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OPINION	:	No. 84-504
	:	
of	:	<u>AUGUST 29, 1984</u>
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THE HONORABLE ARTHUR DANNER III, DISTRICT ATTORNEY OF
SANTA CRUZ COUNTY, has requested an opinion on the following questions:

Should riding a bicycle on a highway while under the influence of alcohol or drugs or both be charged as a violation of Vehicle Code section 21200(b) or as a violation of Vehicle Code section 23152(a) as made applicable to bicycles by section 21200(a), and is the offense a misdemeanor or an infraction?

CONCLUSION

Riding a bicycle on a highway while under the influence of alcohol or drugs or both is an infraction which should be charged as a violation of Vehicle Code section 21200(b).

ANALYSIS

In separate cases three defendants were charged in the municipal court with driving a vehicle, to wit, a nonmotorized bicycle, while under the influence of alcohol. The three defendants sought a writ of prohibition to halt the prosecutions. The superior court granted the writ holding that the Legislature had not made the conduct with which the defendants were charged subject to criminal sanctions under the Vehicle Code. In *Clingenpeel v. Municipal Court* (1980) 108 Cal.App.3d 394 the Court of Appeal affirmed the judgment of the superior court and the Supreme Court denied hearing. This case was chosen to begin the analysis because at the time of the *Clingenpeel* case it is clear that the Vehicle Code did not make riding a bicycle while under the influence of alcohol a crime. We must therefore examine the changes made in the Vehicle Code since *Clingenpeel* to see if drunk bicycle riding has been made a crime.

The *Clingenpeel* case pointed out that the defendant was charged with violation of section 23102¹ which prohibited driving a vehicle while under the influence of intoxicating liquor. The court pointed out that section 670 defined "vehicle" in a way which excepted devices moved exclusively by human power. Thus section 23102 did not apply to bicycles. The prosecution had relied on section 21200 to make section 23102 applicable to bicycles. Section 21200 then read (as amended by ch. 987, Stats. 1975) as follows:

"21200. Every person riding a bicycle upon a roadway or any paved shoulder has all the rights and is subject to all the duties applicable to the driver of a vehicle by this division and Division 10 (commencing with Section 2000), except those provisions which by their very nature can have no application.

"A bicycle is a device upon which any person may ride, propelled exclusively by human power through a belt, chain or gears, and having either two or three wheels in a tandem or tricycle arrangement."

The *Clingenpeel* court discussed the origin of section 21200 pointing out that before 1943 its predecessor, section 452, provided:

"Every person riding a bicycle or riding or driving an animal upon a highway is subject to the provisions of this division applicable to the driver of a vehicle, except those provisions which by their very nature can have no application."

The court then noted that section 452 was amended in 1943 to read:

¹ Section references are to the Vehicle Code unless otherwise indicated.

"Every person riding a bicycle or riding or driving an animal upon a highway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this division, except those provisions which by their very nature can have no application."

The court observed that the pre-1943 version of section 452 making cyclists "subject to the provisions of this division" made it a crime for cyclists to violate any of the traffic laws. The court stated that the 1943 amendment had made the section ambiguous and later amendments had made it even more ambiguous. The court then interpreted section 21200 (the 1975 version quoted above) as follows:

"The intent apparent from the current provisions is that cyclists shall be subject to all of the duties embodied in the rules of the road. Should they violate any of such duties, they will suffer the same civil disabilities and liabilities suffered by the driver of a motor vehicle. Evidence Code section 669, subdivision (a)(1), creates a presumption of a failure to exercise due care from the fact that a person 'violated a statute, ordinance, or regulation of a public entity; . . . ' The provision of section 40000.1, making infractions of any violations of the rules of the road, have no application because that section is not in divisions 10 or 11, to which section 21200 refers. Thus, routine violations do not subject cyclists to criminal punishment. . . ."

The court summed up its ruling as follows:

"To summarize: in order validly to subject cyclists to criminal punishment, section 21200 must explicitly inform cyclists that their driving of a bicycle while under the influence of intoxicating liquor will render them liable to such punishment, and it must do so in terms sufficiently clear that men of common intelligence would not differ as to its application. Judged by this test, section 21200 of the Vehicle Code fails to meet due process standards. It characterizes no conduct as criminal and invokes no criminal penalty . . .

Since the *Clingenpeel* case the Legislature has amended the pertinent Vehicle Code sections in several respects. The section prohibiting the driving of a vehicle while under the influence of alcoholic beverages is now section 23152 and the penalties for its violation have been increased. The Legislature's response to the *Clingenpeel* case was the amendment of section 21200 by chapter 6, Statutes of 1982, which was again amended by chapter 273, Statutes of 1983, to now read as follows:

"21200. (a) Every person riding a bicycle upon a highway shall have all the rights and shall be subject to all the provisions applicable to the driver of a vehicle by this division, including, but not limited to, provisions dealing with driving under the influence of alcoholic beverages or drugs, and by Division 10 (commencing with Section 20000), Division 16.7 (commencing with Section 39000), Division 17 (commencing with Section 40000), and Division 18 (commencing with Section 42000), except those provisions which by their very nature can have no application.

"(b) Any person who rides a bicycle upon a highway while under the influence of an alcoholic beverage, or drugs, or under the combined influence thereof, shall be punished by a fine of not more than two hundred fifty dollars (\$250)."

This new statute not only restored the crime of drunk bicycle riding, it restored it twice producing the confusion which prompted this opinion. Subdivision (a) makes a person riding a bicycle on a highway "subject to all the provisions applicable to the driver of a vehicle" in divisions 10, 11, 16.7, 17 and 18 of the Vehicle Code.² This restores and extends the pre-1943 language making it a crime for a person riding a bicycle to violate the rules of the road. (Div. 11.) (*Clingenpeel v. Municipal Court, supra*, 108 Cal.App.3d 394.) Subdivision (b) of section 21200 independently defines the crime of drunk bicycle riding and fixes penalties for its violation. The problem is to determine how to reconcile and apply these two separate penal provisions in California.

The first step is to ascertain the precise elements of each offense to ascertain how they may differ. Subdivision (a) of section 21200 has the effect of substituting the words "any person riding a bicycle upon a highway" for the words "driver of a vehicle" or their equivalent in provisions of divisions 10, 11, 16.7, 17 and 18. One of those provisions is the drunk driving statute, section 23152(a). Making the above word substitution the new offense provides that it is unlawful for any person who is under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to ride a bicycle upon a highway. Thus the effect of combining section 21200(a)

². Section 21200(a) creates a new series of crimes consisting of applying the rules of the road for driving vehicles (Div. 10) to the riding of bicycles. It would not be accurate to describe these new offenses by reference to the section number of the particular rule of the road in question alone since that section applies only to the driving of vehicles. Instead we refer to the new series of offenses as violations of sections 21200(a) and the section number of the particular rule of the road in question. Thus we refer to one of the new offenses of drunk bicycle riding as a violation of sections 21200(a) and 23152(a).

with section 23152(a) is to define a crime identical in its elements to the crime defined in section 21200(b).

The penalties provided for the two provisions differ, however. Subdivision (b) expressly provides for a fine of not more than \$250. The penalty provided for the offenses defined in subdivision (a) of section 21200 requires some analysis. First, section 40000.1 provides that except as otherwise provided in this article it is unlawful and constitutes an infraction for any person to violate or fail to comply with any provision of this code. Section 40000.15 provides that violation of section 23152, relating to driving under the influence, is a misdemeanor and not an infraction. Would section 40000.15 make the offense of riding a bicycle on a highway while under the influence of alcohol or drugs a misdemeanor? We think not. Section 40000.15 applies to the offense defined by section 23152, i.e., driving a vehicle while under the influence, not to a new offense defined by combining section 21200(a) with section 23152(a). Instead, since nothing in the article containing section 40000.1 makes it a misdemeanor, that section would make any such new offense an infraction. Section 42001 provides that such infraction is punishable by a fine not exceeding \$50 upon a first conviction, not exceeding \$100 upon a second conviction within a year and not exceeding \$250 for a third or any subsequent conviction within one year.

Where two legislative enactments punish exactly the same act they are in conflict. (*People v. Lewis* (1934) 4 Cal.App.2d Supp. 775, 778.) Examining section 21200 we note that subdivision (a) creates a whole series of new bicycle riding offenses which correspond to many vehicle driving offenses while subdivision (b) defines a single offense. In relation to one another subdivision (a) is a general statute and subdivision (b) is a special act.

"It is the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment."

(*In re Williamson* (1954) 43 Cal.2d 651, 654; *People v. Gilbert* (1969) 1 Cal.3d 475, 479.) Stated another way, "prosecution under a general statute is precluded by a special statute when the general statute covers the same matter as, and thus conflicts with, the special statute." (*People v. Jenkins* (1980) 28 Cal.3d 494, 501; *People v. Ruster* (1979) 16 Cal.3d 690, 694.) While this rule does not apply where there are overwhelming indications of a contrary legislative intent (*People v. Jenkins, supra*, at 506), there are no such indications here. Accordingly, we conclude that the offense defined in section 21200(b) controls over and excepts from subdivision (a) of that section the new offense which might otherwise have been created by the combined effect of sections 21200(a) and 23152(a).

Therefore such an offense would be subject to a fine of not more than \$250. The penalty for other offenses covered by subdivision (a) would be governed by section 42001 imposing fines of \$50 upon a first conviction, not exceeding \$100 upon a second conviction within a year and not exceeding \$250 for a third or any subsequent conviction within one year. Offenses under both sections 21200(a) and 21200(b) would be infractions.
