



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 18, 1997

The Honorable Dennis Cadra  
Andrews County Attorney  
109th Judicial District  
Andrews County Courthouse  
Andrews, Texas 79714

Letter Opinion No. 97-086

Re: Whether lesser included offense for class C misdemeanor traffic violation may be submitted in a justice or municipal court or on de novo appeal in a county court (ID# 39334)

Dear Mr. Cadra:

You have asked whether the holder of a commercial driver's license who is charged with the serious traffic offense of excessive speeding may, in a trial in justice or municipal court or on de novo appeal in a county court, request submission of a charge on a lesser included offense of speeding. You state that a "number of charges have come through [your] office charging truck drivers with speeding at 76 miles per hour." You relate that "[t]heir attorneys insist that the lesser-included statute applies to the offense."

An offense is a lesser included offense if:

- (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
- (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
- (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
- (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

Code Crim. Proc. art. 37.09.

First, we consider the offense of "speeding." Section 545.351(a) of the Transportation Code mandates that "[a]n operator may not drive at a speed greater than is reasonable and prudent under the circumstances then existing." Section 545.352(b) sets the speed limits for vehicles and trucks that are lawful unless a special hazard exists requiring a slower speed for compliance with section

545.351(b).<sup>1</sup> A speed in excess of the limits established by section 545.352(b) or under another provision of this subchapter is prima facie evidence that the speed is not reasonable and prudent and that the speed is unlawful. Transp. Code § 545.352(a). We assume that when you refer to “speeding,” you refer to a violation of section 545.351(a).

Next, we consider the offense of “excessive speeding” by a commercial motor vehicle operator. The Transportation Code defines a “serious traffic violation”<sup>2</sup> as a conviction arising from the driving of a *commercial* motor vehicle, other than a parking, vehicle weight, or vehicle defect violation, for, among other things, “*excessive speeding*, involving a single charge of driving 15 miles per hour or more above the posted speed limit.” *Id.* § 522.003(25)(A) (emphasis added). The Transportation Code has set speed limits for commercial vehicles outside an urban district as follows:

[Sixty] miles per hour in daytime and 55 miles per hour in nighttime if the vehicle is a truck, other than a light truck, or if the vehicle is a truck tractor, trailer, or semitrailer, or a vehicle towing a trailer, semitrailer, another motor vehicle or house trailer of an actual or registered gross weight lighter than 4,500 pounds and a length of 32 feet or shorter, excluding the tow bar.

*Id.* § 545.352(b)(5)(C). As stated before, a speed in excess of the limits established by section 545.352(b) or under another provision of subchapter H is prima facie evidence that the speed is not reasonable and prudent and that the speed is unlawful.

Since *Royster v. State*, 622 S.W.2d 442 (Tex. Crim. App. 1981), courts have consistently applied a two-pronged test to determine whether a defendant is entitled to a charge on a lesser included offense: first, the lesser included offense must be included within the proof necessary to establish the offense charged, and second, some evidence must exist in the record that would permit a jury rationally to find that if the defendant is guilty, he is guilty only of the lesser offense. In applying the two-pronged test, the trial court must determine whether the evidence of the lesser offense would be sufficient for a jury rationally to find that the defendant is guilty only of that offense, and not the greater offense. *See Rousseau v. State*, 855 S.W.2d 666, 672 (Tex. Crim. App. 1993). These separate considerations were delineated in *Bell v. State*, 693 S.W.2d 434, 442 (Tex. Crim. App. 1985):

If evidence from any source raises the issue of a lesser included offense, the charge must be given. . . . A defendant’s testimony alone is sufficient to raise

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<sup>1</sup>Section 545.351(b) states that an operator “may not drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to actual and potential hazards then existing,” and that an operator “shall control the speed of the vehicle as necessary to avoid colliding with another person or vehicle that is on or entering the highway in compliance with law and the duty of each person to use due care.” *Id.* § 545.351(b)(1), (2).

<sup>2</sup>“A person is disqualified from driving a commercial motor vehicle for 60 days if convicted of two serious traffic violations, or 120 days if convicted of three serious traffic violations, committed in a commercial motor vehicle arising from separate incidents occurring within a three-year period.” Transp. Code § 522.081.

the issue. . . . As noted in *Thompson v. State*, 521 S.W.2d 621 (Tex. Cr. App. 1974), 'it is . . . well recognized that a defendant is entitled to an instruction on every issue raised by the evidence, whether produced by the State or the defendant and whether it be strong, weak, unimpeached, or contradicted.' . . . It is then the jury's duty, under the proper instructions, to determine whether the evidence is credible and supports the lesser included offense. [Citations omitted.]

The situation you describe meets the *Royster* test. In the first place, the offense of speeding may be established by proof of the same or less than all facts required to establish the commission of excessive speeding. One can commit the offense of speeding without committing the offense of excessive speeding, but the converse is not true--speeding is a subset of excessive speeding. The second prong of the *Royster* test requires that evidence must exist in the record that would permit a jury rationally to find the defendant guilty only of the lesser offense. Evidence from any source may raise the issue of a lesser included offense, and a defendant's testimony alone is sufficient to raise the issue, compelling the charge to be given. Therefore, if evidence existing in the record would permit a jury rationally to find a defendant guilty only of the lesser offense, then the charge of the lesser included offense must be given.

#### S U M M A R Y

The offense of speeding may be submitted as a lesser included offense of excessive speeding.

Yours very truly,



Rick Gilpin  
Deputy Chief  
Opinion Committee