COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, CO 80202	DATE FILED: April 19, 2021 5:12 PM FILING ID: AED724B6CEE83 CASE NUMBER: 2020CA1359
District Court, Jefferson County The Honorable Randall C. Arp Case No. 20CV30008	
Plaintiff-Appellant, KELLY STACKPOOL, v. Appellee, COLORADO DEPARTMENT OF REVENUE, MOTOR VEHICLE DEIVISION.	▲COURT USE ONLY▲ Case Number: 20CA1359
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REPLY 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 Reply Brief contains 2951 words, excluding 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 5700 word limit for a Reply Brief.

s/ Abraham V Hutt_____
Attorney

TABLE OF AUTHORITIES

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ARGUMENT AND AUTHORITIES

I. Mootness

The Department argues that this matter should be dismissed as moot due to Appellant Stackpool obtaining an ignition interlock license as this appeal was pending.[1] The Department, however, fails to discuss that this case falls squarely within "the exception to the mootness doctrine that allows review of 'important issues capable of repetition yet potentially evading review.'" *Walton v. People*, 451 P.3d 1212 (2019) (quoting *People v. Brockelman*, 933 P.2d 1315, 1318 (Colo. 1997) and *People v. Quinonez*, 735 P.2d 159, 161 n.1 (Colo. 1987)).

The primary issue in this case is whether or not the applicable statutes allow persons convicted of felony DUI to reinstate from their driver's license revocations with ignition interlock restricted licenses before serving an entire year of revocation. The record in this case alone demonstrates not only that this issue repeats frequently but that there is a split of authority among the District Courts (even within one judicial district) that have decided the issue. Both sides in this case cited Jefferson County District Court decisions to the District Court judge who ruled on this appeal,

[1] Appellant Stackpool was denied the issuance of an interlock restricted license for an entire year due to the Department's erroneous interpretation of the law which is the subject of this appeal.

and those decisions were in direct conflict. *See Opening Brief*, page 9 *citing Starling v. Colo. Dep't of Revenue,* 17CV30955, CF, p. 118-124 and *Kier v. Colo. Dep't of Revenue*, 19CV31407, CF, p. 133-135.

This issue has arisen and will continue to arise in the case of every single driver convicted of felony DUI who has any interest in receiving early reinstatement of his or her driving privilege with an ignition interlock license. The relevant statutes dictate that these drivers are eligible after serving the first month of their revocation but the Department refuses to grant reinstatement until they have served one full year.

Even though the offense of felony DUI has existed since 2015, the issue has yet to reach this Court. That appears to be true for a variety of reasons. The first is the length of time necessary for a case to make its way through the system. It must go through a criminal trial court to conviction, then to the Department of Revenue, then through the administrative hearing process and then to a District Court for appellate review before ever being presented to the Court of Appeals. The issue of mootness inevitably arises one year into the revocation because it is at the one-year mark (rather than at the one-month mark) that the Department presently concedes interlock reinstatement eligibility. Here, the revocation took effect November 4, 2019, but the case was not ripe for Appeal to the District Court until December 10, 2019. Although Ms. Stackpool filed her Complaint seeking judicial review on

January 3, 2020, the District Court did not ultimately render its final decision on the matter until June 26, 2020.[2] The Department's statutory interpretation, which is the subject of this appeal, placed Ms. Stackpool's reinstatement date at September 29, 2020. That left only 95 days from the District Court's order for the entire Court of Appeals process to run its course before the issue would arguably become moot. This case demonstrates just a few of the many ways that delays in the process can easily cause a year to pass between the start of a license revocation and the case being at issue in the Court of Appeals. The points in the process where delay can occur include scheduling and holding an administrative hearing, transcription of the hearing, transmission of documents from the agency to the court, certification of the record, briefing and ruling.

The second reason this frequently recurring issue has so far evaded this Court's review is the financial expense to a driver of pursuing an appeal of this license revocation. Because license revocation is an administrative proceeding separate from the criminal process drivers are not entitled to court-appointed counsel. The issue therefore cannot arise in the process of an appeal of a criminal conviction or sentence and the Office of the State Public Defender is prohibited from representing its clients before the Department of Revenue regarding their driver's

[2] C.R.S. 24-2-106(4) requires commencement of an action for judicial review within thirty-five days after the agency actions becomes effective.

licenses or on appeal from the Department's actions**.** C.R.S. 21-1-103; *See also, People v. Shank* 420 P.3d 240 (Colo. 2018)**.** Thus, the only drivers capable of bringing the matter before the Court of Appeals are those with private counsel who are suffering the income and employment disabilities that always come with a felony conviction, and who have already expended thousands of dollars asserting their rights in a District Court. Many aggrieved drivers simply cannot afford to hire counsel to pursue an appeal. The odds against a *pro se* litigant sufficiently understanding the issue and then successfully navigating both the administrative and judicial processes to bring the issue before this Court in a timely fashion are clearly enormous.

A third reason that this issue relevant to every person convicted of felony DUI seems so far to have evaded review by the Court of Appeals is that any person so convicted serves a mandatory sentence of incarceration at exactly the time that the driver's license revocation is imposed. This usually presents the driver either with the preoccupation of coping with the incarceration or having no need for a driver's license for at least several months, or both. When combined with the fact that drivers are not entitled to court appointed counsel with regard to driver's license issues, this incarceration factor is another significant barrier to aggrieved drivers deciding to seek appellate review. Only those whose private counsel understand and advise them on the intricacies of the driver's license statutes are even in a position to know

in a timely manner that an issue exists, let alone potentially have the resources to pursue it.

It is worth noting that while they did not appear to play a role in this case, many of the opportunities for delay in the process of a driver attempting to appeal this adverse action by the Department of Revenue are within the control of the Department.[3] For example, scheduling a hearing, issuing a ruling, and transmitting the record to the reviewing court are all within the Department's control, with no ability of an appellant to expedite the process. The Department, of course, has an interest in continuing to apply its own statutory interpretation to every felony DUI conviction and therefore an interest in its interpretation not being reviewed by the Court of Appeals. Because at least one District Court judge has agreed with the Department's action, the Department can continue to assert that contrary rulings by other reviewing District Courts are not binding upon it. If the Department's interest in continuing its behavior was overridden by a desire to have the matter resolved by this Court, the Department would not have moved to dismiss this appeal as moot. That the party who possesses a unilateral ability to delay proceedings can always argue mootness once one year has passed in this inevitably recurring issue is another reason for this Court to hear the appeal.

[3] The primary source of delay in this case was not the fault of the Department but the District Court's premature ruling before the case was at issue and the resulting litigation concerning Ms. Stackpool's Motion to Recuse.

Finally, the issue in this appeal of the denial of Ms. Stackpool's Motion for Change of Judge deserves this Court's attention and review. To begin, the Department concedes that the District Court applied the wrong standard to Ms. Stackpool's motion disqualify him. Answer Brief p. 35, footnote 8. The split of authority within the Jefferson County District Court regarding the issue raised in this appeal makes clear that had a different judge been assigned Ms. Stackpool might well have prevailed. Clearly, had her case been in front of Judge Pilkington, who decided *Starling supra* 17CV30955, CF, p. 118-124 Ms. Stackpool would have prevailed.

Additionally, the Department responds to the failure to recuse by attempting to minimize it into Ms. Stackpool simply complaining about an adverse ruling: "… 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." Answer Brief p. 41. However, a judge ruling on a case before he has any information about it is much more than complaining about an adverse ruling. The Department correctly asserts the proposition that "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." Answer Brief p. 41. Here, however, the opinion expressed by the judge against Ms. Stackpool's case could not possibly have been "from evidence before the court." It was rendered before any

such evidence was put before the court. Particularly because of the Attorney General's confession that the District Court applied the wrong standard, this Court should not dismiss the opportunity to render a decision on this appeal.

II. The statutory construction issue was properly preserved.

The Department argues in section II. A. 2. of its Answer Brief that Ms. 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" and that therefore this Court should not consider the issue as it was first raised in the District Court. The Department's argument should be rejected because there was no reason to address a statutory conflict at the administrative hearing. What gave rise to the issue of a statutory conflict was the erroneous interpretation of the law by the Department following the hearing. Consequently, it was in seeking judicial review of the Department's action that Ms. Stackpool first had the opportunity to raise the issue.

At the administrative hearing Ms. Stackpool argued for the Department to apply the ignition interlock statute and issue her a restricted license. Tr. (December 9, 2019), pp.5-8. The Department, however, erroneously interpreted the law and found that the "any felony with a car" statute, 42-2-125(1)(c) conflicts with and overrides the ignition interlock statute 42-2-132.5. It is this misapplication of the law which creates the issue of a statutory conflict. Once the Department misapplied the law, Ms. Stackpool properly addressed the issue in the District Court who bears

authority to reverse the Department's finding upon determining that the Department erroneously interpreted the law.

To be clear, Ms. Stackpool's position has always been unambiguous and consistent: the plain meaning of the ignition interlock statute, 42-2-132.5, is that persons with multiple alcohol related driving convictions are eligible for ignition interlock restricted licenses after serving the first month of their revocations. There is no authority for the Department's position that the "any felony involving a car" statute, 42-2-125(1)(c), somehow silently creates an exception to that statute. It is telling that the only authority cited by the Department for this supposed exception is its own statement on its website. CF p. 19. That is the one and only reference the Hearing Officer gave in support of the Department's refusal to grant Ms. Stackpool's request for an interlock license. Nowhere in any of its filings in this case, in either the district court or in this Court has the Department cited any additional authority. In essence, the Department's position is that the "any felony with a car" statute excepts felony DUIs from the interlock law because the Department says so. Clearly there is no statute or case that creates or supports any such exception. That is precisely the argument Ms. Stackpool made to the Hearing Officer in this case. Tr. (December 9, 2019), p. 6 line 25 – p.7 line 6. Only the Department finding that the "any felony with a car" statute creates an interlock exception raises the issue of a conflict between the statutes. Ms. Stackpool properly discussed and preserved that

issue in her appeal of the Department's action in the district court and it is properly before this court.

III. Punishment

The Answer Brief defends the Department's erroneous attempt to read an exception into the interlock statute for felony DUIs in part by arguing that it is justified as an additional punishment for felony as opposed to misdemeanor DUI. Answer Brief at pp. 18-21. Colorado law is clear, however, that "license revocation proceedings serve remedial, rather than punitive purposes." *Deutschendorf v. People,* 920 P.2d 53 (Colo. 1996). "[T]"he sanction of revocation is intended to serve the remedial purpose of fostering the safety of the general public who use the highways of the state. *People v. Olsen*, 921 P.2d 51 (Colo. App. 1996). Consequently, the Department's assertion of this "additional punishment" argument to justify its erroneous interpretation of the "any felony with a car" and ignition interlock statutes must fail.

When the legislature created felony DUIs in 2015 it chose to create different punishments for them than for misdemeanor DUIs but chose not to create different license revocation provisions for them. The legislature was of course aware that remedial license revocation provisions existed for multiple DUI offenders and, by making no change in them, chose to have those provisions apply to felony DUIs. There is no authority for the Motor Vehicle Division to make a contrary choice and

override the statutes duly adopted by the legislature and signed by the Governor. It is entirely consistent with the remedial function of license revocation for the legislature to have made the choices it did about how to handle multiple DUI offenders.

Since the inception of the ignition interlock program in 1999 offenders with multiple alcohol-related convictions or license revocations have been included in it regardless of the number of convictions they have. This is by operation of the interlock statute, 42-2-142.5 (adopted in 1999), and its interaction with each of the statutes that creates a license revocation for having multiple alcohol convictions. Those statutes are, 42-2-125(1)(g)(I) (second offenders), 42-2-125(1)(i) (third and subsequent offenders), 42-2-202 and 203 (habitual traffic offenders), 42-1-102(68.5) (persistent drunk drivers) and 42-2-125(1)(b.5) (anyone convicted of DUI including felony DUI) all of which pre-date 1999.[4] When the legislature chose to make no change to those multiple offender license revocation provisions regarding interlock

[4] Some confusion in the briefs by both parties in this case seems to arise regarding discussion of one of the multiple alcohol offender revocation statutes, 42-2-125(1(i) and an overlapping statute that governs revocation for any DUI conviction regardless of its number, 42-2-125(1)(b.5). Counsel for Ms. Stackpool regret any contribution they have made to this confusion. There are citations to paragraph (1)(b.5) in the Opening Brief that would have been clearer had they also referenced paragraph (1)(i). The crux of this case is that the ignition interlock law has applied to all multiple DUI offenders (like Ms. Stackpool) since its inception, and nothing has ever been done by the legislature to remove felony DUI offenders from that program.

eligibility at the time it created felony DUI in 2015 (or at any time thereafter) it was simultaneously choosing to still include drivers with 4 convictions in the interlock program.

IV Statutory Construction

The Department concedes the principle that when statutory language is clear and unambiguous, courts "look no further and apply the words as written." Answer Brief at p. 33 citing *Colo. Dep't of Revenue v. Creager Mercantile Co*., 395 P.3d 741, 744 (Colo. 2017). However, the Department then contradicts itself and argues that the court should read into the DUI revocation statutes, 42-2-125(1)(b.5),(g) and (i), a legislative intention that they apply only to misdemeanor and not felony DUIs. The language of the statutes is clear and unambiguous and makes no distinction between felonies and misdemeanors. Neither the words felony nor misdemeanor appear anywhere in them. Similarly, the language of the ignition interlock statute, 42-2-132.5, and the multiple offender revocation statutes listed above, is clear and unambiguous in applying the interlock program to all multiple offenders. Yet, the Department asks this Court to read into that clear statutory scheme a completely unstated exception for 4th offenders simply because of the existence of the ancient "any felony with a car" revocation, 42-2-125(1)(c). That statute has never had anything to do with DUIs or ignition interlock licenses. It is at least 5 years older than the ignition interlock law and 11 years older than felony DUIs and no change

has ever been made to apply it to DUI cases; nor has any change ever been made to the interlock statute to exclude felony DUIs. The Answer Brief at p. 28 seems not to understand that timeline when it argues that "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." The problem, however, is that felony DUI did not yet exist in 2008, so no such "opportunity" existed.

The gymnastics in the Department's arguments are unnecessary to harmonize the "any felony" statute with the interlock statute. Those statutes are in harmony when the interlock eligibility after one month provided by the interlock statute, 42-2-132.5(4)(a)(I) is granted to felony DUI convicts. That is the same simple, plain-meaning application of the law Ms. Stackpool has been requesting since September of 2019. Conflict only arose when the Department decided, without authority, that the "any felony with a car" statute created an exception to the interlock statute.

For all the reasons stated here and in her Opening Brief, this Court should reverse the ruling of the District Court and hold that drivers convicted of felony DUI are eligible for early license reinstatement pursuant to 42-2-132.5.

Respectfully submitted this _19th_ day of April, 2021.

RECHT KORNFELD, P.C.

S/Abraham V Hutt

s/Andrew E. Ho

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via ICCES to Laurie Kristen Rottersman, Office of the Attorney General, Legal Services Division, 1300 Broadway, 10th Floor, Denver, CO 80203 this 19th day of April, 2021.

s/ Leni Charles
Leni Charles, Legal Assistant