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Municipal Corporations

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over them seems to stem more from tribal inertia than from hostility to state jurisdiction. Until the legislature acts affirmatively to assert jurisdiction over the Indian Tribes, situations such as those presented in the *Adams* and *Starlund* cases will continue to arise in Washington. A large number of Indians will continue to be without the protection of the state's courts.

LEON MISTEREK

MUNICIPAL CORPORATIONS

Suspension or Revocation of a Driver's License by Police Courts. The Washington Supreme Court recently announced that no police or municipal court may suspend a Washington State driver's license for violation of a municipal ordinance.

In *City of Bellingham v. Schampera,*[1] defendant Schampera was charged and convicted in the Bellingham police court of driving while under the influence of intoxicants in violation of a city ordinance[2] substantially similar[3] to RCW 46.56.010. He appealed to the Whatcom County Superior Court where a trial de novo[4] was had. He was convicted, fined $100 and sentenced to ninety days in the county jail. His driver's license was suspended for 6 months.

On appeal, Schampera argued that the state, by enacting RCW 46.56.010, had pre-empted the field of legislation with respect to drunken driving; that a municipality was without power to suspend or revoke a state driver's license for violation of a municipal ordinance; and that the Bellingham ordinance was invalid because the punishment provided thereunder was in excess of that allowed by law to be assessed by a municipal or police court. The court held against Schampera's first and third contentions but for him on the second.

With respect to the third contention, the Bellingham city ordinance provided:

> Upon the first conviction for the violation of the provisions of this section [one of which prohibits driving on the public highways while under the influence of intoxicating liquor] the court shall impose a fine of not less than fifty dollars or more than five hundred dollars and not less than five days or more than one year in jail, and shall in addition

[1] 157 Wash. Dec. 1, 356 P.2d 292 (1960).

[2] BELLINGHAM, WASH., CODE § 18.56.100 (1955).

[3] The ordinance forbade drunken driving and was, in its penalty provisions, a verbatim copy of RCW 46.56.010.

[4] "Though the appeal results in a trial de novo, the charge is still the violation of a municipal ordinance, and the superior court's authority is specifically limited on such an appeal by RCW 35.22.560... [$300 fine and/or ninety days imprisonment]." City of Bellingham v. Schampera, 157 Wash. Dec. 1, 11, 356 P.2d 292, 299 (1960).

thereto, suspend the operator's license of such person for not less than thirty days. . . .[5]

RCW 35.22.470[6] limits the power of a municipality to the imposition of a $300 fine and/or ninety days imprisonment for violation of city ordinances.

Although the sentence imposed upon Schampera was within the statutory limits (exclusive of the suspension of his operator's license, which is treated below), the defendant urged that that sentence could not be imposed because the quoted ordinance was void. The alleged invalidity arose out of the conflict between the maximum penalty provisions of the statute and the excess of the ordinance penalty provisions over that maximum. The issue thus defined was the validity of a city ordinance which provides a minimum penalty ($50 and/or five days) which is less than the statutory maximum ($300 and/or ninety days), but whose maximum penalty ($500 and/or one year) exceeds the statutory maximum.

In resolution of this issue, one of first impression, the court said:[7]

> There is a division of authority on this question, but we adopt the majority and, we believe, the preferable rule: that an ordinance which authorizes a penalty in excess of that permitted by statute is not void, and a sentence pronounced under such an ordinance may be enforced to the extent that it is within statutory limitations, *if the city's legislature would have enacted the ordinance knowing that only the lesser penalties could be imposed.* (Emphasis added.)

That the unitalicized portion of the rule above is the majority rule is undeniable.[8] That the italicized portion of the rule above is the majority rule is unsupportable.[9]

The variance between the majority rule and that used by the court is pointed out neither for criticism nor analysis but merely to draw attention to its existence. Should the occasion again arise which calls

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[5] BELLINGHAM, WASH., CODE § 18.56.100 (1955).

[6] Wash. Sess. Laws 1923, c. 182, § 1: "That any city of the first class shall have power by ordinance to provide for the punishment of all disorderly conduct, and of all practices dangerous to the public health or safety, and to make all regulations necessary for the preservation of public morality, health, peace and good order within its limits; to provide for the arrest, trial, and punishment of any person charged with violating any of the ordinances of said city; to provide for the imposition by police judges of a fine not to exceed three hundred dollars ($300), or imprisonment not to exceed ninety (90) days, or both such fine and imprisonment."

[7] City of Bellingham v. Schampera, 157 Wash. Dec. 1, 13, 356 P.2d 292, 300 (1960).

[8] See cases cited in 37 AM. JUR. *Municipal Corporations* § 164 (1941); Annot., 138 A.L.R. 1208; 62 C.J.S. *Municipal Corporations* §§ 178, 354 (1949).

[9] Kist v. Butts, 71 N.D. 436, 1 N.W.2d 612 (1942), the case cited by the court in support of the rule, provides no such authority, nor do the cases cited therein. See also note 8 *supra*.

for use by the court of the rule adopted, one of three things will happen: the court will adopt the additional requirement by pointing out, as it did in the instant case,[10] that the municipality has enacted previous ordinances on the subject and, therefore, that the legislative intent is clear; or the court will second-guess the municipal legislative body; or the variation will be eliminated by the court. In view of the court's announced intention to uphold municipal regulations whenever possible,[11] the last alternative would seem to be preferable.

Also worthy of brief note are the standards used by the court in disposing of Schampera's first contention that the state has taken over the field of drunken driving legislation generally. Looking, routinely enough, to the legislative intent in adopting RCW 46.56.010 (the drunken driving statute), the court, finding no exclusionary intent on the face of the statute, perceived no pre-emptive intent. Looking then to ascertain whether the Bellingham ordinance was "pre-empted," *i.e.*, invalid, because of conflict with RCW 46.56.010, the court, citing *Salt Lake City v. Kusse*,[12] approved and used[13] the following test for determining whether or not a conflict existed:

> In determining whether an ordinance is in "conflict" with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.... Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits....

Attention is drawn to the court's use of this test because the Washington court has not previously stated the rule so concisely. Numerous decisions[14] can be found, however, which attest the use of very similar criterion. In fact, none has been found which bespeaks use of a different standard.

Schampera's second contention on appeal, and the only one which the court accepted, was that a municipality is without power to provide for the suspension or revocation of a driver's license for violation of a city ordinance. Because of the important and practical considerations raised by the court's acceptance of this contention, it deserves a more detailed treatment.

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[10] City of Bellingham v. Schampera, 157 Wash. Dec. 1, 13, 356 P.2d 292, 300 (1960).
[11] See *e.g.* Sandona v. City of Cle Elum, 37 Wn.2d 831, 840, 226 P.2d 889, 892 (1951).
[12] 97 Utah 113, 119, 93 P.2d 671, 675 (1939).
[13] City of Bellingham v. Schampera, 157 Wash. Dec. 1, 6, 356 P.2d 292, 296 (1960).
[14] *E.g.*, Fazio v. Eglitis, 54 Wn.2d 699, 344 P.2d 521 (1959); Lauterbach v. City of Centralia, 49 Wn.2d 550, 304 P.2d 656 (1956); City of Yakima v. Gorham, 200 Wash. 564, 94 P.2d 180 (1939).

The court's rationale in handling this problem may be summarized as follows: The state constitution grants a municipality the power to "make and enforce . . . all such local police . . . regulations as are not in conflict with general laws."[15] "General law"[16] has limited the enforcement power of the municipality to imposition of a $300 fine and/or imprisonment for ninety days for violation of a municipal ordinance. Therefore, without a specific grant of authority from the legislature, a municipality cannot revoke or suspend a driver's license for violation of a municipal ordinance.

The court further reasoned that RCW 46.08.190, which provides that a "police court judge shall have concurrent jurisdiction with superior court judges of the state for all violations of the provisions of this title and may impose any punishment provided therefor," does not contain a special grant of authority to municipalities to suspend or revoke a driver's license for violation of a municipal ordinance alone because the "provisions of this title" refers to state laws, not city ordinances. Therefore, RCW 46.08.190 does not modify RCW 35.22.470.[17]

The court also failed to find a specific grant of power to police judges to suspend or revoke licenses in RCW 46.20.280.[18] Although that section contains an apparent grant of power, the court pointed out[19] that the codification does not conform to the session laws. Citing an opinion of the Washington Attorney General,[20] the court thought the session law was ambiguous and declined to give it any effect.

Except for the last mentioned holding, the court's rationale is unimpeachable. The entire rationale is unimpeachable *if* the premise is accepted that the session law is ambiguous. The finding of ambiguity is, however, subject to serious question. RCW 46.20.280 reads:

> Every court having jurisdiction over any of the offenses defined by this chapter or any other law of this state or by the ordinances of any city or town regulating the operation of vehicles on the public highways, shall forward to the Director a record of the conviction or forfeiture of bail of any person in such court for the violation of any provision of law relating to the licensing of vehicle operators or of any law regulating the operation of vehicles on the public highways, and a record of the conviction or forfeiture of bail of any person for the violation of any municipal ordinance which violation would also be an

[15] WASH. CONST. art. XI, § 11.
[16] RCW 35.22.470.
[17] *Ibid.*
[18] Wash. Sess. Laws 1939, c. 182, § 10.
[19] City of Bellingham v. Schampera, 157 Wash. Dec. 1, 9-10, 356 P.2d 292, 298 (1960).
[20] 1941-42 OPS. WASH. ATT'Y GEN. 229.

offense under the provisions of law relating to the licensing of vehicle operators or of any law regulating the operation of vehicles on the public highways. *In such latter case the court may also revoke or suspend the vehicle operator's license of the defendant.* (Emphasis added.)

Chapter 182 Section 10 of the Laws of 1939 reads:

Every court having jurisdiction over any of the offenses committed under this act or any other act of this state or under the ordinance of any incorporated city or town of this state regulating the operation of vehicles on any of the public highways, shall forward to the Director of Licenses a record of the conviction or of forfeiture of bail by any person in said court for the violation of any provision relating to the licensing of vehicle operators or of any act of this state regulating the operation of vehicles on any of the public highways and a record of the conviction of or forfeiture of bail by any person in said court for the violation of any municipal ordinances which violation would also be an offense under the provisions relating to the licensing of motor vehicle operators or any act of this state regulating the operation of vehicles on any of the public highways in which case such court may in its discretion revoke or suspend the vehicle operator's license of such person.

As pointed out by the court, the italicized portion of RCW 46.20.280 does not conform to the session law. Admittedly, the session law is poorly drafted, but the codifier's reading of the law, as evidenced by the slight variation indicated, seems to be a true and reasonable codification of the law.

The issue can be somewhat clarified by taking only so much of the session law as is pertinent to the power of a municipality to suspend or revoke a driver's license. The law then reads:

Every court having jurisdiction over any of the offenses committed under ... the ordinance of any incorporated city or town of this state regulating the operation of vehicles on any of the public highways shall forward to the Director of Licenses ... a record of the conviction of or forfeiture of bail by any person in said court for the violation of any municipal ordinances which violation would also be an offense under the provisions relating to ... any act of this state regulating the operation of vehicles on any of the public highways in which case such court may in its discretion revoke or suspend the operator's license of such person.

Read in this manner, the session law may more easily be seen to allow every court to revoke or suspend a driver's license where the act with which the licensee is charged violates both a municipal ordinance and the state law. Where such a dually violative act is committed, the

court must forward a record of the conviction or forfeiture of bail, whether or not the court suspends or revokes the driver's license. Thus the commission of the dually violative act not only allows the revocation or suspension of the license, but requires the sending of a report to the Director of Licenses. This section is thus seen to complement RCW 46.08.190 (the concurrent jurisdiction provision). The latter section allows municipal courts to revoke or suspend licenses for violation of state laws. This section allows municipal courts to do likewise where the violation of the municipal ordinance is also a violation of state law.

Under the attorney general's interpretation of the law, which the court accepted, it is not the commission of the dually violative act which occasions the permissive use of the extraordinary power but rather the fact that the court was required to send a report to the Director.[21] That the power of suspension or revocation should be available to the court merely because the court is required to make a report to the Director is called an absurdity by the assistant attorney general and by the court. But is it not the interpretation and not the law which is absurd?

A well-known canon of statutory construction calls for that interpretation of a legislative enactment which gives meaning and effect to all the provisions thereof. Furthermore, in *Sandona v. City of Cle Elum,*[22] the court said that "It is only in extreme cases that courts limit the police power of a municipal corporation; and this is particularly true in such a case as is here presented, where it appears that the ordinance was enacted for the protection of the city and its inhabitants against an ever-present danger."

It would seem that the codifier's interpretation of the act, which gives it meaning and vitality, is to be preferred over the attorney general's, which renders it a nullity. Yet, it must be pointed out that the court has not foreclosed itself from adopting the former interpretation in some circumstances. The court held: "We are satisfied that neither RCW 46.56.010 nor RCW 46.20.280 gives any authority to a police court to suspend a motor vehicle operator's license as a penalty for a violation of a municipal ordinance. . . ."[23] The court did not hold that these sections do not grant the power of suspension or revocation where the defendant is charged with both the violation of a municipal

[21] *Ibid.*
[22] 37 Wn.2d 831, 840, 226 P.2d 889, 892 (1951).
[23] City of Bellingham v. Schampera, 157 Wash. Dec. 1, 10, 356 P.2d 292, 298-99 (1960).

ordinance and of a state law. The court dealt only with the situation where the defendant is charged with violation of a municipal ordinance alone. When the proper case arises, *i.e.*, one in which the defendant is charged in municipal court with both violations, the court may hold that under these circumstances a police court can, upon conviction of either charge, revoke or suspend a driver's license under RCW 46.20.080.

In summary, the present status of the law is that a municipal court cannot revoke or suspend a motor vehicle operator's license upon conviction of violation of a municipal ordinance alone under either RCW 46.56.010 or RCW 46.20.280. A municipal court can suspend a license upon conviction of violation of a state statute regulating use of the highway under RCW 46.08.190. Where the defendant is charged and convicted of violation of a municipal ordinance, and the same act done by the defendant is violative of both an ordinance and a state statute, but no charge is made based upon the statute, the *Schampera* case must be taken to say that the municipal court cannot revoke or suspend the driver's license. Where the defendant is charged with the violation of both an ordinance and a statute, but is convicted only of the violation of the ordinance, it is an open question whether or not a municipal court can deprive him of his driver's license.

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PLEADING, PRACTICE, AND PROCEDURE

Abolition of the Show Cause Order. Are Washington practitioners wasting their own time and their clients' money? It may be that some are by following procedure not contemplated by the new Rules of Pleading, Practice, and Procedure.

This observation is occasioned by the recently decided case of *Dlouhy v. Dlouhy*.[1] The case arose out of a petition to vacate a default divorce decree taken by the wife. The petition was grounded upon lack of notice.

Upon initiating the proceedings, the wife obtained, ex parte, a temporary restraining order prohibiting the husband from selling or encumbering the property, and an order directing the husband to show cause why the restraining order should not be converted to a temporary injunction pendente lite, and why he should not be ordered to vacate the home. No answering affidavits were entered, but on the return day

[1] 55 Wn.2d 718, 349 P.2d 1073 (1960).