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

AB-7695
File: 41-319048 Reg: 00048596

JUAN JOSE DIAZ dba Durango Inn
742 E. 12th Street, Los Angeles, CA 90021,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: August 17, 2001
Los Angeles, CA

ISSUED NOVEMBER 13, 2001

Juan Jose Diaz, doing business as Durango Inn (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for appellant's plea of guilty to the sale or transport of cocaine, a controlled substance, a crime involving moral turpitude, 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, subdivisions (a) and (d), arising from a violation of Health and Safety Code §11352, subdivision (a).

Appearances on appeal include appellant Juan Jose Diaz, appearing through his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated August 31, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine eating place license was issued on June 18, 1996. Thereafter, the Department instituted a five-count accusation against appellant charging that, on June 30, 1999, appellant sold or furnished cocaine in violation of Health and Safety Code §11352 (Count 1); on September 14, 1999, appellant pled guilty to a criminal charge of the sale or transport of a controlled substance, in violation of Health and Safety Code §11352, subdivision (a), an offense involving moral turpitude (Count 2); on December 4, 1999, drink solicitation activities occurred in the premises in violation of Business and Professions Code §25657, subdivisions (a) and (b) (Counts 3 and 4); and on December 4, 1999, appellant's employee sold beer to a person who was obviously intoxicated, in violation of Business and Professions Code §25602, subdivision (a) (Count 5).

An administrative hearing was held on June 27, 2000, at which time documentary evidence was received, and testimony was presented by five officers of the Los Angeles Police Department concerning Counts 1, 2, 3, and 4. No evidence was presented with regard to Count 5 because appellant stipulated to the violation charged in that count. Subsequent to the hearing, the Department issued its decision which dismissed Counts 3 and 4, and determined that the violations alleged in Counts 1, 2, and 5 were established.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) there was not substantial evidence to support the findings and determinations as to Counts 1 and 2, and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends there was not substantial evidence presented to support the findings and determinations that appellant sold cocaine (Count 1) and that he pled guilty to the crime of selling a controlled substance (Count 2). Specifically, appellant argues that the testimony of the officers that appellant admitted orally and in writing that he sold cocaine were hearsay or, if not hearsay, they were inadmissable because appellant's statements were in Spanish and the officers who testified were not certified Spanish language interpreters. With regard to the guilty plea, appellant argues that the record of conviction is hearsay which cannot, by itself, support a finding that the specific acts constituting the violation occurred, and that substantial evidence did not establish that the individual named in the court records introduced by the Department was in fact appellant.

Count 1

The ALJ made the following finding with regard to Count 1 (Finding II):

"On June 30, 1999, several Los Angeles police officers went to [appellant's] premises to conduct an investigation.

"One of the officers (Ruize) saw a man, later identified as [appellant], leave the premises, walk to a burgundy Cadillac, take a small item from the car, and return to the premises. [Appellant] then handed something to a man, later identified as Hector Almaraz, who was inside the premises. Ruize followed the man into a small room, where the man tossed something onto the floor. Another officer (Okamoto) retrieved the tossed item, which was a small bindle of a white powdery substance resembling cocaine.

"The police officers arrested [appellant]. Ruize read [appellant] his Miranda rights, which he waived. He then consented to a search of his car. [Appellant] also told the officers that there was cocaine in the car. The officers found inside [appellant's] car approximately thirty bindles of a white powdery substance resembling cocaine.

> "[Appellant's] booking number was 6108176. In a statement written in Spanish, [appellant] admitted that at the time of his arrest, he had just sold twenty dollars worth of cocaine. The bindles which the officers found, both Almaraz's and the ones in the car, were never tested to determine whether they contained cocaine.
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> "The identification of the man who went to the Cadillac as [appellant] was based on these facts: 1) the information which the man gave to the police officers about himself (date of birth, address, place of birth, telephone number) is the same as that on [appellant's] Individual Personal Affidavit on file with the Department, 2) the man matched a Department of Motor Vehicles photograph of [appellant], and 3) the man made a statement to the officers referring to the premises as 'my bar' (translated from Spanish)."

Detective Jorge Azpeitia testified that appellant (hereinafter "Diaz"), after giving permission to have his car searched, made a spontaneous statement, in Spanish, that there were drugs in the car. Azpeitia stopped Diaz and had Detective Sylvia Ruize read Diaz his rights. Diaz then repeated that there were drugs in the car. When asked what kind of drugs, Diaz said it was cocaine. Ruize then found a shoebox containing bindles of white powder. [RT 25-26.]

Ruize testified that, having obtained permission from Diaz to search his car, she was walking toward the car when Azpeitia called her back, telling her that Diaz had said something about drugs in the car. Ruize read Diaz his rights, which he waived, and Diaz said that there was cocaine in the trunk of the car. [RT 36-40.]

Ruize also testified that later, at her office, she received a written statement from Diaz, in his handwriting, in Spanish, regarding his part in the cocaine activities. Ruize also translated the statement. The statement and translation were admitted into evidence as Exhibit 9.

Ruize testified that she speaks, reads, and writes in Spanish and that her translation of Diaz's written statement was true and correct as far as she knew [RT 35,

42]. Officer Michael Zolezzi testified that both Ruize and Azpeitia spoke Spanish [RT 103]. Although appellant's counsel later had other objections to the admission of Exhibit 9, when asked by the ALJ if he had any objection to the translation, he specifically stated that he had no objections at all to the translation [RT 94].[2]

The statements of appellant testified to by the officers were not hearsay, but admissions, and thus excepted from the hearsay rule. The ALJ properly allowed them and could properly rely on them as the sole bases for findings.

The argument that the statements by appellant in Spanish were inadmissible because the officers testifying were not certified interpreters was not raised at the hearing, and the Board need not consider it. In fact, as noted above, appellant's counsel at the hearing specifically denied having any objection to the translation of Diaz's statement. In any case, the contention does not have merit. Translation does not add an extra level of hearsay to out-of-court statements. (People v. Wang (2001) 89 Cal.App.4th 122, 131-134 [106 Cal.Rptr.2d 829].) As long as the statements were party admissions, their translation, unless shown to be false or incompetent, made no difference to their admissibility.

Count 2

The ALJ made the following finding with regard to Count 2 (Finding II):

> "In August 1999, the Los Angeles District Attorney's Office filed a felony complaint (Case number BA188500) in Los Angeles Municipal Court and an information in Los Angeles Superior Court (Case Number BA188500) alleging that on or about June 3 (**not June 30**), 1999, [appellant] violated Health and

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[2]His later objection was that the document was inherently unreliable because some of Ruize's testimony contradicted what was in the document [RT 108]. (Counsel did not specify whether his objection went to the original statement in Spanish, the English translation, or both.)

Safety Code Section 11352(a) – sale of cocaine. The booking number stated on the information was 6108176, the same as that recorded by the police officers on June 30. The date of birth for Juan Jose Diaz, as stated on the complaint and on the information, was September 16, 1954, the same as that on [appellant's] Individual Personal Affidavit. The complaint also alleged that on June 30, 1999, Hector Almaraz unlawfully had cocaine in his possession, in violation of Health and Safety Code Section 11350(a).

"On September 14, 1999, [appellant] in Los Angeles Superior Court pled guilty to violating Health and Safety Code Section 11352(a) and was convicted based on his guilty plea. The case number for his guilty plea was BA188500.

"Because the booking number on the information is the same as that recorded by the police officers when they arrested [appellant] on June 30, and because the felony complaint for Case Number BA188500 also alleged that Hector Almaraz unlawfully possessed cocaine on June 30, there is a strong suggestion that the information and the complaint intended to refer to the arrests made at [appellant's] premises on June 30.

"However, both the complaint and the information allege that [appellant's] violation of Health and Safety Code occurred on June 3, 1999, and it is to this fact that Respondent pled guilty. It may be that there was a typographical error in the compliant and the information, and that the 'June 3' date should have read 'June 30'.

"It is not clear whether the Department intended to use [appellant's] guilty plea to violating Health and Safety Code Section 11352(a), as alleged in Count 2 of the Accusation, as evidence that Respondent violated Health and Safety Code Section 11352(a), as alleged in Count 1."

The ALJ determined that appellant's guilty plea to violating Health and Safety Code §11352, a crime involving moral turpitude, constitutes cause for suspension or revocation of appellant's license under Business and Professions Code §24200, subdivision (d). (Legal Basis for Decision II.) In addition, he noted that "It is not necessary to determine whether this guilty plea was for the sale which occurred on [appellant's] premises on June 30, 1999."

The ALJ also speculated that it was possible the violation to which appellant pled guilty was the June 30, 1999, violation charged in Count 1. If so, he concluded, Count

1 would be a lesser included offense of Count 2 and, therefore, he stated, he would not consider "Count 1 . . . for purposes of imposing penalty." (Legal Basis II. D.)

While appellant may be correct in stating that "the record of conviction is hearsay which cannot, by itself, support a finding that the specific acts constituting the violation occurred," under Business and Professions Code §24200, subdivision (d), all that the Department need prove is that appellant pled, or was adjudged, guilty to a public offense involving moral turpitude.

Exhibit 6 is a certified record of the superior court with regard to case number BA188500, People v. Juan Jose Diaz, showing that the defendant in that case entered a plea of guilty to a charge of the sale or transportation of a controlled substance, in violation of Health and Safety Code §11352(a).

The ALJ outlined the connection between the complaint, the information, and the record of the guilty plea – all bear the case number BA188500 – for Juan Jose Diaz. He also points out the same booking number – 6108176 – on the complaint as that issued to appellant in connection with the June 30, 1999 violation [RT 18]. In addition, appellant's date of birth – September 16, 1954 – as shown on the Individual Personal Affidavit he filed with the Department (Exhibit 3), is the same as that of Juan Jose Diaz as stated on the complaint and on the information (Exhibits 4 and 5). The "DR no." on appellant's statement (Exhibit 9) is also the same as the DR no. on the complaint.

These connections, taken together, provide sufficient evidence to show that the Juan Jose Diaz who entered the plea of guilty to a public offense involving moral turpitude, is the same Juan Jose Diaz who is the appellant in this matter.

II

Appellant contends that, since Business and Professions Code §24200 does not mandate revocation, it was an abuse of discretion for the Department to order outright revocation in this case without setting forth factors justifying that penalty.

The violation of Health and Safety Code §11352, the offense to which appellant pled guilty, has been held to involve moral turpitude, in that it shows a "readiness to do evil." (People v. Navarez (1985) 169 Cal.App.3d 936, 949 [215 Cal.Rptr. 519].) While the Department did not separately state the factors on which it based its order of revocation, it specifically found that the licensee himself was convicted of the sale of cocaine, a crime clearly held to involve moral turpitude.

The Department is charged with protecting public welfare and morals, and requiring that its licensees do not show a "readiness to do evil" is well within its charter. Some might say that a penalty less than outright revocation would suffice to protect the public welfare and morals, but "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (Harris v. Alcoholic Beverage Control Appeals Board (1965) 62 Cal.App. 2d 589, 594 [43 Cal.Rptr. 633, 636].) There was no abuse of discretion here.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]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.