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

AB-8315
File: 42-334477 Reg: 03055567

RAFAEL DE LA TORRE dba Jalos Bar
144 South First Street, Turlock, CA 95380,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: April 7, 2005
San Francisco, CA

ISSUED JUNE 20, 2005

Rafael De La Torre, doing business as Jalos Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for his employees having purchased property (cigarettes and spirits) believed to be stolen on four separate occasions in 2002, violations of Penal Code sections 496, subdivision (a) and 664, and for having permitted the sale of cocaine on the premises on October 25, 2002, November 7, 2002, December 19, 2002, and January 16, 2003, in violation of Business and Professions Code section 24200.5, subdivision (a), in conjunction with Health and Safety Code section 11352,

Appearances on appeal include appellant Rafael De La Torre, appearing through his counsel, David Renteria, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

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[1]The decision of the Department, dated June 24, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine license was issued on October 28, 1997. Thereafter, the Department instituted an accusation against appellant charging the purchase by employees Manuel Lopez ("Lopez") and Rodolfo Suarez ("Suarez") of Marlboro Red cigarettes on five occasions in late 2002. The accusation alleged purchases by Lopez on October 9, 2002 (four cartons) (Count I), November 6, 2002 (four cartons) (Count III), and December 19, 2002 (four cartons) (Count VI), and purchases by Suarez on October 25, 2002 (two cartons) (Count (II), and November 7, 2002 (two cartons)(Count IV), all believed to have been stolen, in violation of the cited Penal Code sections.[2] In addition, the accusation alleged that appellant permitted sales of cocaine on the premises by Hugo Partida, a patron, on October 25, 2002 (Count VII-A), and by Suarez on November 7, 2002 (Count VII-B), December 19, 2002 (Count VII-C), and January 16, 2003 (Count VII-D), in violation of Business and Professions Code section 24200.5, subdivision (a), and Health and Safety Code section 11352.

An administrative hearing was held on May 13, 2004. At the commencement of the hearing, appellant's counsel stipulated that the administrative law judge (ALJ) could find as true the allegations of Counts I, III, and VI in their entirety, and the allegations of Counts II and IV, with the exception of the words "agent, employee, or servant" in those counts. In addition, it was stipulated that the ALJ could find as true the allegations of Count VII, except for the words "did knowingly permit;" the allegations of Count VII-A except for the words "respondent licensee permitted;" and the allegations of Counts VII-

[2] The Department amended its accusation at the hearing to add to the purchase on December 6, 2002, two one-liter bottles of Cazadores tequila. In addition, the Department dismissed Count V of the accusation, which alleged that a minor had been permitted to remain in the bar.

A through C except for the words "agent, employee, or servant" in those counts. By virtue of the stipulation, appellant admitted that there were three purchases of stolen cigarettes by Lopez, whose status as an employee was not disputed, as well as two such purchases by Suarez, but retained the right to contend that Suarez, the person alleged to have committed the acts alleged in Counts II, IV, and VII-B through -D, was not an employee, and that appellant did not knowingly permit the drug sales.

Subsequent to the hearing, the Department issued its decision which determined that Suarez was in fact an employee, and that each of the counts alleging the purchase of stolen property had been established. The Department also concluded that the sales of cocaine had occurred as alleged, and that, pursuant to Business and Professions Code section 24200.5, subdivision (a), appellant was deemed to have knowingly permitted successive sales of narcotics or dangerous drugs. The Department ordered the license revoked.

Appellant has filed a timely notice of appeal. He argues that the "sting operation" should be treated as a single transaction because the same two investigators returned to the same two individuals on various dates "more or less close together." Thus, appellant argues, the penalty for relatively small stolen property transactions and one continuous drug sting operation is too severe. As we understand his argument, in the absence of evidence that appellant had actual knowledge of the drug sales, mandatory revocation was improper.

The Department appears to read appellant's brief as additionally raising the issue of whether Suarez was, in fact, an employee. We do not believe appellant has preserved that issue, since he does not refer to it in his brief. In any event, there is substantial evidence in the record from which the Department could reasonably

conclude that Suarez held himself out as an employee, and that appellant permitted him to do so. Appellant, from time to time, paid Suarez money for his services, and Suarez performed the kind of duties customarily performed by an employee, such as acting as a doorman and as a bartender. That Suarez may not have been a "registered" employee is immaterial.[3]

DISCUSSION

I

Appellant contends that because the same investigators and same individuals were involved in all but one of the illegal drug and stolen property transactions, they should be treated as a single event for purposes of discipline. Appellant complained at the hearing that the investigators did not alert appellant to the ongoing activity.

The Board addressed a related argument in *Falcon and Suarez* (1996), AB- 6560, and stated as follows:

> It is not for the appeals board to mandate at what point in an investigation the department is to inform appellants that the licensed premises is under scrutiny, as oftentimes a continuing investigation is needed to determine the existence of violations or the degree to which a law is being violated.

Each incident is by itself unlawful. It is unrealistic to treat them as a collective violation. What is important, in this case and generally, is whether a pattern of illegal activity exists. The evidence in this case demonstrated a pattern of illegal activity.

Since there has been no showing of illegal, arbitrary, or abusive conduct on the

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[3] Under California law, an agent may be actual or ostensible. An ostensible agency arises when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him. (See 2 Summary of California Law, Witkin, pages 52-53 for a full discussion of ostensible agency.)

part of the Department, appellant's argument, which is essentially an oblique attack on the penalty, lacks merit.

II

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. *(Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

In this case, appellant attacks the penalty on two grounds. The first, that the various stolen property purchases and drug sales should be treated, for purposes of discipline, as a single transaction, has already been demonstrated to be without merit. Second, appellant argues that, because appellant had no knowledge of the various transactions, the Department erred in ordering the license revoked.

Business and Professions Code section 24200.5 provides, in pertinent part:

> Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:
>
> (a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for such sales, of narcotics or dangerous drugs upon his licensed premises. Successive sales, or negotiations for such sales, over any continuous period of time shall be deemed evidence of such permission.

Section 24200.5, subdivision (a) has been held to create a rebuttable presumption of knowledge on the part of the licensee. (See *Kirchhubel v. Munro* (1957) 149 Cal.App.2d 243 [308 P.2d 432].)

In the *Kirchhubel* case, the licensees offered evidence of their cooperation with

the police along with their denial of any knowledge of the unlawful transactions. Nonetheless, the court sustained the Department's finding of knowledge, stating:

> Petitioners' evidence created a conflict with the presumption. ... The resolution of that conflict was a matter for the Department of Alcoholic Beverage Control, whose action cannot be upset if there is substantial evidence to support it.

(See *Kirchhubel v. Munro*, *supra*, at page 436.)

We believe there is substantial evidence to support the Department's resolution of that conflict in this case.

Appellant suggests that the Department felt itself obligated by section 24200.5 to order revocation. While the decision could be so read, we do not think the Department abused its discretion. Confronted with evidence of multiple instances of purchases of stolen property and illegal narcotics sales, some of which appear to have taken place while appellant was at the premises, the Department undoubtedly concluded that any discipline short of revocation would be ineffective. We cannot say the Department acted unreasonably.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

Any party may, before this final decision becomes effective, apply to the appropriate district 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.