

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 12/07/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

STATE OF ARIZONA,) 1 CA-CR 10-0080
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
NICKOLA KURTI,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Coconino County

Cause No. CR2009-0708

The Honorable Dan R. Slayton, Judge

AFFIRMED

Coconino County Attorney's Office
By Stacy Lynn Krueger
Attorneys for Appellee

Flagstaff

Law Office of Cynthia Leyh
By Cynthia A. Leyh
Attorneys for Appellant

Tolleson

G E M M I L L, Judge

¶1 Nickola Kurti appeals from the superior court's order affirming his conviction and \$223 fine for violating Arizona

Revised Statutes ("A.R.S.") section 28-701.02(A)(3) (2004), driving in excess of 85 miles per hour, a class three misdemeanor. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 On January 31, 2009, Kurti was cited for driving approximately 87 miles per hour in a 65 miles per hour speed zone on U.S. Highway 89. On April 7, 2009, the Flagstaff Justice Court found Kurti guilty of violating A.R.S. § 28-701.02(A)(3), which prohibits driving in excess of 85 miles per hour. The justice court ordered Kurti to pay a \$223 fine.

¶13 Kurti appealed the judgment and fine to the superior court. In his memorandum to the superior court, Kurti argued that the state failed to disclose "calibration records pertaining to the Radar and Tuning Forks used in the stop," in violation of Arizona Rule of Criminal Procedure 15.1. He also argued that the justice court abused its discretion by basing its guilty decision on "Officer Weaver's testimony as to the calibration records," without the actual records being admitted into evidence. Kurti requested the court reverse the justice court's judgment and dismiss the case with prejudice.

¶14 On August 31, 2009, the superior court filed an order denying Kurti relief from the conviction and affirming the justice court's judgment. Kurti timely filed a delayed notice of appeal from the superior court's order. We have jurisdiction

pursuant to A.R.S. § 22-375(A) (2002).

ANALYSIS

¶15 Kurti contends that A.R.S. § 28-701.02(A)(3) violates the United States Constitution's Due Process Clause because it is unconstitutionally vague on its face. Kurti, however, did not raise this argument before the justice court or the superior court, and issues raised for the first time on appeal are usually considered to be waived unless they constitute fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005)¹; see also *State v. Alvarez*, 213 Ariz. 467, 469, ¶ 7, 143 P.3d 668, 670 (App. 2006) (noting that a hearsay objection does not preserve for appellate review a claim that admission of the evidence violated the Sixth Amendment Confrontation Clause); *State v. Holder*, 155 Ariz. 83, 85, 745 P.2d 141, 143 (1987) (stating that the doctrine of waiver "applies to constitutional error"). On appeal, Kurti does not assert fundamental error and we consider his argument waived.

¶16 Even if his argument is not waived, we conclude that § 28-701.02(A)(3) is not unconstitutionally vague. "A statute is

¹ For an error to be deemed fundamental, the defendant must show that it goes to the "foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Henderson*, 210 Ariz. at 568, ¶ 24, 115 P.3d at 608. In addition, the defendant must show he was prejudiced by the error. *Id.* at 568-69, ¶ 26, 115 P.3d at 608-09.

unconstitutionally vague if it does not give persons of ordinary intelligence a reasonable opportunity to learn what it prohibits and does not provide explicit instructions for those who will apply it." *State v. McMahon*, 201 Ariz. 548, 551, ¶ 7, 38 P.3d 1213, 1216 (App. 2002) (citations omitted). In addition, due process "requires only that the language of a statute convey a definite warning of the proscribed conduct." *Fuenning v. Superior Court*, 139 Ariz. 590, 598, 680 P.2d 121, 129 (1983).

¶7 Section 28-701.02(A), entitled "Excessive speeds; classification," provides that a person shall not:

1. Exceed thirty-five miles per hour approaching a school crossing.
2. Exceed the posted speed limit in a business or residential district by more than twenty miles per hour, or if no speed limit is posted, exceed forty-five miles per hour.
3. Exceed eighty-five miles per hour in other locations.

Section (A)(3) provides a clear and definite warning to persons of ordinary intelligence that driving in excess of 85 miles per hour in any location other than a school crossing, business district, or residential district, is prohibited. Moreover, the plain and unambiguous language of § 28-701.02(A)(3) provides clear instruction to law enforcement for its application, thus preventing arbitrary enforcement of the law. See *State v. Cotton*, 197 Ariz. 584, 590, ¶ 19, 5 P.3d 918, 924 (App. 2000) (stating that a statute is unconstitutionally vague if it is

"drafted in a way that permits arbitrary and discriminatory enforcement"). We find no unconstitutional vagueness.

CONCLUSION

¶8 For the above reasons, we affirm the decision of the superior court.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
DIANE M. JOHNSEN, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge