

ISSUED APRIL 30, 1998

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

DONACIANO NUNEZ and NICANOR	)	AB-6886
NUNEZ)	
dba El Sonora Bar	)	File: 42-93785
1862 Santa Fe Avenue	)	Reg: 96037259
Long Beach, California 90810,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	John P. McCarthy
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	February 4, 1998
	)	Los Angeles, CA
)	

Donaciano Nunez and Nicanor Nunez, doing business as El Sonora Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their on-sale beer and wine public premises license for co-licensee Donaciano Nunez having been convicted, upon his entry of pleas of nolo contendere, to charges that he conspired to possess and sell cocaine and cocaine base, in violation of Penal Code §182, subdivision (a), and the transportation and importation in and into the State of California of cocaine, in violation of Health and

¹The decision of the Department, dated May 29, 1997, is set forth in the appendix.

Safety Code §11352, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (d).

Appearances on appeal include appellants Donaciano Nunez and Nicanor Nunez, appearing through their counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on July 31, 1980. Thereafter, the Department instituted an accusation against appellant charging that co-licensee Donaciano Nunez had entered the pleas and suffered the convictions described above.

An administrative hearing was held on March 11, 1997, at which time oral and documentary evidence was received. At that hearing, the Department introduced documents to establish the entry of the nolo contendere pleas and the convictions thereupon, and Donaciano Nunez testified concerning his unsuccessful efforts to persuade the Department, while the disciplinary action was pending, to permit a transfer of the license to Nicanor Nunez, to be held solely by him.

Subsequent to the hearing, the Department issued its decision which ordered the license revoked.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) revocation of the license as to the innocent partner was an abuse of discretion; and (2) the accusation was barred by

the three-year statute of limitations set forth in Business and Professions Code §24207.

DISCUSSION

I

Appellants contend that the Department abused its discretion when it ordered the license revoked, rather than permit its transfer to Nicanor Nunez. Appellants do not challenge the Department's right to revoke the license as to Donaciano, but argue that the Department's refusal to consider Donaciano's application to transfer the license to Nicanor while the disciplinary proceeding was pending unfairly and arbitrarily punished Nicanor, the innocent partner.

The Administrative Law Judge rejected appellant's argument, citing Coletti v. State Board of Equalization (1949) 94 Cal.App.2d 61 [209 P.2d 984], which held that there was no authority in the Board to revoke a partnership license as to the interest of one of the partners. "There was but a single license, although it stood in the names of the two partners. It cannot be invalid as to one partner and valid as to the other." Coletti v. State Board of Equalization, *supra*, 94 Cal.App.2d at 64.

Appellants argue that the court in Coletti was of the view there was no alternative to revocation of the license as to both licensees, while in the situation facing Donaciano and Nicanor there was an alternative, i.e., to permit Donaciano to transfer his interest in the partnership, and the license, to Nicanor, and thereafter have nothing whatsoever to do with the business.

The Board has been informed by the Department on numerous occasions that it will not consider the sale or transfer of a license while a disciplinary proceeding is pending against that license. The record does not indicate whether the refusal to consider the transfer question was in accordance with this general policy or whether it was reached on its own merits. In either respect, the question presented by this case is whether the Department must consider the request because not to do so would work a hardship on the so-called innocent partner, Nicanor.

Appellants do not contest the language in the Coletti decision which treats the license as unitary and indivisible. Instead, they suggest that the Department should have ordered the license revoked, and stayed the revocation on condition that Donaciano pursue to its completion his application to transfer the license to Nicanor.

The court in Coletti expressed little sympathy for the plight of the so-called innocent partner in that case:

“The revocation was effective as to both partners or to neither. It is clear that it was the duty of the board to terminate Gerbosi’s rights under the license. He violated the conditions under which it was held when he engaged in the illegal sale of liquor. It would be a violation of section 3 of the act for him to exercise any of the rights and privileges of a licensee. What he cannot do as an individual, he cannot do through a partnership. Revocation of a partnership license brings about a harsh result as to an innocent partner, but this result cannot be avoided in the present circumstances. The innocent partner must suffer unless the guilty one goes unpunished. Certainly the board does not act arbitrarily in revoking a partnership license where one partner has been found guilty of violations of law which call for revocation. There is no force in the argument that one partner in a liquor license cannot be bound by unauthorized acts of a co-

partner which place the license in jeopardy. When two or more persons apply for a partnership license, each of them necessarily assumes responsibility for the acts of the others with relation to the conditions under which the license is held. It is immaterial here that the offenses of Gerbosi were committed at the Atlantic Boulevard cafe in which Coletti had no interest. A violation of law in the sale of intoxicating liquor is a cause for revocation of a license, and it is none the less a cause if it is committed away from the licensed premises. Coletti has suffered an injustice at the hands of Gerbosi, but not at the hands of the board."

Coletti v. State Board of Equalization, *supra*, 209 P.2d at 986.

We do not believe the Department can be said to have abused its discretion in revoking a license where circumstances warranted a revocation. Donaciano's conduct forfeited the partnership's right to a license.

The responsibility of one partner for the acts of another is one of the burdens assumed in return for the benefits of being able to operate as a partnership. It is undoubtedly in the interest of the Department for partners to have an incentive to obey the law and to see that their partners do so as well, so that the privileges flowing from the ability to sell alcoholic beverages are not lost.

The Department owed no duty to Nicanor under the circumstances, and its refusal to depart from or interrupt its disciplinary program cannot be said to be an abuse of discretion. The Department was not obligated to accept the assurances that Donaciano would no longer have any involvement in a business he and his cousin/business partner had owned for a considerable period of time. We cannot say that its decision not to do so was unreasonable.

II

Appellants contend that the accusation is barred by the three-year statute of

limitations set forth in Business and Professions Code §24207. That section applies only to accusations brought under certain sections of the Code. Although the accusation in this case was brought pursuant to §24200, subdivision (b), which is not one of the sections listed, appellants suggest that the limitation should apply because the proceeding could have been brought under §24200.5, subdivision (a), which is one of the sections embraced by §24207.

However, as noted above, the accusation charged a violation of §24200, subdivision (a), as to which there is no applicable statute of limitations. The Appeals Board is not willing to substitute its judgment for that of the Legislature, which apparently decided that accusations under §24200 would not be subject to the three-year limitation, while those under §24200.5 would be.

Indeed, there appears to be sufficient distinction between the two sections to permit speculation as to the thinking of the Legislature. Section 24200, subdivision (d) involves situations where the licensee was convicted of, or entered a plea of guilty or nolo contendere to, a violation of law involving moral turpitude, while under §24200.5, the licensee could simply have failed to take preventive action in circumstances where he had a duty to do so. (Cf. Laube v. Stroh (1992) 2 Cal.App.4th 362.) It does not seem unreasonable to suppose that the Legislature chose not to place the Department under a time limitation where the Department was dealing with a licensee having pleaded to, or been convicted of, criminal conduct involving moral turpitude.

In any event, the statute of limitations defense is without merit. Even if the three-year statute were to apply, the record shows that the Accusation was timely filed. The plea and conviction occurred, at the earliest, on August 31, 1993, and the accusation was filed eight days short of three years thereafter.

CONCLUSION

The decision of the Department is affirmed.²

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

²This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.