COLORADO SUPREME COURT Court Address: 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: October 19, 2015 9:42 AM FILING ID: DF0821D5FC7D7 CASE NUMBER: 2015SC136
Mesa County District Court Brian J. Flynn, District Court Judge Case No. 14 CV 4106	
PETITIONER: THE PEOPLE OF THE STATE OF COLORADO **RESPONDENT:** GREGORY K. HOSKIN	↑ COURT USE ONLY
Attorney or Party Without Attorney: Jeremy Chaffin Deputy District Attorney Twenty-First Judicial District of Colorado P.O. Box 20,000 Grand Junction, CO 81502-5031 Phone Number: (970) 244-1730 Fax Number: (970) 244-1729 E-mail: jeremy.chaffin@mesacounty.us Attorney Registration # 43627	Case Number: 15 SC 136

OPENING BRIEF

CERTIFICATE OF COMPLIANCE

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

1. The brief complies with the applicable word limits set forth in C.A.R. 28.1(g). It contains 3,681 words. In calculating this word count I relied on the word count of the word-processing system used to prepare this document.

2. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A). For each issue raised, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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

/s/ Jeremy Chaffin
Jeremy Chaffin #43627
Deputy District Attorney

Filed electronically via ICCES, a signed original is on file at the Office of the 21st Judicial District Attorney.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The Respondent may be referred to as Defendant or Hoskin. The Petitioner may be referred to as the People. Pursuant to C.A.R. 28(e), citations to the record follow the "Court of Appeals Policy on Citation to the Record." Page numbers used are to the pdf page numbers in each document.

ISSUES PRESENTED

1. Whether section 42-4-1101(4), C.R.S. 2015, creates a permissive inference or a mandatory rebuttable presumption.

2. Whether the district court erred by concluding that evidence of a defendant's speed in excess of a posted speed limit was insufficient to support a finding that the defendant had violated the speeding statute.

STATEMENT OF THE CASE

In February, 2014, Hoskin was cited for speeding, 10-19 miles over the posted speed limit, in violation of section 42-4-1101(1), (12)(a). R. Court File, p. 19. Hoskin challenged this traffic infraction at a hearing before a magistrate.

R. Court File, p. 21. In a written ruling, the magistrate found that Hoskin had violated the speeding statute. R. Court File pp. 73-75.

Hoskin appealed the magistrate's ruling to the District Court. R. Court File. p. 1. After initial briefing by the parties, the District Court held that the magistrate had impermissibly shifted the burden of proof to Hoskin, violating his due process rights. R. Court File, p. 109. The District Court concluded that there was otherwise sufficient evidence to support the magistrate's ruling, but remanded for a new hearing based on its due process concerns. R. Court File, p. 112.

The People petitioned the District Court for rehearing, arguing the due process concerns articulated by the District Court did not apply to civil traffic infractions. R. Court File, pp. 97-100. Following a response and cross-petition for rehearing by Hoskin, the District Court modified its opinion to conclude that there was insufficient evidence to find Hoskin had violated the speeding statute. R. Court File, pp. 120-122. The District Court did not modify its opinion regarding its due process concerns.

The People then petitioned for writ of certiorari in this Court. Hoskin also cross-petitioned for writ of certiorari. The petition and cross-petition were granted by this Court on September 8, 2015.

STATEMENT OF THE FACTS

On February 12, 2014, at approximately 8:05 a.m., Hoskin was driving his car eastbound on Interstate 70 near mile posts 54 and 55. R. Tr. 09/11/14, p. 8, ll. 2-3. The posted speed limit for this area is sixty miles per hour. R. Tr. 09/11/14, p. 9, ll. 17-21. An airborne Colorado State Trooper observed Hoskin passing a semi-truck. R. Tr. 09/11/14, p. 8, ll. 17-19. The trooper watched Hoskin's car over the course of the next mile, calculating his average speed at seventy-eight miles per hour. R. Tr. 09/11/14, p. 8, l. 24 to p. 9, l. 3. The trooper also observed Hoskin pass another vehicle. R. Tr. 09/11/14, p. 9, ll. 10-12. The trooper relayed this information to another trooper on the ground. R. Tr. 09/11/14, p. 9, ll. 4-12. He identified Hoskin's car for the ground trooper and confirmed that the ground trooper had stopped the correct vehicle. R. Tr. 09/11/14, p. 9, ll. 10-18. The ground trooper then cited Hoskin for his excessive speed. R. Tr. 09/11/14, p. 9, ll. 19-23; R. Court File, p. 19.

SUMMARY OF THE ARGUMENT

Traffic infractions are civil proceedings. Because these proceedings are informal in nature, the full panoply of due process protections ordinarily attendant

to criminal trials do not, and should not, apply.

Section 42-4-1101(4) provides that speeds in excess of a posted speed limit are prima facie evidence of a violation of the speeding statute. This section creates a mandatory rebuttable presumption requiring a defendant to present some evidence of a lawful speed. As in any civil hearing, a rebuttable presumption does not violate the due process rights of a defendant in a civil traffic infraction hearing.

Although Hoskin presented some evidence in his defense, the magistrate made a factual determination that Hoskin's speed was not reasonable and prudent for the conditions then existing. The evidence in this case clearly established Hoskin drove at a speed well in excess of the posted speed limit. This evidence alone is sufficient to support the magistrate's finding that Hoskin violated the speeding statute.

ARGUMENT

For the purposes of civil traffic infraction hearings, section 42-4-1101(4) creates a mandatory rebuttable presumption of illegal speed when a driver exceeds the posted speed limit. Moreover, even when this presumption is rebutted, driving in excess of the posted speed limit continues to support an inference of illegal

speed. The District Court erred in concluding (1) that the magistrate had improperly shifted the burden by acknowledging the rebuttable presumption raised by section 42-4-1101(4) and (2) that exceeding the posted speed limit was insufficient evidence to establish an illegal speed. The People address these issues in turn.

I. The Speeding Statute Creates a Mandatory Rebuttable Presumption in Civil Traffic Infraction Proceedings

Section 42-4-1101(4) creates a mandatory rebuttable presumption of illegal speed when, as pertinent here, a driver exceeds the posted speed limit. The District Court conflated the procedural and due process rights attendant to civil and criminal proceedings. In doing so, the court erroneously concluded that requiring a defendant to present some evidence in a civil traffic infraction hearing to rebut a statutory presumption violated due process principles.

A. Preservation and Standard of Review

The question of whether section 42-4-1101(4) establishes a mandatory rebuttable presumption or a permissive inference, is one of statutory construction. This Court reviews such questions de novo. *Trujillo v. Colo. Div. of Ins.*, 2014 CO 17, ¶ 12, 320 P.3d 1208, 1212-13. The primary objective in statutory construction is to effectuate the intent and purpose of the legislature. *Id.* If the statutory

language is clear, courts apply the plain and ordinary meaning of the provision. *Id.*; *see also* § 2-4-101, C.R.S. 2015 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage.").

Hoskin preserved this issue before the magistrate by asserting section 42-4-1101(4) shifts the burden. R. Court File, pp. 31-32. The issue was also raised before the District Court on appeal by Hoskin, R. Court File, p. 9., and by the People. R. Court File, pp. 86, 98-99. The magistrate and the District Court were given an adequate opportunity to rule on this issue. *See People v. Melendez*, 102 P.3d 315, 322 (Colo. 2004) ("[T]he trial court must be presented with an adequate opportunity to make findings of fact and conclusions of law on any issue before we will review it.").

B. Discussion

A mandatory rebuttable presumption shifts to the opposing party "either the burden of producing evidence or the burden of persuasion, and if that party fails to satisfy this burden, the trier of fact must accept the presumed fact provided it finds the basic fact." *Barnes v. People*, 735 P.2d 869, 872 (Colo. 1987). A permissible inference, on the other hand, shifts no burden "but merely allows the trier of fact to find the inferred fact from the basic fact." *Id.*

Here, the speeding statute prohibits any person from driving "a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." § 42-4-1101(1). The statute then identifies various lawful speeds. § 42-4-1101(2).

The speeding statute also establishes that any speed in excess of the "lawful speeds"—including, as pertinent here, any speed in excess of a posted speed limit—"shall be prima facie evidence that such speed was not reasonable or prudent under the conditions then existing."[1] § 42-4-1101(4). For the purposes of this section, "prima facie evidence" means evidence that is sufficient to establish an illegal speed, and which remains "sufficient proof of such fact, unless contradicted and overcome by evidence bearing upon the question of whether or not the speed was reasonable and prudent under the conditions then existing." *Id.*

The plain language of section 42-4-1101(4) evinces a clear intent to create a rebuttable presumption. *Trujillo*, ¶ 12, 320 P.3d at 1212-13 (the primary purpose when interpreting statutes is to effectuate legislative intent). By requiring that

[1] Hoskin was driving on a portion of Interstate 70. The presumptive lawful speed for interstate highways is ordinarily sixty-five miles per hour. § 42-4-1101(2)(g), C.R.S. 2015. However, because Hoskin was driving in an area with a posted speed limit of sixty miles per hour, the applicable lawful speed in this case is the posted speed limit. § 42-4-1101(2)(h).

defendants "contradict[] and overcome" what would otherwise establish an illegal speed, the legislature was precisely describing a mandatory rebuttable presumption. *See Barnes*, 735 P.2d at 872. Even this Court has concluded that a prior, albeit less specific, version of the speeding statute raised a "rebuttable presumption" of unreasonable or imprudent speed.[2] *Olinyk v. People*, 642 P.2d 490, 495 (Colo. 1982) ("If . . . the driver's speed is the only evidence submitted by the prosecution, and the defendant submits evidence sufficient to rebut the presumption of unreasonableness, a court may rule that a defendant's speed, while in excess of the posted speed limit, was legal under the circumstances existing at the time.").

Nevertheless, the power of the legislature to create statutory presumptions is limited by the due process clause. *People ex rel Tooley v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 362 (Colo. 1985). In criminal cases, the use of presumptions potentially conflicts with the basic principles that a defendant is presumed innocent and the prosecution must prove his or her guilt beyond a reasonable doubt. *Barnes*, 735 P.2d at 872. Thus, "a mandatory presumption may

---

[2] The *Olinyk* court addressed, in part, the language of section 42-4-1001(2) as it existed at the time. *Olinyk v. People*, 642 P.2d 490, 491-92 (Colo. 1982). Section 42-4-1001(2) provided: "Where no special hazard exists, the following speeds shall be lawful, but any speed in excess of said limits shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful." *Id.*

not be constitutionally used against a criminal defendant if a reasonable jury could construe it as conclusive or shifting the burden of persuasion on an essential element of a crime." *Id.*

To avoid implicating constitutional concerns, presumptions in criminal cases are ordinarily construed to raise only permissive inferences. *Id.* Even when a statute appears to create a mandatory presumption, courts in criminal cases have interpreted them as creating only a permissive inference. *Id.* (citing, as an example, *United States v. Gainey*, 380 U.S. 63, 64 (1965) (presumption was permissive inference although statute provided that basic fact "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such [basic fact] . . . .")).

Traffic infractions, however, are civil in nature, § 42-4-1701(1), C.R.S. 2015, and the procedures applicable to these infractions depend on whether they are charged alone or with accompanying criminal offenses. § 42-4-1708(1), C.R.S. 2015. In cases where both traffic infractions and criminal offenses are charged, the rules of criminal procedure apply. *Id.*; C.R.T.I. 2. In cases where only a civil traffic infraction is charged the Colorado Rules for Traffic Infractions apply. C.R.T.I. 1-2.

Clearly, when the rules of criminal procedure apply, section 42-4-1101(4) creates only a permissive inference. Courts have consistently held that mandatory rebuttable presumptions are impermissible in criminal proceedings. *See, e.g.*, *People in re R.M.D.*, 829 P.2d 852, 854-55 (Colo. 1992); *Barnes*, 735 P.2d at 872; *Jolly v. People*, 742 P.2d 891, 899 (Colo. 1987); *People v. Felgar*, 58 P.3d 1122, 1124 (Colo. App. 2002). Indeed, this Court's own model jury instructions contemplate that section 42-4-1101(4) creates only a permissive inference in criminal proceedings. *See* COLJI 42:08.SP (2014).

But this case involves only a traffic infraction hearing, not a criminal proceeding. Because Hoskin was cited for a civil traffic infraction, *see* § 42-4-1101(12)(a), the C.R.T.I. governed his hearing. C.R.T.I. 1; *see also* § 13-6-501(9), C.R.S. 2015 (requiring this Court to develop rules and regulations relating to traffic infraction matters). The C.R.T.I. apply concepts of both civil and criminal law, as deemed appropriate, to establish informal hearing procedures. C.R.T.I. 1.

To be sure, some procedural requirements in civil traffic infraction hearings are similar to criminal proceedings. For example, the burden of proof is on the People, and the defendant's liability must be proven beyond a reasonable doubt. § 42-4-1708(3); *see also* C.R.T.I. 7 (detailing the rights of a defendant in a traffic

infraction hearing).

Even so, a defendant is not entitled to the full panoply of procedural and constitutional guarantees normally associated with criminal proceedings. Discovery is not available. C.R.T.I. 8(a). Posthearing motions are not permitted. C.R.T.I. 13(a). There is no presumption of innocence; default judgement enters if a defendant fails to appear. § 42-4-1710(2), C.R.S. 2015; C.R.T.I. 16(a). And, the rules of evidence—and presumably the confrontation clause concerns ordinarily attendant to hearsay evidence—do not apply. C.R.T.I. 11(c); *cf.* C.R.T.I. 7(c)(8) (defendants in traffic infraction hearings have the right to "cross-examine any witness for the state").

Instead, traffic infraction hearings are intended to be kept informal, "the object being to dispense justice promptly and economically." C.R.T.I. 11. The district attorney is not permitted to appear on behalf of the People. § 42-4-1708(3), C.R.S. 2015. The magistrate presiding over the hearing may call and question any witness and acts as the fact-finder, *id.*, but need not be an attorney. § 13-6-501(3). Overall, the purpose is to offer evidence and conduct questioning in an orderly and expeditious manner, according to basic notions of fairness. C.R.T.I. 11.

The speeding statute's rebuttable presumption furthers the aims of informal

traffic infraction hearings. As with all rebuttable presumptions, its basic purpose "is to simplify the determination of certain legal issues." *Rome v. HEI Res., Inc.*, 2014 COA 160, ¶ 39, ___ P.3d ___, ___. It does so by creating more orderly and expeditious traffic infraction hearings without sacrificing basic notions of fairness.

The rebuttable presumption obviates the need for extensive and possibly difficult to procure testimony. Here, for example, Hoskin's speed exceeded the posted speed limit. This speed limit represented the Department of Transportation's careful determination—based on appropriate design standards and projected traffic volumes, or a traffic investigation or survey—of the reasonable and safe speed limit for that portion of Interstate 70. *See* § 42-4-1102, C.R.S. 2015 (permitting the Department of Transportation to declare a reasonable and safe speed limit, using certain standards, when the speeds authorized by statute are greater or less than is reasonable or safe on any part of a highway under its jurisdiction). Without a rebuttable presumption it may become necessary to procure testimony regarding these determinations.

Moreover, section 42-4-1101(4) comports with basic notions of fairness. "A rebuttable presumption shifts only the burden of going forward with evidence, and does not shift the entire burden of proof." *Krueger v. Ary*, 205 P.3d 1150, 1154

(Colo. 2009); *see also* CRE 301 ("[A] presumption imposes ... the burden of going forward ... but does not shift ... the burden of proof...."). Thus, Hoskin did not ultimately bear the burden of persuasion, only the burden of presenting facts legally sufficient to rebut the presumption. *Krueger*, 205 P.3d at 1154.

Here, the magistrate recognized Hoskin's burden. As noted, Hoskin was driving seventy-eight miles per hour. His speed exceeded the legislature's determination of the reasonable and safe speed for the interstate highway he was travelling on. *See* § 42-4-1101(2)(g) (lawful speed for surfaced, four-lane highways which are on the interstate system is sixty-five miles per hour). But more importantly, Hoskin's speed exceeded the speed the department of transportation had determined was reasonable and safe for that portion of the highway. *See* § 42-4-1102. Requiring Hoskin to present some evidence to rebut the speeding statute's presumption was not only fair, it was necessary to allow the magistrate to even comprehend how it was possible Hoskin's speed did not violate the speeding statute.

The District Court, wrongly applying the standards applicable to criminal proceedings, concluded the magistrate improperly shifted the burden by acknowledging Hoskin's burden to present evidence sufficient to rebut the speeding

statute's presumption. However, the plain language of 42-4-1101(4) creates a rebuttable presumption of an illegal speed based on Hoskin exceeding the posted speed limit. And the hearing was an informal civil traffic infraction hearing in which the full panoply of procedural and constitutional protections normally attendant to criminal proceedings did not apply. Consequently, the District Court erred in concluding a due process violation had occurred.

II. Exceeding the Posted Speed Limit is Sufficient Evidence to Establish a Violation of the Speeding Statute

Hoskin exceed the posted speed limit. This evidence alone is sufficient to establish Hoskin's violation of the speeding statute. The District Court erred in concluding it was not.

A. Preservation and Standard of Review

The sufficiency of evidence is reviewed de novo. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005). The standard is whether the evidence, when viewed in the light most favorable to the People, is both "substantial and sufficient" to support the verdict beyond a reasonable doubt. *Id.*

"[I]n Colorado, sufficiency of the evidence may be raised for the first time on appeal. *People v. Redinger*, 2015 COA 26, ¶ 10, ___ P.3d ___, ___. Here, however, Hoskin asserted to the magistrate that the evidence was insufficient to

establish a violation. R. Tr. 09/11/14, pp. 43-44. Therefore, this issue was sufficiently preserved.

B. Discussion

As applicable here, a person violates the speeding statute if his speed exceeds the speed that is reasonable and prudent under the conditions then existing. § 42-4-1101(1). Exceeding a lawful speed, which includes a posted speed limit, is prima facie evidence of an illegal speed. § 42-4-1101(4). As discussed above, such evidence creates a mandatory rebuttable presumption of an illegal speed. Even when rebutted, a permissible inference of the presumed fact remains. *Krueger*, 205 P.3d at 1154.

Here, Hoskin was driving seventy-eight miles per hour in a posted sixty mile-per-hour zone. R. Court File p. 73. Hoskin presented some evidence attempting to justify his excessive speed. R. Court File p. 73. Even assuming Hoskin's evidence—which the magistrate noted amounted to nothing more than a "mere assertion" that he was driving reasonably and prudently, R. Court File p. 74—was sufficient to rebut the speeding statute's presumption, a permissible inference remained that Hoskin's speed was unreasonable and imprudent. This alone was

sufficient evidence to establish Hoskin had violated the speeding statute.[3]

The District Court initially recognized that Hoskin's speed alone was sufficient evidence to establish a violation. Indeed, despite later modifying its opinion to ultimately conclude the evidence was insufficient, a portion of the District Court's order still reads ". . . proof that the defendant was exceeding the posted speed limit would allow the trier of fact to conclude that the speed at which the defendant was traveling was greater than was reasonable and prudent under the circumstances . . . ." R. Court File p. 109.

The District Court concluded, without further explanation, that Hoskin's speed in excess of the posted speed limit was insufficient evidence to conclude Hoskin had violated the speeding statute. Because this ruling is inconsistent with the nature of rebuttable presumptions, and inconsistent with its own ruling regarding permissible inferences, this Court must reverse the District Court's ruling.

[3] Additionally, the trooper testified that Hoskin's speed was an average over the course of a mile and could have exceeded the seventy-eight mile per hour average. R. Tr. 09/11/14, p. 28, ll. 14-19. Hoskin also passed two vehicles while the trooper was observing him, and other vehicles were on the roadway. R. Tr. 09/11/14, p. 8, ll. 17-19, p. 9, ll. 10-12.

CONCLUSION

Section 42-4-1101(4) creates a mandatory rebuttable presumption of an illegal speed when a person exceeds the posted speed limit. Although this presumption may be impermissible in criminal proceedings, it is appropriate and useful in civil traffic infraction hearings. Because the District Court erroneously concluded that imposing the rebuttable presumption created by section 42-4-1101(4) violates due process principles in civil traffic infraction hearings, its ruling should be reversed. Further, the District Court disregarded the evidentiary effect of section 42-4-1101(4), in effect usurping the role of fact-finder in this case. Consequently, the District Court's ruling concluding there was insufficient evidence to establish Hoskin had violated the speeding statute must be reversed and the magistrate's ruling upheld.

Respectfully submitted this 15th day of October, 2015.

PETE HAUTZINGER
District Attorney
Twenty-First Judicial District

/s/ Jeremy Chaffin
Jeremy Chaffin #43627
Deputy District Attorney

Filed electronically via ICCES, a signed original is on file at the Office of the 21st Judicial District Attorney.

CERTIFICATE OF MAILING

I hereby certify that I have duly served the within **OPENING BRIEF** upon the Defendant by depositing an electronic copy of same via Integrated Colorado Courts E-Filing System designated for his attorney, Michael Bender, this 15th day of October, 2015.

/s/ Lori Sharon

Filed electronically via ICCES, a signed original is on file at the Office of the 21st Judicial District Attorney.