ISSUED MAY 6, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

NISHAN & PREETINDER HUNDAL dba Tip Top Liquors 439 South Bascom Avenue San Jose, CA 95128, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6701 File: 21-234649 Reg: 96035026 Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja Date and Place of the Appeals Board Hearing: March 5, 1997 San Francisco, CA

Nishan and Preetinder Hundal, doing business as Tip Top Liquors (appellant), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their off-sale general license revoked, with revocation stayed for a probationary period of three years, and suspended the license for 10 days for possession of drug paraphernalia for sale, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Health and Safety Code §11364.7,

[1]The decision of the Department dated July 25, 1996, is set forth in the appendix.

subdivision (a).[2]

Appearances on appeal include appellants Nishan and Preetinder Hundal, appearing through their counsel, Neil Ison; and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert M. Murphy.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on August 21, 1989. Thereafter, the Department instituted an accusation alleging that appellants violated Health and Safety Code §11364.7, subdivision (a), for being in possession of drug paraphernalia, as defined in Health and Safety Code §11014.5, for purposes of sale.

An administrative hearing was held on June 7, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the Department's seizure of numerous (approximately 700) items of alleged drug paraphernalia which were displayed in, and offered for sale from, appellants' licensed premises. Subsequent to the hearing, the Department issued its decision which determined that appellants violated the Health and Safety Code provision cited above, and ordered appellants' license revoked, with revocation stayed for a probationary period of three years, and imposed an actual 10-day suspension. Appellants thereafter filed a timely notice of appeal.

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[2] The text of Health and Safety Code §11364.7, subdivisions (a) and (d), and an excerpt of the text of Health and Safety Code §11014.5, subdivision (a), which defines "drug paraphernalia," are set forth in the appendix.

In their appeal, appellants raise the following issues: (1) the Department failed to prove the essential element of scienter; and (2) the Department is guilty of selective enforcement.

DISCUSSION

I

Appellants contend that the Department failed to prove that appellants possessed the necessary element of scienter, without proof of which there is no violation of Health and Safety Code §11364.7, subdivision (a).

Appellants argue that the Department failed to prove that the items confiscated as drug paraphernalia were ever sold to any specific customer for use with controlled substances. Appellants assert that their intention was to sell the items only for use with ordinary smoking tobacco, and that if anyone indicated to them that they intended to use the product for an illicit purpose, they would not sell to them. To that end, appellants placed signs in several areas of the store stating "PLEASE DO NOT USE ANY ILLEGAL REFERENCE CONCERNING OUR PRODUCTS. ANY ONE IGNORING THIS REQUEST WILL BE REFUSED SERVICE & ASKED TO LEAVE THE STORE." (See Exhibit B-1).

The Department contends, and the Administrative Law Judge (ALJ) so found, that appellant Nishan Hundal was not credible when he testified that, while he knew the items seized could be used for ingesting illegal substances, he sold them only for use with tobacco and other legal products.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) Given its overall content, we cannot say that the ALJ abused his discretion in this case in his assessment of appellant Hundal's testimony.

Appellant Hundal admitted that he knew the items he was selling could be used for illegal purposes [RT 109]. That knowledge formed the basis for his stated reason in putting signs on the counters warning against the use of any "illegal reference." Of course, all the signs did was tell customers to avoid talking about what everyone knew was going on - that what was being purchased was, and was known to be, drug paraphernalia.

There was substantial expert evidence establishing that the items were drug paraphernalia. Appellants' counsel acknowledged [RT 23, 63] that both of the Department's witnesses who testified qualified as experts on "drug paraphernalia."

The only real issue, then, is whether appellant Hundal could say, with any degree of credibility, that items designed for use with controlled substances were not sold by him knowing that they would be used in the manner for which they were intended.

Both the Department and appellants cite and rely upon language in People v. Nelson (1985) 171 Cal.App.3d Supp.1 [218 Cal.Rptr. 279], a case which affirmed

a conviction under Health and Safety Code §§11364.5, subdivision (a), and 11014.5, and which, after a comprehensive review of pertinent legislative history and case law, rejected contentions that the phrases "designed for use" and "marketed for use" contained in the statute were impermissibly vague because they imposed liability on a seller based upon the intent of the buyer rather than that of the seller.

Appellants read Nelson as requiring an accused to have the requisite specific intent in a specific transaction. Thus, if appellants' contention is valid, by refusing to sell to anyone who told or indicated to appellants that they intended to use the item of drug paraphernalia to ingest a controlled substance, and by posting signs that warned against any "illegal reference," appellants effectively insulated themselves against any charge that they were knowingly selling drug paraphernalia.

The Department disagrees with appellants' reading of People v. Nelson, and contends that appellant Hundal's own testimony establishes the requisite intent under Health and Safety Code §11364.7, subdivision (a), as interpreted by the court in People v. Nelson. The Department cites appellant Hundal's testimony that he knew the items could be used for illegal purposes, and that is why he placed the signs on the counters warning against "illegal references."

This testimony, coupled with the testimony of the Department's witnesses, whose expertise with respect to drug paraphernalia was conceded by appellants' counsel, that many of the items had no other purpose than for use with controlled

substances [e.g., Neilson: RT 18, 43; Bowen: RT 86], is strong evidence in support of the ALJ's determination that appellant Hundal's claim of ignorance was untrue. At best, appellants have simply chosen to blind themselves to what they were doing:

> Q. (By ALJ): You are selling a product and you have no idea [of what it is used for]? Usually any person -- any retail person thinks about who could -- what's the product going to be used for because that would determine what kind of sale you are going to have, what a customer needs.
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> A. I never went into it, your Honor, in details. We were just selling it so I never think about it. I have never had time to think about it."

Both the Department and appellants quote the language of People v. Nelson which explains the scienter requirements of the statute:

> "The knowledge requirement of Section B [of the Model Drug Paraphernalia Act drafted by the Drug Enforcement Administration of the United States Department of Justice, upon which §11364.7, subdivision (a), was patterned] is satisfied when a supplier: (I) has actual knowledge an object will be used as drug paraphernalia; (ii) is aware of a high probability an object will be used as drug paraphernalia; or (iii) is aware from facts and circumstances from which he should reasonably conclude there is a high probability an object will be used as drug paraphernalia. Section B requires a supplier of potential paraphernalia to exercise a reasonable amount of care. He need not undertake an investigation into the intentions of every buyer, but he is not free to ignore the circumstances of a transaction. Suppliers of objects capable of use as paraphernalia may not deliver them indiscriminately."

(People v. Nelson, supra, 171 Cal.App.3d Supp., at 17.)

In arguing that the scienter requirement of §11364.7, subdivision (a), has been satisfied, the Department stresses the fact that regularly, at least up to the time of the hearing, appellant sold the drug paraphernalia to make money and

displayed the items in his store knowing that the products could be used for illegal purposes. The Department contends that appellant Hundal "chose to close his mind to reality because he was making very good money selling these items" (the evidence showed, as an example, a "bong," a device for smoking marijuana, for which appellant paid $10.00 and sells for $59.99) [RT 118].

Appellants argue that People v. Nelson holds that the scienter requirement "must be present in a specific transaction where the seller is aware of facts and circumstances that an object will be used as drug paraphernalia and that the requisite state of mind exists at the time of the sale." (App.Br., p. 8.) They argue that the refusal of appellants to make a sale when the investigators requested an item by the name it is known to users of drug paraphernalia proves that appellants lacked the requisite intent. Appellants also rely on testimony of Officer Bowen that possession and sale of unused drug paraphernalia is not illegal, and that so long as there is no drug residue on the paraphernalia, it is not illegal for head shops or even individuals on the street to possess such items. Finally, appellants contend that their refusal to sign receipts tendered by the Department for the seized goods because the receipts referred to the goods as "drug paraphernalia" is further evidence of their innocence. We are unpersuaded by these arguments.

Appellant Hundal knew the objects he held out for sale could be used to ingest illegal drugs. Indeed, it may be assumed, as the ALJ intimated, that it was his knowledge and expectation that his stock in trade was highly susceptible to

illegal use, that his placement of the "illegal reference" signs was little different from applying a blindfold, or displaying a "knowing wink."

II

Appellants argue that they are the victims of unconstitutional selective enforcement, violative of their equal protection rights under the California and United States Constitutions.

Appellants contend that since Officer Bowen, an expert on drug paraphernalia, testified that possession and sale of unused drug paraphernalia is not illegal and that as long as no drug residue is found, then it is not illegal for drug paraphernalia "head shops" or individuals to possess such unused items, a double standard has been created. From his testimony, appellants posit that only liquor store owners are being targeted in the enforcement of drug paraphernalia laws.

The Department asserts that Officer Bowen's testimony represents only his personal opinion and not that of the Department; that there is no evidence in the record to support that opinion; and there is no evidence in the record in support of the inference appellants wish to draw regarding law enforcement policy.

Appellants further contend that the initial, and unsuccessful, efforts of the Department investigators to effect transactions which would have shown the requisite intent with respect to a specific transaction, and the testimony that it was only after conversations with superiors that it was determined they could go forward with the seizure of the paraphernalia, establishes that appellants were

being singled out for prosecution.

The Department's response to this argument is that the investigators were engaging in a prudent and professional investigation by consulting their superiors in the Department for further guidance as to what action they might be permitted to take.

Appellants' contention that they are the victims of selective enforcement lacks merit. Officer Bowen's opinions are not binding on the Department. Nor is the Department bound by the initial understandings of its investigators of what Department enforcement policy may be, or of the kind and type of evidence required before they could effect a seizure of contraband or recommend an accusation against the license. The more reasonable conclusion to be drawn from any alleged inconsistency in enforcement is simply that the people in the field were not as informed as their superiors as to what the Department could or could not do in enforcing drug paraphernalia laws as affecting liquor licensees.

We think that the evidence reasonably supports the inference appellants well knew what they were selling. The suggestion that their ignorance was the result of their having come from a different culture (App.Br., p.4) is belied by the fact that appellant Nishan Hundal has resided in the United States 30 years. It is inconceivable that he could be as ignorant of the drug culture in the United States and in the State of California, and his role in it, as appellants would have this Board believe.

CONCLUSION

The decision of the Department is affirmed.[3]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[3] This final order is filed as provided in Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.