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

AB-7796
File: 48-269655 Reg: 00049350

DAVID A. AVILA and FERN AVILA dba Henry's Cantina
622 Fifth Street, Clovis, CA 93612,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: February 14, 2002
San Francisco, CA
ISSUED MAY 16, 2002

David A. Avila and Fern Avila, doing business as Henry's Cantina (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their on-sale general public premises license with revocation stayed for 180 days to permit transfer, with the serving of a 60-day suspension and suspended indefinitely thereafter until the license is transferred during the 180 days, or revoked if not transferred within the time prescribed, for appellants permitting their employee and bartender to possess, sell, and furnish controlled substances, 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 (b), arising from violations of Business and Professions Code §24200.5, subdivision (a), and Health and Safety Code §§11378 and 11379.

Appearances on appeal include appellants David A. Avila and Fern Avila,

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[1]The decision of the Department, dated March 22, 2001, is set forth in the appendix.

appearing through their counsel, David E. Roberts, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas Loehr.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on August 23, 1984. Thereafter, the Department instituted an accusation against appellants charging the violations of law set forth above. An administrative hearing was held on November 30, 2000, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violations had been proven, and made the order of conditional revocation.

Appellants thereafter filed a timely appeal in which they raise the issue that the findings and decision of the Department are not supported by substantial evidence.

DISCUSSION

Appellants contend the findings and decision of the Department are not supported by substantial evidence, arguing that they did not know of the illegal sales or consented to such, essentially arguing they did not permit the illegal conduct.

The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record,

and whether the Department's decision is supported by the findings.[2]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Appellants and the Department stipulated that the allegations in the six-count accusation were true and correct. In its decision, the Department found that on six occasions, February 3, 10, 25, March 30, April 19 and 21, 2000, Brenda Sjurset (bartender), an employee of appellants, sold and furnished methamphetamine to Susan Gorsuch, a Department investigator (investigator) [Finding III]. Testimony also showed that the investigator on one occasion found some methamphetamine drying in the women's bathroom [Finding IV].

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[2]The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

The testimony of appellants was that they had no knowledge that the area around the premises was a drug area, and no knowledge of any drug sales at or near the premises [RT 44]. Notwithstanding, a sign warning that the premises was under surveillance was placed in the men's restroom, "[B]ecause I (co-appellant Fern Avila) didn't want nothing going on in there." No such sign was placed in the women's [RT 49, 55, 64]. Co-Appellant Fern Avila further testified:

> "Q. Do you have any surveillance equipment in the premises anywhere?
> A. No. I don't.
> Q. Did you have any knowledge of potential drug activity occurring in Henry's Cantina that made you put that sign in the premises?
> A. No. But in the evenings like it gets real busy, you know, so I thought it would help for (sic) business.
> Q. But you had no known drug problems?
> A. No. No.
> Q. You just put it in there?
> A. Yes.
> Q. Okay. There is no such sign in the females' restroom is there?
> A. No." [RT 54-55.]

The stall door in the men's restroom was removed, to guard against any illegal activity [RT 49, 54].

The bartender had been employed but fired due to tantrums, prior to her rehire in 1996. Appellants did not know of any specific drug activity, but were concerned as co-appellant David Avila knew the bartender had been convicted of a crime where drugs were involved [RT 51, 56-57, 60, 66-67, 74].

There is a lunch trade, but the business is minimal, with the major business in the evenings. The bartender worked during the week from 12 noon to 6 pm on the days the premises is open on weekdays. Co-appellant Fern Avila testified that she "all the time" had discussions with the bartender about drugs, who denied any involvement [RT 45-46, 50]. Co-appellant Fern Avila usually worked 9 am to 1 pm, every day the

premises was open, but would come back between 3 pm and 5 pm, and occasionally in the evenings as needed. Co-appellant David Avila usually came to the premises from 2 pm to 3 pm, and in the late afternoons and evenings. The bartender when appellants were not present, would manage the premises [RT 52-53, 55, 62].

This issue in this matter is whether the on-premises illegal conduct, and therefore knowledge, of the bartender, over successive periods of time, can be vicariously attributed to appellants where it was not shown that appellants had actual knowledge of the crimes.

The case of McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], concerned several transactions which occurred on the premises involving patrons selling or proposing to sell controlled substances to undercover agents. While the licensee and its employees did not know of the specific occurrences, they knew generally of contraband problems and had taken numerous preventive steps to control such problems. The McFaddin court held that since (1) the licensee had done everything it reasonably could to control contraband problems, and (2) the licensee did not know of the specific transactions charged in the accusation, the licensee could not be held accountable for the incidents charged.

The case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], was actually two cases--Laube and DeLena, both of which involved restaurants/bars--consolidated for decision by the Court of Appeal.

The Laube portion dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge–and

the court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity.

The DeLena portion of the Laube case concerned employee misconduct, wherein an off-duty employee on four occasions sold contraband on the licensed premises. The court held that the absence of preventative steps was not dispositive, but the licensee's penalty should be based solely on the imputation to the employer of the off-duty employee's illegal acts.

The imputation to the licensee/employer of an on-duty employee's on-premises knowledge and misconduct is well settled in Alcoholic Beverage Control Act case law. (See Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; and Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366, 370-371].)

We turn to the question of §24200.5(a) and the presumption it raises that successive negotiations or sales over a period of time should be deemed evidence of "permission" or "knowledge" by the appellant.

The §24200.5(a) presumption is that a licensee knowingly permits sales or negotiations for sales of contraband where there are successive transactions over a continuous period of time. Two appellate court cases discussing the "knowingly-permitted" phrase in §24200.5(a) held that the statute gives rise to a rebuttable

presumption, treated the presumption as evidence,[3] and were decided prior to the enactment of Evidence Code §600, which precluded a presumption from being evidence.

Witkin: California Evidence, 3rd ed., Vol. I, Ch. III, Burden of Proof and Presumptions, and the Comments of the Law Revision Commission and the Assembly Committee on Judiciary in West's Annotated California Codes, Evidence Code §600 et seq., however, do not find the existence of presumptions and their no longer being regarded as evidence as irreconcilable. Instead, presumptions should be classified as either presumptions affecting the burden of proof (public policy presumptions other than those facilitating proof) or presumptions affecting the burden of producing evidence (proof-facilitating presumptions). The Kirchhubel case declared that the presumption in §24200.5(a) was a rebuttable one (308 P.2d at 436). Evidence Code §602 provides that "A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption." Accordingly, the presumption involved in §24200.5(a) is one affecting the burden of proof.

In People v. Hampton 1965) 236 Cal.App.2d 795 [46 Cal.Rptr. 338], it was held that Labor Code §212(a), which creates a presumption of knowledge that there are insufficient funds when employer/defendants issue checks that are later

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[3]In Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395, 300 P.2d 366, the Court of Appeal regarded the presumption as evidence when it stated: "The evidence (including the statutory presumption) which supports the finding is substantial ..." (300 P.2d at 369). In Kirchhubel v. Munro (1957) 149 Cal.App.2d 243, 308 P.2d 432, the same panel of the Court of Appeal again regarded the presumption as evidence when it stated: "The presumption is not made conclusive but merely evidence of permission which may be overcome by a contrary showing." (308 P.2d at 436.)

dishonored, imposed the burden of proving the nonexistence of knowledge on defendants, and held that their testimony of no knowledge was insufficient to meet the presumption. To prove no knowledge, defendants had to prove that reasonable steps had been taken to inform themselves on whether funds would be available.

We have reviewed the entire record, and heard arguments in behalf of appellants. The penalty in this matter is harsh, and will work a great hardship on appellants. However, we cannot allow our sympathies to control our duty to review the record which shows a great degree of carelessness on the part of appellants to protect the premises, their license, and the public from their bartender who was derelict in her duty to them and the public.

The Department is charged with the duty to protect the welfare and morals of the people of the State of California, and where the Department has acted within its duties without arbitrariness, we cannot but uphold the Department in its decision.

ORDER

The decision of the Department is affirmed.[4]

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

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[4]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.