ISSUED FEBRUARY 11, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KIM ANH THI TRAN dba Al's Market 508 E. Foothill Blvd. Upland, CA 91786, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)))))))))))	AB-6851 File: 20-315932 Reg: 96038411 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: November 5, 1997 Los Angeles, CA

Kim Anh Thi Tran, doing business as Al's Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked appellant's off-sale beer and wine license, for having conspired with another to purchase property which was believed to be stolen, and having pled guilty to the crime of attempted receiving stolen property, a crime involving moral turpitude, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §24200, subdivisions (a) and (d), and Penal Code §§182 and

[1]The decision of the Department, dated March 27, 1997, is set forth in the appendix.

664/496, subdivision (a).

Appearances on appeal include appellant Kim Anh Thi Tran, appearing through her counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on February 28, 1996. Thereafter, the Department instituted an accusation against appellant charging in three counts, that appellant had conspired with another, and thereafter in accordance with that conspiracy, did buy and receive 15 cartons of cigarettes represented to appellant and her agent and employee, to have been stolen, and on a subsequent date, her agent and employee bought and received three cases of cigarettes represented to have been stolen.

An administrative hearing was held on February 13, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the sales, and the fact that appellant had pled guilty to the charge of attempted receiving stolen property.[2] Subsequent to the hearing, the Department issued its decision which determined that the license should be revoked.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant

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[2]Count 4 was added as an amendment to the accusation at the administrative hearing. The plea, being a form of an admission against interest, would be a valid amendment pursuant to the authority set forth in Business and Professions Code §24200, subdivision (d).

raises the following issues: (1) the decision is not supported by the findings, (2) the crime alleged is not one of moral turpitude, (3) appellant was entrapped, and (4) the penalty is excessive.

DISCUSSION

I

Appellant contends the decision was not supported by the findings, arguing that the evidence "utterly" fails to show actual knowledge on the part of appellant that the cigarettes were stolen.

Eric Froeschner, a Department investigator, testified that he and another investigator approached appellant in her market and asked if she wanted to purchase cartons of cigarettes for $7 a carton. Following an inquiry by appellant as to why the cost was so cheap, he replied "we steal them," to which appellant replied "Oh," and then asked what type of cigarettes were available [RT 9-10]. Appellant accompanied the investigators to an automobile and appellant inspected the cartons, commenting that the investigator should have come earlier as she had just purchased cigarettes [RT 11]. After the price was reduced to $5, appellant consummated the deal [RT 20]. Thereafter, appellant prepared a list of what future cartons she wanted [RT 22-23, 48]. Sang Viet Nguyen, a person seen by the investigators to be working in the premises, and who had been part of the colloquy at the car, delivered the list, and later the funds for the cigarettes to the investigators [RT 13, 21, 23, 25].

We determine there was sufficient evidence in the record that appellant knew

or should have known that the cigarettes she purchased and caused to be paid for, were sold as stolen goods.

Appellant further argues that her attorney at the administrative hearing was inadequate and she was deprived of effective counsel. The brief uses such rhetorical words as "aggressive" and "tenaciously" in describing the absence of such in the former counsel's representation.

Appellant's argument cites (1) that no objection was made to the amending of the accusation to allow evidence of the plea of guilty; (2) that no objection was made that the crime was not one involving moral turpitude; (3) that no argument was advanced that no nexus existed between the crime and the ability of appellant to function under her license; and (4) no defense testimony was presented.

The issue of failure to object to the introduction of exhibit 1, a certified copy of the plea of guilty document, does little to support appellant's argument. The record shows that counsel for appellant discussed the matter of the document "off the record" with appellant, and then stated he had no objection to the document [RT 5-6].

Appellant's brief argues that the former counsel "... did not object to the proposed amendment [the plea of guilty] on the grounds that such was both unduly prejudicial and irrelevant under the existing accusation since the accusation never alleged that appellant attempted to receive stolen property." This statement is not true. Count 1 of the accusation alleges a conspiracy to receive property represented to have been stolen, and cites seven overt acts in furtherance of that conspiracy.

Count 2 of the accusation alleges "did buy or receive fifteen (15) cartons of cigarettes represented as having been stolen," then cites the attempted stolen property citation, as Penal Code §664/496(a).

The record shows that the issue of no "aggressive" or "tenacious" cross examination has no foundation: (1) a hearsay objection was made, which the Administrative Law Judge sustained [RT 11-12]; (2) a hearsay objection was made, which the Administrative Law Judge overruled, but went on to explain to the Department's counsel that a foundation needed to be made before the testimony could be admitted [RT 14-17]. The Administrative Law Judge allowed the evidence in subject to a motion to strike after the hearing's testimony was completed [RT 17]; and (3) appellant's counsel in the hearing cross-examined one of the Department's witnesses [RT 35-43], and another witness, as well [RT 50-52].

A reading of the record shows that counsel adequately represented appellant in questioning the witnesses and attempting to suppress some of the testimony. However, despite counsel's representation at the hearing, the whole of the evidence was sufficient to find against appellant.

The issue that the crime was not one which constitutes moral turpitude and should have been argued as such, is one involving a trial attorney's choice of tactics. Most likely, counsel knew that the law is clear on that subject. The Department proceeded against appellant under the authority of Business and

Professions Code §24200, subdivision (d).[3] No definition of what constitutes "moral turpitude" has been given by the Legislature. However, the courts have found certain acts involve moral turpitude, such as crimes involving theft, receiving stolen property, extortion, and fraud.[4]

The court in Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30, 37 [152 Cal.Rptr. 285], stated that "moral turpitude is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain ...." Also, see Ullah (1994) AB-6414, where the crimes of insurance fraud, grand theft, and perjury were held to be crimes of "moral turpitude" and were substantially related to the duties, functions, and qualifications of a licensee.

The Appeals Board determines that the facts of the present appeal come within the concept of "moral turpitude," as defined in case law.

Appellant raises the issue that her counsel at the administrative hearing did not offer any defense in opposition to the evidence presented against appellant. Appellant fails to inform the Appeals Board what was so egregiously missing in the record or what her counsel could have reasonably done, considering the testimony given by the two Department investigators, and the fact that appellant had pled

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[3]The statute states in pertinent part: "The following are the grounds that constitute a basis for the suspension or revocation of licenses ...(d) The plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude ...."

[4]See In re Rothrock (1944) 25 Cal.2d 588 [154 P.2d 392, 393]; Re Application of McKelvey (1927) 82 Cal.App. 426 [255 P. 834]; Re Application of Stevens (1922) 59 Cal.App. 251 [210 P. 422]; and Re Application of Thompson (1918) 37 Cal.App. 344 [174 P. 86].

guilty to a crime, the basis of which was at issue before the administrative law judge.

We determine that appellant has failed to make a reasonable showing that she was not adequately represented by her counsel at the administrative hearing.

II

Appellant contends that the crime alleged was not one of moral turpitude. The Appeals Board has consistently held that crimes involving dishonesty are crimes of moral turpitude, and receiving what a licensee believes is stolen property, is such a crime.[5]

III

Appellant contends that she was entrapped.

The test for an entrapment defense is whether the conduct of the public agent was such that a normally law-abiding person would be induced to commit the prohibited act. Official conduct that does no more than offer an opportunity to act unlawfully is permissible. (People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459].) The court stated:

> "... We hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as

[5]Elzofri & Saif (1996) AB-6601, and Alqudsi (1996) AB-6542.

> badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (23 Cal.3d at 689-690) (fn. omitted)

We determine that, from a review of the record, there is nothing that approaches the conduct said in the Barraza decision to be improper.

IV

Appellant contends that the penalty is excessive. 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].)

Appellant argues that the penalty is out of proportion to the offense and should be reduced. The Department had the following factors to consider: (1) appellant received her license on February 28, 1996, (2) On July 16, 1996, a period of approximately four and one-half months after issuance of the license, appellant purchased cigarettes believing them to be stolen, (3) attempted receipt of stolen property is based on the principle of dishonesty, and (4) the people of the State of California can ill afford to have state-authorized licenses in the possession of those who openly act in a dishonest manner, by willingly trafficking in stolen goods.

Considering such factors, the dilemma of the penalty's appropriateness must

be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

CONCLUSION

The decision of the Department of Alcoholic Beverage Control is affirmed.[6]

BEN DAVIDIAN, CHAIRMAN
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD[7]

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

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

[7]Ray T. Blair, Jr., Member, did not participate in the oral argument or decision is this matter.