and felony DUI convictions should be treated differently. The minimum fine for a second or a third misdemeanor DUI conviction is $600.00, which may be suspended at the court's discretion. § 42-4-1307(5)(a)(II) & (6)(a)(II), C.R.S. In contrast, the minimum fine for a felony DUI conviction is $2,000.00. §§ 42-4-1307(6.5)(a), C.R.S., and 18-1.3-401(1)(a)(III)(A), C.R.S.

The period within which a person remains under court supervision is also disparate. Persons with a second or a third conviction for misdemeanor DUI are subject to at least two years of probation. § 42-4-1307(5)(a)(IV) & (6)(a)(IV), C.R.S. In contrast, the probationary period for a person with a felony DUI conviction may exceed the maximum period of incarceration and an additional period of probation not exceeding two years may be imposed. §§ 18-1.3-202(1)(a) C.R.S. and 42-2-1307(7)(b)(II), C.R.S.

This disparate treatment of misdemeanor and felony DUIs is consistent with the legislature's authority to impose harsher penalties for felony DUI convictions as compared to misdemeanor DUI

convictions. *Dean v. People*, 366 P.3d 593, 598 (Colo. 2016) (citing *Smith v. People*, 852 P.2d 420, 421 (Colo. 1993) ("[T]he General Assembly has the prerogative to establish the penalties for criminal offenses and is entitled to establish more severe penalties for acts it believes have greater social impact and graver consequences").

In addition, the General Assembly's purpose in enacting a comprehensive administrative process governing the revocation of driver's licenses for alcohol related offenses was "[t]o provide safety for all persons using the highways of this state by quickly revoking the driver's license of any person who has shown himself or herself to be a safety hazard by driving with an excessive amount of alcohol in his or her body." § 42-2-126(1)(a), C.R.S.

Treating Stackpool's felony DUI conviction under section 42-2-125(1)(c) in the same manner as her conviction for multiple misdemeanor DUI convictions under section 42-2-125(1)(i), (i.e., making her eligible for early reinstatement on her felony DUI after a one month revocation) would be inconsistent with the deterrent effect of a felony

revocation as well as with the General Assembly's goal of ensuring the safety of Colorado's highways.

The legislature's provision of more severe penalties for felony DUI convictions as compared to misdemeanor DUI convictions, as well as the absence of statutory provision for early reinstatement for felony DUI convictions, is consistent with these policy considerations.

3. Section 42-2-132.5(4)(a)(II)(A) explicitly concerns revocations of first-time offenders under section 42-2-125(1)(b.5) and thus does not apply to Stackpool's felony revocation.

In addition to seeking to bring her felony revocation under section 42-2-125(1)(i), Stackpool seeks to bring her felony revocation under section 42-2-125(1)(b.5) because section 42-2-132.5(4)(a)(II)(A) permits early reinstatement from revocations under this section. Thus, she asserts that section 42-2-132.5(4)(a)(II)(A) applies not only to revocations under section 42-2-125(1)(b.5) but also to her felony revocation.

Stackpool's assertion that section 42-2-125(1)(b.5) applies to her felony conviction is incorrect. Section 42-2-125(1)(b.5) does not support early reinstatement of her privilege to drive because early reinstatement of revocations under section 42-2-125(1)(b.5) is available only to first-time offenders, and thus does not apply to Stackpool's felony revocation. *See* § 42-2-132.5(4)(a)(II)(A), C.R.S.

C. Section 42-2-125(1)(c) can be read harmoniously with sections 42-2-125(1)(b.5), 42-2-125(1)(i), and 42-2-132.5(4).

1. Section 42-2-132.5(4)'s provision for early reinstatement for misdemeanor DUI revocations under sections 42-2-125(1)(b.5) and 42-2-125(1)(i) does not create a conflict between these sections and felony revocations under section 42-2-125(1)(c).

Section 42-2-132.5(4)(a)(I) provides that a person who has been revoked for one year or more for DUI, DUI per se, or DWAI "may apply for early reinstatement with an interlock-restricted license." Stackpool asserts that section 42-2-132.5(4) applies to revocations under sections 42-2-125(1)(b.5) and 42-2-125(1)(i) and, therefore, not applying it to

felony revocations under section 42-2-125(1)(c) creates a statutory conflict. Op. Br. at 8–10.[6]

As support Stackpool cites *Craig v. Hamm*at, 809 P.2d 1034 (Colo. App. 1990), for the proposition that a conflict exists when one section (section 42-2-125(1)(c)) forbids what other sections (sections 42-2-125(1)(b.5), 42-2-125(1)(i), and 42-2-132.5(4)) authorize. Op. Brief at 11 (citing *Craig*, 809 P.2d at 1036). But *Craig* is not applicable to this matter.

Craig addressed whether there was a conflict between a state statute and a municipal ordinance, stating "in determining whether two pieces of legislation conflict, the critical inquiry is whether the ordinance authorizes what the statute forbids, or forbids what the statute has expressly authorized." *Craig* at 1036. *Craig* concluded there

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[6] Stackpool repeatedly conflates reinstatement under section 42-2-132.5(4) with revocations under both sections 42-2-125(1)(b.5) and 42-2-125(1)(i). As noted above, section 42-2-132.5(4) does not apply to revocations under section 42-2-125(1)(b.5) for two reasons. First, revocations of first-time offenders under section 42-2-125(1)(b.5) are addressed in section 42-2-132.5(4)(a)(II)(A). Second, section 42-2-132.5(4)(a) applies to revocations for one year or more and revocations under section 42-2-125(1)(b.5) are for nine months.

was no conflict "because the ordinance does not authorize what the statute forbids nor forbid what the statute authorizes." *Id* at 1037.

Likewise, section 42-2-132.5(4) addresses early reinstatement for DUI, DUI per se, and DWAI misdemeanor convictions. This statutory section doesn't address reinstatement for felony DUI convictions. Therefore, there is no conflict between the one-year revocation provision for felony DUIs in section 42-2-125 and early reinstatement provisions for misdemeanor alcohol offenses in section 42-2-132.5(4).

Thus, the fact that section 42-2-132.5(4) does not provide for early reinstatement from revocation under section 42-2-125(1)(c) does not create a conflict between section 42-2-125(1)(c) and sections 42-2-125(1)(b.5), 42-2-125(1)(i), and 42-2-132.5(4).

2. Although sections 42-2-125(1)(b.5) and 42-2-125(1)(c) both provide for mandatory revocation for felony DUI convictions, Stackpool was revoked under section 42-2-125(1)(c). It is early reinstatement under section 42-2-125(1)(c) that is at issue.

Because both sections 42-2-125(1)(b.5) and 42-2-125(1)(c) mandate revocation for a felony DUI conviction, Stackpool asserts that both sections apply to felony DUI convictions and that the legislature's intent in adopting section 42-2-125(1)(b.5) was that felony convictions fall within this statutory provision. As noted above, however, Stackpool did not raise section 42-2-125(1)(b.5) at the administrative hearing.

Rather, her argument at the administrative hearing was that section 42-2-132.5(4) applied to her revocation under section 42-2-125(1)(c). Stackpool's focus on section 42-2-125(1)(c) at the hearing makes sense given that her privilege to drive was revoked under section 42-2-125(1)(c). But as discussed above, section 42-2-132.5(4) does not provide for early reinstatement from revocations under section 42-2-125(1)(c). *See* Argument § II.B, above.

To the extent the Court determines to consider this unpreserved contention, her allegations concerning section 42-2-125(1)(b.5) fail for two reasons.

a. There is no evidence that in enacting section 42-2-125(1)(b.5) the legislature intended felony convictions already addressed in section 42-2-125(1)(c) to now come within section 42-2-125(1)(b.5).

In 2008, section 42-2-125 was repealed and reenacted and a new section (1)(b.5) was added. The phrase "any offense provided for in section 42-4-1301(1) or (2)(a)," which had previously been in section 42-2-125(1)(i), was deleted from section 42-2-125(1)(i) and placed in section 42-2-125(1)(b.5).

Significantly, in 2008 the alcohol-related offenses provided for in sections 42-4-1301(1)(a) and (2)(a) were misdemeanor DUI, DUI per se, and DWAI. Felony DUI was not an offense provided for in sections 42-4-1301(1)(a) or (2)(a). Instead, felony driving offenses were already addressed in section 42-2-125(1)(c), which had been in effect at least since 1994.

Thus, the legislative history behind the enactment of section 42-2-125(1)(b.5) supports the conclusion that the legislature did not intend

section 42-2-125(1)(b.5) to address felony DUI convictions. Rather, it was intended to address misdemeanor DUI convictions.

That section 42-2-125(1)(b.5) was enacted to address misdemeanor DUI convictions is further demonstrated by section 42-2-125(1)(b.5) specifying a nine-month revocation period for a conviction for any of the offenses in section 42-4-1301.[7] A logical and reasonable inference is that in enacting 42-2-125(1)(b.5) the legislature intended to provide a shorter period of revocation for the misdemeanor DUI offenses described in section 42-4-1301 than the general one-year revocation period in effect for offenses in section 42-2-125, such as felonies falling within 42-2-125(1)(c).

Nonetheless, Stackpool argues that when the General Assembly revised sections 42-4-1301(1)(a) and (2)(a) to create felony DUI in 2015, this Court should "infer" legislative intent that felony DUIs fall within section 42-2-125(1)(b.5). Op. Brief at 14. There is no indication,

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[7] Prior to the enactment of section 42-2-125(1)(b.5) the period of revocation for offenses in section 42-2-125 was not less than one year "[u]nless otherwise provided."

however, that the legislature intended section 42-2-125(1)(b.5) should supersede section 42-2-125(1)(c). Stackpool's assertion is inconsistent with several established rules of statutory interpretation.

First, "in the absence of a contrary indication, statutes should be construed to assume the existence of other parts of the same statutory scheme and create a single, harmonious whole." *People v. Market*, 475 P.2d 607, 613 (Colo. App. 2020) (citing *Union Pac. R.R. Co. v. Martin*, 209 P.3d 185, 189 (Colo. 2009)). And the legislature "is presumed to be aware of its own enactments." *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 330 (Colo. 2004). In addition, if the legislature had intended a particular construction it would have said so. *People v. Griffin*, 397 P.3d 1086, 1089 (Colo. App. 2011) (observing that if the legislature had intended a particular interpretation, "it certainly [knows] how to say so").

In short, if the legislature had intended section 42-2-125(1)(b.5) to supplant or supersede existing section 42-2-125(1)(c) for felony DUIs, then it had the opportunity to make this clear in 2008 when subsection (b.5) was adopted. And in 2015 when felony DUI was added to section

42-4-1301, if the legislature had intended this change to affect the one-year license revocation period for felony DUI then in section 42-2-125(2), it could have made such intention clear. It did not do so. And its failure to do so must be interpreted as intentional. *Zamarripa v. Q & T Food Stores, Inc.*, 929 P.2d 1332, 1338 (Colo. 1997) (stating that "[u]nder the ordinary rule of statutory construction requiring us to give effect to the plain meaning of a statute's wording [an] omission must be viewed as intentional and given effect"); *see also People v. Prieto*, 124 P.3d 842, 848 (Colo. App. 2005) (stating if the legislature had intended a specific criminal statute to preclude prosecution under a general criminal statute "it certainly could have drafted [the statute] using such language").

There is no evidence that in enacting section 42-2-125(1)(b.5), the legislature intended this statutory provision to supersede section 42-2-125(1)(c).

b. Application of section 42-2-125(1)(b.5) to felony DUI convictions is not supported by statutory history and would create an unjust and unreasonable result.

In addition to her unsupported assertion that the legislature knew, when felony DUI was created in sections 42-4-1301(1)(a) and (2)(a), that drivers convicted of felony DUI would fall within section 42-2-125(1)(b.5), Stackpool asserts that the legislature intended that drivers convicted for felony DUI be treated no differently than drivers convicted of misdemeanor DUI. Op. Brief at 14. Stackpool's assertion is not supported by the statutory history of section 42-2-132.5 and would create an unjust result.

When section 42-2-125(1)(b.5) was added in 2008, the legislature also added section 42-2-132.5(1.5)(a)(II)(A) (now codified at section 42-2-132.5(4)(a)(II)(A)). Section 42-2-132.5(1.5)(a)(II)(A) provided that "[f]or revocations under section 42-2-125(1)(b.5) . . . *for a first violation that requires only a nine-month revocation,* a person . . . may voluntarily apply for an early reinstatement with a restricted license under the

provisions of this section after the person's privilege to drive has been revoked for at least one month." (emphasis added).

Thus, the legislature indicated its intent that section 42-2-125(1)(b.5)—and the nine-month revocation period provided therein—apply to first-time offenders. This first-time offender limitation is inconsistent with Stackpool's assertion that the legislature intended for persons convicted of felony DUI (that is a DUI after three or more prior DUI convictions) to fall within the provisions of section 42-2-125(1)(b.5).

Furthermore, making drivers convicted of felony DUI and drivers convicted of misdemeanor DUIs both eligible for reinstatement one month after revocation would be inconsistent with the deterrent effect of revocation, disparate penalties for misdemeanor and felony DUIs, and the General Assembly's goal of providing safety for persons using Colorado highways. *See* § 42-2-126(1)(a), C.R.S.

It also would be logically inconsistent with the goal of treating felony convictions more seriously than misdemeanor convictions. And in construing statutes, courts must avoid constructions that lead to illogical or absurd results. *McCoy v. People,* 442 P.2d 379, 389 (Colo.

2019) (citing *Doubleday v. People*, 364 P.3d 193, 196 (Colo. 2016)). *See* § 2-4-203(1)(e), C.R.S. (in determining the intention of the general assembly, a court may consider "the consequences of a particular construction").

Stackpool's interpretation would make a felony conviction no more serious than a misdemeanor conviction with respect to the loss of the privilege to drive. The Department's interpretation avoids this absurd result. Persons convicted of misdemeanor DUIs can seek early reinstatement with an interlock-restricted license while those convicted of felony DUI can seek reinstatement with an interlock-restricted license only after serving their full revocation period. Thus, felony convictions are treated more harshly than misdemeanor convictions.

3. Stackpool's driving subjected her to revocation under both sections 42-2-125(1)(c) and 42-2-125(1)(i).

Stackpool's driving privilege was revoked under section 42-2-125(1)(c) and under section 42-2-125(1)(i). CF, pp 016, 050. By their plain language, different circumstances are required to trigger

revocation under sections 42-2-125(1)(c) and 42-2-125(1)(i), although there are situations where both provisions are applicable to a single act.

Section 42-2-125(1)(i) applies when a driver has "[b]een convicted of DUI, DUI per se, or DWAI and has two previous convictions of any of those offenses." The language of section 42-2-125(1)(i) is plain and its meaning is clear. It applies when a driver has a third (or subsequent misdemeanor) DUI conviction.

In contrast, section 42-2-125(1)(c) applies when a driver "has been convicted of any felony in the commission of which a motor vehicle was used." And under sections 42-4-1301(1)(a) and (2)(a), driving under the influence is a class 4 felony if the driver has three or more prior DUI convictions.

When statutory language is clear and unambiguous, courts "look no further and apply the words as written." *Colo. Dep't of Revenue v. Creager Mercantile Co.*, 395 P.3d 741, 744 (Colo. 2017). And by its plain language, section 42-2-125(1)(i) provides for mandatory revocation for a third DUI conviction. It does not address felony convictions, which section 42-2-125(1)(c) does address. Considering the plain wording of

section 42-2-125(1)(i), and consistent with accepted principles of statutory construction, the district court correctly held that sections 42-2-125(1)(c) and 42-2-125(1)(i) do not conflict, and that Stackpool could have her privilege to drive revoked under multiple statutory provisions with different reinstatement guidelines. CF, pp 150–51. But because she could not have her license reinstated early when it was revoked under section 42-2-125(1)(c), the district court correctly upheld the Department's denial of her application for early reinstatement.

III. The district court did not err when it denied Stackpool's motion for change of judge.

A. Preservation and Standard of Review

Stackpool filed a Motion for Change of Judge pursuant to C.R.C.P. 97 in her district court appeal. CF, p 082. Her motion was denied. CF, p 096. The issue of disqualification was preserved for appeal.

The Department agrees with the standard of review in Stackpool's Opening Brief with the addition that whether a judge should be disqualified in a civil case is a matter within the discretion of the district court judge, and refusal to disqualify will not be disturbed on

appeal except for an abuse of discretion. *Goebel v. Benton*, 830 P.2d 995, 998–99 (Colo. 1992)

B. The affidavits in support of Stackpool's motion failed to allege actual bias or prejudice, or to set forth facts from which bias or prejudice could reasonably be inferred.

C.R.C.P. Rule 97 governs the disqualification of a judge in a civil case. It provides that "[a] judge shall be disqualified in an action in which he is interested or prejudiced," and that a motion for disqualification must be supported by affidavit.

In ruling on the sufficiency of a motion to disqualify, the judge must accept the factual statements in the motion and affidavit as true and determine as a matter of law whether they are legally sufficient for disqualification.[8]

"To be legally sufficient, the motion and affidavits must state facts from which it may reasonably be inferred that the judge has a bias or

[8] Although the judge incorrectly applied a subjective test in denying Stackpool's Motion for Change of Judge (CF, p 097), this does not alter the insufficiency of the Motion and affidavits.

prejudice that will prevent the judge from dealing fairly with the moving party." *Parsons ex rel. Parsons v. Allstate Ins. Co.*, 165 P.3d 809, 819 (Colo. App. 2006). But a motion and affidavit that "merely alleges opinions or conclusions, unsubstantiated by facts supporting a reasonable inference of actual or apparent bias or prejudice, are not legally sufficient to require disqualification." *Goebel* at 999 (citing *S.S. v. Wakefield*, 764 P.2d 70, 73 (Colo. 1988)). "The record must clearly establish bias." *People v. Schupper*, 353 P.3d 880, 895 (Colo. App. 2014).

Turning to Stackpool's Motion, Stackpool asserted the district court exhibited bias or prejudice in two ways. First, when it entered an order (hereafter "initial order") before briefing had been completed. CF, p 035. And second, by stating "no Reply brief will be necessary" in the order rescinding the initial order and "[n]o reply brief is required" in the order setting a briefing schedule. CF, pp 045, 049.

As to the initial order, Stackpool's assertion of bias or prejudice rests on the court entering an order affirming the judgment of the hearing officer before briefs had been filed by either party. In entering the initial order, the court erroneously stated that it had "reviewed the

party's briefs, the record, and all other relevant materials." CF, p 035. Admittedly, this statement was partially in error because, although the record had been filed, neither party had filed a brief. Therefore, two days after entry of the initial order, Stackpool filed a Motion to Rescind, noting that briefs had not been filed by either party. CF, p 038. The court immediately remedied its error, granting Stackpool's Motion to Rescind the day after it was filed (CF, p 045), and issuing a briefing schedule. CF, p 049.

Stackpool's second assertion of bias or prejudice is based on the court's statements in its order granting Stackpool's Motion to Rescind, and in its order granting Stackpool's request for a new briefing schedule, that a reply brief is not necessary or required. CF, pp 045, 049.[9]

[9] The district court subsequently entered another order clarifying that although it considered a reply brief unnecessary because the case concerns statutory interpretation, Stackpool may file a reply brief. CF, p 097. Stackpool filed a reply brief. The district court's final Order on Appeal was entered after briefing was completed.

In support of her assertions of bias or prejudice Stackpool submitted her own affidavit and the affidavit of an attorney not involved in this matter. Neither affidavit was sufficient to show personal bias or prejudice.

Stackpool's affidavit stated that she "feel[s] that the judge is prejudiced against [her] side of the case" based on entry of the initial order prior to briefing. It also expressed her feeling that the judge's statements regarding a reply brief indicated that the judge had already decided against her appeal. CF, p 077.

The unaffiliated attorney's affidavit stated that he had "never previously heard of an appeal being decided by a court prior to the filing of any briefs." CF, p 079. The attorney also opined that the statement "no Reply brief will be necessary" "suggests that the court has formed a conclusion prior to affording the party's [sic] the right to present argument." CF, p 080.

Neither affidavit met the required elements for disqualification. "A motion and supporting affidavits which merely allege opinions or conclusions, unsubstantiated by facts supporting a reasonable inference

of actual or apparent bias or prejudice, are not legally sufficient to require disqualification." *Goebel* at 999 quoting *Wakefield* at 73. "To sustain a motion under C.R.C.P 97, the facts alleged in the affidavits may not be based on 'mere suspicion, surmise, speculation, rationalization, conjecture [or] innuendo,' nor can they be 'statements of mere conclusions of the pleader.'" *In re Marriage of Goellner*, 770 P.2d 1387, 1390 (Colo. App. 1989).

Rather, to be legally adequate, the affidavit must "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. *People v. Botham,* 629 P.2d 589, 595 (Colo. 1981) (emphasis added). "Unless a reasonable person could infer that the judge would in all probability be prejudiced against the petitioner, the judge's duty is to sit on the case." *Smith v. Dist. Ct.*, 629 P.2d 1055, 1056 (Colo. 1981). And "prejudice" "has been described . . . as '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.'" *Id.* at 1057 (quoting *Walker v. People*, 126 Colo. 135, 146, 248 P.2d 287, 294 (1952)).

A prior adverse ruling is an insufficient basis for recusal. *Altobella v. People*, 161 Colo. 177, 184, 420 P.2d 832, 836 (Colo. 1966) (stating that "previous rulings of a judge although erroneous, numerous and continuous, especially when they are subject to review, are not sufficient to show bias or prejudice as would disqualify him"); *Schupper*, 353 P.3d at 895 (rejecting as "mere speculation" a motion to recuse based on judge's ruling against party's indigency determination); *Edmond v. City of Colo. Springs*, 226 P.3d 1248, 1252 (Colo. App. 2010) (stating that "[j]udicial rulings alone rarely constitute a basis for bias or prejudice [motion]" (citing *Liteky v. U.S.*, 510 U.S. 540, 555 (1994))). In addition, the fact that a judge presided over a related case involving the same party, or made prior unfavorable rulings in a previous case, are not grounds for recusal. *People ex rel. S.G.*, 91 P.2d 443, 448 (Colo. App. 2004). And "a judge's opinion formed against a party from evidence before the court in a judicial proceeding, even as to the guilt or

innocence of a defendant, is generally not a basis for disqualification." *Id.* at 447 (citing *Walker*, 248 P.2d at 293).

Neither Stackpool's nor the unaffiliated attorney's affidavit alleged prejudice or bias supporting a reasonable inference of actual or apparent bias that would prevent the district court judge from dealing fairly with Stackpool's appeal. Neither affidavit alleged personal bias or prejudice as the result of any outside source. Finally, neither affidavit alleged facts from which a reasonable person could infer the district court judge had a bias or prejudice that would prevent him from basing his decision on elements other than the merits of the appeal. Instead, the affidavits alleged feelings, opinions, and speculations based on the court's premature ruling and its statement that no reply brief was required.

But an adverse ruling, or (as occurred in this matter) an erroneously entered adverse ruling, is not sufficient to show bias or prejudice sufficient for recusal.[10] And although the court's initial order

[10] Evidence that the court may have inadvertently issued the order is the notation in the order that "as Respondent correctly notes, C.R.S.

was premature, as soon as this error was pointed out, the court promptly rescinded its order.

The erroneous statement in the initial order that the court had reviewed the parties' briefs did not require recusal. *See Altobella*, 420 P.2d at 836 (holding that the entry of orders "subsequently declared erroneous on appeal do not compel the conclusion that prejudice or bias existed toward defendant").

And the court's statements concerning a reply brief do not support the inference that the court would be basing its decision on information from an outside source or on elements other than the merits of the case. The court correctly noted that this matter involved issues of statutory interpretation. CF, p 045. And its decision that a reply brief would likely not be helpful does not demonstrate prejudice.

Stackpool's Motion and affidavits were insufficient to warrant recusal because, even if the allegations were accepted, they did not state

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§ 42-2-132.5(4) does not state that Applicant has the right to an interlock-restricted license." CF, p 036. As Stackpool points out (CF, p 084) no such notation had been made, suggesting the order may have incorporated information from an unrelated case.

facts from which it could reasonably be inferred that the district court judge had a bias or prejudice that would prevent him from dealing fairly with this matter. The district court did not abuse its discretion or err.

CONCLUSION

This appeal should be dismissed as moot. If the Court declines to dismiss on this basis, then the district court's order should be affirmed.

Respectfully submitted this 15th day of March, 2021.

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CERTIFICATE OF SERVICE

I certify that on March 15, 2021, I served this ANSWER BRIEF on all parties to this case, as identified below, using Colorado Courts E-Filing System.

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s/Jennifer Duran