ISSUED MARCH 27, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

GERTRUDE S. HARPER dba Sunshine Market 2619 West Florence Los Angeles, California 90043, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6894 File: 21-297313 Reg: 96038298 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: February 4, 1998 Los Angeles, CA

Gertrude S. Harper, doing business as Sunshine Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered her off-sale general license revoked, with revocation to be stayed subject to a three-year probationary period and an actual suspension of 15 days, for her employees, Lerone Campbell and Alphonso Harper, having displayed and sold controlled substance paraphernalia, i.e., plastic baggies, being contrary to the universal and generic public welfare and morals provisions of the California

[1]The decision of the Department, dated June 5, 1997, is set forth in the appendix.

Constitution, article XX, §22, arising from a violation of Business and Professions Code §24200, subdivision (a), and Health and Safety Code §11364.7.

Appearances on appeal include appellant Gertrude S. Harper, appearing through her counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 10, 1994. Thereafter, on December 5, 1996, the Department instituted an accusation against appellant charging that appellant's employees sold and displayed controlled substance paraphernalia to two undercover Los Angeles police officers, Darius Bone and Lynn Arceneaux, in violation of Health and Safety Code §11364.7, subdivision (a).

An administrative hearing was held on April 4, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Officer Bone, Gertrude Harper, and Alphonso Harper, Gertrude Harper's former brother-in-law and one of the employees involved, concerning the transaction involving the sale of plastic baggies.

The Department's decision, in Findings VI and VII, makes it clear that Gertrude Harper is being held responsible for the conduct of her employees, Lerone Campbell and Alphonso Harper, and that she had no direct or personal involvement in the violation:

"Respondent Gertrude Harper testified credibly that she bought the store in

> 1994 and the baggies in question were part of the inventory she purchased. She did not carry them as drug paraphernalia and really gave them little thought until this incident. She was not present during the incident involving her employees and the Officers on September 12, 1996. She knew that one customer, a seamstress, bought and used the baggies for storing buttons. Her grandson sometimes used them to display rocks. She no longer carries the baggies as a result of the incident of September 12, 1996.
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> ...
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> "While respondent did not likely know the baggies were being displayed and sold as drug paraphernalia, it is clear that both her employees did."

It is also clear from the evidence and the decision that it was the employees' responses to the questions posed to them by the undercover officers, about what might be suitable containers for rock cocaine, that provided the basis for the finding that the statute was violated. Officer Darius Bone testified that he and his partner, Lynn Arceneaux, were conducting what he described as "an ABC investigation along with ABC and the administrative vice unit," the focus of which was to identify different locations, liquor stores primarily, selling narcotics paraphernalia [RT 9]. He described what occurred when he and his partner visited appellant's store:

"Q. And what, if anything, did you say to Mr. Campbell initially?

"A. I have the report. But I said something similar to 'Do you handle baggies for rock cocaine?

"Q. And when you asked him that question, how did he react?

"A. He kind of nodded over towards a cardboard display which contained some plastic baggies which are probably one inch by one inch in size."

...

"Q. And after he nodded or indicated in the direction of the display, did you say -- what next, if anything, did you say to him?

"A. At that time me and my partner kind of carried out a conversation between ourselves."

The conversation with his partner, Officer Bone testified, involved a discussion regarding their uncertainty about the size of the baggies needed for rock cocaine. The officers spoke loudly, for the purpose of being heard by the employees behind the counter [RT 13]. Officer Bone explained the purpose of this discussion:

> "Part of our role in the undercover investigation was to be very blatant about what we needed the plastic bags for. And in conducting that role, we made several comments to rock cocaine specifically and our lack of education as to how it was packaged or the proper size of packaging for the quantity that was going in the baggies."

At that point, according to officer Bone, Alphonso Harper intervened in the conversation, indicated a size that was most popular for rock cocaine, and inquired about the size of the objects the officers intended to put in the baggies [RT 13-14]. Ultimately, according to Officer Bone, Lerone Campbell brought one of the displays over, removed a two by two inch baggie containing 16 one-and-one-half inch by one inch clear plastic bags, for which the officers were charged one dollar. Officer Bone also testified he was shown other displays of plastic bags of various sizes. The baggies he purchased were not available at the hearing; the police computer records indicated the items had been destroyed at some undetermined date after having been booked into evidence [RT 20, 27-28]. Bone also testified that when he entered the store, he intended, as part of his assignment, to see if

there were any "ABC violations," and if there had been any, he would have noted them [RT 26]. Finally, he acknowledged that the plastic baggies were the only items he saw in the store he identified as narcotics paraphernalia [RT 27].

Alphonso Harper, whose testimony was found by the Administrative Law Judge (ALJ) to be unreliable and not credible, testified variously that he did not sell anything to the officers or remember whether they purchased anything from anyone else in the store [RT 40]; that even though he used the word "cocaine" in response to what the officers were saying, he did not think he was selling them anything they could use for cocaine [RT 42]; that he did not care what they used the baggies for, because he had grown impatient as a result of the 20 or 25 minutes the officers had spent discussing cocaine [RT 43]; again that he had not sold any baggies and did not know if Campbell had [RT 45];[2] that anyone in the store could have heard the officers' discussion about cocaine [RT 47]; that after he had grown tired of Officer Bone, he told Bone he was fed up with him talking about the same thing [RT 49]; but, although he did not remember the officers purchasing anything, he may have pointed out a size of baggie they could use [RT 48].

Subsequent to the hearing, the Department issued its decision and order, finding that the violation occurred.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) she lacked the requisite intent to violate the statute;

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[2] Officer Bone testified it was Alphonso Harper, referred to as "the older gentleman," who actually sold him the baggies [RT 18]. Alphonso Harper was 67 at the time of the hearing [RT 39].

(2) the items were not "marketed for use" as narcotics paraphernalia; and (3) the penalty constitutes an abuse of discretion.

DISCUSSION

Appellant contends that she lacked the requisite intent required for a violation of Health and Safety Code §11364.7, subdivision (a), and contends further the baggies in question were not marketed for use as drug paraphernalia.

This is one of two cases currently on appeal to the Board which present issues relating to the alleged sale of drug paraphernalia; the other is Mbarkeh (AB-6882). The factual settings in the two cases are very similar, the legal issues posed are the same, and as to both, we are compelled to reverse the decision of the Department. We do so mindful of the serious problems associated with the sale and usage of narcotics and controlled substances, and the harm that flows to society from such activity. We are also mindful of the enormous burden drug trafficking imposes on law enforcement agencies, and we have not hesitated in the past to acknowledge the efforts of the police and the Department to stamp out such behavior by holders of alcoholic beverage licenses. Nevertheless, on the record in this case, constrained as we are by the law, we are required to reverse the decision of the Department.

The drug paraphernalia statutes of the kind involved in this appeal are sweeping in their nature, embracing almost any object used or useful in any way in connection with controlled substances. Given their scope, their potential for application to innocent persons has engendered numerous constitutional challenges,

and an understanding of the reasoning by which the statutes have been sustained in the face of such challenges is crucial to a resolution of this case. For that reason, we have gone well beyond the briefs of the parties to set forth what we understand to be the applicable law.

Health and Safety Code §11014.5[3] defines "drug paraphernalia" and establishes criteria for courts to consider when determining what constitutes drug paraphernalia. Section 11364.7 makes it a misdemeanor for anyone to deliver, furnish, transfer, possess, manufacture with intent to deliver, furnish, or transfer drug paraphernalia; provides those who are over 18 years of age and violate these provisions by delivering, furnishing or transferring drug paraphernalia to a minor at least three years their junior may be punished by a fine and/or imprisonment; declares the violation of its provisions cause to revoke any business or liquor license; and provides that all drug paraphernalia is subject to forfeiture and seizure by a peace officer.

In People v. Nelson (1985) 171 Cal.App.3d Supp. 1 [218 Cal.Rptr. 279], the court rejected challenges to the constitutionality of Health and Safety Code §11014.5 and §11364.7, subdivision (a), based upon grounds of vagueness. The court relied heavily on decisions of federal courts other than the Ninth Circuit, and its reasoning guides us to the result to be reached in this case.

In People v. Nelson, the defendants were convicted of delivering, furnishing

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[3] The complete texts of §§11014.5 and 11364.7 are set forth in the Appendix.

or transferring drug paraphernalia, in violation of §11364.7, subdivision (a). Defendants operated a store which stocked and sold such novelties as T-shirts and posters, but also had a substantial supply of items which, in the opinion of several experts who testified at trial, were drug paraphernalia as that term is defined in §11014.5, described by the court as "the companion section to section 11364.7, subdivision (a)." These items included bongs (small water pipes), roach clips (devices for holding burning marijuana cigarettes), coke kits (packages containing items commonly used for preparing and ingesting cocaine), coke spoons (small spoons for inhaling cocaine), as well as items which had legitimate uses such as scales and bulk chemicals but which, in the opinion of the expert witnesses, were stocked by the store for the purpose of weighing and preparing drugs and narcotics. When §11364.7, subdivision (a), took effect, on January 1, 1983, defendants' employees erected signs declaring that the merchandise they had always sold was now being offered for sale only for legitimate purposes. Thereafter, a policeman entered the store, asked to purchase, and was sold, a bong. His purchase was followed by a series of police seizures of suspected drug paraphernalia, and criminal proceedings ensued.

Defendants based their constitutional challenge to the statutes in question on the grounds the terms "designed for use" and "marketed for use" are impermissibly vague in that many items are not solely designed to be drug paraphernalia but are dependent upon the ingenuity or purpose of the purchaser. The court construed their arguments to be an attack on the sufficiency of the mens rea or scienter

element of §11364.7, subdivision (a), and in a through and well-researched decision rejected those arguments.

The court first focused on the statutory language itself, observing that while §11014.5 contained no overt scienter requirement:

> "§11364.7, subdivision (a), exhibits what appears to be a two-tier or double scienter standard (i.e., 'intent' and 'knowing or under circumstances where one reasonably should know')."

It then concluded that the "designed for use" and "marketed for use" language in §11014.5's definition of "drug paraphernalia" reflected the Legislature's attempt to assign the appropriate scienter to each category of offender within the section's reach:

> "In other words, the 'designed for use' phrase pertains to the state of mind of the manufacturer of an item while the 'marketed for use' phrase refers to the seller, including the distributor, of the item. The common denominator in both instances is that the requisite state of mind belongs to the person in control of the item at the time the item is manufactured, or delivered, furnished, transferred, etc."

(People v. Nelson, supra, 171 Cal.App.3d Supp. at 9.)

The court rested its reasoning primarily on the United States Supreme Court decision in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982) 455 U.S. 489 [102 S.Ct. 1186], which rejected similar challenges to a statute requiring a license to sell items designed or marketed for use with illegal cannabis or drugs. The Court found the phrase "designed for use" unambiguous, since it "at least encompassed an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer." Hoffman Estates,

supra, 455 U.S. at 501-502, 102 S.Ct. at 1194, 1195. Similarly, the Court found the phrase "marketed for use" "transparently clear":

> "[I]t describes a retailer's intentional display and marketing of merchandise. The guidelines refer to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items.[4] ... The standard requires scienter, since a retailer could scarcely 'market' items 'for' a particular use without intending that use."

(Hoffman Estates, supra, 455 U.S. at 502, 102 S.Ct. at 1195.)

Adopting this reasoning, the court in People v. Nelson went on to state (171 Cal.App. 3d Supp. at 11):

> "We therefore follow the cogent reasoning of the Supreme Court in Hoffman Estates and infuse the phrases 'designed for use' and 'marketed for use' in section 11014.5 with the requisite element of scienter, which is construed solely from the viewpoint of the person in control of the item, i.e., the manufacturer or seller, without reference to a third person's state of mind.
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> "This conclusion is further buttressed by a plain reading of the phrase 'marketed for use' in the context of section 11014.5 as a whole. The unambiguous language of subdivision (b) of that section specifically defines that phrase to mean 'advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or material with controlled substances.' The clear import of this language is to focus only on the intent and actions of the seller. Additionally, subdivision (c) spotlights the owner or anyone in control of the object with regard to two of the seven enumerated factors that may be used to determine whether an object constitutes drug paraphernalia. There is nothing in the language of section 11014.5, however, which would give rise to an inference that the intent of a third person is relevant to the definition of what constitutes drug paraphernalia.
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> "On the other hand, turning to the phrase 'reasonably should know' in subdivision (a) of section 11364.7, we note that this phrase is already a part of the two-tier scienter component of that subdivision; thus, infusing scienter to clear up any vagueness is inapposite. We also note that this phrase is not further defined, nor is there anything in that section or in a related section

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[4] The guidelines for the determination of what is drug paraphernalia referred to are different from those set forth in §11014.5, but, we think, the same reasoning applies with respect to the §11014.5 guidelines.

> which clarifies what that phrase signifies. We therefore must look elsewhere for guidance in this regard."

The court turned to the legislative history preceding the adoption of §11014.5 and §11364.7, subdivision (a), noting that they were intended to eliminate the use and sale of drug paraphernalia, and were patterned after the Model Drug Paraphernalia Act (the "Model Act") drafted by the Drug Enforcement Administration of the United States Department of Justice.

Quoting from Levas and Levas v. Village of Antioch, Illinois (7th Cir. 1982) 684 Fed.2d 446, 449, the Nelson court described the Model Act as:

> "an attempt to write a statute that will be broad enough to deal with the problem effectively, yet not so broad that it impinges on constitutionally protected conduct or so vague that neither the law's targets nor its enforcers know what it means. The distinctive features of the Model Act are two: it attempts to give content to the necessarily general definition of drug paraphernalia by listing examples and factors to be considered; and it contains an intent requirement that is meant to eliminate any definitional uncertainty."

According to the court, the various state statutes patterned after the Model Act have been challenged on vagueness grounds, it being contended either that they encompassed multi-purpose objects with both drug-related and legitimate uses, and innocent items capable of drug use, or that a violation could be established by transferring a purchaser's intent to use an innocent object with proscribed drugs to an unaware seller. However, according to the Nelson court, every federal circuit that has considered such a challenge has upheld the statute in question. By infusing a scienter element into the statute, a seller of objects which have innocent or legitimate uses as well as potential drug uses is protected from prosecution "in

the absence of showing that the seller intended to sell, distribute, etc., the objects for use with controlled substances." (People v. Nelson, supra, 171 Cal.App.3d Supp. at 13-14.)

As to the "transferred intent" issue, the Nelson court again referred to the line of federal circuit court decisions addressing like statutes, pointing out [at 171 Cal.App.3d Supp. 16-17, emphasis supplied]:

> "These courts essentially concluded that the two-tiered scienter standard of the Model Act, which is tracked by section 11364.7, presents no danger that an innocent seller would be at risk of prosecution for the unknown intent of a purchaser for the simple reason that the seller must already have intended that the object be sold for drug use before his knowledge of its use by a buyer comes into play. 'In these circumstances, it is not constitutionally improper that the seller be required to open his eyes to the objective realities of the sale.'"

The court supports its statement with a footnote quoting extensively from the decision of the Eighth Circuit United States Court of Appeal in Casbah, Inc. v. Thone (1980) 651 F.2d 551, 561, which, in a footnote of its own, adopted "the cogent reasoning" of a Delaware federal district judge in Delaware Accessories Trade Association v. Gebelein (D.Del. 1980) 497 F.Supp. 289, 294, who said:

> "In the context of an alleged sale or delivery of drug paraphernalia, the Act requires the state to prove both (1) that the defendant intended that an item would be used for the production or consumption of controlled substances and also (2) that he either knew, or that he acted in a set of circumstances from which a reasonable person would know, that the buyer of an item would thereafter use it for those purposes. So-called constructive knowledge thus has significance only in a situation where the defendant is selling or delivering items which he intends to be used to produce or consume illicit drugs in the first place. The legitimate merchant who sells innocuous items need make no judgment about the purpose of the buyer based upon the surrounding circumstances. The dealer, on the other hand, who sells innocuous items with the intent that they be used with drugs is, in effect,

> put on notice by the illicit nature of his activity that he must be careful to conform his conduct to the law. Even the illicit dealer, however, is not held legally responsible ... for guessing what is in the mind of a buyer. The seller is safe as long as he does not actually know the buyer's purpose and as long as the objective facts that are there for him to observe do not give fair notice that illegal use will ensue." (Emphasis supplied.)

In Stoianoff v. State of Montana (9th Cir. 1982) 695 F.2d 1214, 1221, the court stated, addressing the constitutional challenge to the "reasonably should know" language of a statute "patterned closely" after the Model Act:

> "[In] light of the unusual nature of the layered state of mind requirements imposed by [the Montana statute], the merchant must already have intended that an item be sold for drug use under the 'intended for use' standard, before his or her knowledge of its use by a buyer comes into play. Once the merchant has passed this threshold, the merchant is required to be aware only of the objective facts that would fairly put him or her on notice of the use for which the product was purchased."

The Nelson court expressed its concurrence with the Stoianoff decision's reading of the "reasonably should know" language of the Model Act, and also its belief that such reading was supported by the comments of the drafters of the Model Act [Model Act, Comments, Art. II] which it quoted:

> "The knowledge requirement of Section B 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 of facts and circumstances from which he reasonably should 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."

Although at first blush it might appear the quoted comment might apply to all sellers, it must be read in light of the earlier statements in the court's opinion, and

in the statements of the federal court decisions which Nelson quotes and relies upon, to be addressing the responsibilities placed upon the seller who "already intended that an item be sold for drug use,"[5] and it is when this threshold is passed that the merchant must be aware of objective facts which would put him on notice of the use for which the product was purchased.

Guided as we are by our understanding of the law, we conclude that there is insufficient evidence of a violation of the statute.

There is no evidence that the baggies were displayed or marketed for use as drug paraphernalia prior to the arrival of the police officers. As the ALJ found, the baggies were part of the inventory of the business appellant purchased, and appellant did not carry them as drug paraphernalia [Finding VI]. Officer Bone acknowledged he saw no other items of drug paraphernalia in the store. The baggies are no more than plastic containers capable of holding small items such as beads, buttons, and the like, and, of course, illicit substances, depending upon the uses to which the buyer intends to put them.

Although the ALJ found that appellant's employees knew the baggies were being displayed and sold as drug paraphernalia [finding VII], the finding rests entirely on the employee's responses to the questions of the police officer as to whether the baggies would be suitable for the use to which he would put them. There is no evidence of any pre-existing intent on the part of the two employees to display or market anything as drug paraphernalia.

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[5] People v. Nelson, supra, 171 Cal.App.3d Supp. at 16 (emphasis supplied).

This is a case where a 67-year-old store clerk was overly-helpful to a customer seeking a common household product which ordinarily sold for one dollar. The notion that his actions come within §11364.7, subdivision (a) is one we do not accept.

Even though Alphonso Harper may have known the customers' intention to use the baggies to package a controlled substance, his assistance in their purchase decision cannot be the intent that brings him within the statute. His behavior, at best, satisfies only the second tier of the two-tier scienter requirement infused into the statute by Nelson and the many other cases dealing with similar statutes. Nor can his testimony, which the ALJ found not credible, support an affirmative presence of the intent he denied possessing.

CONCLUSION

The decision of the Department is reversed.[6]

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

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[6]This 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.