

OPINION
75-129

October 17, 1975 (OPINION)

Mr. Tom M. Beyer
State's Attorney
Billings County Courthouse
Medora, ND 58645

Dear Mr. Beyer:

This is in response to your letter of 8 October, 1975, as City Attorney of a named city of this state, with regard to prosecutions for violation of a city motorcycle helmet ordinance.

You indicate that now that the Attorney General has ruled that the state law was invalid, the question arises whether the various cities that have municipal ordinances should prosecute such offenses under the municipal code.

Your question is stated as:

"As it appears that the provisions of Section 39-06.1-02 refer to specifically the statutory fee established and there is no specific statutory fee or penalty provision under the motorcycle helmet statute is it not incumbent upon the City Attorney to refrain from prosecution in a situation whereby the Judge is the sole discretion would have to establish a fee as a punishment in the absence of a statutory fee being established in the penalty section thereof?"

Looking to the context of your letter as a whole, we believe we should comment first on the background situation and the former opinion to which you refer. It is our understanding, that there has been increasing vocalization among experienced motorcyclists against enforcement of the motorcycle helmet laws, they contending that such devices are actually extremely dangerous in the usual traffic situation. We understand that such vocalization culminated in the 29 July, 1975 national "protest ride" against the requirements of the Federal Department of Transportation of such legislation as a partial prerequisite to federal aid for state highways, though there had been some discussions of these matters prior to that date. For example, we might note that the only bill in the 1975 Session of the North Dakota Legislature that would have fulfilled those requirements as to "eye protection" was killed in that legislative session. Our current state legislation in such field was enacted at a time when there were thus opposing pressures in regard to such subject.

On such basis, we should probably reiterate at this time, that as stated in our prior opinion North Dakota definitely does have a motorcycle helmet law. We made and have heard no suggestion that same is invalid. We might add at this time, that we and we believe the legislative assembly, at least hope that same is "valid" enough, to continue North Dakota's

standing for eligibility for Federal Department of Transportation highway aid funds, at least until such time as HR3869 and HR6211 currently pending before the Federal Congress to eliminate such requirements have had a chance to pass or fail.

What our prior opinion stated was in effect that while North Dakota did have a motorcycle helmet law, no statutory fee, penalty, points etc. were provided for violation thereof, and on such basis we advised state's attorneys that they should not prosecute for violations thereof.

As to your new question, we should mention that in 1973 the North Dakota Legislative Assembly decided to decriminalize most traffic offenses and establish a uniform system of noncriminal penalties therefor. Prior to that time, most cities had adopted their own traffic codes, criminal type penalties for violations etc. By 1973, perhaps a large number of city traffic offenses were identical with state offenses, the basic distinction in many being that the fine, penalty or forfeiture for violation of a city ordinance went to the municipal treasury, whereas the fine, penalty or forfeiture for violation of the state law went into the basic endowment for the common schools of the state.

We are enclosing herewith a copy of our letter of 30 July, 1973 to an Assistant City Attorney, pursuant to his request for our viewpoint on same where we explained how, the result of this 1973 legislation was to in effect decriminalize all but the excepted offense under the state law, prescribed the state law "fees" as the "fees" under either state law or municipal ordinances, etc. Subsequent thereto, of course, the cities individually and working with their North Dakota League of Cities have revised their traffic ordinances, to conform to the state law, almost immediately as of the effective date of the biennial changes in the state law.

The 1975 Legislative Assembly continued this program in effect, easing some of the problems the cities had felt, by adopting such former municipal offense as "exhibition driving" and "drag racing" into the state law, and similar actions.

The current version of the statute you cite is as follows:

39-06.1-02. TRAFFIC VIOLATIONS NONCRIMINAL - EXCEPTIONS - PROCEDURES. Any person cited, in accordance with the provisions of sections 39-07-07 and 39-07-08, for a traffic violation under state law or municipal ordinance, other than an offense listed in section 39-06.1-05, shall be deemed to be charged with a noncriminal offense and may appear before the designated official and pay the statutory fee for the violation charged at or prior to the time scheduled for a hearing, or, if he has posted bond in person or by mail, he may forfeit bond by not appearing at the designated time. If the person appears at the time scheduled in the citation, he may make a statement in explanation of his action, and the official may at that time, in his discretion, waive, reduce, or suspend the statutory fee or bond, or both. If the person cited follows the foregoing

procedures, he shall be deemed to have admitted the violation and to have waived his right to a hearing on the issue of commission of the violation. The bond required to secure appearance before the official designated in the citation shall be identical to the statutory fee established by section 39-06.1-06. Within ten days after forfeiture of bond or payment of the statutory fee, the official having jurisdiction over the violation shall certify to the licensing authority:

1. Admission of the violation; and
2. In speeding violation, whether the speed charged was in excess of the lawful speed limit by more than nine miles per hour and the miles per hour by which the speed limit was exceeded.

This section shall not be construed as allowing a halting officer to receive the statutory fee or bond, unless he is otherwise authorized by law to do so.

Source: N.D.C.C.; S.L. 1975, ch. 339, section 8.

(Emphasis supplied by us).

Looking to the first use of the term "statutory fee" in that statute it is perhaps arguable whether same means the "statutory fee" under the state statute or perhaps something equivalent from a municipal ordinance, likewise, with the second time it appears, however, as used the third time in the statute, it is obvious that the legislative meaning in the use of that term throughout the statute, is the "statutory fee" under the state statute and in fact the "statutory fee" specified in the statute cited. As mentioned in our prior opinion there is no "statutory fee" in the state statute for violation of the motorcycle helmet law, and the above-quoted section does apply to the motorcycle helmet law (see section 39-10.2-07 of the 1975 Supplement to the North Dakota Century Code). The above-quoted section of the state statute does obviously make violation of the motorcycle helmet law, noncriminal and the criminal penalty under either section 39-07-06 and subsection 6 of section 12.1-32-01 of the state law, or under any municipal ordinances cannot apply to this "offense".

You do not forward a copy of your city's municipal ordinance on the subject matter with your request for an opinion. In one of the ordinances we have examined on the subject matter, we note that violation of the motorcycle helmet ordinance is "tossed in" with D.W.I. offense, the reckless driving offense, and the hit and run offense (all of which other offense are specifically left criminal under the state law and not decriminalized under the above-quoted section 39-06.1-02). The editor's note to the ordinance we have examined would indicate that the relevant section was apparently not expressly adopted by the governing body of the city, but was so printed at the discretion of the editors. In any case, however, as heretofore indicated, we do not believe there can be a criminal penalty or statutory fee for violation of a municipal ordinance equivalent to Section 39-10.2-06 of the 1975 Supplement to the North Dakota Century Code, our current "motorcycle helmet" law.

Our current reading of news articles etc. on the general subject does indicate that there have been municipal court "convictions", impositions of "fines" and/or "fees" for violation of municipal helmet ordinances et. We do not interfere with any processes of the judiciary, any citizen who wishes to plead guilty to such an "offense", pay the "fine" and/or "fee" assessed therefor, and not appeal therefrom has a perfect right to do so. However, under our responsibility, under subsection 17 of section 54-12-01 of the North Dakota Century Code, we must issue our opinion to you, on the same basis as our opinion to you as state's attorney of the county, under the state law, to the effect that as there is no penalty under the city ordinance for violation of its motorcycle helmet law, you as prosecuting attorney for the city should not prosecute for violations of a municipal motorcycle helmet law equivalent to section 39-10.2-06 of the North Dakota Century Code.

Sincerely yours,

ALLEN I. OLSON

Attorney General