

ISSUED JUNE 13, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

MICHAEL CONTINO	)	AB-6712
dba Uncle Mike's Submarine Sandwich Shop)	
20844 Vanowen Street	)	File 41-69720
Canoga Park, CA 91306,	)	Reg. 95032833
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John A. Willd
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	April 2, 1997
	)	Los Angeles, CA
_____)	

Michael Contino, doing business as Uncle Mike's Submarine Sandwich Shop (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered his on-sale beer and wine public eating place license revoked for his having been convicted on his plea of guilty to selling, distributing or disbursing narcotics in violation of Title 21 United States Code §841, subdivision (a) (1), a crime involving moral turpitude, being contrary to the universal and

¹ The decision of the Department, dated August 8, 1996, is set forth in the appendix.

generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §24200, subdivision (d).

Appearances on appeal include appellant Michael Contino, appearing through his counsel, Jonathan Kissel, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on July 31, 1974. Thereafter, the Department instituted an accusation alleging that appellant had been convicted, pursuant to his plea of guilty, of a violation of Title 21 United States Code §841, subdivision (a) (1), for selling, distributing or disbursing narcotics, namely 998.9 grams of cocaine, a controlled substance, a public offense involving moral turpitude, and in violation of Business and Professions Code §24200, subdivision (d).

Administrative hearings were held on December 8, 1995, and June 27, 1996, at which time oral and documentary evidence was received. At that hearing testimony was presented concerning the details of the offense with which appellant was charged in the United States District Court for the Central District of California, the documents associated with his plea to the criminal charges, and the sentence imposed by the federal district court.

Subsequent to the hearing, the Department issued its decision which determined that appellant had in fact been convicted of the crime of selling, distributing or disbursing narcotics, namely cocaine, a crime of moral turpitude, and ordered his license revoked. Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issue: the Department failed to establish the validity of the prior conviction.

DISCUSSION

Appellant contends that the Department failed to meet its burden of proof of establishing the existence and validity of the federal narcotics conviction which led to the Department's decision to revoke his on-sale beer and wine license.

Appellant is 74 years old, and fears that the loss of his license will be the death knell of his restaurant, resulting in economic loss to his 15 employees, his suppliers, and to the Board of Equalization. Appellant's brief asserts that there was no relevant, competent evidence introduced at the hearing establishing the validity of the prior conviction; that no evidence was introduced to show that any waivers of appellant's constitutional rights were intelligently and understandably made; that no transcripts of any plea were introduced, no documentation from the federal court was introduced showing a valid waiver of rights, and no written waivers were introduced at the time of the hearing ; and that none of the documents which were introduced into evidence established the validity of the federal conviction.

Appellant argues that the original case against him was the result of “a setup,” and that the probationary sentence which was imposed by the federal court is evidence suggesting that the alleged conviction is constitutionally flawed.

Appellant’s contentions are factually without basis. The documentary evidence in the record of the administrative hearing soundly refutes his claim that the evidence of a prior conviction is deficient. In sum, appellant has failed to give the Board any valid reason to question the action taken by the Department.

At the evidentiary hearing² in this matter, the Department introduced into evidence certified copies of a two-count federal grand jury indictment (Exhibit 1) charging appellant with violations of Title 21 United States Code §841, subdivision (a), for knowingly possessing with intent to distribute, and distributing, 998.9 grams of cocaine, a controlled substance; an eight-page “Plea Agreement” (Exhibit 4) executed by appellant [II RT 22]; the criminal docket for the federal court proceeding (Exhibit 5) setting forth, among other things, the disposition of the case by entry of a plea of guilty on February 16, 1993 (entry 36, page 5) and the sentence (page 1); and a “Change of Plea Minute Order” (Exhibit 10), recording

² The first day of hearings took place on December 8, 1995. At that time appellant’s counsel complained that the Department had refused to produce certain discovery items which appellant’s counsel said were essential to his ability to prove that appellant had not been validly convicted. As a consequence, the Administrative Law Judge continued the hearing in order to permit appellant’s counsel an opportunity to seek an order compelling the discovery he sought.

appellant's entry of his plea of guilty to the charge in count 2 of the indictment.

The Plea Agreement contains the following language (Section X, page 6, entitled "Waiver of Constitutional Rights"):³

"You understand that by pleading guilty, you will be giving up the following constitutional rights: You have the right to plead not guilty, the right to be tried by a jury, or if you wish, and with the consent of the government, to be tried by a judge. At that trial, you would have the right to an attorney and if you could not afford an attorney, the court would appoint one to represent you. During the trial, you would be presumed innocent and a jury would be instructed that the burden of proof is on the government to prove you guilty beyond a reasonable doubt. You would have the right to confront and cross-examine witnesses against you. If you wish, you could testify on your own behalf and present witnesses in your defense. On the other hand, if you did not wish to testify, that fact could not be used against you and the jury would be so instructed. You would also have the right to call witnesses on your behalf. If you were found guilty after a trial, you would have the right to appeal that verdict to see if any errors were committed in that trial that would either require a new trial or the dismissal of the charges. By pleading guilty, you will be giving up all these rights,

³ The Plea Agreement contains the following language above the line for appellant's signature bearing on appellant's awareness of the contents of the document:

"I have read this agreement and carefully reviewed every part of it with my attorney. I understand it and I voluntarily agree to it. Further, I have consulted my attorney and fully understand my rights with respect to the provisions of the Sentencing Guidelines and statutes which may apply to my case. No other promises or inducements have been made to me, other than those contained in this letter. In addition, no one has threatened or forced me in any way to enter into this agreement. Finally, I am satisfied with the representation of my attorney in this matter."

It is of no small significance that the signatures on this document of appellant and his federal court attorney are both dated February 16, 1993, the same date on which his guilty plea was entered. (See Exhibit 5, entry 36, page 5).

except the right to appeal an illegal sentence. By pleading guilty, you understand that you may have to answer questions posed to you by the court both about the rights that you will be giving up and about the facts of this case. Any statements made by you during such a hearing would not be admissible during a trial, except in a criminal proceeding for perjury or false statements."

In addition to the documentary evidence establishing appellant's conviction, appellant admitted, when called as a witness by the Department pursuant to Government Code §11514, that he was the person who in fact had entered the plea of guilty to the criminal charges as shown on the documents [II RT 23]:

"Q.: In any event, Mr. Contino, the Michael Contino that is identified in the Federal Court documents as having this felony narcotics conviction, that's you; correct, sir?

"A.: Yeah."

Appellant has no satisfactory response to this conclusive evidence. The documents are genuine, he is the person named in them, and he signed the Plea Agreement and pleaded guilty. The waivers of constitutional rights are clear, and were with the advice of counsel.

Appellant's counsel invites the Board to look behind the conviction, arguing that the sentence imposed by the federal court (probation) does not make sense in light of the mandatory sentencing laws applicable to the offense charged, in response to which appellant's plea was entered. We decline to do so. We are satisfied that, on the basis of the documents and evidence in the record, the

Department's actions were proper. The argument that the Department failed to prove the existence and validity of the federal court conviction which gives rise to the violation of §24200, subdivision (d), charged in the accusation, is, in our view, without merit.

CONCLUSION

The decision of the Department is affirmed.⁴

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

⁴ 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.