Case No. H029406 Santa Cruz County Superior Court Cases Nos. 4SM021812, 4SM028271, 4SM044470, 4WM023363, 4SM023894

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CALIFORNIA HIGHWAY PATROL,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CRUZ,

Respondent

RICHARD J. QUIGLEY,

Real Party in Interest.

SUPERIOR COURT OF SANTA CRUZ COUNTY
HON. MICHAEL BARTON, JUDGE

PETITION FOR REHEARING

LASCHER & LASCHER,
A Professional Corporation
WENDY COLE LASCHER
SBN 58648
605 Poli Street, P.O. Box 25540
Ventura, California 93002
805-648-3228 phone
805-643-7692 fax

Attorneys for Real Party in Interest Richard J. Quigley

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SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CRUZ,

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PETITION FOR REHEARING

Real party in interest Richard Quigley respectfully petitions for rehearing. While he applauds the Court's holding that a violation of Vehicle Code section 27803, subdivision (b) is a correctable offense [Opin. 1], the Court should reconsider its conclusion on page 11 of the opinion that a trial court does not have authority to make factual findings concerning circumstances that a police officer believes make a helmet ticket noncorrectable. This part of the opinion changes the Evidence Code section 664 presumption that official duty has been regularly performed from a

rebuttable to a conclusive presumption, denying real party due process of law under article 1, §7 of the California Constitution and the Fourteenth Amendment of the United States Constitution, and contravening the California Constitution's provisions for separation of executive and judicial power (art. 3, §3). It also contravenes the holding in *Easyriders Freedom F.I.G.H.T. v. Hannigan* (9th Cir. 1996) 92 F.3d 1486, which limits the authority of police officers to arrest motorcyclists for helmet law violations.

The Court should also reconsider its statement that "*driving* without a proper safety helmet certainly poses an immediate safety hazard to the violator" [p. 10] because it is based on mistakes of fact and law.

I.

TREATING A LAW ENFORCEMENT OFFICER'S FINDINGS AS UNREVIEWABLE VIOLATES THE CALIFORNIA AND U.S. CONSTITUTIONS.

Before the trial court issued the order to show cause that is the subject of this proceeding, it had found that all but one of real party's helmet tickets were correctable. The opinion holds that "the trial court erred in disregarding the citing officers' implied findings" that Mr. Quigley's citations were not correctable [p. 12]. This holding assumes that neither a trial court nor an appellate court has authority to review an arresting officer's implied findings of noncorrectability [p. 11]. But such a conclusion flies in the face of 50 years of California law enforcement practice and the Evidence Code, not to mention the United States and California Constitutions.

A. EVIDENCE CODE SECTION 664 CREATES ONLY A REBUTTABLE PRESUMPTION.

The Court's rationale for concluding that courts lack power to review findings of noncorrectability is based on Evidence Code section 664: "[g]enerally, ***absent evidence to the contrary***, we presume that 'official duty has been regularly performed' [citation], and this presumption applies to law enforcement officers, except on the issue of the lawfulness of a warrantless arrest" [p. 11, emphasis added]. In other words, Evidence Code section 664 is a ***rebuttable*** presumption (Evid. Code, §660 ["The presumptions established by this article, and all other rebuttable presumptions established by law that fall within the criteria of Section 605, are presumptions affecting the burden of proof"]). Its effect is "merely 'to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact'" (*California Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, 505, quoting *Gee v. California State Personnel Bd.* (1970) 5 Cal.App.3d 713, 718).

A line of decisions recognizes that drivers are permitted the opportunity to rebut the implied findings of an arresting officer in subsequent judicial or administrative proceedings (*e.g*, *Roze v. Department of Motor Vehicles* (2006) 141 Cal.App.4th 1176, 1183 ["Evidence Code section 664 creates a rebuttable presumption that blood-alcohol test results recorded on official forms were obtained by following the regulations and guidelines of title 17"]; *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1232). The presumption that official duty has been regularly

performed is treated as conclusive only in the absence of contrary proof (*e.g., Romero v. County of Santa Clara* (1970) 3 Cal.App.3d 700, 705). Thus, in one of the cases the Court cited, *Davenport v. Department of Motor Vehicles* (1992) 6 Cal.App.4th 133, the opinion says: "The trial court concluded that in a hearing under section 13558, the hearing officer is authorized by the statute to rely upon the arresting officer's 367 report, absent a showing by the licensee that the statement or the scientific test upon which the statement is based is unreliable" (*Id.* at 138).

Real party Quigley offered contrary proof, ***and the trial court accepted it***. The evidence had been presented at a series of ***more than 30 hearings*** on the helmet tickets during 2004. These hearings were tape-recorded but never transcribed because Mr. Quigley was acquitted (the tickets were ultimately dismissed) and therefore the prosecution did not appeal from any of Judge Barton's rulings. The CHP did not include this evidence in the exhibits offered in support of its writ petition and, until the Court issued its opinion, Mr. Quigley had relied on Judge Barton's factual findings. In most cases, a court's findings of fact are presumed to be based on substantial evidence unless ***the party challenging the findings*** presents a complete record, and that record shows that there is no substantial evidence to support the findings (*Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1847 [It is petitioner's burden to provide this court with a record sufficient to permit review of the challenged ruling]).

It is only because this Court has not honored Judge Barton's findings that the need for evidence became an issue. But in disregarding the court's

findings of correctability, and inferring that the arresting officers' findings disqualified Mr. Quigley from relying on Vehicle Code section 40303.5 [Opin. 12], the opinion has improperly transformed Evidence Code section 664 from a rebuttable to a conclusive presumption.

B. THE DUE PROCESS CLAUSE AND THE DOCTRINE OF SEPARATION OF POWERS REQUIRE THAT COURTS BE PERMITTED TO REVIEW THE FINDINGS OF ARRESTING OFFICERS.

Although a motorcycle helmet ticket is an infraction, the burden of proving a driver has violated the helmet law is the same as it would be if the driver were charged with a misdemeanor or felony (Pen. Code, §19.7 ["Except as otherwise provided by law, all provisions of law relating to misdemeanors shall apply to infractions including, but not limited to . . . burden of proof"]).

By treating Evidence Code section 664 as if it were conclusive, the opinion in effect creates a mandatory presumption that lightens the CHP's burden of proving that a helmet ticket is not correctable. Vehicle Code section 40303.5 says that a law enforcement officer "***shall*** permit the arrested person to execute a notice containing a promise to correct the [motorcycle helmet] violation in accordance with the provisions of Section 40610 unless the arresting officer finds that any of the disqualifying conditions . . ." In other words, the operative statute requires that a helmet ticket be treated as correctable unless the officer makes specific findings.

The Evidence Code presumption, as applied by the Court, lessens

that burden by assuming without proof that the officer found noncorrectability. This violates the Due Process Clauses of the United States and California Constitutions (*e.g., People v. Thompson* (2000) 79 Cal.App.4th 40, 59, citing *United States v. Gaudin* (1995) 515 U.S. 506, 522-523, 115 S.Ct. 2310, 132 L.Ed. 444; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182; *Carella v. California* (1989) 491 U.S. 263, 265, 109 S.Ct. 2419, 105 L.Ed.2d 218; *People v. Flood* (1998) 18 Cal.4th 470, 481-482, 491; *People v. Kobrin* (1995) 11 Cal.4th 416, 423).

Because the Vehicle Code leaves it to the judgment of an arresting officer whether to make a citation correctable or not, there must be an avenue to challenge that decision in case it is based on invalid criteria, such as race, religion, or other arbitrary classification, including the exercise of protected statutory or constitutional rights (*People v. McKay* (2002) 27 Cal.4th 601, 622-623). In *Hughey v. Department of Motor Vehicles* (1991) 235 Cal.App.3d 752, the Department of Motor Vehicles argued that the decision as to whether a driver was incapable of refusing a chemical test of blood alcohol content (former Veh. Code §23157; renumbered as §23162, subd. (a)(5)) was to be determined by the arresting officer on the scene, and that the driver could not offer subsequent evidence of incapacity to refuse (*Id*. at 758). The Court of Appeal rejected the contention (*Id*. at 760 [“None of the cases we have reviewed precludes a driver from showing he or she should be deemed not to have refused to submit due to a medical condition unrelated to alcohol use”]).

II.

THE OPINION RESTS ON FACTUAL MISSTATEMENTS THAT, IN TURN, ARISE FROM LEGAL DEFICIENCIES.

The opinion states that "[h]ere, the officers did not issue 'fix-it' tickets to Quigley, and therefore the standard citations that were issued imply a finding that in riding his motorcycle without a proper safety helmet, Quigley presented an immediate safety hazard to himself" [p. 12]. Since there are four possible reasons the arresting officers might have failed to make Mr. Quigley's tickets correctable – three are the disqualifying circumstances listed in Vehicle Code section 40610, and the fourth is a blanket CHP policy refusing to make any motorcycle helmet ticket correctable[1] – there is no basis on which this Court can infer that any of the officers made the finding the Court thinks they did.

Ironically, in determining that the basis for the citations was a conclusion that Mr. Quigley presented an immediate safety hazard to himself, the Court was doing what it had said on page 11 of the opinion that courts cannot do: making a factual finding (or findings) concerning disqualifying circumstances. Indeed, the citing officers must not have found that Mr. Quigley presented an immediate safety hazard to himself because they let him ride away from the scene of each of the citations. It is unlikely a CHP or local police officer would let a citizen ride away if the

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[1]The existence of such a policy was established in the trial court by the introduction of the CHP's Bulletin 42, issued in 1993 .

officer believed an immediate hazard existed.

A. THE LAW DOES NOT DEFINE "PROPER" HELMET AND NEITHER THE CHP NOR ANY OTHER GOVERNMENT AGENCY HAS ISSUED A LIST OF APPROVED HELMETS.

Assuming for the sake of argument that lack of a "proper" helmet was the rationale relied upon by the arresting officers, what constitutes a proper helmet? According to *Buhl v. Hannigan* (1993) 16 Cal.App.4th 1612, 1622, it is "absurd" to believe the motorcycle helmet law requires either a consumer or a law enforcement officer to decide if a helmet is properly fabricated. Instead, Vehicle Code section 27803 requires only that a motorcyclist wear a helmet that is certified by its manufacturer to comply with Federal Motor Vehicle Safety Standard 218 (49 C.F.R. §571.218), and that has not been recalled:

> If a manufacturer determines that its helmet conforms to the federal standards and certifies that conformity by labeling the helmet with a DOT self-certification sticker, it is legal to sell that helmet under the federal law ***and it is legal under California law to drive a motorcycle while wearing that helmet*** until such time as that helmet has been shown not to conform to the federal standards.

Bianco v. California Highway Patrol (1994) 24 Cal.App.4th 1113, 1123, emphasis added.[2]

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[2]In *EasyRiders Freedom F.I.G.H.T. v. Hannigan, supra*, the Ninth Circuit upheld in part a district court injunction that defined a determination of non-conformity with federal standards as: "(1) a determination of non-compliance issued by the [NHTSA] or (2) manufacturer recall of a helmet

Neither the CHP nor any other state or federal government agency produces any list of "proper" or "approved" helmets. Allowing an individual arresting officer to decide for him- or herself whether the helmet a motorcyclist is wearing is "proper" would violate the Due Process clauses of the state and federal constitutions. Delegating the legislative job of defining what is prohibited to law enforcement officers and judges creates a danger of arbitrary and discriminatory application of the law (*City of Los Altos v. Barnes* (1992) 3 Cal.App.4th 1193, 1202).

B. FAILURE TO WEAR A MOTORCYCLE HELMET DOES NOT CONSTITUTE AN IMMEDIATE SAFETY HAZARD.

The opinion assumes that motorcyclists face immediate safety hazards if they do not wear an undefinable kind of headgear [p. 12]. "Immediate" means "occurring or accomplished without delay; instant," "following or preceding without a lapse of time;" "of or pertaining to the present time or moment;" "without intervening medium or agent" (www.dictionary.com). There is no safety hazard in ***riding*** a motorcycle without a helmet. Assuming for the sake of argument that helmets provide safety benefits, they do so only if there is a motorcycle crash – i.e., only if there is an intervening medium or agent, after a lapse of time. A helmet

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because of non-compliance with [Standard 218] or (3) other competent objective evidence from independent laboratory testing that the helmet does not meet [Standard 218]" (92 F.3d at 1493. This standard does not permit a citing officer to make a determination of non-conformity with the federal standards.

does not prevent an accident, and a motorcyclist's failure to wear a helmet, or to wear a "proper" one – whatever that is – will not cause an accident.

C. THE OPINION ASSUMES FACTS NOT IN EVIDENCE, AND CONTRARY TO THE FINDINGS OF THE TRIAL COURT.

The opinion assumes that Mr. Quigley was found not to be wearing a "proper" helmet, presumably meaning a helmet that complies with Vehicle Code section 27803. But it is impossible for a law enforcement officer to determine compliance.

Buhl v. Hannigan , supra, states that "it is clear [Vehicle Code section 27803] ***requires only that the consumer wear a helmet bearing a certification of compliance***" with FMVSS 218 (16 Cal.App.4th at 1623, emphasis added) and that it would be ***"absurd***" to read section 27803 as requiring either a consumer or a law enforcement officer to decide if the helmet is properly fabricated (16 Cal.App.4th at 1623, emphasis added). If a law enforcement officer cannot determine if a motorcyclist's headgear complies with the helmet law, there could be no factual basis for the Court's conclusion.

CONCLUSION

The Court should grant rehearing. It should issue a new opinion holding that tickets for alleged violations of the motorcycle helmet law are: (1) correctable; and (2) subject to judicial review when an arresting officer determines that a particular citation is not correctable. The Court should

deny the writ of mandate and remand the case to the trial court for further proceedings in accord with its opinion, and should award real party Quigley his costs in this proceeding.

Dated:June 1, 2007

Respectfully submitted,

LASCHER & LASCHER,
A Professional Corporation
WENDY COLE LASCHER

By:_____
Attorneys for Plaintiffs

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204 (c)(1))

The text of this brief consists of 2,399 words as counted by the Corel WordPerfect version X3 word processing program used to generate this brief.

Dated: _____ _____

Appellate Counsel