

State of Washington, Petitioner,
v.
Jack I. Maxwell and Josh T. Sanasky, [FN*]
Respondents.

FN* Although this spelling appears throughout the court records,
we have used the correct spelling in the opinion.

City of Omak, Respondent,

v.
Edwin A. Fisher, Petitioner.
(74 WASH.APP. 688, 878 P.2D 1220)
Nos. 12748-6-III, 12534-3-III, 12749-4-III.
Court of Appeals of Washington,
Division 3, Panel Three.
June 28, 1994.

Two defendants were convicted in the District Court, Benton County, of violating the Head Injury Prevention Act. Defendants appealed and the Superior Court, Benton County, Albert Yencopal, J., reversed. A third defendant was convicted of violating the Act in Omak Municipal Court. Defendant appealed and the Superior Court, Okanogan County, affirmed. Appeals were taken and consolidated. The Court of Appeals, Munson, J., held that: (1) portion of Head Injury Prevention Act requiring motorcyclists to wear helmets was unconstitutionally vague, and (2) roll bar exception to Head Injury Prevention Act's helmet requirement was not in effect.

Charges against two defendants dismissed; judgment against third defendant reversed.

[1] AUTOMOBILES

State patrol regulation regarding safety standards for protective motorcycle helmets, adopted pursuant to Head Injury Prevention Act, failed to provide fair notice or ascertainable standards of types of helmets which would

comply with Act and, thus, portion of Act requiring motorcyclists to wear helmets was unconstitutionally vague where ordinary citizen of average intelligence would not have known how to locate federal standard for helmets adopted by state patrol regulation and even if ordinary citizen could have found federal regulation, he or she would not have understood what was required to comply with Act. West's RCWA 46.37.530(1)(c), (2); U.S.C.A. Const.Amend. 14.

[1] CONSTITUTIONAL LAW

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[2] CONSTITUTIONAL LAW

Statute violates due process clause of Fourteenth Amendment if it fails to afford citizens fair warning of proscribed conduct. U.S.C.A. Const.Amend. 14.

[3] CONSTITUTIONAL LAW

Statute is unconstitutional if it fails to provide fair notice; if standards to which citizen must conform are so inaccessible that average person could not be expected to discover them by reasonable research efforts, then statute does not provide requisite notice. U.S.C.A. Const.Amend. 14.

[4] CONSTITUTIONAL LAW

Statute is unconstitutional if it fails to define offense so that ordinary people can understand what it proscribes; standard is whether persons of common intelligence and understanding have ascertainable standards by which to guide their conduct. U.S.C.A. Const.Amend. 14.

[5] AUTOMOBILES

Roll bar exception to Head Injury Prevention Act's helmet requirement was not in effect and, thus, defendant, whose motorcycle was equipped with roll bars, was required to wear helmet under Act where only roll bars approved by state patrol qualified for exception and state patrol had not approved any roll bars. West's RCWA 46.37.530(1)(c).

[6] AUTOMOBILES

Requiring motorcyclists to take motorcycle to state patrol office to determine whether roll bars on motorcycle qualified for exception to Head Injury Prevention Act's helmet requirement would violate due process requirements where state patrol had not adopted any regulations or standards for approval of roll bar. West's RCWA 46.37.530(1)(c).

[6] CONSTITUTIONAL LAW

Requiring motorcyclists to take motorcycle to state patrol office to determine whether roll bars on motorcycle qualified for exception to Head Injury Prevention Act's helmet requirement would violate due process requirements where state patrol had not adopted any regulations or standards for approval of roll bar. West's RCWA 46.37.530(1)(c).

[7] CONSTITUTIONAL LAW

Due process requires that penal statutes and statutes defining traffic infractions include standards to prevent arbitrary enforcement. U.S.C.A. Const.Amend. 14.

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[8] STATUTES

Statutes are construed to effect their legislative purpose.

Andrew K. Miller, Prosecutor and Ann K. Colburn, Deputy Prosecutor,
Kennewick, for petitioner in No. 12748-6-III.

Charles E. Alden, Kennewick, for respondents in No. 12748-6-III.

Martin D. Fox and Eric R. Draluck, Seattle, for petitioner in No. 12534-3-III.

Christine O. Gregoire, Atty. Gen. and Kim O'Neal, Asst. Atty. Gen.,
Olympia, for respondent in No. 12534-3-III.

Decision by MUNSON, Judge.

We granted discretionary review of the memorandum decision of the Benton County Superior Court reversing District Court judgments finding Jack Maxwell and Josh Sanaski had violated RCW 46.37.530(1)(c) which requires persons riding motorcycles to wear approved protective helmets.

We also granted review of the decision of the Okanogan County Superior Court affirming an Omak Municipal Court order finding Edwin Fisher violated RCW 46.37.530(1)(c). Mr. Fisher contends the statute cannot be enforced as to him because his conduct was within a statutory exception which has been rendered unconstitutionally vague by the failure of the state patrol to adopt implementing regulations. Because these cases involve the constitutionality of RCW 46.37.530(1)(c), they are consolidated for purposes of this opinion.

In 1990 the Legislature enacted the Head Injury Prevention Act, amending RCW 46.37.530 to require all persons riding motorcycles on the public highways to wear protective helmets:

(1) It is unlawful:

....

(c) For any person to operate or ride upon a motorcycle, motor-driven cycle, or moped on a state highway, county road, or city street unless wearing upon his or her head a protective helmet of a type conforming to rules adopted by the state patrol except when the vehicle is an antique motor-driven cycle or automobile that is licensed as a motorcycle or when the vehicle is equipped

with seat belts and roll bars approved by the state patrol. The helmet must be equipped with either a neck or chin strap which shall be fastened securely while the motorcycle or motor-driven cycle is in motion;

....

(2) The state patrol is hereby authorized and empowered to adopt and amend rules, pursuant to the administrative procedure act, concerning the standards and procedures for conformance of rules adopted for glasses, goggles, face shields, and protective helmets.

Laws of 1990, ch. 270, s 7.

[FN1] The state patrol had not approved or adopted rules for the approval of roll bars for motorcycles as of the fall of 1991.

THE MAXWELL AND SANASKI APPEALS

[FN2] The District Court found both men had committed the infraction and they appealed to the Superior Court which reversed the judgments. The Superior Court determined the law is unconstitutionally burdensome and confusing.

[1][2] A statute violates the due process clause of the Fourteenth Amendment if it fails to afford citizens fair warning of proscribed conduct. *State v. Coria*, 120 Wash.2d 156, 163, 839 P.2d 890 (1992); *Spokane v. Douglass*, 115 Wash.2d 171, 178, 795 P.2d 693 (1990). The State contends the Superior Court was incorrect in its determination RCW 46.37.530(1)(c) is so unclear it fails to provide the requisite fair warning.

The statute does not involve First Amendment rights; we evaluate its constitutionality as it applies to the facts of the particular case. *Coria*, at 163, 839 P.2d 890. The notices of infraction issued to Messrs. Maxwell and Sanaski described the offense as "failure to wear approved helmet ..."; it is undisputed each was wearing a helmet and the substance of the charge was that the helmet failed to comply with WAC 204-10-040 adopting the federal standards adopted under the statute.

[3] A statute is unconstitutional if it fails to provide fair notice; if the standards to which a citizen must conform are so inaccessible that an average person could not be expected to discover them by reasonable research efforts, then the statute does not provide the requisite notice. See *In re Powell*, 92 Wash.2d 882, 888-89, 602 P.2d 711 (1979); *State v. Dougall*, 89 Wash.2d 118, 570 P.2d 135 (1977).

The administrative regulation for protective helmets in Washington stated in its entirety:

(1) "Federal Motor Vehicle Safety Standard 218 is hereby adopted by reference as the standard for motorcycle helmets."
Former WAC 204-10-040.

In order to comply with the statute and the state regulations, an ordinary citizen would have to know where to find the Federal Motor Vehicle Safety Standards, or Standard 218. Counsel and the court found it because we are aware of the Code of Federal Regulations; the index therein cites us to chapter 49, section 571.218. The regulation itself consists of sections 1 through 7.3.4 and covers 16 pages. Within those sections are topics such as scope -- purpose -- application -- definitions -- requirements -- impact attenuation -- penetration -- retention system -- configuration -- projections -- labeling -- helmet positioning index -- selection of appropriate headform -- reference marking -- helmet positioning -- conditioning -- impact attenuation test -- penetration test -- and retention system test. Also included are 7 1/2 pages of diagrams and 4 pages of charts.

The regulation fails to inform the average citizen of the location or legal citation of the federal standard it adopts. We have not been advised how a citizen of common intelligence should discover this information. RCW 46.37.530, as implemented through WAC 204-10-040, fails to provide citizens with the fair notice required for due process.

[4] A statute is unconstitutional if it fails to define the offense so that ordinary people can understand what it proscribes. *Douglass*, at 178, 795 P.2d 693. The standard is "whether persons of common intelligence and understanding have ... ascertainable standards by which to guide their conduct." *State v. Schimmelpfennig*, 92 Wash.2d 95, 102, 594 P.2d 442 (1979).

The federal regulation has numerous sections relating to the qualities and tests to be supplied by the manufacturer. Ordinary citizens would not be able to tell which protective helmet met those requirements, even if they could find the regulation. In adopting the entire regulation, the state patrol has made it impossible for ordinary citizens to understand what is required to comply with the Washington statute. The state patrol should redraft the

regulation in ordinary language so that ordinary citizens would know what to look for to be certain they are complying with the law. If the state patrol feels it must adopt standards for manufacturers, then that should be in a separate regulation.

The trial court did not err in finding the statute and regulation failed to provide the fair notice and ascertainable standards required by the due process clause.

THE FISHER APPEAL

[5] Mr. Fisher was issued a notice of infraction on September 16, 1991, for riding a motorcycle without a protective helmet. His motorcycle was equipped with a seat belt and roll bars supplied by the motorcycle manufacturer.

Mr. Fisher contends RCW 46.37.530 is vague because the state patrol has not adopted any regulation relating to roll bars. A person of common intelligence cannot determine what is required to bring himself within the exception for motorcycles equipped with seat belts and roll bars.

[6][7] During oral argument, counsel for the City of Omak suggested a person could bring himself within the roll bar exception by taking his vehicle to a Washington State Patrol office and asking for express approval of a particular roll bar. Due process requires that a penal statute include standards to prevent arbitrary enforcement. *State v. Walsh*, 123 Wash.2d 741, 749, 870 P.2d 974 (1994). The same standard applies to traffic infractions. *Galjour v. General Am. Tank Car Corp.*, 764 F.Supp. 1093 (E.D.La.1991). Without the adoption of regulations expressly approving particular roll bars or articulating standards for the approval of roll bars, the procedure suggested by counsel for the City of Omak would plainly violate due process requirements.

[8] Mr. Fisher argues in the absence of administrative action approving roll bars he was entitled to the benefit of his good faith effort to comply with the law by having any roll bars on his motorcycle. Statutes are construed to effect their legislative purpose. *State v. McDougal*, 120 Wash.2d 334, 350, 841 P.2d 1232 (1992). The express purpose of the Head Injury Prevention Act helmet requirement is to "reduce the occurrence of head injury". RCW 43.70.400. The roll bars on Mr. Fisher's motorcycle are those commonly

called "roll bars" in the motorcycle vernacular in that they extend out from the sides and around the rear of the back and front wheels, not over the head. Such bars serve to protect the operator's legs from being trapped if the motorcycle falls over but would not be effective in preventing head injury. See *Miller v. White*, 222 Va. 311, 281 S.E.2d 802 (1981). The evidence does not disclose the existence of any other type of roll bar which would be suitable for approval. When the Legislature delegates power to approve, it also delegates power to disapprove. *State v. Crown Zellerbach Corp.*, 92 Wash.2d 894, 899, 602 P.2d 1172 (1979). The Washington State Patrol is not required to approve such roll bars under the statute. No roll bar has been approved; the roll bar exception to the helmet requirement is not in effect.

In the absence of an exception for motorcycles equipped with roll bars, Mr. Fisher was required to wear a helmet. Having determined the adoption of Standard 218 (WAC 204-10-040) renders the helmet requirement of RCW 46.37.530(1)(c) unconstitutionally vague, we conclude Mr. Fisher could not be required to wear a helmet.

The charges against Messrs. Maxwell and Sanaski are dismissed. The judgment against Mr. Fisher is reversed.

SCHULTHEIS and THOMPSON, JJ., concur.

FN1. The state commission on equipment had previously adopted Standard 218 as the standard for motorcycle helmets under former RCW 46.37.530(3), Laws of 1971, Ex.Sess., ch. 150, s 1; WAC 204-10-010, -040. This became, in effect, adoption by the state patrol as a result of WAC 204-08-010, filed in 1987: "Whenever used in this title ... 'state commission on equipment' means the chief of the Washington state patrol." Standard 218 is attached as an appendix.

FN2. Violation of the statute is a civil traffic infraction. See RCW 46.63.010 and .020.
