

GARY K. NELSON, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

September 17, 1969

DEPARTMENT OF LAW LETTER OPINION NO. 69-21-L (R-93)

REQUESTED BY: JAMES J. HEGARTY, Director
Department of Public Safety

QUESTION: When a driver of a motor vehicle is discovered to be in violation of A.R.S. § 28-411.A, as amended, must the arresting officer take the driver into custody or detain him and his vehicle until a licensed operator is in control?

ANSWER: No.

It has been requested that Attorney General's Opinion No. 61-60, rendered August 26, 1961, be reviewed to determine if there is a mandatory duty on a law enforcement officer to prevent a person found in violation of A.R.S. § 28-411.A, as amended, from continuing to operate his vehicle after it becomes evident the person is not licensed or exempt from licensing provisions of Chapter 4, Title 28, Arizona Revised Statutes. The pertinent language of this statute is as follows:

"A. No person, except those expressly exempted in this chapter, shall drive any motor vehicle upon a highway in this state unless the person has a valid license as an operator or chauffeur under the provisions of this chapter. . . ."

Persons who operate motor vehicles without a license may be roughly categorized as follows:

1. The person may have had his license revoked, cancelled or suspended, whether under the laws of Arizona or another jurisdiction.

Opinion No. 69-21-L
(R-93)
September 17, 1969
Page Two

2. The person may have been forbidden a license under the terms of A.R.S. § 28-413, titled "What persons shall not be licensed".

3. The person may have a license which has expired under the provisions of A.R.S. § 28-426, but otherwise be eligible for renewal of his license on application.

4. The person may be a new arrival in Arizona, who is required to have an Arizona operator's or chauffeur's license, but has a valid license from another jurisdiction.

Those falling within the first two categories should not be operating motor vehicles on the highways. It is not so clear that those falling within the latter two categories should be immediately removed from the highways. There is no prior determination of their inability to operate a vehicle or that their presence on the highway would be inimical to the safety of other highway users. In this posture then, does the quoted language of A.R.S. § 28-411.A, as amended, make it the mandatory duty of an arresting officer to prevent the person accused from further operating his vehicle?

The purpose of enacting statutes requiring operator's or chauffeur's licenses is to protect the users of the public highways from incompetent or unskilled drivers. In order to effectuate this purpose, the Arizona Legislature has enacted A.R.S. §§ 28-401, et seq. Because it is important that all persons who are required by our laws to be licensed as operators or chauffeurs be initially and periodically screened to determine if they are competent to drive on our highways, the penalty for violation of A.R.S. § 28-411.A, as amended, can be severe for those who choose to ignore its mandate. However, had the Legislature intended

Opinion No. 69-21-L
(R-93)
September 17, 1969
Page Three

such a person be immediately arrested or prevented from further operating his vehicle on the highways of the State, it would have so stated. This conclusion is compelling when it is considered those whose licenses have been revoked, suspended or refused have been considered in a separate category and dealt with specifically in A.R.S. § 28-473, as amended. This statute provides, in part:

"A. Any person who drives a motor vehicle on a public highway of this state at a time when his privilege so to do is suspended, revoked or refused, is guilty of a misdemeanor* * *."

Clearly, this language imposes no duty on the arresting officer to prevent the person arrested from further operating his vehicle. There is no doubt this statute would control in any case where a driver operates a vehicle on a suspended or revoked license or where a license has been refused. As was stated in State v. Dickens, 66 Ariz. 86, 183 P.2d 148 (1947):

". . . But it is a well-settled rule of statutory construction that the specific controls over the general. . . ." 66 Ariz. at 92, 183 P.2d at 151.

Thus, if the officer has a mandatory duty to prevent further operation of a vehicle by a driver who falls in category three or four, it would result in that person being more severely treated than the driver whose driving right has been administratively (based on judicial determination) or legislatively barred. The mere fact a person is not licensed pursuant to Chapter 4, Title 28, Arizona Revised Statutes, does not of itself make him a hazard to other highway users; there must be independent evidence of that.

In the case of operators falling in the first two categories, there has been a legislative or administrative determination that they are unsafe drivers. In the case of categories three and four, the act for which the operator has

come under scrutiny of the officer would likely be the only evidence of his ability to operate a motor vehicle or the hazard he might create to others. A blanket directive that they be immediately removed from the highways of this State, that is, not allowed to continue on their journey until someone who is a licensed driver becomes available to drive, or taken into custody by the officer, appears to fall without the purview of the Legislature's intent in enacting the statute. As has been stated by our Supreme Court in Lutfy v. Lockhart, 37 Ariz. 488, 295 P. 975 (1931):

"While possession of an operator's license, regularly issued, might be some evidence of competency, the lack of such license would be no evidence whatever that he was not a capable, skilled, safe driver." 37 Ariz. at 493, 295 P. at 977.

Our conclusion is strongly fortified by a recent case, Wilson v. City of Tucson, 8 Ariz.App. 398, 446 P.2d 504 (1968), which concerned a wrongful death action against the City of Tucson by plaintiff's decedent. One theory of negligence advanced by the plaintiff was that a city police officer had an absolute duty to arrest one Ochoa under A.R.S. § 28-1053.4, leaving the scene of an accident where personal injuries or property damage resulted. (Ochoa had left the scene of such an accident, and was stopped by the police. Ochoa exhibited an expired driver's permit to the officer [but it is not clear if the officer read it then], and asked to make a telephone call. While the officer's attention was diverted, Ochoa got back into his car and fled, with the police pursuing. During the ensuing chase, Ochoa collided with a car in which plaintiff's decedent was a passenger, fatally injuring both Ochoa and the decedent.) In dismissing this theory, the Court stated:

"The purpose of A.R.S. § 28-1053 is not to provide a rule for the safety of persons or property. It has as its aim the prompt and orderly administration of criminal justice. Although an incidental

Opinion No. 69-21-L
(R-93)
September 17, 1969
Page Five

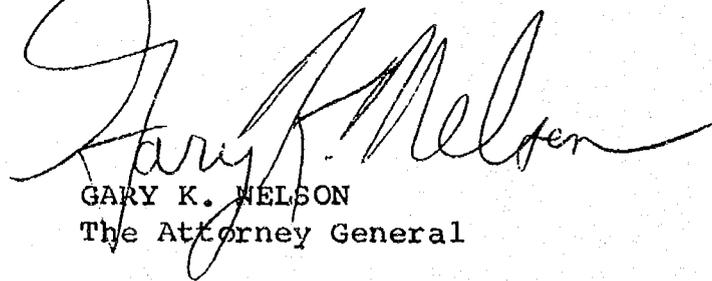
benefit may be in some cases the temporary elimination of an offending driver from the streets, there is no express requirement of an actual, physical restraint of the person to insure accomplishment of the statutory purpose. The same can be said of driving under an expired license. . . ." 8 Ariz.App. at 402, 446 P.2d at 510. (Emphasis added.)

While the language emphasized above is dicta, it strongly indicates what the Court of Appeals' position would be in the event the point was ever squarely before them.

It is therefore concluded that the arresting officer does not have a mandatory duty to detain such an unlicensed driver until a licensed driver can be summoned to take control of the vehicle or that he take that person into custody. However, it is emphasized that the officer may arrest such a person (as that person would be in violation of a statute for which he may be convicted of a misdemeanor) when, in his judgment, such a person constitutes a danger to other highway users.

Therefore, that portion of Attorney General's Opinion No. 61-60, which relates to this question, is overruled.

Respectfully submitted,



GARY K. NELSON
The Attorney General

GKN:ell