

Oregon Law Commission
JUSTICE AND MUNICIPAL COURTS APPEALS WORK GROUP
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**Violation Cases: Appeals from Circuit Court to Court of Appeals:
Should They Proceed as Civil or Criminal Cases**

Introduction

Violation cases initially heard in a justice court or a municipal court not of record can be appealed *de novo* to the circuit court; violation cases also can be initiated and decided in the circuit court in the first instance. In either event, the circuit court's decision can be appealed to the Court of Appeals. Likewise, violation cases decided by a municipal or justice court of record can be appealed to the Court of Appeals. Under current law, those appeals proceed under ORS chapter 19, which governs appeals in civil cases, despite that, for most purposes, violation cases proceed in trial courts as criminal cases. ORS 138.057(1)(a) (providing that appeals in violation cases from justice and municipal courts of record to the Court of Appeals will proceed under ORS chapter 19); ORS 138.057(3)(a) (providing that appeals in violation cases from circuit court to the Court of Appeals will proceed under ORS chapter 19.) (ORS 138.057(3)(a) applies to violation cases decided by the circuit court in the first instance or on appeal from a justice or municipal court not of record.)

For the reasons that follow, the Oregon statutory scheme should be amended to provide that appeals in violation cases from justice and municipal courts of record or from circuit court should proceed under ORS chapter 138, which governs procedures on appeal in criminal (misdemeanor and felony) cases.

Violation Cases Generally are More Like Criminal Cases than Civil Cases

Violation cases are not like civil cases, which typically involve resolving disputes between private parties about their personal and property rights, such as real or private property disputes, breach of contract cases, dissolution of marriage cases, etc. Violations, like misdemeanors and felonies, are created by political entities pursuant the state's

police power, and the issues that arise in the prosecution and defense of violations are more like the issues that arise in criminal cases rather than civil cases. As such, then, on appeal, violation cases should be treated as criminal cases for case processing purposes.

**In Trial Courts, the Rules of Procedure Governing Criminal Cases
Apply to Violation Cases**

ORS 53.030(1) in material part provides:

(1) The procedures provided for in this chapter apply to violations described in ORS 153.008. Except as specifically provided in this chapter, the criminal procedure laws of this state applicable to crimes also apply to violations.

ORS chapter 53 prescribe procedures that differ from the procedures governing criminal cases, but they address the same topics, such as stops and detention, citation forms, initiation and prosecution of violations by law enforcement officers, requiring a defendant to appear and enter a “plea,” authorizing issuance of a warrant for the arrest of a defendant who fails to appear, a defendant is found “guilty” or “not guilty,” if the defendant is found guilty the trial court imposes a “sentence,” and the sentence may include a fine and restitution. Those are permutations of statutes that govern criminal cases generally., And as noted above, in ORS 53.030 specifically provides, “* * * Except as specifically provided in this chapter, the criminal procedure laws of this state applicable to crimes also apply to violations.”

Oregon law does distinguish between violation cases and criminal cases based on whether, on conviction, the trial court may impose a term of confinement. ORS 161.505:

An offense is conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law or ordinance of a political subdivision of this state. *An offense is either a crime, as described in ORS 161.515, or a violation, as described in ORS 153.008.*

(Emphasis added.)¹ But, both violation and criminal cases are part of the larger category of offenses and, in that sense, they are treated similarly.

¹ Similarly, ORS 153.008(3) provides: “The offense is created by an ordinance of a county, city, district or other political subdivision of this state with authority to create offenses, and the ordinance provides that violation of the ordinance is punishable by a fine but does not

Statutes Governing Appeals from Justice and Municipal Courts Not of Record to Circuit Court Mirror ORS Chapter 138

ORS 55.250 to ORS 55.285 govern appeals from justice and municipal courts not of record to the circuit court in violation and misdemeanor cases. Apart from treating violation cases the same as misdemeanor cases, those provisions mirror provisions in ORS chapter 138 governing appeals in criminal cases from circuit court to the Court of Appeals. For instance, ORS 55.250 allows a defendant to appeal from a judgment of conviction, restitution decisions, and probation revocation, and sets the conditions under which a defendant may cross-appeal when the state has appealed a pre-trial order under ORS 55.250. If the parties want to appeal from the circuit court's decision in violation cases, there are no comparable provisions in ORS chapter 19 governing such appeals. But there are comparable provisions in ORS chapter 138. See ORS 138.035 and ORS 138.045.

Similarly, while ORS chapter 19 has detailed provisions about which parties may appeal from the circuit court to the Court of Appeals in civil cases and what kinds of decisions parties can appeal (see particularly ORS 19.245), none of those provisions apply to violation cases.

By contrast, ORS 55.300 to ORS 55.330 govern appeals in civil cases arising from justice court and those provisions mirror provisions in ORS chapter 19 governing appeals in civil cases.

It makes sense, then, on appeal from justice and municipal courts of record and from circuit court to the Court of Appeals in violation cases to treat them the same as appeals from justice and municipal courts not of record to the circuit court, that is, to have such appeals proceed under ORS chapter 138 governing appeals in criminal cases rather than proceeding under ORS chapter 19 governing appeals in civil cases.

provide that the offense is punishable by a term of imprisonment. The ordinance may provide for punishment in addition to a fine as long as the punishment does not include a term of imprisonment.”

Statutes in ORS ch. 19 that Should Not Apply to Violation Cases; and Statutes in ORS ch. 138 that Should Apply to Violation Cases

I have reviewed the statutes in ORS chapters 19 and 138; accompanying this memorandum is a summary of that review.

Under current law, many of the statutes that govern appeals from circuit court to the Court of Appeals apply to both civil and criminal cases. ORS 138.005(1) provides that the definitions in ORS 19.005 governing appeals in civil cases also apply in criminal cases. Also, ORS 138.015 makes 14 statutes in ORS chapter 19 applicable to appeals in criminal cases, addressing such matters as when jurisdiction attaches in the appellate court, preparation of the record on appeal, authorizing a reversal of the judgment being appealed if the circuit court record is lost or destroyed, and issuance of the appellate judgment. There are five additional statutes in ORS chapter 19 that contain virtually identical or substantially equivalent provisions as provisions in ORS chapter 138, addressing such topics as how to initiate an appeal, the Court of Appeals' authority to transfer appeals to the Supreme Court, and review of intermediate orders on appeal.

But, there are 23 statutes in ORS chapter 19 that have no application to violation cases, such as statutes dealing with appeals in class actions and domestic relations cases, undertakings and stays on appeal, dispositional alternatives on appeal, awarding attorney fees, and awarding damages on affirmance of judgment. Another statute addressing the scope of review in civil cases does not apply to violation cases because ORS 138.057 requires the scope of review for criminal cases to apply to violation cases.²

² There are four statutes in ORS chapter 19 that should apply to criminal cases, including violation cases: ORS 19.235 (jurisdiction for determining whether decision is appealable); ORS 19.265 (payment of filing fee); ORS 19.400 (where appeals heard); and ORS 19.500 (service of documents under provisions of chapter). ORS 138.015 should be amended to make ORS 19.235, 19.400, and 19.500 applicable to criminal cases and a version of ORS 19.265 should be added to ORS chapter 138.

There are 19 statutes in ORS chapter 138 that should be applicable to appeals in violation cases but are not; two other statutes addressing stays pending appeal that, by their terms, are applicable to violation cases; and one statute, ORS 138.057, that provides that violation cases are to be treated as appeals in civil cases. The latter statute makes no sense in that, if violation cases are to be treated as appeals in civil cases, those provisions should be in ORS chapter 19, not ORS chapter 138.

The statutes that make up ORS chapter 138 are a better fit for disposition of appeals in violation cases as compared to the provisions of ORS chapter 19.

Work Group's Prior Consideration of this Matter

The previous iteration of the Justice and Municipal Court Appeals Work Group initially decided that appeals in violation cases from justice and municipal courts of record and circuit court should proceed under ORS chapter 138. However, shortly before the Work Group needed to submit its draft bill to Legislative Counsel, the Work Group representative from the Office of the Public Defender requested reconsideration of that decision for two reasons:

Ancillary Proceedings Civil in Nature

The OPD representative asserted that there can be ancillary proceedings in violation cases that are appealable only under ORS 19.205 and, if violation cases proceed on appeal under ORS chapter 138, the final disposition of such ancillary proceedings will no longer be appealable. For instance, apparently the City of Portland has adopted an ordinance authorizing vehicles subject to a certain number or amount of unpaid parking (or traffic?) citations to be forfeited.³ Under Oregon case law, a criminal forfeiture proceeding is considered a special statutory proceedings and subject to appeal under ORS 19.205(5),

³ ORS 131.550 to 131.604 addresses forfeiture of property as part of prosecution of a crime under state law; ORS 131.553(2) recognizes that counties and cities may adopt forfeiture provisions enforceable as part of prosecutions of violations and misdemeanors created by county or city ordinances.

notwithstanding that the proceedings arises within a criminal case. *State v. Branstetter*, 332 Or 389 (2001) (so holding).

ORS 138.065 arguably addresses appeals in such cases:

“A party may appeal a judgment or order deciding a special statutory proceeding as provided in ORS 19.205.”

As applicable here, ORS 19.205(5) provides:

“An appeal may be taken from the circuit court in any special statutory proceeding under the same conditions, in the same manner and with like effect as from a judgment or order entered in an action, unless appeal is expressly prohibited by the law authorizing the special statutory proceeding.”

The problem is with the word “statutory” in both statutes, which suggests that only special proceedings prescribed by state law would be subject to appeal under those statutes and that special proceedings prescribed by city or county ordinance would not.

That problem can be addressed by amending ORS 138.065 follows:

ORS 138.065. A party may appeal a judgment or order deciding a special statutory proceeding as provided in ORS 19.205. **As used in this section “special statutory proceeding” includes a proceeding created by a city, county, district or other political subdivision of this state pursuant to a state statute.**

Legislature’s Reason for Making Appeals in Violations Case
Subject to ORS chapter 19 is Unclear

ORS 138.057 as originally enacted in 1993 provided for appeals in violation cases under ORS chapter 19 rather than ORS chapter 138, the legislature (or at least the sponsor of the bill) must have had a good reason for doing so, and we should not propose to amend that law until we know what that reason was. I and others have researched the legislative history and record of the bill that resulted in the enactment of ORS 138.057. Unfortunately, that record does not reveal why the bill provided for appeals in violation cases to proceed under ORS chapter 19 rather than chapter 138, notwithstanding that, for virtually all other procedural purposes, Oregon law treats violation cases like criminal cases.

I was a member of the Oregon Judicial Department appellate legislation review team in 1993 when the bill that became ORS 138.057 was proposed. I was relatively unfamiliar with appeals in violation cases at that time and, for two reasons, did not question why violation cases would proceed as appeals in civil cases. First, I knew that Oregon law

prescribed filing and first appearance fees on appeal in violation cases the same as civil cases. By contrast, no filing or first appearance fees are prescribed for criminal cases. Second, I was aware that the United States Supreme Court had decided that, for the purposes of the 6th Amendment to the United States Constitution, defendants in cases where the defendant could not be imprisoned for more than six months were not entitled to a jury trial or court-appointed counsel. Under Oregon law, by definition, a defendant charged with a violation can only be fined and cannot be imprisoned, therefore, such cases were not criminal cases for the purpose of the 6th Amendment. So, I thought at that time, if violation cases were not criminal cases, necessarily, they must be civil cases.

Of course, that is not true: the legislature is entitled to adopt procedures governing violation cases that are neither wholly civil or wholly criminal, and those provisions could be very criminal-like or very civil-like or a mixture of the two. As described above, the Oregon legislature has decided that violation cases in trial courts are subject to procedures that are very much like procedures in criminal cases, except that no imprisonment can be ordered as part of a sentence and there is no right to a jury trial or court-appointed counsel. And, on appeal, the appellate court's scope of review is the same as criminal cases.

Regardless of why the legislature originally adopted ORS 138.057 in 1993 to require appeals in violation cases to proceed as appeals in civil cases, merely because "we have always done it that way" is not a sufficient reason to continue doing it that way if there are good reasons for doing it a different way. This memorandum has set out reasons why it is better that appeals in violation cases in the Court of Appeals proceed under ORS chapter 138 rather than ORS chapter 19. I urge the Work Group to adopt amendments that result in appeals in violation cases from the circuit court to the Court of Appeals proceeding under ORS chapter 138.