

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

QUINCY ALONZO HINNANT	)	AB-7101
dba Three Minute Mini-Market)	
8861 South Broadway	)	File: 20-200555
Los Angeles, CA 90003,	)	Reg: 97041659
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	August 12, 1999
	)	Los Angeles, CA
)	

Quincy Alonzo Hinnant, doing business as Three Minute Mini-Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered his off-sale beer and wine license revoked, with revocation stayed subject to a three-year probationary period, and an actual 20-day suspension, for his clerk, Nickdondo Gordon, 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).

¹The decision of the Department, dated April 30, 1998, is set forth in the appendix.

Appearances on appeal include appellant Quincy Alonzo Hinnant, appearing through his counsel, Louis R. Mittlestadt, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on a date prior to August 21, 1997, the date of the alleged violation. Thereafter, on November 4, 1997, the Department instituted an accusation against appellant charging that appellant, through his employee, Nickdondo Gordon, delivered, furnished or transferred drug paraphernalia, consisting of a glass pipe, a Chore Boy metallic scouring pad, and matches, to an undercover police officer.

An administrative hearing was held on March 17, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles police officer Alfred Labada in support of the accusation, and by appellant and two of appellant's clerks, Nickdondo Gordon and Lyle Nixon.

Subsequent to the hearing, the Department issued its decision which determined that the unlawful transaction had occurred, and ordered the stayed revocation and suspension.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant contends that the decision is not supported by the findings, and the findings are not supported by substantial evidence in light of the whole record.

DISCUSSION

Appellant contends that the decision is not supported by the findings, and the findings are not supported by substantial evidence.

Appellant argues that, "even believing everything the officer testified to, it is not established that the items sold were intended to be used to ingest anything other than what the officer purported to display to the clerk - a piece of wet coffee creamer." (App.Br., at page 4).

The testimony of Los Angeles police officer Alfred Labada is summarized in Findings of Fact III. In even briefer summary, Labada, while holding in his hand a plastic baggie containing a lump of wet coffee creamer intended by him to appear to be rock cocaine, asked appellant's clerk, Nickdondo Gordon, if he had something which could be used to smoke rock cocaine [RT 12]. The clerk, without comment, reached under the counter and placed an object in a brown paper bag [RT 13]. Labada, gesturing with his hand, then asked for the "stuff which goes inside the pipe" [RT 14]. Again without saying anything, Gordon reached to a shelf behind him, retrieved a Chore Boy metallic scouring pad, and placed that in the bag [RT 14-15]. Labada then asked for matches, and was handed a book of matches [16-17]. Gordon paid for the items, and left the store. He found that, in addition to the scouring pad, the bag contained a glass tube, closed at each end, and containing a fabric flower. He and other officers then returned to the store and confiscated a number of the glass tubes. Labada further testified that, based upon his law enforcement experience involving narcotics users, he knew that these items were commonly used for smoking crack cocaine [RT 22].

Relying upon the holding in People v. Nelson (1985) 17 Cal.App.3d Supp. 1 [218 Cal.Rptr. 279], that there must be an intent on the part of the seller that the items are being sold for the purpose of use with controlled substances, appellant suggests that, since what the officer had in the baggie was not really cocaine, the clerks could not have known that the items were to be used to ingest a controlled substance, and, therefore, could not have had the requisite intent. The argument is unpersuasive.

Gordon, appellant's clerk, denied making a sale to Labada, or having been shown a bag containing what might have been cocaine. He claimed that on the day in question, a different undercover officer, described as an Hispanic male, asked specifically for a rose, paid for it, and then asked for a Chore Boy, paying for it separately. He then asked for matches, was told they cost five cents, and left the store without them. The Administrative Law Judge (ALJ) described the "whole" of Gordon's testimony as "not persuasive," and described the "too identical" testimony of appellant's other clerk, Lyle Nixon, as "similarly not credible." (Findings of Fact V and VI.)

Appellant suggests that, at best, the Department might have proved an attempt to commit a violation. He argues that the clerks could not have known the items sold were to be used to ingest a controlled substance, since no controlled substance existed, only wet coffee creamer. Of course, there is no evidence that appellant's clerk knew the substance in the baggies was wet coffee creamer. Nor does it matter. It is clear that Gordon possessed the requisite intent to sell the

rose-containing vial as a crack pipe, since he selected it in response to the officer's non-specific request.

An analogy can be made to cases dealing with the purchase of stolen property, where the property has not been stolen, but only represented as such. The crime is complete since the "stolen property" was purchased with the belief it was stolen. Here, the evidence is that the glass vial and Chore Boy pad were sold with both the intent and belief they would be used for the purpose of ingesting a controlled substance.

What distinguishes this case from earlier cases in which the Board felt compelled to reverse decisions of the Department where other, similar, items with both legitimate and illegitimate uses, were sold,² is that here the evidence is clear that the item in question, at least the glass vial, was selected by the clerk without any prompting or suggestion from the buyer that he wanted that specific item. This is not a case where the seller's intent was unknown; it is, instead, a case where the seller already intended that the object be sold for drug use.

As the ALJ observed (Finding of Fact IV):

"Neither the glass tube with the flower in it nor the Chore Boy scouring pad, individually, is drug paraphernalia. The scouring pad certainly has a legitimate use by itself. Presumably, the glass flower tube has such a use as well. The sale of the two together, in the manner set forth above, with a request for matches, and specifically in response to a request for something

² See Elias Mbarkeh and Rafee Mbarkeh (1998) AB-6882; Gertrude S. Harper (1998) AB-6894.

in which to smoke rock cocaine, followed by a request for the 'thing' which goes inside, is what results in the items being categorized as drug paraphernalia."

ORDER

The decision of the Department is affirmed.³

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

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.