

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

AB-9290

File: 09/17/20-425277 Reg: 11075247

DEBORAH CHARMAINE WILKINSON and JAMES KENDALL WILKINSON,
dba Wilkinson Gourmet Imports
24686 Evening Star Drive, Dana Point, CA 92629,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 2, 2013
Los Angeles, CA

ISSUED JUNE 14, 2013

Deborah Charmaine Wilkinson and James Kendall Wilkinson, doing business as Wilkinson Gourmet Imports (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for a violation of Business and Professions Code section 24200(d).

Appearances on appeal include appellants Deborah Charmaine Wilkinson and James Kendall Wilkinson, appearing in propria persona, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

¹The decision of the Department, dated July 17, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' beer and wine importer, beer and wine wholesaler, and off-sale beer and wine license was issued on June 22, 2007. On June 22, 2011, the Department instituted an accusation against appellants charging that co-licensee James Kendall Wilkinson had been convicted of a public offense involving moral turpitude, and that such conviction established grounds for revocation under section 24200(d) of the Business and Professions Code.

At the administrative hearing held on April 24, 2012, evidence and testimony established that on June 15, 2010, Mr. Wilkinson appeared in the Superior Court of California, County of Orange, to face a jury trial on a felony violation of Penal Code section 118, subdivision (a), perjury under oath. He was represented by an attorney. On June 21, 2010, the jury found Mr. Wilkinson guilty.

Mr. Wilkinson filed a timely appeal with the California Court of Appeal. On August 31, 2011, the appellate court affirmed the conviction. Mr. Wilkinson then filed a petition for rehearing, which the court denied on September 19, 2011.

Mr. Wilkinson then filed a petition for review with the California Supreme Court. The court denied his petition on November 16, 2011.

Finally, Mr. Wilkinson filed a petition for writ of certiorari with the United States Supreme Court. The petition was denied on April 23, 2012. The administrative hearing in this case occurred the following day. At the administrative hearing, Mr. Wilkinson argued for a continuance on the grounds that he intended to file a petition for rehearing with the U.S. Supreme Court. The request for a continuance was denied. On June 15, 2012, the Supreme Court denied Mr. Wilkinson's request for rehearing.

On August 31, 2012, Mr. Wilkinson filed the petition for writ of habeas corpus

with the Federal District Court, Central District of California. That case is still pending.

It was undisputed that perjury is a crime of moral turpitude.

Subsequent to the hearing, the Department issued its decision which determined that co-licensee James Kendall Wilkinson was convicted of a public offense involving moral turpitude, to wit, perjury, and that this constituted grounds for revocation under Business and Professions Code section 24200, subdivision (d).

Appellants have filed an appeal contending that the Department did not proceed in the manner required by law, because Mr. Wilkinson's pending federal habeas corpus petition prevented the conviction from becoming final, and the administrative hearing was therefore premature.

DISCUSSION

Appellants contend that the hearing on revocation was premature because Mr. Wilkinson's conviction is not yet final. Mr. Wilkinson has filed a petition for writ of habeas corpus in U.S. District Court, and therefore has yet to exhaust the appellate process.

The Department's authority to regulate the sale of alcoholic beverages and administer licensing derives from California's Constitution, Article XX, section 22. That section notes, in part:

The department shall have the power, in its discretion, to deny, suspend, or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude.

Section 24200, subdivision (d) of the Business and Professions Code authorizes revocation for the "[t]he plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude." The court of appeals has

indicated that the "[d]isciplining of licensees such as the petitioners herein is for the protection of the public in the exercise of the police power and not for the purpose of punishing any licensee." (*Copeland v. Dept. of Alcoholic Bev. Control* (1966) 241 Cal.App.2d 186, 188 [50 Cal.Rptr. 452].)

The statute itself does not require that the judgment be final, or that the convicted be offered any appellate recourse whatsoever before his license is revoked. However, both this Board and the state courts have suggested that some degree of finality should be achieved before revocation occurs. (See, for example, *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1969) 270 Cal.App.2d 535, 538-539 [75 Cal.Rptr. 823].)

There is little question whether Mr. Wilkinson has been convicted of perjury. In fact, the Department's cross-examination of Mr. Wilkinson at the administrative hearing was limited to the following exchange:

BY MS. WINTERS:

Q So Mr. Wilkinson, isn't it true that on June 21st, 2010, you were convicted of perjury in violation of Penal Code Section 118, subsection A?

A Yes, I was.

MS. WINTERS: Okay. I have no further questions.

[RT at p. 21.]

In their brief, however, appellants contend that the conviction is not final for purposes of section 24200(d), as Mr. Wilkinson has filed a habeas corpus petition in U.S. District Court.² (App.Br. at p. 2.) Appellants further contend that the Department has not proven that Mr. Wilkinson is guilty of perjury.

²At the time of this opinion, Mr. Wilkinson's petition is still open and active in the Central District of California as *James Kendell Wilkinson v. Doug Gingrich*, case no. SACV-12-01441.

The Department, on the other hand, contends that "[t]he finality of a judgment has been defined as that point at which the courts can no longer provide a remedy on direct review." (Reply Br. at p. 3.) The Department asserts that because Mr. Wilkinson has exhausted his direct appeals, his habeas petition is irrelevant. The case the Department relies on, however, is directed at finality for the purposes of retroactive application of amended law, not finality for the purposes of administrative revocation of an alcoholic beverage license. (See *In re Pine* (1977) 66 Cal.App.3d 593 [136 Cal.Rptr. 718].)

It is undisputed that Mr. Wilkinson was found guilty of perjury by a jury, and that the verdict has been appealed to and affirmed by both the state court of appeals and the California Supreme Court. Moreover, Mr. Wilkinson was denied certiorari at the U.S. Supreme Court, and further denied on a request for rehearing.

The limited question this Board faces, then, is whether a federal habeas petition, made in a state criminal case following exhaustion of all state court appeals, is sufficient to delay revocation of an alcoholic beverage license. On one hand, this Board is beholden to the citizens of California. Section 24200(d) provides for revocation in the case of convictions for moral turpitude specifically to protect the health and welfare of the state's citizens. (See *Copeland, supra.*) On the other hand, it would be an affront to due process for this Board to permit revocation of a license, and thus deprive a licensee of his livelihood and income, without some certainty that the conviction was obtained fairly.

There is surprisingly little case law to guide this Board. In one instance, a court of appeals held that a collateral Rule 35 attack on a conviction was not sufficient to delay suspension of a license for petty theft and tax evasion. (*Kirby v. Alcoholic Bev.*

Control Appeals Bd. (1969) 270 Cal.App.2d 535, 538-539 [75 Cal.Rptr. 823].) In that case, however, the ruling was made on the basis that the Rule 35 attack was aimed at the sentence, and not the fact of the conviction.³ (*Id.* at p. 539.) The court did not address whether a collateral attack such as a federal habeas corpus petition, aimed at the constitutionality of the defendant's custody, would change the outcome.

Moreover, the point of finality in a criminal conviction appears to vary widely depending on the purpose. As noted above, in *Pine*, the Court of Appeals determined the narrow question of when a judgment become final for the purposes of retroactive application of a statutory amendment, and held that it occurred when the courts could no longer provide a remedy on direct review. (*Pine, supra*, at p. 594.)

In another case cited by the Department, the California Supreme Court considered the use and abuse of federal and state habeas petitions in capital cases. (*In re Reno* (2012) 55 Cal.4th 428 [146 Cal.Rptr.3d 297].) The court restricted the size and number of state court habeas filings in order to protect "society's interest in the finality of its criminal judgments." (*Id.* at 451.) The court did *not* hold, however, that a conviction was final merely because the convicted had exhausted his state court appeals; a habeas corpus petition would still operate to stay the execution. (See *ibid.*) Instead, the court merely set a limit on the quantity and size of habeas filings, beyond which the conviction would become final and the capital sentence could be carried out. (*ibid.*) The court's goal was to put an end to the use of frivolous habeas petitions as a

³In so ruling, the court overturned a decision from this Board holding that, because of the licensee's Rule 35 attack, proceedings to reconsider the conviction were still underway, and it could not be considered final. (*Whitfield* (1968) AB-3135, at pp. 6-7.) The Board, however, had acknowledged "some question as to whether the aforementioned appeal is limited to a question concerning whether the District Court abused its discretion as to the sentence imposed." (*Id.* at p. 6.)

delay strategy. (*Id.* at pp. 514-516.)

In both these cases, however, the court addressed finality for the purposes of defining or carrying out sentencing. Here, the Board is not addressing the crime itself or the resulting sentence; instead, it must determine the narrow issue of whether Mr. Wilkinson's federal habeas petition should delay revocation of his alcoholic beverage license, a privilege supplied by an administrative agency under a grant of power from the California Constitution.

We have sought guidance in analogous proceedings. Where an attorney is convicted of a crime of moral turpitude, the Business and Professions Code provides for the revocation of her license to practice law. (Bus. & Prof. Code section 6101(a).) As with alcoholic beverage licensing, the courts have held that the removal of an attorney from practice following conviction for a crime of moral turpitude is not punitive, but is "protective of the public." (*In re Shepard* (1917) 35 Cal.App. 492, 501 [170 P. 442].)

In the case of attorney licensing, courts have held that revocation is not part of the sentence or penalty for the conviction; rather, it is an entirely separate administrative action. (*In re Riccardi* (1920) 182 Cal. 675, 678 [189 P. 694].) Most importantly, the revocation "is not in the slightest degree affected by a setting aside or reversal of the judgment of conviction." (*Ibid.*) Thus, *even where a conviction is overturned on appeal*, the suspended or disbarred attorney must petition for readmission. (*Ibid.*)

We agree with the reasoning applied in attorney licensing cases. Because the revocation of a liquor license is a separate administrative proceeding, the Department's decision is authorized by the state constitution to protect the health and safety of

California's citizens by revoking a license as necessary under the provisions of section 24200, subdivision (d). Thus, we hold that, at a minimum, the revocation of an alcoholic beverage license should not be slowed by a collateral attack on a conviction already upheld throughout direct appeal. In the event that Mr. Wilkinson's habeas corpus petition is successful and his conviction is overturned, he may apply to the Department to reinstate his license.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.