ISSUED AUGUST 6, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

HWA SOOK and LEEN SUP CHANG dba A.C. Market 17719-21 Saticoy Street Reseda, CA 91335, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6830 File: 21-215760 Reg: 96037846 Administrative Law Judge at the Dept. Hearing: Ronald Gruen Date and Place of the Appeals Board Hearing: April 1, 1998 Los Angeles, CA

Hwa Sook and Leen Sup Chang, doing business as A.C. Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license but stayed the revocation for a probationary period of three years, with an actual suspension of 20 days, for appellants having possessed for sale and having sold drug paraphernalia, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Health and Safety Code §11364.7, subdivision (a).

[1]The decision of the Department, dated March 20, 1997, is set forth in the appendix.

Appearances on appeal include appellants Hwa Sook and Leen Sup Chang, appearing through their counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on April 8, 1988. Thereafter, the Department instituted an accusation against appellants charging that they possessed for sale drug paraphernalia as defined in Health and Safety Code §11014.5 and that co-licensee Leen Sup Chang sold drug paraphernalia to Los Angeles Police Department (LAPD) officer James Flynn in violation of Health and Safety Code §11364.7, subdivision (a).

An administrative hearing was held on February 11, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the circumstances of officer Flynn's purchase of a cylindrical glass vial from appellant.

Subsequent to the hearing, the Department issued its decision which determined that appellants had violated the Health and Safety Code and ordered that appellants' license be revoked, with the revocation stayed for a probationary period of three years, that appellants serve an actual suspension of 20 days, and that appellants pay the Department the sum of $230 in interpreter's fees.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: 1) co-appellant Leen Sup Chang did not knowingly sell an item for smoking rock cocaine, 2) the vial sold did not qualify as drug paraphernalia as defined by Health and Safety Code §11014.5, and 3) the penalty is too severe. The first two issues are related and will be discussed together.

DISCUSSION

I

Appellants contend that Leen Sup Chang (hereinafter "appellant") did not knowingly sell drug paraphernalia and that the glass vial sold did not constitute drug paraphernalia as defined in Health and Safety Code §11014.5.

At the hearing, officer James Flynn of the LAPD, an officer trained and experienced in narcotics investigations, testified that he entered appellants' premises on the evening of September 6, 1996[2] in the course of an undercover "narcotics paraphernalia compliance check" that involved other premises as well as appellants' [RT 5-8]. Flynn testified that he asked appellant if appellant had "a pipe to smoke rock cocaine" [RT 10]. Appellant responded by directing the officer to an aisle in which tobacco products, including tobacco pipes, were located [RT 10-11]. Not finding a cocaine pipe there, Flynn testified that he returned to appellant, told him "No. A pipe for smoking rock cocaine," and then "Mr. Chang stepped to his right a little bit behind the counter and pointed to a cardboard display of glass vials which contained roses and stated, 'This one over here'" [RT 13]. Flynn was standing in front of the display of glass vials at the time [RT 14], although he testified that he had not seen the display until appellant pointed it out to him [RT 27]. Flynn stated he asked appellant "Is this for smoking rock cocaine?" to which

[2]The hearing transcript [RT 7] records Department counsel asking the officer about September 6, 1986, but this is clearly either a misstatement by counsel or a typographical error by the hearing reporter.

appellant responded "yes" [RT 14]. Flynn then purchased one of the glass vials for $1.99 plus tax [RT 14-15].

Appellant testified that he had been selling the glass vials with roses in them for about a month before Flynn purchased one and that he had obtained them from a wholesaler who brought him a variety of things to sell. The wholesaler, appellant said, told him that other places were selling the glass vials and that they sold well [RT 35, 45]. Appellant testified that he did not know what rock cocaine was, what it looked like, or how to smoke it [RT 35, 44].

The item identified by the officer as a rock cocaine pipe was a thin glass cylinder about 4 inches long and ¼-inch in diameter. Each end was closed off with a small cork, and a small artificial rose was inside the tube [RT 15]. The cylinders were displayed in a small red and white cardboard box with dividers that allowed the cylinders to stand on end. A white heart-shaped piece of cardboard at the back of the box and extending upward several inches depicted a man giving a flower to a woman, with the words "Heart & Soul" in red underneath the picture. (Dept. Exh. 1B; Resp. Exh. A.)

Officer Flynn testified [RT 17] that he identified the glass cylinder as drug paraphernalia based on having seen

> "probably hundreds of these exact same tubes or these same type dimension of tubes used as a rock cocaine pipe.
>
> "In this manner the cork ends are always removed. When I see it, the flower is removed from the inside, inside of which is usually a small piece of copper, like a scouring pad, under the Chore Boy brand name which is placed in one end."

* * *

> "I've arrested, like I said, probably over a hundred persons for being under the influence of cocaine. A lot of them will have a cocaine pipe of the exact similar dimensions of this. These people who I interviewed will say they buy these flowers in the liquor stores as cocaine pipes."

The ALJ made two "findings" in his proposed decision that merely reiterated the allegations of the Department's accusation. The only clue to the rationale for the ALJ's decision is in his Supplemental Findings of Fact:

> "The [appellants] deny knowledge that the glass vial they offered for sale constituted drug paraphernalia that could be used as a pipe to smoke rock cocaine. [Appellants] contend that the vials were merely novelty items, and as such were legally offered for sale. Such contention is rejected in that the undercover Los Angeles Police Officer Flynn specifically asked co-[appellant] Lee [sic] Sup Chang for a pipe to smoke rock cocaine and was directed to the glass vial display. [Appellant] knew of the illegal purpose to which the glass vial could be put and sold such vial knowing its illegal use."

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) The ALJ apparently resolved the contradictions between the officer's testimony and that of appellant in the favor of the officer.

On the basis of the officer's testimony, the ALJ concluded that, because appellant directed the officer to the glass vials in response to the officer's request for a rock cocaine pipe, appellant "knew of the illegal purpose to which the glass vial could be put and sold such vial knowing its illegal use." Since no other specific findings were made, we must assume that appellant's act of selling the vial

"knowing" that it could be used for an illegal purpose was the basis for the ALJ's findings that appellant possessed for sale, and sold, drug paraphernalia.

Section 11364.7, subdivision (a), makes it a misdemeanor for anyone to deliver, furnish, transfer, possess, manufacture with intent to deliver, furnish or transfer drug paraphernalia. Subdivision (d) states that the violation of the preceding subdivisions of §11364.7 is cause to revoke any business or liquor license.

Health and Safety Code §11014.5, subdivision (a), defines "drug paraphernalia" as items "which are designed for use or marketed for use, in [among other things] injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance . . ." There follows a non-exclusive list of items that could be drug paraphernalia, if, in each case, the item is "designed for use or marketed for use" in connection with a controlled substance. Subdivision (b) states:

> "For the purposes of this section, the phrase 'marketed for use' means advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or materials with controlled substances."

In subdivision (c) is the following list of things that may be considered, "in addition to all other logically relevant factors," in determining whether something is drug paraphernalia:

"(1) Statements by an owner or by anyone in control of the object concerning its use.

"(2) Instructions, oral or written, provided with the object concerning its use for ingesting, inhaling, or otherwise introducing a controlled substance into the human body.

"(3) Descriptive materials accompanying the object which explain or depict its use.

"(4) National and local advertising concerning its use.

"(5) The manner in which the object is displayed for sale.

"(6) Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products.

"(7) Expert testimony concerning its use."

This Board has recently issued decisions in two appeals that presented facts and legal issues very similar to those of the present appeal: Mbarkeh (1998) AB-6882 and Harper (1998) AB-6894. While mindful of the serious problems for society and the enormous burdens placed on law enforcement agencies by the illegal sale and use of narcotics and controlled substances, this Board was compelled to reverse the decisions of the Department in both those appeals. We are not so compelled here, but some of the analysis in those cases is pertinent to the present case.

In Mbarkeh and Harper we extensively reviewed the case of People v. Nelson (1985) 171 Cal.App.3d Supp. 1 [218 Cal.Rptr. 279]. The court in Nelson rejected the argument that the terms "designed for use" and "marketed for use" used in §11014.5 are impermissibly vague since many items are not designed, or not solely designed, to be used as drug paraphernalia, but their use as such is dependent upon the ingenuity or purpose of the purchaser.

The court in Nelson found that the phrases "designed for use" and "marketed for use" in §11014.5 were designed to assign the appropriate scienter to the different categories of offenders covered by the statute:

> "We therefore follow the cogent reasoning of the Supreme Court in Hoffman Estates and infuse the phrases 'designed for use' and 'marketed for use' in section 11014.5 with the requisite element of scienter, which is construed solely from the viewpoint of the person in control of the item, i.e., the manufacturer or seller, without reference to a third person's state of mind.
>
> "This conclusion is further buttressed by a plain reading of the phrase 'marketed for use' in the context of section 11014.5 as a whole. The unambiguous language of subdivision (b) of that section specifically defines that phrase to mean 'advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or material with controlled substances.' The clear import of this language is to focus only on the intent and actions of the seller. Additionally, subdivision (c) spotlights the owner or anyone in control of the object with regard to two of the seven enumerated factors that may be used to determine whether an object constitutes drug paraphernalia. There is nothing in the language of section 11014.5, however, which would give rise to an inference that the intent of a third person is relevant to the definition of what constitutes drug paraphernalia."

(People v. Nelson, 171 Cal.App.3d Supp. at 11.)

The United States Supreme Court, in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982) 455 U.S. 489 [102 S.Ct. 1186], rejected challenges to a statute requiring a license to sell items designed or marketed for use with illegal cannabis or drugs. The Court found the phrase "designed for use" unambiguous, since it "at least encompassed an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer." (Hoffman Estates, supra, 455 U.S. at 501-502, 102 S.Ct. at 1194, 1195.) Similarly, the Court found the phrase "marketed for use" "transparently clear":

> "[I]t describes a retailer's intentional display and marketing of merchandise. The guidelines refer to the display of paraphernalia, and to the proximity of

> covered items to otherwise uncovered items.[3] ... The standard requires scienter, since a retailer could scarcely 'market' items 'for' a particular use without intending that use."

(Hoffman Estates, supra, 455 U.S. at 502, 102 S.Ct. at 1195.)

Because the intent of the seller in marketing an object is an integral part of the §11014.5 definition of drug paraphernalia, sellers of items that might have potential uses with controlled substances are protected from prosecution "in the absence of showing that the seller intended to sell, distribute, etc., the objects for use with controlled substances." (People v. Nelson, supra, 171 Cal.App.3d Supp. at 14.) The intent of a third party to use an item illegally cannot "create" drug paraphernalia under the statute "for the simple reason that the seller must already have intended that the object be sold for drug use before his knowledge of its use by a buyer comes into play." (People v. Nelson, supra, 171 Cal.App.3d Supp. at 16.)

The ALJ in the present case found the drug paraphernalia statutes violated based on his conclusion that appellant sold the glass cylinder knowing that it could be used for an illegal purpose. In doing so, he used the wrong standard. A seller's knowledge of the item's potential use does not, by itself, make sale of the item illegal; the statute requires that the glass cylinders must be "marketed for use" with illegal drugs in order to be considered drug paraphernalia.

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[3] The guidelines for the determination of what is drug paraphernalia referred to are different from those set forth in §11014.5, but, we think, the same reasoning applies with respect to the §11014.5 guidelines.

While the ALJ applied the wrong standard to reach his result, the record supports the same result using the correct standard. Officer Flynn's testimony establishes that appellant pointed to the glass vials and said "This one over here" in response to the officer's specific request for "a pipe for smoking rock cocaine." Although appellant did not advertise, distribute, or display the glass vials as cocaine pipes, in his response to the officer we believe he offered the vials for sale and sold them for use with a controlled substance, thereby "marketing" the items within the definition of that term in subdivision (b) of Health and Safety Code §11014.5.

II

Appellants argue that the penalty imposed - revocation stayed for a three-year probationary period, with an actual suspension of 20 days - is too severe. They contend that potentially mitigating factors, such as operating for ten years with only one disciplinary action and the possibility that a language problem may have contributed to the violation, were not considered.

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].)

While it is true that a single disciplinary action in ten years of operation probably represents an admirable record, we cannot say that it would be a

substantial factor, if any, in mitigation. Therefore, just because the Department's decision states that appellants' prior disciplinary record was "not established," this does not mean that the Department exercised its discretion unreasonably in imposing the penalty it did.

While there is "the possibility that there may have been a language or hearing barrier," the ALJ did not make any findings indicating he believed that such barriers existed. The finding that appellant sold the vial knowing its illegal use indicates that any barrier that may have existed was not sufficient to negate the existence of the violation or to provide a defense to it. Presumably a language barrier, if one existed, would provide exoneration, not mitigation.

CONCLUSION

The decision of the Department is affirmed.[4]

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

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

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