ISSUED JUNE 23, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

HAO Q. HUYNH and CATHERINE TRAN dba Sportsman Liquor 2615 Newport Boulevard Newport Beach, CA 92660, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7094 File: 21-278079 Reg: 97039695 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: February 3, 1999 Los Angeles, CA

Hao Q. Huynh and Catherine Tran, doing business as Sportsman Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for two consecutive 15-day periods (totaling 30 days) for appellants' clerk selling an alcoholic beverage to a person under the age of 21 and for appellants' clerk willfully resisting, delaying, and obstructing a police officer while discharging his official duty, both occurrences being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX,

[1]The decision of the Department, dated April 9, 1998, is set forth in the appendix.

§22, arising from violations of Business and Professions Code §25658, subdivision (a), and Penal Code §148.

Appearances on appeal include appellants Hao Q. Huynh and Catherine Tran, appearing through their counsel, Stephen Leventhal, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on December 11, 1992. Thereafter, the Department instituted an accusation against appellants charging (Count 1) that appellants' clerk, Tony Tran (Tran), sold beer and ale, both alcoholic beverages, to Jeffrey Waisblatt (Waisblatt), who was 19 years old at the time, and (Count 2) that Tran willfully resisted, delayed, or obstructed Newport Beach Police Officer John Ludvigson (Ludvigson) in the discharge of his official duties, by refusing to identify himself, attempting to leave the premises during the officer's investigation, and hitting the officer's arm for the purpose of escaping detention.

An administrative hearing was held on February 11, 1998, at which time documentary evidence was received, and testimony was presented concerning the circumstances of the alleged sale.

Waisblatt testified that he chose and took to the counter two six-packs and two bottles of beer [RT 11-12]. When Waisblatt was waited on by Tran, Waisblatt showed him a California driver's license, that was not Waisblatt's, showing a date of birth in 1986 [RT 13-15].

Waisblatt further testified that Tran rang up the sale, told Waisblatt the total price, received money from Waisblatt, gave him change, put the beer in a bag and placed on the counter [RT 15-19]. As Waisblatt began to pick up the bag, a friend

indicated to Waisblatt that the police were outside. Waisblatt immediately released the bag, pushing it toward Tran, and asked for his money back. He then left the store without the alcoholic beverages or the money and was detained by the police outside. [RT 20-22.]

Tran testified that he rang up the sale and put the beer in a bag [RT 125-126]. He asked for and looked at the proffered identification, didn't think the ID was Waisblatt's, and asked for a second ID, which Waisblatt said he would have to go outside to get [RT 123-124, 142-143]. When Waisblatt didn't return right away, Tran voided the transaction [RT 129-130], leaving the money he received from Waisblatt out of the register [RT 124, 131, 145].

Appellants introduced into evidence the cash register tape showing the transaction in question. (Exhibit E.)

Subsequent to the hearing, the Department issued its decision which determined that both counts of the accusation had been proven.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) There was no completed sale of alcoholic beverages within the meaning of Business and Professions Code §25658, subdivision (a); and (2) there was no violation of Penal Code §148, subdivision (a).

DISCUSSION

I

Appellants contend the finding that a sale was made was not supported by substantial evidence in the record and was incorrect as a matter of law.

Under the “substantial evidence” test applicable here, the Appeals Board must determine, based “on the record taken as a whole after considering the entire record,

whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) "Substantial evidence is not [literally] any evidence--it must be reasonable in nature, credible, and of solid value." (Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1, 51 [26 Cal.Rptr.2d 834, 865 P.2d 633].) In applying the substantial evidence test, "the focus is on the quality, not the quantity of the evidence. Very little solid evidence may be 'substantial,' while a lot of extremely weak evidence might be 'insubstantial.'" (Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871-872 [269 Cal.Rptr. 647].)

The ALJ, in the first paragraph of Finding III, found that Tran sold beer and ale to Waisblatt. Finding III.C. found:

> "Clerk Tran took possession of the identification and looked it over for a few seconds. Then, Tran gave the identification back to Waisblatt, scanned the items being purchased, and told Waisblatt the total price, $16.74. Waisblatt removed some currency from his wallet and handed it to Tran. Tran made change, which he gave to Waisblatt. The alcoholic beverages were put into a bag and placed on the counter in front of Waisblatt."

We find that the record as a whole does not provide substantial evidence, "reasonable in nature, credible, and of solid value," to support the critical findings that Tran told Waisblatt the total price was $16.74 and the Waisblatt received change from Tran, and, therefore, the findings do not support the determination.

The two items of evidence that address these findings are Waisblatt's testimony and the cash register tape [Exhibit B]. Waisblatt's testimony, quoted below from the reporter's transcript, was as follows:

[*Direct examination of Waisblatt by counsel for the Department*.]
Q And that's -- we don't want you to speculate. After you paid this clerk the sum of money, did he give you any change?
A Yeah, he -- I think they did. [RT 18:1-4.]
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Q Let's back up just a little bit. When you say you think you got change, do you recall receiving anything from the clerk and putting it in your wallet other than your -- the I.D. that was used?
A I believe if I was given change I put it in the wallet.
Q Do you recall receiving any coins in change?
A I assume so. It wasn't a round number.
Q And if you received the change in coins, where would those coins have been placed?
A In the wallet. [RT 19:5-15.]

[*Cross examination by counsel for appellant*.]
Q Now, you said that you are not sure whether or not you received any change; is that correct?
A I believe I received some change.
Q Was that in currency or in change?
A Probably a combination of the two.
Q But you're not sure if you received some change?
A I had to. It currently stated a round number.
Q But you're positive you received some change, or just assuming that you received change?
A No. I'm pretty -- I'm very positive I received change. [RT 31:19-32:6.]

Waisblatt said he *thought* he received change; he *believed* that *if* he received change, he put it in his wallet; he *assumed* he received coins because the amount was not a round number; he *believed* he received some change; and the change was *probably* a combination of currency and coins. The ALJ, ignoring all of the preceding statements that clearly indicated Waisblatt's lack of memory about whether he had received change, based his finding on the single, weak statement by Waisblatt: “I'm pretty -- I'm very positive I received change.” Looking at Waisblatt's final statement in

the context of his testimony as a whole, we cannot say that the statement relied on by the ALJ was "reasonable in nature, credible, and of solid value."

The ALJ entirely discounted the probative value of the cash register tape, because "the tape does not specify why the transaction was voided" and because "the time gap from the preceding transaction at 10:[39] p.m.[2] to the transaction in question at 10:46 p.m., a total of seven minutes, suggests, if anything, that voiding the transaction was an afterthought." (Finding V.) We are at a loss to know why that seven-minute time gap between transactions would suggest anything about a reason for voiding the subject transaction, much less why it would suggest "that voiding the transaction was an afterthought." There is no evidence that we can find in the record of any reason for voiding the transaction other than that testified to by Tran: the transaction had not been completed and there were other customers who could not be rung up until that transaction was somehow cleared.

The tape showed the items were scanned and subtotaled; then the transaction was voided with no amount of tax shown, no total amount shown, no amount shown as received, and no amount shown as change. Significantly, the cash register tape clearly shows, contrary to the ALJ's finding, that Tran did not tell Waisblatt the *total* amount of the transaction. The amount shown, $16.74, was only a *subtotal* which did not include tax and so did not show the total amount that Waisblatt would have to pay. Whatever money Waisblatt tendered had to be in anticipation of learning the total. We conclude from this (contrary to the ALJ's finding but consistent with the vast majority of

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[2] Although the decision says "10:37 p.m.," this is clearly a typographical error, since the immediately preceding transaction occurred at 10:39 p.m., and the ALJ referred to a seven-minute time gap between the preceding transaction and the subject transaction at 10:46 p.m.

Waisblatt's testimony that he was unable to remember whether or not he got change) that Tran did not tell Waisblatt the total amount owed and did not give Waisblatt any change; he couldn't know how much change to give without knowing what the total price was.

Looking at the record as a whole, we find there is no substantial evidence to support the findings that Waisblatt was told the total price for the alcoholic beverages or that he received change from Than. Clearly, the financial transaction, as reflected on the cash register tape, was not completed before Waisblatt left the premises.

In addition, we agree with appellants that there was no completed sale as a matter of law since delivery, which is necessary for a completed sale, was interrupted. Almost as soon as Waisblatt picked up the bag, he put it down. He essentially rejected the goods before the transaction was complete and abandoned the goods, leaving them on the counter and pushing them toward the clerk. (See Comm. Code, §2401.)

Although Tran placed the bag on the counter and took the money tendered, this is consistent with normal usage of trade in the context of a consumer transaction, and does not indicate that the sale had been completed. Clerks do not always wait until the transaction is completed to bag goods, but often put items in a bag immediately following the scanning of the bar code. Likewise, customers do not always wait until they know the exact total to tender what they think will cover the total purchase price. However, no customer or clerk would consider or intend for the sale to be complete until the total amount to be paid were known and any change to which the customer was entitled had been given to the customer.

There is not substantial evidence to support the finding that Tran completed a sale of alcoholic beverages to Waisblatt, and, therefore, the findings do not support Determination of Issues I.

II

Appellant contends that neither the failure of Tran to identify himself to the officer, his use of expletives, his turning away from the officer, nor his "unintentional act . . . of touching a police officer" was shown to have delayed or interfered with the officer in the discharge of his official duties, citing People v. Quiroga (1993) 16 Cal.App.4th 961 [20 Cal.Rptr.2d 446] and People v. Allen (1980) 109 Cal.App.3d 981 [167 Cal.Rptr. 502].

Penal Code §148, subdivision (a), penalizes "Every person who willfully resists, delays, or obstructs any. . . peace officer, . . . in the discharge or attempt to discharge any duty of his or her office or employment . . . ."

As acknowledged by the Department decision (ftnt. 2), "Merely refusing to produce identification or his name does not violate California Penal Code §148. (*See People v. Quiroga* (1993) 16 Cal.App.4th 961, 970, 20 Cal.Rptr.2d 446, 451.)" Similarly, the use of expletives in addressing the officer probably does not, by itself, violate §148. The Quiroga court stated: "No decision has interpreted the statute to apply only to physical acts, and the statutory language does not suggest such a limitation." (People v. Quiroga, supra, 16 Cal.App.4th at 968.) The court went on to say, however, that "the statute must be applied with great caution to speech. Fighting words or disorderly conduct may lie outside the protection of the First Amendment (Houston v. Hill, [(1987) 482 U.S. 451[96 L.Ed.2d 398]]), ... But the areas of

unprotected speech are extremely narrow." (Ibid.) The court also emphasized the right of individuals to verbally contest an officer's actions:

> "Moreover, appellant possessed the right under the First Amendment to dispute Officer Stefani's actions. '[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.' (Houston v. Hill (1987) 482 U.S. 451, 461 [96 L.Ed.2d 398, 411-412, 107 S.Ct. 2502].) Indeed, '[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.' (Id. at pp. 462-463 [96 L.Ed.2d at pp. 412-413].) While the police may resent having abusive language 'directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment.' (Duran v. City of Douglas, Ariz. (9th Cir. 1990) 904 F.2d 1372, 1378.)"

(Id., at 966.)

It is arguable that the "F--- you!" directed at the officer could be considered fighting words taking the verbal conduct outside the protection of the First Amendment. However, we need not decide that, since Tran did not limit himself to verbal conduct. He accompanied his expletive with turning away from the officer and starting to walk to the back of the store. When the officer took Tran's arm, Tran "swung with his left arm to break free and using his right arm and the palm of his right hand pushed the Officer away." (Dept. decision, Finding IV.F.) The officer overpowered Tran and handcuffed him, but "Tran continued to use expletives and continued to try to pull his arms free." (Dept. decision, Finding IV.G.)

Tran's walking away and his struggle with the officer take his conduct out of the realm of possibly protected verbal conduct. Whether or not Tran's conduct caused the officer to believe he was in danger is irrelevant. There is no allegation that the officer's temporary detention for investigation was unlawful; therefore, Tran's attempt to end that lawful detention violated the statute. Appellants cite People v. Allen, supra, and that

case is pertinent, although not helpful to appellants' position. In the Allen case, the defendant, detained by the police, fled and attempted to hide, and was charged with violation of Penal Code §148. The court stated (109 Cal.App.3d at 985-986):

> "Since the officer had a legal right, indeed duty, (see *In re Tony C., supra*, 21 Cal.3d 888, 894) to detain appellant, appellant, if he was aware of the officer's desire, had the concomitant duty to permit himself to be detained. (Cf., Pen.Code, §834a.) Therefore, on the face of the statute it would appear that the physical activity that appellant engaged in, flight and concealment, which *delayed* the officer's performance of his official duty, violated the statute." (Emphasis in original.)

Appellants argue that Allen is distinguishable, since Tran did not run away and hide. However, the language from Allen quoted above was also quoted by the court in In re Gregory S. (1980) 112 Cal.App.3d 764, 778 [169 Cal.Rptr. 540]. In that case, an officer was investigating a malicious mischief complaint and attempted to speak to a juvenile whom the officer believed was involved in the incident. The officer told the juvenile he was investigating a complaint and wanted to talk to him and to get his name. The juvenile said he did not have to talk to the officer and began to walk away. The officer took the juvenile by the arm to stop him from leaving, and the juvenile struggled to free himself. The juvenile was found to have violated §148 by walking away from the officer and then struggling with him. In re Gregory S. is very similar to the situation in this appeal, and indicates that Tran's nonverbal conduct constituted a violation of Penal Code §148.

ORDER

The decision and order of the Department are reversed as to the sale to minor, but the decision and order as to the violation of Penal Code §148, subdivision (a), are affirmed.[3]

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

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[3]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 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.