

Opinion No. 70-43

April 23, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. Fernando E. C De Baca Commissioner Department of Motor Vehicles State Capitol Santa Fe, N.M. 87501

QUESTIONS

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Does Section 64-18-55.1, N.M.S.A., 1953 Compilation, (1969 P.S.), requiring the use of a safety helmet, apply to all motorcyclists?

CONCLUSION

No, but see analysis.

OPINION

{*75} ANALYSIS

Section 64-18-55.1, N.M.S.A., 1953 Comp. (1969 P.S.), provides in part:

"No person holding a restricted license pursuant to Section 61-13-40A(3) NMSA 1953 or a provisional license pursuant to section 64-13-48(b) NMSA 1953 shall operate a motorcycle, motor scooter or motor-driven cycle unless he is wearing a safety helmet securely fastened on his head in a normal manner as headgear and meeting the standards specified by the commissioner of motor vehicles."

The language of the statute is clear and plain in its meaning. **No person** holding either of the two licenses mentioned **shall operate** a motorcycle without an approved safety helmet. The restricted license referred to and provided for by Section 64-13-40A(3), N.M.S.A., 1953 Comp. (1969 P.S.), deals with a license issued to a person 13 years of age or older which restricts him to the operation of a motorcycle with five brake horsepower or less. It provides:

"The department shall not issue any license under the Motor Vehicle Code to any person:

"A. As an operator, who is under the age of sixteen [16] years, except the department may, in its discretion, issue:

"(3) to any person thirteen [13] years of age or older, who passes an examination prescribed by the department, a license restricted to the operation of a motor-driven cycle, motor scooter or motorcycle, provided:

"(a) the motor does not produce in excess of five [5] brake-horsepower;

"(b) each restricted license when first issued shall be marked 'original' until the renewal thereof, and no holder of an 'original' license may carry any other passenger while operating a motor-driven cycle, motor scooter or motorcycle; and

"(c) the commissioner shall approve and certify motor-driven cycles, motor scooters or motorcycles producing less than five brake-horsepower as 'not in excess of five brake-horsepower' and by regulation provide for a method of identification of such cycles by all law enforcement officers;"

The provisional license which is issued pursuant to Section 64-13-48(b), N.M.S.A., 1953 Comp., is a license issued to a person under the age of 18. This section provides:

"(b) Whenever the division issues an original license to a person under the age of eighteen (18) years such license shall be designated and clearly marked as a 'provisional license.' Upon renewal as applicable to operator's licenses the division may for reasonable cause as shown by its records designate the renewal of the license as provisional, otherwise a license in usual form shall be issued subject to other provisions of this act [64-13-31 to 64-13-43, 64-13-44 to 64-13-74, 64-13-76 to 64-13-78]."

In order to say that Section 64-18-55.1, supra, requires everyone who operates a motorcycle to wear a safety helmet we would have to {^{*76}} re-write the statute. It is impossible to construe this statute as requiring every motorcycle operator to wear an approved safety helmet. There is no room for construction where the meaning of the statute is plain. **State v. Ortiz**, 78 N.M. 507, 433 P.2d 92 (1967).

In addition to requiring that persons who hold a restricted license issued pursuant to Section 64-13-40A(3), supra, and persons who hold a provisional license issued pursuant to Section 64-13-48 (b), supra, wear an approved safety helmet while **operating** a motorcycle, Section 64-18-55.1, supra, requires that any **passenger** of an operator holding either of these licenses wear an approved safety helmet. It states:

"No person holding a license pursuant to section 64-13-40A(3) or section 64-13-48(b) NMSA 1953 shall carry any passenger on any motorcycle, motor scooter or motor-driven cycle unless the passenger is wearing a securely fastened safety helmet, as specified above, meeting the standards specified by the commissioner."

Thus the age or license held by the passenger is immaterial, if the operator holds either of the two mentioned licenses the passenger must wear an approved safety helmet.

In issuing this opinion we are not unmindful of the two previous opinions issued by this office which question the constitutionality of a statute which would require motorcyclists over the age of 21 to wear an approved safety helmet. (New Mexico Attorney General Opinion Nos. 66-15 and 69-14). However, since these two opinions were issued, a number of state courts have held that the requirement of wearing an approved safety helmet by all motorcyclists regardless of age was a valid exercise of the police power of the state and necessary to promote the safety of persons and property within the state and not an improper restraint upon one's personal liberty. **Commonwealth v. Arnold**, 215 Pa. Super. 444, 258 A.2d 885 (1969); **State v. Krammes**, 105 N.J. Super. 345, 252 A.2d 223 (1969); **State v. Fetterly**, 456 P.2d 996 (Ore. 1969); **State v. Odegaard**, 165 N.W.2d 677 (N.D. 1969); **Bisenius v. Karns**, 42 Wis. 2d 42, 165 N.W.2d 377 (1969); **State v. Laitinen**, 459 P.2d 789 (Wash. 1969); **Ex Parte Smith**, 441 S.W.2d 544 (Tex. 1969).

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