Washington Law Review

Volume 36
Number 2 *Washington Case Law—1960*

7-1-1961

Pleading, Practice, and Procedure

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Recommended Citation

C. D. Sheppard, Washington Case Law, *Pleading, Practice, and Procedure*, 36 Wash. L. Rev. & St. B.J. 167 (1961).
Available at: https://digitalcommons.law.uw.edu/wlr/vol36/iss2/9

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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.

C. DAVID SHEPPARD

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).

of the order the husband appeared in court, without counsel, and successfully defended to the extent that he was not required to vacate the home. The plaintiff wife subsequently filed a motion and affidavit for an order of default, and later obtained an uncontested decree of divorce. Defendant husband was given no notice of these proceedings and took no action other than his personal appearance in court in response to the show cause order.

There was no question but that in personam jurisdiction had been obtained over the husband by the service of summons and complaint; the question was whether his response to the show cause order was such a voluntary participation in the case as to indicate his appearance and willingness to defend and, therefore, to entitle him to notice of motions and other proceedings in the case.

The court held that the husband's presence at the hearing and his argument against the entry of the order was such a *voluntary* act as to constitute a common law appearance and, therefore, entitled the defendant to such notice. Had the court held otherwise, it would have had to base its holding upon a finding that the show cause order *required* the physical presence of the defendant or his counsel.

For the purposes of this Note, the important facet of the case is the court's holding that the husband's response to the show cause order was voluntary.

Since such a response is voluntary, there is no distinction between the legal effect of an order to show cause and an ordinary notice motion. The difference lies in procedure.

Stripped to its essence, the show cause order procedure requires that, upon affidavits filed in support thereof, the order be signed by the court, filed, and a certified copy be obtained and served personally upon the adverse party, following which argument on the merits will be heard on the return day.[2] The noticed motion procedure requires only that the motion for the requested relief, supported by affidavits, together with a notice of the hearing thereof, be given to the adverse party or his representative, similarly followed by argument on the merits on the day noted for the hearing.

In theory, the noticed motion procedure would seem to be the only course authorized in divorce,[3] or other proceedings[4] by the Washington Rules of Pleading, Practice, and Procedure.

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[2] See TOWNE, WASHINGTON PRACTICE § 1087 (1956).

[3] RCW 26.08.140: "The practice in civil action shall govern all proceedings in the trial of actions for divorce. . . ."

[4] An exception to this general statement is provided by WASH., RULES, PLEADING,

Rule 7(b)(1) directs that "an application to the court for an order shall be by motion. . . ."[5] Although the show cause order is still widely used in divorce and injunction proceedings, it is not a motion and would not seem to be within the ambit of the quoted rule.

A further argument for the point that the rules do not authorize the show cause procedure is found by reference to history. This procedure has been used by the courts for literally centuries. Yet, the supreme court has omitted any mention of it in the general rule, Rule 7,[6] but has provided for its use in a specific instance, vacation of a judgment, Rule 60.04W. By the canons of statutory construction, use of the show cause procedure should then be restricted to the specific instance mentioned. This general exclusion but specific inclusion, viewed against the historical background of use, would seem to allow but one view—that the court's failure to make provision for the show cause procedure was deliberate.

In practice, the disadvantage of the show cause order lies in the time-consuming process of securing the signature of the court prior to service. Especially is this true in the more populous counties. A second disadvantage arises when the request for temporary relief is made after the service of summons and complaint. A copy of the order and affidavit in support thereof must be certified and personally served upon the defendant. Thus, a fee, in addition to that already paid for the service of the summons and complaint, must be paid. Utilization of the show cause procedure adds to the plaintiff's costs the expense of the time spent in securing the signature, the cost of certification, and, occasionally, an extra fee to the process server.

Petitioning the court to grant the desired order by means of the noticed motion eliminates these undesirable economic results and time-consuming procedures.

There is, however, an aspect of the show cause procedure which may be desirable to retain. Although the court has said that the response to the show cause order is voluntary, this is undoubtedly not the impression conveyed to the average recipient of such an order—to him it is an order, signed by a judge, directing him to appear. There is a strong practical coercion to appear.

PRACTICE, PROCEDURE 60.04W, which authorizes a show cause order in an action for the vacation of a judgment. It is, of course, possible that this discrepancy is a mere oversight by the court. Another possible exception is noted in the principal case, dealing with contempt proceedings. 55 Wn.2d 718, 722, 349 P.2d 1073, 1075 (1960).

[5] WASH., RULES, PLEADING, PRACTICE, PROCEDURE 7(b)(1).

[6] *Ibid.*

Where desired, this practical coercion can be transferred to the noticed motion simply by appending to the notice a warning, as strongly worded as necessary, to the effect that an order may be entered at the hearing which will bind the notice recipient under pain of contempt of court for failure to obey. In this way the noticed motion can assume the desirable aspects of the show cause order while doing away with the practical disadvantages. There remains little, if any, reason for retaining the show cause order procedure.

In summary, the show cause order has no more legal coercive effect as the show cause order, it eliminates the ex parte hearing, and is a less complex procedural device. Abandonment of the show cause order, with the two noted exceptions,[7] would seem to be amply justified.

C. DAVID SHEPPARD

TORTS

Warrantless Arrest. The Washington Supreme Court in the case of *Plancich v. Williamson*,[1] has indicated that the police of this state will receive judicial protection in suits instituted by private individuals because of arbitrary and unreasonable police action. In the *Plancich* case, the court sustained the right of the police to arrest a citizen of this state without a warrant, on the barest of circumstances supporting the police contention that there was probable cause for the arrest. The *Plancich* case is more remarkable than other decisions of the court on this point, since neither the court nor the police department could decide if the facts which were relied upon to support a warrantless arrest of the suspect justified a suspicion that he had committed a felony, or that he was dangerously insane. It is submitted that the following facts, upon which the court and the police department relied, support neither contention.

About 10:30 one Sunday evening, Jerry Plancich, father of Louis Plancich, the plaintiff, came into the Olympia Police Station, and in very erratic and broken English told the acting desk sergeant that his son, armed with two guns, a small one and a big one, had knocked on his bedroom door and threatened to kill him. Acting upon the complaint, the sergeant and one other officer went to the Plancich home. The officers knocked on the door but received no response. They then looked through a window and observed Louis Plancich sitting at a

[7] Note 4 *supra*.

[1] 157 Wash. Dec. 265, 357 P.2d 693 (1960).