



**THE ATTORNEY GENERAL
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October 24 , 1969

Mr. Royal Hart
District Attorney
119th Judicial District
County Courthouse
San Angelo, Texas

Opinion Request No.M-495

RE: Constitutionality of
Article 670ld, Section
166(b) and Section
166(c), Texas Civil
Statutes

Dear Mr. Hart:

You have requested the opinion of this office as to the constitutionality of Article 670ld, Section 166, Subsections (b) and (c), Texas Civil Statutes. In addition you have asked for suggestions as to the wording of complaints made under the authority of the statute.

The appropriate provisions of Article 670ld, Section 166, read as follows:

"(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the circumstances then existing. Except when a special hazard exists that requires lower speeds for compliance with paragraph (b) of this Section, the limits specified in this Section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this Section or established as hereinafter authorized shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:"

[Subsection (a) is followed by various paragraphs setting prima facie speed limits and definitions]

"(b) No person shall drive a vehicle

on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

"(c) The driver of every vehicle shall, consistent with the requirements of paragraph (b), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions."

To be valid a penal statute must be clear. Article I, Section 10, Constitution of Texas declares that every accused has the right to know the nature and cause of the accusation against him. This requirement is reenforced by Article 6, Texas Penal Code, which provides that a penal statute must be written in definite and understandable terms. A presumption of constitutionality exists, however, unless the statute in question is clearly in violation of the constitution; and a statute may be couched in general terms if the offense is defined so that persons of ordinary intelligence will understand what acts are prohibited. Ex Parte Frye, 156 S.W.2d 531 (Tex.Crim. 1941).

Various decisions of the Texas Court of Criminal Appeals

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have considered the validity of early laws relating to speed and reckless driving. In Russell v. State, 228 S.W. 566 (Tex. Crim. 1921), the court held invalid for lack of plain language a statute which required drivers to operate vehicles ". . . in a careful manner with due regard for the safety and convenience of pedestrians and all other vehicles . . ." In Ex Parte Slaughter, 243 S.W. 478 (Tex.Crim. 1922), the court held invalid the requirement that motorists not exceed a specified speed where the territory contiguous to the highway was "closely built up" because the term "closely built up" was indefinite. A statute was held invalid in Ladd v. State, 27 S.W.2d 1098 (Tex.Crim. 1930), because the requirement that no motorists should pass other vehicles at a rate that might "endanger" persons or property set no definite standard. A conviction for reckless driving was reversed in Ex Parte Chernosky, 217 S.W.2d 763 (Tex.Crim. 1949). The opinion in the Chernosky case held that the statutory test of driving "without due caution or circumspection" was indefinite, a position which was affirmed in Ex Parte De La Pena, 251 S.W.2d 136 (Tex.Crim. 1952). In the latter case, the court mentioned Article 827a, Section 8, Texas Penal Code, which preceded the statute under consideration in this opinion, but made no comment on the validity of the article.

The present Article 670ld, Section 166, Texas Civil Statutes, was enacted in a revision of Article 827a, Section 8, Texas Penal Code, which read in Subsection 1 as follows:

"(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing, having regard to the actual and potential hazards when approaching and crossing an intersection or a railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special

hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions; and in every event, speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

"(b) Where no special hazard exists that requires lower speed for compliance with subsection 1(a) of this Section, the speed of any vehicle not in excess of the limits specified in this subsection or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this subsection or established as hereinafter authorized shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:"

[Subsection (b) was followed by various paragraphs setting prima facie speed limits and definitions.] The foregoing language was considered to be constitutional by this office in Attorney General's Opinion No. V-1562 (1952).

Since the date of Opinion No. V-1562, the Court of Criminal Appeals has considered the validity of Article 827a, Section 8, in Rowland v. State, 311 S.W.2d 831 (Tex.Crim. 1958). In that case the appellant was charged with having driven at an unreasonable and imprudent speed in excess of the prima facie speed limit. Article 827a, Section 8, was found valid to the extent that prima facie speed limits set a definite standard. Judge Woodley's opinion in dictum (311 S.W.2d 831, 838) questioned the validity of the basic prohibition against unreasonable and imprudent speed contained in Subsection 1(a) of Section 8, but the court reached no decision on this point.

The question of the constitutionality of Article 827a, Section 8, arose again in Eaves v. State, 353 S.W.2d 231 (Tex.Crim. 1962). Judge Morrison, writing for the court, reviewed the fact that most states had laws similar to that of Texas, with a number of appellate courts having upheld

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those statutes, and made the following conclusion:

"The aim of every appellate judge should be to achieve uniformity in interpretation of similar laws. It is with this in mind that I align myself with the great weight of authority and hold the statute constitutional" (353 S.W.2d 231, 232).

The conviction was reversed, however, because the information had failed to allege that the defendant's speed was not reasonable and prudent, as well as in excess of the prima facie limits. In overruling the state's motion for rehearing, Judge Woodley, for the court, affirmed the position taken in the Rowland case and ruled that the statute was constitutional as applied to driving at a speed in excess of the prima facie limit for business districts. The defendant had been charged with driving in excess of the prima facie speed limit, so the holding of the court was not squarely on the validity of the reasonable and prudent speed test in the absence of prima facie limits. The broad language in Eaves v. State, supra, written for the court by Judge Morrison, would indicate an inclination on the part of the court to uphold all portions of Article 827a, Section 8.

Statutes similar to that of Texas have been considered by the courts of other states and have generally been upheld. The annotation on speed regulations found in 6 A.L.R. 3d 1326 contains a number of citations to cases upholding various statutes with tests such as the "reasonable and prudent" speed test of the Texas statute. See 6 A.L.R. 3d 1326, 1331-1339, Sections 5 and 6.

The New York Court of Appeals in People v. Lewis, 13 N.Y. 2d, 245 N.Y.S.2d 1, 194 N.E.2d 831, 6 A.L.R.3d 1321 (1963), upheld the New York speed law against a challenge for indefiniteness. The law in question contained the following basic rule worded the same as Article 670ld, Section 166(b), Texas Civil

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Statutes:

"No person shall drive a motor vehicle on a public highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing."

The New York court reasoned that the statute in effect placed the duty of ordinary care on drivers and was designed for situations when the maximum speed should be less than the prescribed speed limit ". . . in order to limit the operation of motor vehicles under unusual circumstances - too various to be specifically defined - to such a speed as would be reasonable and prudent under the conditions" 6 A.L.R. 3d 1321, 1324.

The Rhode Island courts have taken a somewhat more restrictive view than have the New York courts but nonetheless have considered the Rhode Island statute valid. The statute considered by the court in State v. Brown, 196 A2d 133 (Rhode Island Sup.Ct., 1963), was worded similarly to the basic test contained in the Texas and New York statutes. The court reversed the conviction in the Brown case because the complaint against the defendant alleged only the basic prohibition against unreasonable and imprudent speed and did not allege any of the specific hazards requiring reduced speed as mentioned in the statute. The court stated that the statute was sufficiently definite to be valid, however, and that the offense of driving at an unreasonable and imprudent speed could result from driving in excess of the statutory speed limits or from failure to reduce speed under the conditions of hazard specified in the statute. The Rhode Island court apparently would not go beyond the listed hazards in determining when speeds should be reduced below prima facie speed limits.

The Supreme Court of Iowa upheld a law requiring a ". . . careful and prudent speed not greater than nor less than is

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reasonable and proper" The court reasoned that a driver must obtain a license and hence must have knowledge of traffic laws and the operation of an automobile and should know what speeds are reasonable under various circumstances. See State v. Coppes, 78 N.W.2d 10 (Iowa Sup.Ct., 1956).

The Texas Statute must be considered in view of the various Texas and out-of-state decisions, as well as the constitutional and statutory requirement of definiteness. Language in Judge Morrison's opinion in Eaves v. State, supra, indicates that the Court of Criminal Appeals probably would uphold the reasonable and prudent speed test of Article 6701d, Section 166(b) and Section 166(c), although some Texas decisions have struck down various speed and reckless driving statutes for vagueness. No Texas decision has invalidated the provisions of Section 166(b) and Section 166(c) or the rule in the prior penal statute, Article 827a, Section 8, Subsection 1. The basic prohibition against unreasonable and imprudent speed found in Section 166(b) of Article 6701d has been expressly upheld as found in an identical New York statute. People v. Lewis, supra. The Rhode Island courts have indicated the validity of speed laws like that of Texas. State v. Brown, supra. Similar provisions have been found valid in other jurisdictions, although the courts are not unanimous.

The language of Section 166(b) and Section 166(c) of Article 6701d is more clearly written than that of Article 827a, Section 8, Subsection 1, in that Section 166(c) specifically directs that a driver reduce speed when encountering one of the listed hazards. Thus the dictum in Rowland v. State, supra, concerning the definiteness of Article 827a, Section 8, probably would not be applied by the Court of Criminal Appeals to the present statute.

Although we have some doubt as to the constitutionality of the language in question, but basing our opinion solely on the opinions of our Court of Criminal Appeals this office is of the opinion that the provisions of Article 6701d, Section 166(b) and Section 166(c), Texas Civil Statutes, are sufficiently definite to be valid as penal provisions. See Eaves v. State, supra, and the general holdings of courts in jurisdictions outside Texas, as well as the ruling of this office in Attorney General's Opinion No. V-1562 (1952).

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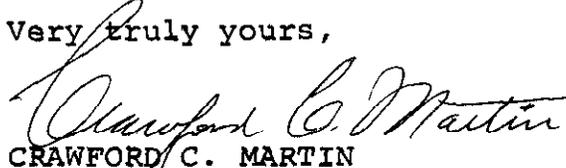
The second portion of the opinion request deals with the wording of complaints filed under Article 6701d, Section 166(b) and Section 166(c). The general form of complaints before justice and corporation courts is established by Article 45.01, Article 45.16, and Article 45.17, Texas Code of Criminal Procedure. The complaint should always track the language of the first sentence of Section 166(b) and should further allege in detail the specific hazard under Section 166(c) requiring that speed be reduced. If an accident is involved, the complaint should include an allegation tracking the test in the second sentence of Section 166(b). A complaint not containing a full description of the offense will not be upheld. See Eaves v. State, supra.

S U M M A R Y

The provisions of Article 6701d, Section 166(b) and Section 166(c), Texas Civil Statutes, are sufficiently definite to be valid as penal provisions, in view of the language in Eaves v. State, 353 S.W.2d 231 (Tex.Crim.1962).

A complaint filed under the provisions of Section 166(b) and Section 166(c) should allege that the defendant failed to comply with the basic rule in the first sentence of Section 166(b) and should allege in detail the particular conditions requiring that speed be reduced.

Very truly yours,


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