

ISSUED JANUARY 12, 1999

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

JERONIMO and MARIA ESQUEDA	)	AB-7044
dba Viva La Vida Mariscos)	
8219 De Soto Avenue	)	File: 41-304072
Canoga Park, CA 91304,	)	Reg: 97041036
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	November 4, 1998
	)	Los Angeles, CA

Jeronimo and Maria Esqueda, doing business as Viva La Vida Mariscos (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for co-licensee Jeronimo Esqueda being convicted, on his plea of guilty, of a violation of Health and Safety Code §11379, subdivision (a), for the sale or transportation of a controlled substance, a crime involving moral turpitude, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivision (d), arising from a violation of Health

¹The decision of the Department, dated February 11, 1998, is set forth in the appendix.

and Safety Code §11379, subdivision (a).

Appearances on appeal include appellants Jeronimo and Maria Esqueda, appearing through their counsel, Armando Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public eating place license was issued on April 17, 1995. Thereafter, the Department instituted an accusation against appellants charging that continuance of the license would be contrary to public welfare and morals due to the conviction of Jeronimo Esqueda ("Jeronimo"), on his plea of guilty, for violation of Health and Safety Code §11379, subdivision (a), which prohibits the sale or transportation of a controlled substance, and is an offense involving moral turpitude.

An administrative hearing was held on January 8, 1998, at which time oral and documentary evidence was received. Jeronimo Esqueda testified as to matters in mitigation.

Subsequent to the hearing, the Department issued its decision which determined that the charge in the accusation had been proven.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: 1) The Administrative Law Judge improperly precluded Jeronimo Esqueda from testifying about the facts and circumstances of Esqueda's participation in a narcotics transaction, which could have provided

evidence of mitigation that might have lessened the penalty of outright revocation; and 2) the penalty of revocation is excessive, since a violation of Health and Safety Code §11379, subdivision (a), is not an offense involving moral turpitude as a matter of law since it did not involve possession of a controlled substance.

DISCUSSION

I

Appellant contends he was erroneously prevented by the Administrative Law Judge (ALJ) from testifying about the circumstances of the narcotics transaction of which he was convicted, thereby not having the opportunity to present mitigating circumstances that could lessen the severe penalty of outright revocation. He asks that the matter be remanded to the Department for further hearing, allowing the testimony on the issue of mitigation.

It is unclear whether the testimony appellant wanted to present would really be evidence in mitigation. Evidence in mitigation is not a justification or excuse for the offense committed, but evidence of circumstances which could be considered to be extenuating or to lessen the degree of moral culpability. (Richards v. Gordon (1967) 254 Cal.App.2d 735, 742 [62 Cal.Rptr. 466, 471].) The additional evidence appellant wanted to present purportedly had to do with his level of involvement in the illegal drug transaction and how he came to be involved in it [RT 18, 19, 28, 33].

In a case brought under §24200, subdivision (d), discipline is imposed on the

basis of a guilty plea; the Department does not need to prove the commission of the offense by the licensee, and the facts involved cannot be re-litigated at the administrative disciplinary hearing. (See California Real Estate Loans, Inc. v. Wallace (1993) 18 Cal.App.4th 1575, 1582 [23 Cal.Rptr.2d 462].) “[I]rrelevant, therefore, are the acts or omissions of the licensee which led to the judgment.” (Richards v. Gordon *supra*, 254 Cal.App.2d at 741 [62 Cal.Rptr. at 470].) Clearly, the testimony appellant desired to present would have involved “acts or omissions of the licensee which led to the judgment.”

We cannot say that the ALJ abused his discretion in not allowing testimony as to appellant's involvement in the drug transaction.²

II

Appellant contends his conviction under Health and Safety Code §11379, subdivision (a), does not come within the provisions of Business and Professions Code §24200, subdivision (d), because a violation of that Health and Safety Code section is not an offense involving moral turpitude.

² We note that appellant was allowed to present some evidence suggesting his level of involvement in the crime might not have been great: he was sentenced to no jail time, only three years of probation and a period of electronic monitoring [RT 14-15], and no drugs were found on his person or at the licensed premises [RT 16]. He also testified as to his good behavior both before and after his conviction: he reported monthly to his probation officer and was in compliance with the terms of his probation [RT 25]; he had worked for 20 years [RT 16]; he was in no other trouble with the police either before or after his conviction for this offense [RT 15,16,23];and he had operated the premises since 1995 with no record of discipline [RT 22-23].

“Moral turpitude” is said to be

“inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain or other corrupt purpose (citations) but not in other crimes which neither intrinsically reflect similar inimical factors nor demonstrate a level of ethical transgression so as to render the actor unfit or unsuitable to serve the interests of the public in the licensed activity. (Citations.)”

(Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30, 36-37 [152 Cal.Rptr. 285].)

Possession of drugs for sale has been designated a crime involving moral turpitude as a matter of law. (Rice v. Alcoholic Beverage Control Appeals Board, supra, 89 Cal.App.3d at 38.) In People v. Castro (1985) 38 Cal.3d 301 [211 Cal.Rptr. 719, [696 P.2d 111], the court stated that possession of narcotics for sale is a crime involving moral turpitude, not because it involves dishonesty, but because it involves “the intent to corrupt others.” The court held, however, that simple possession of narcotics does not necessarily involve moral turpitude.

(People v. Castro, 38 Cal.3d at 317.)

Health and Safety Code §11379, subdivision (a), to which appellant pled guilty, penalizes one who: “transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport [certain specified non-narcotic controlled substances]. . . .”

We have found no case directly addressing whether violation of Health and Safety Code §11379 is considered a crime involving moral turpitude. However, the

court in People v. Navarez (1985) 169 Cal.App.3d 936 [215 Cal.Rptr. 519], considered whether violation of Health and Safety Code §11352 was a crime involving moral turpitude for purposes of impeachment. Health and Safety Code §11352 penalizes one who: “transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport” designated controlled substances, including narcotics such as heroin. The court pointed out that the statute was “directed at trafficking in narcotics and their proliferation in our society”³ and that “[a]nything that is related to trafficking is more serious than possessing.”⁴ The court concluded that “a conviction under section 11352 does satisfy the threshold test of Castro [,supra], 'a readiness to do evil,' and thus entails moral turpitude.” (People v. Navarez , supra, 169 Cal.App.3d at 949.)

We find that analysis and conclusion to be equally applicable in the present appeal, even though the statute involved here is Health and Safety Code §11379 instead of §11352. The only real difference between the two statutes is that the former generally involves controlled substances that are potentially dangerous stimulants or depressants, but are not classified as narcotics, while the controlled

³ Citing People v. Holquin (1964) 229 Cal.App.2d 398, 402 [40 Cal.Rptr. 364], disapproved on another point in People v. Daniels (1975) 14 Cal.3d 857, 861-862 [122 Cal.Rptr. 872].

⁴ Citing People v. Cina (1974) 41 Cal.App.3d 136, 140 [115 Cal.Rptr. 758]; People v. Cortez (1985) 166 Cal.App.3d 994, 1000 [212 Cal.Rptr. 692].

substances covered by the latter statute are generally classified as narcotics (e.g., opium and cocaine and their derivatives). We do not believe that this difference requires a result different from that reached by the Navarez court, since trafficking in the non-narcotic controlled substances covered by §11379, such as methamphetamine and phencyclidine (PCP), also connotes “a readiness to do evil.” We conclude that appellant pled guilty to a crime involving moral turpitude.

ORDER

The decision of the Department is affirmed.⁵

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

⁵This 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 order as provided by §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 §23090 et seq.