

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

AB-9307

File: 20-382828 Reg: 11076214

JOSE FRANCISCO CERVANTES and MAXIMINA CERVANTES,
dba Rocky's Beer and Wine Market
10375 California Avenue, South Gate, CA 90280,
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

Jose Francisco Cervantes and Maximina Cervantes, doing business as Rocky's Beer and Wine Market (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 Jose Francisco Cervantes and Maximina Cervantes, appearing through their counsel, Ronald Talmo, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

¹The decision of the Department, dated August 23, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 14, 2001. On December 28, 2011, the Department instituted an accusation against appellants charging that co-licensee Jose Francisco Cervantes 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 May 30, 2012, documentary evidence was received and testimony concerning the violation charged was presented by co-licensee Jose Francisco Cervantes.

Evidence and testimony established that on August 22, 2011, Mr. Cervantes appeared in the Superior Court of California, County of Los Angeles, and entered a plea of no contest to a violation of California Penal Code sections 496(a) and 664(b), attempted receipt of stolen property. The court accepted the plea and found Mr. Cervantes guilty of the charge. He was placed on summary probation for 18 months and required to complete 45 hours of community service.

It was undisputed that attempted receipt of stolen property is a crime of moral turpitude.

Subsequent to the hearing, the Department issued its decision which determined that Mr. Cervantes' plea of no contest to a crime of moral turpitude was grounds for revocation under section 24200(d).

Appellants have filed an appeal contending that the Department did not proceed in the manner required by law, because appellants had already been penalized for the violation under an earlier settlement and decision issued by the Department on March 15, 2011.

DISCUSSION

Appellants contend that the Department did not proceed in the manner required by law, because appellants had already been disciplined and penalized for the receipt of stolen property under an earlier settlement and decision issued by the Department on March 15, 2011.

Following the administrative hearing in this case, the Department revoked appellants' license. The decision noted that "[c]ontinuation of the license would be contrary to public welfare and morals pursuant to Article XX, Section 22, of the Constitution of the State of California, and Business and Professions Code Sections 24200(a) and (b) in conjunction with Section 24200(d) of said Code." [Determination of Issues II.]

Section 24200, subdivision (d), provides grounds for suspension or revocation for "[t]he plea, verdict, or judgment of guilty, or the plea of *nolo contendere* to any public offense involving moral turpitude." Appellants do not challenge the conclusion that receipt of stolen property is a crime of moral turpitude, nor do they challenge the assertion that Mr. Cervantes pled no contest² to the charge.

The undisputed chronology of events is important. Appellants were licensed in December of 2001. On May 14, 2009, in the course of an ABC sting operation, co-licensee Jose Francisco Cervantes purchased alcohol he believed to be stolen. (App.Br. at p. 5.) On November 24, 2009, a misdemeanor complaint was filed against Mr. Cervantes in the Los Angeles Superior Court alleging receipt of stolen property in

²We note, for purposes of clarity, that the term *nolo contendere*, used in section 24200, is functionally interchangeable with "no contest," the term used on Mr. Cervantes' Superior Court paperwork and in the Department's decision.

violation of Penal Code section 496(a). [Exhibit 2.]

On March 15, 2011, while the criminal case was pending against Mr. Cervantes, two additional violations occurred at the premises:³ a sale to a minor, in violation of Business and Professions Code section 25658(a), and the sale of dangerous drugs without a license, in violation of Health and Safety Code section 11352.1(a). The Department filed a two-count accusation based on these violations on April 28, 2011.⁴

In response to the pending accusation, appellants negotiated a stipulation and waiver, which Mr. Cervantes signed on March 24, 2011.

On May 10, 2011, the Department issued its decision imposing disciplinary action for the March 15, 2011 sales. Appellants received a penalty of revocation, conditionally stayed for a period of one year provided (1) that the license be suspended for a period of 20 days, and (2) that no cause for disciplinary action occur within the stayed period. [Exhibit 5.]

On August 22, 2011, Mr. Cervantes entered a plea of no contest in his criminal case. The Los Angeles County Superior Court accepted the plea and found Mr. Cervantes guilty of attempted receipt of stolen property, a violation of Penal Code section 496(a). [Exhibit 2.]

On December 28, 2011, the Department filed the present single-count

³Mr. Cervantes is co-licensee at two businesses: Rocky's, located in South Gate, and T.K. Liquor, located in Pico Rivera. [RT at p. 19.] All events described took place at the South Gate location, and both accusations and decisions are directed at that license. All references to "the premises" are to the South Gate store.

⁴We note here that the signature of the District Administrator on the second page of the accusation apparently predates the violation. The violation, according to the accusation, occurred on March 15, 2011, but the signature affixed to the accusation is dated March 7, 2011 – a week before the violation occurred. As the March 2011 violations and accusation are not in question, we need not address the error here.

accusation against appellants alleging grounds for suspension or revocation under Business and Professions Code sections 24200(d). [Exhibit 1.] The accusation cited Mr. Cervantes' conviction of a violation of Penal Code sections 664 and 496, a crime of moral turpitude. Appellants filed a Notice of Defense requesting a hearing on the merits.

At the administrative hearing, counsel for appellants asserted that, because the Department was aware of Mr. Cervantes' attempted receipt of stolen property, which occurred in 2009, when it negotiated the stipulation and waiver, the matter was settled – that is, the penalty imposed in that case also addressed Mr. Cervantes' receipt of stolen property. The court clarified counsel's assertion:

THE COURT: Okay. Let me see if I understand you correctly. I'm looking at Exhibit 5 and I'm looking at the Accusation. It does not appear that the Accusation which is part of Exhibit 5, which was filed April 28, 2011, deals with receiving stolen property.

MR. TALMO: It does not. I'm not asserting that.

THE COURT: Okay.

.....

MS. WINTERS: The Department's not revoking because of that action. The Department's revoking because of a guilty plea to a crime of moral turpitude under 24200, Subsection D, of the Business and Professions Code.

THE COURT: I understand that. I think what your argument then is, Mr. Talmo, is that the events that led to the eventual plea of nolo occurred prior to the prior Accusation and settled. Is that what you're arguing?

MR. TALMO: Yes. All this was done.

.....

MR. TALMO: He's the same moral character. He's the same everything and he complied with the Department's requirements.

THE COURT: Okay. But the prior Accusation was filed prior to the plea of nolo; is that correct?

MR. TALMO: The prior Accusation--oh, yes.

. . . .

MR. TALMO: The only thing that happened is that he honestly admitted that he did it, which is the information they had at the time of the prior Accusation and the prior deal that he agreed to, and my point is it's executory. He did it. He did the 20-day suspension. So they had an agreement and he did the suspension on it and it's done.

[RT at pp. 20-21.]

On appeal, appellants repeat this assertion, that they have already been disciplined for the attempted receipt of stolen property as part of the earlier stipulation and waiver, and that the agreement impliedly precluded subsequent action on facts known to the Department at the time. (App.Br. at p. 4.)

In *Sood* (1999) AB-7404, this Board noted:

It has been the Board's position in all cases previously decided, that appellants may not, in matters where a stipulation and waiver form waives appeal, raise substantive issues on the merits of the facts of the case. However, appellants may raise narrow issues of due process and substantial justice: has the appellant been dealt with fairly.

Essentially, appellants are requesting that this Board clarify the extent of the stipulation and waiver they signed on March 24, 2011, and whether the subsequent accusation and revocation for attempted receipt of stolen property were fair in light of this earlier agreement.

A stipulation and waiver is governed by contract principles. (*Frankel v. Bd. of Dental Examiners* (1996) 46 Cal.App.4th 534, 544 [54 Cal.Rptr.2d 128].) California has codified the parol evidence rule: "Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein

may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement." (Cal. Code Civ. Proc. §1856(a).) However, "[t]his section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement." (*Id.* at §1856(g).)

We can find no reference in either the April 28, 2011 Accusation or the related stipulation and waiver that indicates it any way addressed or resolved Mr. Cervantes' receipt of stolen property in 2009. The Accusation itself is quite clearly limited to two counts: the first, the sale of beer to a minor, in violation of Business and Professions Code section 25658(a); the second, the dispensation of dangerous drugs without a license, in violation of Health and Safety Code section 11352.1. [Exhibit 5.] Likewise, the stipulation and waiver agreement is limited to the counts described in the Accusation: by signing it, appellants "[s]tipulate that *disciplinary action may be taken on the accusation* and that such discipline may be determined on the basis of facts contained in the investigative reports on file with the Department." [Exhibit 5, emphasis added.] On its face, the stipulation and waiver does *not* authorize the Department to take action on matters outside the related accusation.

Under contract law, appellants may be entitled to supply additional evidence to clarify the terms of the contract. Appellants have supplied no such extrinsic evidence, and would have this Board rely on unsupported inferences alone. We decline to do so.

Moreover, even if appellants could supply some evidence that the prior stipulation and waiver did in fact entail Mr. Cervantes' attempted receipt of stolen property, it would almost certainly be insufficient to merit reversal. At the time of the stipulation and waiver in March 2011, Mr. Cervantes' criminal case had commenced,

but he had not yet entered a plea of no contest. The entry of the plea itself represented a change in circumstances: before the plea, the criminal case against Mr. Cervantes was unresolved and the facts were still open to dispute. The no contest plea, entered in August 2011, finalized his conviction, removed the facts from contention, and established grounds for revocation under section 24200(d).

Because it was Mr. Cervantes' no contest plea, and not the sting operation itself, which led to the present accusation, we find no error in the ALJ's failure to discuss or make findings regarding the extent of the stipulation and waiver agreement. Simple chronology indicates that the stipulation and waiver could not possibly have addressed Mr. Cervantes' plea and conviction. As of August 2011, Mr. Cervantes has been convicted of a crime of moral turpitude. We are satisfied that the penalty of revocation is not duplicative, and is well within the Department's discretion.

ORDER

The decision of the Department is affirmed.⁵

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

⁵This 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.