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

AB-9116
File: 21-244707 Reg: 07067625

KINGS SUPERMARKET, INC., dba Kings Supermarket
400 El Camino Avenue, Sacramento, CA 95815,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas Loehr

Appeals Board Hearing: April 7, 2011
San Francisco, CA

ISSUED APRIL 28, 2011

Kings Supermarket, Inc., doing business as Kings Supermarket (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for its sole shareholder having purchased distilled spirits on three separate occasions, believing them to have been stolen, violations of Penal Code sections 664/496, subdivision (a), and for its sole shareholder having been convicted, on his plea of nolo contendere, for having violated those same Penal Code sections on one of those occasions.

Appearances on appeal include appellant Kings Supermarket, Inc., appearing through its counsel, Ralph Barat Saltsman and Autumn Renshaw, and the Department

[1]The decision of the Department, dated June 3, 2010, is set forth in the appendix.

of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 3, 1990. On December 31, 2007, the Department instituted an accusation against appellant charging violations of Penal Code sections 664 and 496, subdivision (a) (Counts 1, 3, and 4) (purchase or sale of distilled spirits, believing them to have been stolen); Penal Code sections 664 and 496, subdivision (a), (Count 2) (purchase or sale of distilled spirits and cigars, believing them to have been stolen); Health and Safety Code section 11364.7 (Count 5) (possession with intent to deliver, furnish or transfer drug paraphernalia); Penal Code section 12020, subdivision (a) (Count 6) (possession of a wood baton); Penal Code section 12420 (Count 7) (possession of tear gas); and Health and Safety Code section 11377 (Count 8) (possession of a controlled substance).

At the administrative hearing held on March 18, 2010, documentary evidence was received and testimony concerning the violations charged was presented by three Department Investigators: Alba Medina, Edgar Valdes, and David Pickel. Testimony was also given by the licensee's sole shareholder and president, Sam Alkakos, as well as his accountant and business consultant, Diane Strategos.

Subsequent to the hearing, the Department issued its decision which sustained the charges of counts 1, 3 and 4 (attempt / purchase stolen property). Counts 2, 5, 6, 7 and 8 were dismissed.

Appellant filed a timely appeal raising the following issues: (1) The Department exceeded its jurisdiction by pleading and proving a violation that does not exist; (2) the Department violated the APA's prohibition against ex parte communications; (3) the ex parte communications were a violation of due process; (4) the burden is on the

Department to prove that ex parte communications did not occur; and (5) the findings in the decision are not supported by the evidence. Issues 2, 3 and 4 will be discussed together.

DISCUSSION

I

Appellant first contends that the Department exceeded its jurisdiction by improperly pleading and proving a violation. Appellants allege that by using the term "believing" rather than "knowing", the charge of attempted receipt of stolen property in the accusation is pled so improperly as to change the burden of proof.

Subdivision (a) of Penal Code section 496 provides, in pertinent part:

> Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, *knowing* the property to be so stolen or obtained, . . . shall be punished by imprisonment in a state prison, or in a county jail for not more than one year. . . . [Emphasis added.]

Alleged by itself, section 496, subdivision (a), charges the crime of receipt of stolen property.

Penal Code section 664, "which is a general section on attempts to commit crimes" (*People v. Siegel* (1961) 198 Cal.App.2d 676, 683 [18 Cal.Rptr. 268]), provides in pertinent part: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows: . . . " Combining section 664 with section 496, subdivision (a), results in a charge of attempted receipt of stolen property.

Appellant takes issue with the wording of counts 1, 3 and 4 of the accusation - the three counts which were sustained:

> On or about June . . . 2007, respondent-licensee, Chief Executive Officer and sole share holder Sam Alkakos at the premises, bought, received, withheld or concealed property, to wit: distilled spirits, *believing* the same to have been stolen, in violation of Penal Code Section 664/496(a). [Emphasis added.]

Appellant maintains that the wording of counts 1, 3, and 4 bears insufficient resemblance to Penal Code section 496, and that the Department therefore exceeded its jurisdiction, by failing to plead and prove this "knowing" element, thereby "pleading and proving a violation of a statute that does not exist" (AOB at p. 5).

People v. Wright (1980) 105 Cal App 3d 329 [164 Cal.Rptr 207] is instructive on this point. In that case, the court found that the purchaser of a watch committed the offense of attempting to receive stolen property where an undercover agent who sold him the watch had represented it to be stolen, and where the purchaser believed he was purchasing stolen property - although in fact the watch had not been stolen, but had been purchased by the undercover agent. As the court explained, a person commits the offense of attempting to receive stolen property where he has the intent to commit the substantive offense, and, under the circumstances as he reasonably sees them, does the acts necessary to consummate the substantive offense - notwithstanding that, due to circumstances unknown to him, there is an absence of one or more of the essential elements of the substantive crime.

The facts in the instant case are similar to *Wright, supra,* in that the licensee believed the alcohol he purchased was stolen. Therefore, he had the requisite intent to commit the offense of receiving stolen property, and, under the circumstances as he reasonably saw them, did the acts necessary to consummate that offense by purchasing the alcohol at a greatly reduced price.

In terms of statutory construction, the universally accepted rule is:

> " The court's role in construing a statute is to 'ascertain the intent of the Legislature so as to effectuate the purpose of the law.' " [Citation.] The first step in this process is to scrutinize the words of the statute, giving them a plain and commonsense meaning. [Citation.] If the language is clear and unambiguous, the plain meaning of the statute governs. [Citation.]

(*Ford v. Norton* (2001) 89 Cal.App.4th 974, 981 [107 Cal.Rptr.2d 776].)

The purpose of Penal Code section 496 is to criminalize the receipt of stolen property. The legislature included the word *knowing* to eliminate the situation in which a person could not reasonably believe or know that the item was stolen, and was simply found to be in possession of such property. This is not that case.

We do not believe that the use of the word "believing" in the accusation represents a lesser burden of proof than that contemplated in the statute, or that it negates a charge of violating Penal Code sections 664/496.

II, III, and IV

Appellant contends the Department violated the APA's prohibition against ex parte communications; that the ex parte communications were a violation of due process; and that the burden is on the Department to prove that ex parte communications did not occur. These issues will be considered together.

Appellant contends that the Department engaged in ex parte communications, in violation of the Administrative Procedure Act, simply because administrative law judge (ALJ) Loehr was employed as staff counsel for the Department in 2007, at the time the accusation was filed.

Appellant's assertion, that the burden is on the Department to prove the non-existence of ex parte communications, ignores the impact of the Department's General Order 2007-09 (the General Order) and the provisions of Evidence Code section 664.

Section 664 provides that "It is presumed that official duty has been regularly performed." The annotations to section 664 (29B pt. 2 West's Ann. Evid. Code (2011 ed.), foll. §664, pp. 216 *et seq*.) demonstrate that this presumption is regularly relied upon in support of decisions of administrative agencies and departments. There is no reason why it should not apply in this case, in light of the Department's adoption of the General Order on August 10, 2007, nearly three years prior to the administrative hearing in this matter on March 18, 2010.

The General Order sets forth changes in the Department's internal operating procedures which satisfy the requirements of *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585] (*Quintanar*) and the APA regarding the prevention of ex parte communications. The presumption exists that there has been compliance, absent the submission of evidence to the contrary.

Appellant cites *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr. 3d 6] (*Chevron*) for the proposition that the burden is on the Department to prove the non-existence of ex parte communications (AOB at p. 13).[2] Appellant misapprehends *Chevron*, which actually says: "Where a petitioner ***makes out a prima facie case***, the burden is thrown on the opponent to refute it [Citation]." [Emphasis added.] (*Id* at p. 131.) No such prima facie case has been made.

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[2]We note with disapproval appellant's failure to properly cite this quoted language. 149 Cal.App.4th 116, 137, cited by appellant, is a different case altogether. This Board is not required to search through the pages of a decision to find a quotation appellants have used to support their argument. If appellants cannot properly cite the authority they use, we may be compelled simply to ignore it.

Appellant has not affirmatively shown that any ex parte communication took place in this case. Without evidence that the procedure outlined in the General Order was disregarded, or that ALJ Loehr actively participated in this case, we believe it would be unreasonable to assume that any ex parte communication occurred.

To say that ALJ Loehr should be disqualified simply because he was employed as staff counsel by the Department in 2007, and therefore *could* have engaged in prohibited ex parte communication, is not supported by the evidence, and does not establish a prima facie case sufficient to shift the burden to the Department.

V

Appellant contends lastly that the decision contains findings that are not supported by admissible and reliable evidence.

When an appellant contends that the findings are not supported by the evidence, the standard of review is as follows:

> In examining the sufficiency of the evidence, all conflicts must be resolved in favor of the department, and all legitimate and reasonable inferences indulged in to uphold its findings if possible. When findings are attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 245, pp. 4236-4238.)

(*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815].)

Appellant maintains that the ALJ relied solely on the testimony of Investigator Valdes to establish the pricing disparity that would establish that the alcohol was stolen,

and asserts that a proper foundation was not laid for the evidence admitted. (AOB at pp. 15-16.) However, "[t]he trier of fact is accorded broad discretion in ruling on the admissibility of evidence, and the ruling will be reversed only if there is a clear showing of an abuse of discretion." (*Aguayo v. Crompton & Knowles Corp*. (1986) 183 Cal.App.3d 1032, 1038 [228 Cal.Rptr. 768].)

It is generally assumed that the judge is competent to, and does, disregard evidence that should not be considered. The administrative hearing before the ALJ is the same in this respect as a bench trial, where the judge sits without a jury to do the factfinding. The Supreme Court has rejected a challenge similar to that made here by appellant:

> In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions. It is equally routine for them to instruct juries that no adverse inference may be drawn from a defendant's failure to testify; surely we must presume that they follow their own instructions when they are acting as factfinders.

(Harris v. Rivera (1981) 454 U.S. 339, 346-347 [102 S.Ct. 460; 70 L.Ed.2d 530].)

The erroneous admission of evidence is not reversible error. (*Lone Star Security & Video, Inc. v. Bureau of Security & Investigative Services* (2009) 176 Cal.App.4th 1249, 1254 [98 Cal.Rptr.3d 559].) Therefore, even if the Board were to conclude that it was error to admit some or all of Investigator Valdes' testimony, it still would not be *reversible* error.

The ALJ made the following determination (Det. of Issues 4):

> On or about February 10, 2010, Sam Alkakos pled nolo contendere and was convicted of violating Penal Code Sections 664/496(a). (State's Exhibit 2) This conviction pertains to Alkakos purchasing purportedly stolen property from Investigator Valdes in the Licensed Premises on

June 28, 2007. (*Id*.) Furthermore, Respondent knowingly bargained for and entered into illicit transactions for purportedly stolen distilled spirits inside the Licensed Premises on June 13, 2007, and July 12, 2007. (See Findings of Fact, ¶¶ 3, 5, 6, 8 & 9)

"[M]oral turpitude is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain or other corrupt purpose." (*Rice v. Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30, 37 [152 Cal.Rptr. 285].)

Appellant was convicted of violation of Penal Code sections 664/496(a), which include, as an essential element, intentional dishonesty. Therefore, he has been convicted of a crime involving moral turpitude - grounds for revocation in and of itself - with or without the testimony of Investigator Valdes. The Staff finds no abuse of discretion by the ALJ in reaching his conclusion.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.