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| <p>Mesa County District Court Brian J. Flynn, District Court Judge Case No. 14CV4106</p> | |
| <p>Petitioner:</p> <p>THE PEOPLE OF THE STATE OF COLORADO,</p> <p>v.</p> <p>Respondent/Cross-Petitioner:</p> <p>GREGORY K. HOSKIN.</p> | <p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case Number: 2015SC136</p> |
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| <p>REPLY BRIEF</p> | |

CERTIFICATE OF COMPLIANCE

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

In particular, the undersigned certifies that: The brief complies with the applicable word limits set forth in C.A.R. 28.1(g). The brief contains 1,683 words according to the Word processor word count function. I acknowledge that my brief may be stricken if it fails to comply with the applicable provisions of the Colorado Appellate Rules.

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INTRODUCTION

This Court has found that the People cannot rely on a mandatory rebuttable presumption when the People have the burden to prove a defendant's guilt beyond a reasonable doubt. This burden of proof is the applicable burden in criminal cases, but it is also the applicable burden in traffic infraction cases. Because this burden of proof precludes reliance on a mandatory rebuttable presumption, and because this is the applicable burden in traffic infraction proceedings, the People cannot rely upon a mandatory rebuttable presumption in traffic infraction proceedings.

ARGUMENT

- I. ISSUE ONE: C.R.S. § 42-4-1101(4) Creates a Permissive Inference.**
 - A. The Requirement of Proof Beyond a Reasonable Doubt Precludes Reliance on a Mandatory Rebuttal Presumption.**

In their Opening Brief, the People acknowledged that relying on a mandatory rebuttable presumption conflicts with their evidentiary burden of proof beyond a reasonable doubt:

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.

(Opening Brief p. 8.) Inconsistently, the People argue that there exists no conflict: “And while the burden of proof in both instances is beyond a reasonable doubt, this standard does not prohibit a rebuttable presumption.” (Answer-Reply Brief p. 3.) The People were right the first time. If the People’s burden is proof beyond a reasonable doubt, then the People cannot employ a mandatory rebuttable presumption.

Colorado case law confirms this principle. It is the burden to prove guilt beyond a reasonable doubt—not the general categorization of a case as criminal or civil—that precludes reliance on a mandatory rebuttable presumption. Use of a mandatory rebuttable presumption can relieve the People of their burden to prove guilt beyond a reasonable doubt and thereby violate due process. *Jolly v. People*, 742 P.2d 891, 897 (Colo. 1987); *Barnes v. People*, 735 P.2d 869, 872 (Colo. 1987). The People’s focus on criminal versus civil misses the point. It is the burden of proof that determines whether the People can rely on a mandatory rebuttable presumption.

Because speeding violation proceedings require the People prove guilt beyond a reasonable doubt, the People cannot rely upon a mandatory rebuttable presumption in speeding violation proceedings, just as they cannot rely on a

mandatory rebuttable presumption in other cases where their burden is proof beyond a reasonable doubt.

B. The People’s Arguments in Their Answer-Reply Brief Do Not Resolve the Conflict between a Mandatory Rebuttable Presumption and Proof Beyond a Reasonable Doubt.

First, the People argue that they can rely upon a mandatory rebuttable presumption in traffic infraction proceedings because there is no presumption of innocence in traffic infraction proceedings. (Answer-Reply Brief p. 3.) No authority supports this proposition. Assuming it is true, it does not save the People’s argument. A mandatory rebuttable presumption is impermissible not only when a defendant is presumed innocent, but also when the prosecution has the burden to prove the defendant’s guilt beyond a reasonable doubt. *Jolly*, 742 P.2d at 897; *Barnes*, 735 P.2d at 872.

Here, even if Mr. Hoskin was not presumed innocent, the People had the burden to prove his guilt beyond a reasonable doubt. Therefore, the People were precluded from relying on a mandatory rebuttable presumption in the case against Mr. Hoskin just as they are in other situations where they have the burden to prove guilt beyond a reasonable doubt.

Second, in a switch of position from their Opening Brief, the People argue that traffic infraction proceedings are run-of-the-mill civil matters, and therefore

reliance on a mandatory rebuttable presumption is permissible. (*Compare* Opening Brief p. 10 (acknowledging the criminal elements involved in traffic infraction proceedings) *with* Answer-Reply Brief p. 5 (equating traffic infraction proceedings with all other civil matters).) Again, the People had it right the first time: “the [Colorado Rules for Traffic Infractions] apply concepts of both civil and criminal law, as deemed appropriate, to establish informal hearing procedures in the county courts.” Colorado Rules for Traffic Infractions, Rule 1. Traffic infraction proceedings are hybrid proceedings.

The issue on appeal, whether the People can rely on a mandatory rebuttable presumption, depends on a criminal component of traffic infraction proceedings—the People’s burden to prove a defendant’s guilt beyond a reasonable doubt. Thus, for purposes of this appeal, the criminal nature of traffic infraction proceedings matters more than their civil nature. And in criminal cases, where the requirement is proof beyond a reasonable doubt, mandatory rebuttable presumptions are impermissible.

Third, the People argue that they may apply a mandatory rebuttable presumption against Mr. Hoskin because the burden of proof relating to exemplary damages is proof beyond a reasonable doubt. (Answer-Reply Brief p. 3.) Though a bit unclear, the People’s argument appears to be: (1) the burden of proof relating

to exemplary damages in a civil action is proof beyond a reasonable doubt; (2) a mandatory rebuttable presumption is sometimes permissible in a civil action; (3) therefore it is permissible to employ a mandatory rebuttable presumption when the burden of proof is proof beyond a reasonable doubt. Their logic appears flawed. It is the simultaneous operation of a mandatory rebuttable presumption with the requirement of proof beyond a reasonable doubt that is the issue here. The People's reference to proving entitlement to exemplary damages has no connection to a mandatory rebuttable presumption and misses the point.

Fourth, the People, in yet another shift from their Opening Brief, now refuse to acknowledge that a mandatory rebuttable presumption can shift the burden of persuasion to the defendant. (*Compare* Opening Brief p. 6 (citing *Barnes* and acknowledging a mandatory rebuttable presumption's potential to shift the burden of persuasion) *with* Answer-Reply Brief p. 3 (“With or without a rebuttable presumption, the burden of persuasion remains with the party on whom it was originally cast.”).) Once again, the People had it right the first time. Reliance on a mandatory rebuttable presumption can shift the burden of persuasion to the defendant. *Jolly*, 742 P.2d at 897; *Barnes*, 735 P.2d at 872.

This shift is what happened against Mr. Hoskin. The fact-finder shifted the burden of proof to Mr. Hoskin and found him guilty of the speeding violation

because he failed to prove that he drove reasonably and prudently. (Trial Court Order, R. Court File, p. 147; Judgment Reversed and Case Remanded with Directions, R. Court File, p. 139.) This shifting of the burden by the trial court here illustrates why a mandatory rebuttable presumption is impermissible when the prosecution has the burden to prove guilt beyond a reasonable doubt. *Jolly*, 742 P.2d at 897 (“[A] mandatory rebuttable presumption will nonetheless violate due process of law if it shifts the burden of persuasion to the defendant on an essential element of the crime.”); *see also Barnes*, 735 P.2d at 872.

Fifth, contrary to the People’s assertions otherwise, Colorado Criminal Jury Instruction 42:08.SP is a valid summary of the law relating to C.R.S. § 42-4-1101(4) even if traffic infraction proceedings do not involve juries. *Bayer v. Crested Butte Mountain Resort, Inc.*, 960 P.2d 70, 73 n.2 (Colo. 1998). Jury instructions are not only for use by juries. *See* COLJI-Crim. GENERAL DIRECTION 11(1) (2014). Colorado Criminal Jury Instruction 42:08.SP correctly states that evidence of speed in excess of the posted limit gives rise to a permissive inference—not a mandatory rebuttable presumption—that the defendant’s speed was unreasonable and imprudent under the existing conditions:

**42:08.SP SPEEDING - SPECIAL INSTRUCTION
(SPEED IN EXCESS OF DESIGNATED SPEED LIMIT)**

Evidence that the defendant was driving at any speed in excess of [insert the lawful designated speed pursuant to section 42-4-1101 (2)] gives rise to a permissible inference that such speed was not reasonable or prudent under the conditions then existing.

A permissible inference allows, but does not require, you to find a fact from proof of another fact or facts, if that conclusion is justified by the evidence as a whole. It is entirely your decision to determine what weight shall be given the evidence.

You must bear in mind that the prosecution always has the burden of proving each element of the offense beyond a reasonable doubt, and that a permissible inference does not shift that burden to the defendant.

COLJI-Crim. 42:08.SP (2014).

II. ISSUE TWO: Evidence of Mr. Hoskin's Speed, by Itself, was Insufficient to Find He Violated the Speeding Regulation.

An appellate court can evaluate the sufficiency of evidence under a de novo standard of review. (Opening Brief p. 14; *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005).)

In their Answer-Reply brief, the People fail to address the evidence offered by Mr. Hoskin in support of his position that his speed was reasonable and prudent under the existing conditions. The People do not address the evidence Mr. Hoskin offered regarding his driving experience, his driving equipment, the existing conditions, or the inaccuracies in the officer's speed calculations. Instead, the People assume that a determination of Mr. Hoskin's guilt will automatically follow

from a decision that C.R.S. § 42-4-1101(4) creates a mandatory rebuttable presumption:

Hoskin was driving eighteen miles per hour over the posted speed limit. R. Court File p. 73. As previously noted this created a rebuttable presumption that his speed was unreasonable and imprudent.

(Answer-Reply Brief p. 6.)¹ Other than this reference to Mr. Hoskin's alleged speed, the People offer no further argument that Mr. Hoskin's speed was unreasonable and imprudent under the existing conditions. This argument does not establish the People's burden to prove Mr. Hoskin's guilt beyond a reasonable doubt. It demonstrates that the People are trying to rely on a mandatory rebuttable presumption to prove Mr. Hoskin's guilt without shouldering their required burden: proof beyond a reasonable doubt. The People's argument shows they are doing exactly what they claim they are not trying to do—prove a defendant's guilt by reliance on a mandatory rebuttable presumption and thereby avoid their burden to prove guilt beyond a reasonable doubt.

¹ Mr. Hoskin disputed at trial and continues to dispute that his speed was eighteen miles per hour over the posted limit. (R. Tr. 09/11/2014, p. 38:19-20.)

CONCLUSION

Wherefore, Mr. Hoskin respectfully requests that this Court affirm the District Court and find that (1) C.R.S. § 42-4-1101(4) creates a permissive inference, and (2) Mr. Hoskin was not guilty of the charged speeding violation.

DATED this 21st day of December,
2015

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In accordance with C.R.C.P. 121 § 1-26(9), a duly signed original of this document is on file at the law firm of Perkins Coie LLP and will be made available for inspection by other parties or the court upon request.

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2015, a true and correct copy of the foregoing **REPLY BRIEF** was served via ICCES, addressed to the following:

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