

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

FIRST BORN, INC.	)	AB-7138
dba Pelikan Pub	)	
7828 Broadway	)	File: 42-315179
Lemon Grove, CA 91945,	)	Reg: 97042056
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rudolfo Echeverria
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	February 3, 1999
	)	Los Angeles, CA
	)	

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First Born, Inc., doing business as Pelikan Pub (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which revoked its license for the guilty plea of appellant's president and sole shareholder to a public offense, assault with a deadly weapon, involving moral turpitude, being contrary to the universal and 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), in conjunction with violations of Penal Code §§245, subdivision (a)(1), and 1192.7, subdivision (c)(23).

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<sup>1</sup>*The decision of the Department, dated April 30, 1998, is set forth in the appendix.*

Appearances on appeal include appellant First Born, Inc., appearing through its counsel, Sheldon Sherman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

#### FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on April 1, 1996. Thereafter, the Department instituted an accusation (later amended) against appellant charging that Vincent Eliseo (Eliseo), appellant's president and sole shareholder, pled guilty to a charge of felony assault with a deadly weapon (a baseball bat) on Jacqueline Barrios, a public offense involving moral turpitude.

An administrative hearing was held on March 24, 1998, at which time documentary evidence was received and testimony was presented by appellant and by Jackqueline<sup>2</sup> Barrios concerning the criminal charges against Eliseo. Eliseo presented evidence that his conviction for felony assault with a deadly weapon was reduced later to a misdemeanor conviction pursuant to Penal Code §17, subdivision (b)(3). (Ex. A.)

Subsequent to the hearing, the Department issued its decision which determined that appellant's president and sole shareholder, Vincent Eliseo, pled guilty to a public offense, assault with a deadly weapon, which under the circumstances involved moral turpitude, in violation of Business and Professions Code §24200, subdivision (d).

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the issue of whether a misdemeanor violation of the crime of assault with a

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<sup>2</sup>*This was the spelling given by Ms. Barrios at the administrative hearing.*

deadly weapon constitutes an offense involving moral turpitude per se within the meaning of Business and Professions Code §24200.

#### DISCUSSION

Appellant contends Eliseo's plea to felony assault was reduced to a misdemeanor by the superior court judge and that a misdemeanor assault with a deadly weapon is not an offense involving moral turpitude per se within the meaning of Business and Professions Code §24200.

For purposes of Business and Professions Code §24200, subdivision (d), it makes no difference whether the crime was classified as a felony or misdemeanor. The grounds for discipline under that section arise from “The plea, verdict, or judgment of guilty . . . to *any public offense* involving moral turpitude . . . .” (Emphasis added.) A “public offense” includes both felonies and misdemeanors. (Pen. Code §16.) With regard to the reduction of appellant's conviction from a felony to a misdemeanor, the Administrative Law Judge (ALJ) stated in Finding V: “Nevertheless, Eliseo committed a public offense involving moral turpitude under the circumstances which included the use of a deadly weapon.”

The real issue is whether or not Eliseo's assault of Ms. Barrios with a deadly weapon constitutes a crime of moral turpitude. The California Supreme Court has defined moral turpitude as “an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.” (In re Craig (1938) 12 Cal.2d 93 [82 P.2d 442, 444].)

Penal Code §245, subdivision (a)(1), the section under which Eliseo was charged and convicted, provides :

“Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.”

The crime can be punished as either a felony or a misdemeanor, but the elements of the crime do not change. Eliseo originally pled guilty to, and was convicted of, a felony violation of §245, subdivision (a)(1), and also admitted a §1192.7, subdivision (c)(23), enhancement (personal use of a deadly weapon). In reducing the conviction to a misdemeanor, the enhancement allegation was removed, since it only applies to felonies. However, Eliseo's misdemeanor conviction was still for assault with a deadly weapon under Penal Code §245, subdivision (a)(1).

In People v. Cavazos (1985) 172 Cal.App.3d 589 [218 Cal.Rptr. 269] and People v. Thomas (1988) 206 Cal.App.3d 689 [254 Cal.Rptr. 15], felony assault with a deadly weapon was held to be a crime involving moral turpitude for purposes of determining whether a prior felony conviction could be used for impeachment in a criminal trial. Both courts looked at the elements of the crime of assault with a deadly weapon to determine whether it was a crime involving moral turpitude. The court in Cavazos reasoned:

“assault with a deadly weapon . . . does require proof of an unlawful *attempt* to inflict physical force upon another person. . . . Because an attempt to commit a battery requires a specific intent to commit the battery and a direct but ineffectual act done towards its commission [citations] and because a deadly weapon is used to effectuate the attempted battery, it follows that the 'least adjudicated elements' of the crime of an assault with a deadly weapon involve some degree of moral turpitude. It is the use of the deadly weapon which elevates the assault to a moral turpitude crime.” (Italics in original.)

(People v. Cavazos, supra, 172 Cal.App.3d at 595.) We see no reason why the same analysis should not apply to the same crime classified as a misdemeanor.

Both Cavazos, supra, and Thomas, supra, distinguished In re Rothrock (1940) 16 Cal.2d 449 [106 P.2d 907]. Rothrock found that assault with a deadly weapon did not necessarily involve moral turpitude for purposes of attorney disbarment proceedings, since an attorney's conviction for a violent crime does not automatically call into question his or her fitness to practice law. The result in Rothrock, however, is not controlling in the case of an alcoholic beverage license, because such a conviction does reflect on the licensee's fitness to hold the license. Where people are drinking alcoholic beverages, such as in appellant's bar, violence, or the potential for violence, is a very real, everyday concern. The Department reasonably considers evidence of a licensee's propensity for violence as an unacceptable risk to public welfare and morals.

Eliseo was convicted of assaulting his girlfriend with a baseball bat, apparently using it to break a window of her vehicle in which she was sitting. We have no difficulty in agreeing with the Department that this falls within the California Supreme Court's definition of moral turpitude as "an act of baseness, vileness or depravity . . . , contrary to the accepted and customary rule of right and duty between [people]."

Appellant states in its brief that "During negotiations that formed the basis of the plea agreement, Judge Exarhos indicated that he would enter any necessary orders in the event [appellant's] license was put into jeopardy by the conviction" (App.Br. at 5 [ftnt. 1]) and that Eliseo's conviction was reduced to a misdemeanor because of the judge's "specific intention of showing all parties the court's view that no action be taken as to [appellant's] license." (App.Br. at 4.)

Whatever the views of the superior court judge regarding Eliseo's license, they are, in this instance, irrelevant. The Department is vested by the California Constitution with the exclusive power to suspend or revoke alcoholic beverage licences.

ORDER

The decision of the Department is affirmed.<sup>3</sup>

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

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<sup>3</sup>*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 order as provided by §23090.7 of said code.*

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