GENERAL SPEED STATUTE VOID FOR VAGUENESS

People v. Firth,
3 N.Y.2d 472, 146 N.E.2d 682 (1957)

The defendant was convicted and fined fifty dollars after a trial before a Justice of the Peace on an information which charged a violation of subdivision 1 of section 56 of the Vehicle and Traffic Law of New York reading:

> No person shall operate a motor vehicle or a motorcycle upon a public highway at such a speed as to endanger the life, limb or property of any person, nor at a rate of speed greater than will permit such person to bring the vehicle to a stop without injury to another or his property.

There was testimony that the defendant while passing another car struck a young girl on a bicycle. While some of the testimony was that the defendant was going sixty to sixty-five miles per hour, he was not charged with exceeding any of the speeds made unlawful in other subdivisions of section 56, nor was he charged with reckless driving under another section of the statute. The Court of Appeals of New York held the subdivision invalid as it was "too vague and indefinite to constitute a sufficient definition of criminal conduct," and contained no sufficient standard by which a driver's conduct could be tested.[1]

The principle that a criminal statute must be definite and clear, and make known to all the nature of the behavior cited as criminal is widely recognized. From the earliest English cases all have agreed "that it is impossible to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal [penal] matters."[2] In this country the basis of invalidating vague statutes may be the violation of a due process clause of a state or the federal constitution,[3] or the sixth amendment to the Constitution,[4] or a similiar state provision,[5] or may never be expressly noted by the court.[6] But as with all common principles, the recognition is easier

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[1] People v. Firth, 3 N.Y.2d 472, 146 N.E.2d 682 (1957).

[2] Chicago & N.W. Ry. v. Dey, 35 Fed. 866, 876 (S.D. Iowa 1888) quoting DWARRIS, A GENERAL TREATISE ON STATUTES 652 (1831).

[3] Lanzetta v. New Jersey, 306 U.S. 451 (1939); Connally v. General Construction Co., 269 U.S. 385 (1926); United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921).

[4] United States v. L. Cohen Grocery Co., *supra* note 3.

[5] Wabash Ry. v. O'Bryan, 285 Fed. 583 (E.D. Mo. 1922).

[6] In the principal case the statute was not expressly declared unconstitutional (except in the county court), but was deemed too vague to enforce. In terms of effect, if there is a distinction here, it is one without a difference. In terms of theory, it is its vagueness that causes the statute to be unconstitutional. Because any statute too vague to be enforced is also an unconstitutional statute, once a statute is found to be too indefinite for application, the court may not necessarily

than the application.[7]

The statute in question was passed in 1946 in response to the recommendation of the Governor's Conference on Highway and Traffic Safety that the state speed laws include a clause to make driving at a speed greater than that which is reasonable and prudent under the conditions illegal. Similar statutes have been upheld in most jurisdictions.[8] But the statute

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go on to spell out the constitutional results of that finding. Railway Comm'n v. Grand Trunk Ry., 179 Ind. 255, 100 N.E. 852 (1913). See Cook v. State, 26 Ind. App. 278, 59 N.E. 489 (1901). The court in overturning the conviction in this case expressly noted that the defendant had not properly attempted to have the law declared unconstitutional as no particular clause of the constitution was referred to as contravened by the statute.

[7] Winters v. New York, 333 U.S. 507 (1948); United States v. Petrillo, 332 U.S. 1 (1947), where the words, to force employment of a person "in excess of the employees needed . . . to perform actual services," were held not so vague, indefinite or uncertain as to violate the due process clause of the fifth amendment. Robinson v. United States, 324 U.S. 282 (1945), where the Federal Kidnapping Act was found not to be invalid for uncertainty because of the words "the sentence of death shall not be imposed by the court, if prior to its imposition, the kidnapped person has been liberated unharmed." The defendant, sentenced to death, had released the victim with minor injuries. Lanzetta v. New Jersey, *supra* note 3, where an attempt to make being a gangster criminal behavior by defining "gangster" as "any person not engaged in any lawful occupation, known to be a member of any gang . . . ." was held repugnant to the fourteenth amendment. International Harvester v. Kentucky, 234 U.S. 216 (1914); Collins v. Kentucky, 234 U.S. 634 (1914). The difficulty of determining when a statute is too vague is indicated by the fact that most of the cases cited above were split decisions characterized by strong dissents. See Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831 (1923).

[8] Illinois v. Beak, 291 Ill. 449, 126 N.E. 201 (1920); Gallaher v. State, 193 Ind. 629, 141 N.E. 347 (1923); State v. Goldstone, 144 Minn. 405, 175 N.W. 892 (1920); Ohio v. Schaeffer, 96 Ohio St. 215, 117 N.E. 220 (1917); State v. Mulkern, 176 Wis. 490, 187 N.W. 190 (1922). *Cf.* Commonwealth v. Pentz, 247 Mass. 500, 143 N.E. 322 (1924), where the court held constitutional a statute that made it a crime to operate a motor vehicle "so that the lives or safety of the public might be endangered"; State v. Lantz, 90 W.Va. 738, 111 S.E. 766 (1922). *Contra,* Hayes v. State, 11 Ga.App. 371, 75 S.E. 523 (1912); Holland v. State, 11 Ga.App. 769, 76 S.E. 104 (1912); Commonwealth v. Davidson, 21 Pa. Dist. 885 (1912). Howard v. State, 151 Ga. 845, 108 S.E. 513 (1921), where the words "reasonable and safe" were held too indefinite a standard to establish criminal liability. The decision in Hayes v. State, *supra,* was approved. *Cf.* Empire Life Insurance Co. v. Allen, 141 Ga. 413, 81 S.E. 120 (1914). In a dictum this court suggested that while the words "reasonable and proper" are too indefinite to serve as a test of criminal responsibility, they may be adequate to establish a standard of civil responsibility. *But see* Gaines v. State, 80 Ga.App. 512, 56 S.E.2d 772 (1949). The court discusses the case of Hayes v. State, *supra,* and urges that it has been limited in its application by other decisions, *e.g.,* Ray v. State 47 Ga.App. 22, 169 S.E. 538 (1933), and should only be applied where that precise question is involved, *i.e.,* a speed statute where the test is a "reasonable and proper" rate of speed. All states but Delaware, Louisiana, Mississippi, Tennessee, and Vermont have a general speed prohibition using the reasonable and prudent or reasonable and proper test, and these tests are approved expressly or by impli-

as passed omitted the recommended reasonable and prudent test, and its omission made the statute subject to such extreme interpretations that it was found too vague and indefinite to be enforced. Despite its legislative history, the New York Court of Appeals refused to read this test into the statute.[9] Other attacks on the statute prior to the *Firth* decision had led to a variety of results.[10] The opinion of the New York Court of Appeals on the issue will end the uncertainty that existed heretofore.

In the principal case the court could not have been unaware of mounting highway fatalities, in large measure attributable to increased speed, and the general concern of the state government and the public with the problem. Still it was necessary to hold Firth's conviction under the first subdivision of the law invalid since the law was too vague to be acceptable. Analysis of the statute shows that it is a crime to set a vehicle in motion, even at the lowest possible speed, if the vehicle is thereafter involved in an accident which causes injury to another or to his property. Since it is common experience that many accidents happen without fault or negligence, the statute imposes criminal liability without fault, and makes proof of an accident sufficient for conviction.[11] The provisions become meaningless since, as the court says, "there is no such thing as a motor vehicle speed incapable of endangering life, limb, or property."[12]

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cation in almost every state that has adopted them, except Georgia. The Pennsylvania decision cited above, while never expressly overruled, has never been followed, other Pennsylvania courts reaching an opposite conclusion on the same statute.

[9] A lower New York court in the case of People v. Burkhalder, 203 Misc. 532, 117 N.Y.S.2d 609 (County Ct. 1952) had read the reasonable and prudent test into this same statute.

[10] People v. Wilson, 168 N.Y.S.2d 391 (Sup. Ct. 1957). The court held the statute constitutional, and a conviction under §56 (1) of the Vehicle and Traffic Law of New York was sustained, the court pointing out that a traffic violation is not a crime and holding the statute sufficient to support a conviction of a traffic violation. Section 2 of the New York Vehicle and Traffic Law provides that offenses against it are "traffic violations" and not misdemeanors or felonies unless expressly stated. The court of appeals in the principal case agreed that under New York law offenses under §56 were traffic violations and not crimes, but held that the constitutional standards were the same. In People v. Horowitz, 3 N.Y.2d. 827, 144 N.E.2d 655 (1957), the county court's reversal of conviction on insufficient evidence and constitutional grounds was affirmed on grounds of insufficient evidence. People v. Furber, 5 Misc.2d 614, 133 N.Y.S.2d 101 (County Ct. 1954) (Appeal on insufficient evidence; constitutionality was not raised); People v. Sprague, 204 Misc. 99, 120 N.Y.S.2d 725 (County Ct. 1953) (Affirms conviction); People v. Roberts, 195 Misc. 172, 89 N.Y.S.2d 367 (County Ct. 1949) where the court held that the evidence must show a violation of the specific speed prohibitions in §56(2) or §56(3) to sustain a conviction for violation of §56. People v. Wilson, *supra*, contains a listing of New York decisions under this statute.

[11] People v. Gaebel, 2 Misc.2d. 458, 153 N.Y.S.2d 102 (County Ct. 1956). Conviction reversed as not supported by the evidence. Dictum suggested the statute was too vague to be inforced.

[12] People v. Firth, *supra* note 1.

There is authority under which this statute could be sustained, and the extreme interpretations suggested by the court need not be made.[13] While the rules that operate in this area, either to sustain or to invalidate legislation challenged as vague, can be considered helpful in the abstract, their application to a specific statute will seldom resolve the constitutional question. The rules may aid in supporting a decision, but they offer little help in making it. Ultimate decisions on the actual vagueness of legislation seem to be made in terms of reasonableness. The rules may help crystallize or channel judicial thought as the reasonableness of a statute is weighed, but the end result still seems to be opinion.[14] Can it be otherwise?

The decision in the principal case warrants an examination of a similar statute in Ohio which combines a general speed prohibition similar to that invalidated in the *Firth* case, but including, as the New York statute did not, a reasonable and proper clause, and the assured clear distance rule.[15] Both the prohibition and the rule are tied together in the first paragraph of the statute, and are followed, as in the New York statute, by other paragraphs containing specific speed provisions.

This combination of the general speed prohibition with the assured clear distance rule raises interesting constitutional questions which have not been adjudicated. In Ohio, the general speed prohibition was held to be constitutional prior to its amendment by the inclusion of the assured clear

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[13] There is a presumption of a statute's constitutionality. United States v. Butler, 297 U.S. 1, 67 (1935). A statute can not be set aside for indefiniteness if it is open to any reasonable construction which will support it. State v. Dvoracek, 140 Iowa 266, 118 N.W. 399 (1908); State v. West Side St. Ry., 146 Mo. 155, 47 S.W. 959 (1898). The courts should not declare a statute void on the ground that the statute is unintelligible and meaningless in a doubtful case. State *ex rel.* Forchheimer v. LeBlond, 108 Ohio St. 41, N.E. 491 (1923). See People v. Bulkhalder, *supra* note 9, a lower court decision where the statute in the principal case is sustained, but where proof of an accident is *not* regarded as sufficient for conviction, and the extreme interpretation made by the *Firth* court is avoided.

[14] Compare, State v. Scofield, 138 A.2d 415 (R.I. 1958) with State v. Pigge, 322 P.2d 703 (Idaho 1957), where similar statutes were under consideration. In the latter case, a statute prohibiting the operation of any motor vehicle upon the public highways in such a manner as to endanger or be likely to endanger any persons or property, was found to be unconstitutional and void for uncertainty. In the former, a statute reading, "Reckless driving.—Any person who operates a motor vehicle on any of the highways of this state recklessly so as to endanger the lives or safety of the public shall be guilty of a misdemeanor," was found to be constitutional, and not too indefinite and uncertain. Neither decision seems unreasonable.

[15] OHIO REV. CODE §4511.12 (1953), as amended (Page's Supp. 1957). "No person shall operate a motor vehicle . . . in and upon the streets and highways at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, and no person shall drive any motor vehicle . . . in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead."

distance rule.[16] In the only other state where a similar statute has been challenged, the validity of the general speed prohibition was questioned, but not that of the assured clear distance rule.[17] Therefore we have no decision on the constitutionality or unconstitutionality of the assured clear distance rule. Perhaps one reason for this is the apparent reluctance of prosecuting attorneys to use the rule to impose criminal liability. The defendant, in cases where the assured clear distance rule seems to have been violated, is tried for reckless driving, for violation of the general or specific speed prohibitions, or for manslaughter based on the violation of these statutes.[18] And when an attempt to utilize the rule for a criminal prosecution was made, the judiciary seemed equally reluctant to apply it.[19] A search of recorded cases supports, by absence of example, the conclusion that the predication of criminal liability on the violation of the assured clear distance rule alone has not yet received the blessing of any court of record. Yet the rule is drafted as a prohibition, a penalty for violation is provided, and it is utilized by the state highway patrol as a basis for citations.[20] It has, however, received frequent use in civil cases either to establish negligence per se[21] or contributory negligence,[22] the courts saying the rule sets a standard of care.[23] If the rule can not be constitutionally used to subject an offender to criminal liability, it still may be used by the courts

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[16] Ohio v. Schaeffer, *supra* note 8. The assured clear distance rule was enacted in 1929 and added to the speeding prohibition which was then contained in OHIO GEN. CODE §6307-21.

[17] Iowa v. Coppes, 247 Iowa 1057, 78 N.W.2d 10 (1956). In Commonwealth v. Klick, 164 Pa.Super. 449, 65 A.2d 440 (1949), the court held the constitutional issues had not been properly raised, but added gratuitously that they had no merit. The assured clear distance rule was not mentioned. In Oklahoma and Michigan, the only other states which have the assured clear distance rule in its statutory form, the statute has apparently not been questioned.

[18] Ohio v. Wells, 146 Ohio St. 131, 64 N.E.2d 593 (1945); State v. Cheatwood, 84 Ohio App. 125, 82 N.E.2d. 770 (1948); Ohio v. Brookman, 52 Ohio Op. 283, 112 N.E.2d. 416 (1952).

[19] State v. Cheatwood, *supra* note 18. Manslaughter counts based on reckless driving, and the general speed prohibition and the assured clear distance rule, were affirmed on violation of the general speed prohibition—the jury found the defendant had not violated the reckless driving statute—after court agreement that the defendant had violated the assured clear distance rule, the court saying "can and *must* be sustained on" violation of the general speed prohibition. (Italics added.)

[20] The highway patrol automatically gives a citation based on violation of OHIO REV. CODE §4511.21 (1953), as amended, in any accident involving a rear end collision.

[21] Lukin v. Marvel, 219 Iowa 773, 259 N.W. 782 (1935); Bowmaster v. DePree Co., 252 Mich. 505, 233 N.W. 395 (1930).

[22] Gumley v. Cowman, 129 Ohio St. 36, 193 N.E. 627 (1934); Skinner v. Pennsylvania R.R., 127 Ohio St. 69, 186 N.E. 722 (1933).

[23] Skinner v. Pennsylvania R.R., *supra* note 22.

as a civil standard.[24] If the assured clear distance rule establishes a criminal offense—as it apparently attempts to do—then the rule raises the same question as the *Firth* case: whether it is certain enough and is not so vague and indefinite as to be a violation of due process. An argument can be made on both sides of the issue. From the discussions of the rule in the cases it is difficult to tell whether the courts view this part of the statute as creating a criminal offense, a civil standard, or both. The cases can best be harmonized by regarding the rule as having both a criminal and civil effect. Since the rule is not expressly made a standard of care by the legislature, its civil effect is solely the result of its acceptance as such by the courts.

Returning to the principal case, the situation in New York is not greatly changed by the decision that the general prohibition is too vague to be a basis for criminal liability, for the specific prohibitions on excessive speeds remain in effect. The vagueness of the subdivision invalidated could have permitted local law enforcement officers—in cases where insufficient evidence was available to convict under the specific speed prohibitions, or under the reckless driving statute—to attach criminal sanctions to an individual's conduct. The possibility of arbitrary action is one factor to consider when general speed statutes are in question. "It follows that in deciding upon the admissibility of flexible or indefinite terms, regard must be had to the circumstances under which, the persons by whom, and the sense of responsibility with which, the law will be applied, and to the consequences which an error will entail."[25] The same consideration applies to the assured clear distance rule. Perhaps the best argument against general speed prohibitions, with or without the assured clear distance rule, is that even if they can be sustained constitutionally, they are not needed to protect the public considering the other statutes available in this area.

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[24] Clinkscales v. Carver, 22 Cal.2d 72, 136 P.2d 777 (1943); Empire Life Insurance Co. v. Allen, *supra* note 8; Strickland v. Whatley, 142 Ga. 802, 83 S.E. 856 (1914); Solan & Billings v. Pasche, 153 S.W. 672 (Tex. Civ. App. 1913); Houston & T.C. Ry. v. Stevenson, 29 S.W.2d 995 (Tex. Comm. App. 1930).

[25] Freund, *The Use of Indefinite Terms in Statutes,* 30 YALE L. J. 438 (1921).