ISSUED MARCH 21, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

GREG BRITTON and PHILIP RAIMAN dba Ragtop 17873 Sierra Highway Canyon Country, CA 91351, Appellants/Applicants, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6661 File: 41-308180 Reg: 95033859 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: February 5, 1997 Los Angeles, California

Greg Britton and Philip Raiman, doing business as Ragtop (applicants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which denied their petition for an on-sale beer and wine public eating place license because co-applicant Philip Raiman shoplifted from the Price Club six envelopes of the kind used to return developed film to the customer, an offense involving moral turpitude, and a violation of Business and Professions Code §23958.

Appearances on appeal include Greg Britton and Philip Raiman, applicants,

[1]The decision of the Department dated April 25, 1996, is set forth in the appendix.

appearing through their counsel, Ralph B. Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Applicants petitioned the Department for an on-sale beer and wine public premises license on May 2, 1995. The Department denied their petition for the license on August 31, 1995, and applicants requested a hearing.

An administrative hearing was held on January 4, 1996, at which time oral and documentary evidence was received. Subsequent to the hearing,[2] the Department issued its decision which denied appellants' petition, concluding that co-applicant Raiman was guilty of shoplifting, a crime involving moral turpitude, and that appellants failed to meet their burden of proving that the Department abused its discretion in denying their application for a license. Appellants filed a timely notice of appeal.

In their appeal, appellants contend there is no evidence that the property allegedly taken had any value, and, therefore, no crime was committed.

DISCUSSION

At the administrative hearing, there was testimony that on May 8, 1995, co-applicant Philip Raiman and his wife went to a Price Club discount store. They proceeded to the film section of the store, where Raiman picked up six envelopes of the kind used to return developed film to the customer. After walking behind some aisles, Raiman placed the envelopes in his wife's purse and closed the purse. They

[2] The ALJ had initially continued the hearing to another date to permit appellants to present evidence. That hearing was taken off calendar at appellants' request.

then exited the store, without paying. They were stopped in the parking lot, and the envelopes were returned to the Price Club. The envelopes were not placed in evidence at the administrative hearing.

Appellants argue that since the roles of film left for processing could have been underexposed or overexposed, there might not have been any charge reflected on the envelopes. Therefore, since no crime was committed, the Department abused its discretion in refusing to issue the license.[3]

Department investigator Rose testified that he recommended denial of the application on the strength of the sheriff's report which stated that one of the applicants had been arrested for shoplifting [RT 16]. He was not permitted to testify regarding the disposition of the charge [RT 17-18]. Witness Gomez, at the time of the incident a Price Club security officer, testified that he saw applicant Raiman place six processed film envelopes into Raiman's wife's purse, after which the two left the store without paying.

Appellants' brief and the oral argument of its counsel at the hearing focused on the contention that the envelopes taken from the Price Club had no value, and that the crime of theft requires the taking of something of value.

Penal Code §490.5 sets forth the penalties for "petty theft involving merchandise taken from a merchant's premises." Subdivision (g) (1) of §490.5 defines

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[3] Appellants' theory that the envelopes may not have set forth a charge assumes that the Price Club does not impose a processing charge for processing rolls of film that, because of underexposure, overexposure or some other problem, do not produce printable photos. The record is silent as to whether there is such a charge.

"merchandise" as "any personal property, capable of manual delivery, displayed, held or offered for sale by a retail merchant" (emphasis supplied). We think it clear that in this case the envelopes were displayed, held or offered for sale within the meaning of the Penal Code.

It is settled law that, in the absence of any contrary evidence, the price charged by a retail store is sufficient to establish the value of the merchandise taken. (People v. Brown (1982) 138 Cal.App.3d 832, 835 [188 Cal.Rptr. 324].) In the instant case, whatever evidence of value the envelopes might have indicated is unavailable, because the envelopes were not placed in evidence. However, the testimony of Gomez that he saw the envelopes taken from the area which usually contained developed film, and that when he retrieved them was able to observe that "there was value to it, to some of them," is some evidence, albeit slight, that at least some of the envelopes had prices marked on them.

It is common knowledge that merchants who provide film processing often depend upon their processor to imprint the finished film envelopes with the processing and printing charges. The record in this case does not disclose whether the Price Club follows this practice. Nonetheless, while it is conceivable that all six rolls of film were defective, and generated no charges to the person who brought the film in for processing and developing, it seems highly unlikely. However, the Board need not decide whether this could have been the case.

We think that we are entitled to assume that, whether or not the envelopes themselves reflect the charges associated with their handling, the very fact of their

possession establishes value to the merchant, so that when one takes those envelopes, one takes something of value. Aside from the loss of revenue from film processing that the envelopes might have brought, the Price Club was deprived of property which would protect it against claims of lost or damaged film if the envelopes contained film belonging to someone else.

As to appellant's argument that the Department failed to meet its burden of proof at the administrative hearing, we are satisfied that the evidence introduced by the Department was sufficient to sustain the denial of the application, and to shift any burden of proof to appellants, if, indeed, it was not appellants' burden in the first instance, as the Department argues. Appellants elected to cancel a later-scheduled hearing at which they were to be permitted to offer evidence in opposition to that presented by the Department. In so doing, they waived their opportunity to refute the Department's evidence.

CONCLUSION

The decision of the Department is affirmed.[4]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4] This final order is filed as provided in Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.