

ISSUED OCTOBER 19, 2000

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

| | | |
|---------------------------|---|--------------------------|
| MARIA A. DIAZ |) | AB-7467 |
| dba Mario's Place |) | |
| 2327-29 East First Street |) | File: 42-098216 |
| Los Angeles, CA 90033, |) | Reg: 99046126 |
| Appellant/Licensee, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | Rodolfo Echeverria |
| |) | |
| DEPARTMENT OF ALCOHOLIC |) | Date and Place of the |
| BEVERAGE CONTROL, |) | Appeals Board Hearing: |
| Respondent. |) | August 3, 2000 |
| |) | Los Angeles, CA |

Maria A. Diaz, doing business as Mario's Place (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked her on-sale beer and wine public premises license following the entry of a plea of guilty by Jose Diaz, alleged to be her spouse, to a charge of possession for sale of a controlled substance (cocaine) in violation of Health and Safety Code §11351.

Appearances on appeal include appellant Maria A. Diaz, appearing through her counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated July 29, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on December 8, 1980. Thereafter, the Department instituted an accusation against appellant alleging the entry of a plea of guilty by appellant's spouse, Jose Diaz, to a charge of possession for sale of a controlled substance as grounds for the imposition of discipline against the license held by appellant.

An administrative hearing was conducted on June 15, 1999. Maria Diaz was represented by counsel, but neither she nor Jose Diaz attended the hearing. The Department presented the testimony of Craig McLaren, a Los Angeles police officer, who testified about his arrest of Jose Diaz on the controlled substance charge, his conversation with Diaz at the time of the arrest, and about certain data set forth in the report he prepared at the time. The Department also introduced certified copies of the criminal information and Superior Court documentation relating to the entry of the guilty plea (Exhibit 2), and certified copies of the personal affidavits submitted by Maria Diaz and Jose Diaz in support of her license application. Appellant's counsel made timely hearsay objections to the testimony of officer McLaren and to the documentation offered by the Department. The objections were overruled.

Following the conclusion of the hearing, the Department entered its order that the license be revoked, and this timely appeal followed.

DISCUSSION

This appeal presents several interesting and interrelated questions: whether,

as the Department contends, the conviction of Jose Diaz of a crime which involved moral turpitude is grounds for the revocation of the license held by Maria Diaz, his alleged spouse, in her name alone; whether there was substantial evidence that Jose Diaz was in fact the spouse of Maria Diaz; and, if so, whether Department Rule 58, which governs the issuance of licenses in circumstances involving spousal relationships, is a valid basis for the imposition of an order of revocation.²

Appellant challenges each of these propositions.

Addressing the last question first, we believe, contrary to appellant's contention, that Rule 58 must be construed to have continuing effect. We believe

² Rule 58 (4 Cal. Code Regs., §58) provides, in pertinent part, as follows:

“Application by Married Persons.

(a) Where a business is the community property of husband and wife, an alcoholic beverage license may be issued or held either:

- (1) In the name of both husband and wife;
- (2) In the name of either spouse, if it can be demonstrated by evidence satisfactory to the department that the unlicensed spouse is qualified and cannot participate in the business for reasons including, but not limited to, the following:
 - (A) Physical disability;
 - (B) Absence from the State for a prolonged period.

(b) Where a business is the separate property of a spouse, established by satisfactory proof to the department, an alcoholic beverage license may be issued in the spouse's name alone.

(c) The unlicensed spouse must have the qualifications required of a holder of a license unless the husband and wife are not living together and have not lived together for at least six months.

(d) The provisions of this rule shall apply to the ownership, by either spouse, of 10 percent or more of the stock of any corporation owning an alcoholic beverage license.”

it to be of equal importance during the existence of the license that the spouse of a licensee be qualified to be a holder, and there is nothing in the rule that militates against this. Given the possibility that the unlicensed spouse may have a community property interest in the business, and/or might share in the proceeds of the business, it does not seem unreasonable to require, as a continuing condition of holding the license, that the unlicensed spouse also remain qualified to hold a license. Thus, if Jose Diaz, as the spouse of Maria Diaz, committed an offense which would disqualify him for holding a license, Rule 58 supports the revocation of the license issued to Maria Diaz.

While this seems harsh, it must be kept in mind that the Department is charged with protecting the welfare and morals of the people of California with respect to the sale of alcoholic beverages. Given that charge, the Department's position that the unlicensed spouse must remain qualified to hold a license, cannot be said to be unreasonable.³

This, of course, assumes that the Department proved by competent evidence, that Jose Diaz was in fact the spouse of Maria Diaz. Appellant claims it failed to do so. The decision, while finding that Maria Diaz was married to Jose Diaz in 1980, and that no evidence was presented to show she was no longer married to him, does not discuss the evidence upon which it based that finding.

³ We find it interesting, although not fatal to the decision, that the proposed decision does not even mention Rule 58. But for this rule, the conduct of appellant's spouse would seem irrelevant.

The Department's case at the hearing was based upon circumstantial evidence, all of which was admitted over appellant's repeated objections that it was inadmissible hearsay evidence.

Government Code §15113 permits the use of hearsay evidence for the purpose of supplementing or explaining other evidence, but provides that it shall not be sufficient in itself to support a finding, unless it would be admissible over objection in civil actions.

The Department contends that affidavits executed by Maria Diaz and Jose Diaz at the time the license issued establish their spousal relationship; that the affidavit of Jose Diaz contains the same California driver's license number as that recorded on the police officer's arrest report; and that the booking number which is also on the arrest report is identical to the booking number on the criminal information to which the guilty plea was entered. Thus, the Department contends, the documents show a paper trail that connects the Jose Diaz of 1980 to the Jose Diaz of 1998.

The critical links in this paper trail are the booking number and the driver's license number. Officer McLaren testified that the booking number is assigned at the time the person who has been arrested is booked into the system, and is included in the arrest report prepared by the officer. The booking number in McLaren's report, 5598837, is the same number that appears on the certified copy of the criminal information filed against Jose Diaz. McLaren also testified that, at the time of the arrest, he obtained Jose Diaz's driver's license number and his date

of birth, both of which match the information on the 1980 affidavit. Appellant's objection that this testimony was hearsay was overruled. Since it is apparent that this was information obtained from the driver's license presented to McLaren, the objection does not appear to have been well-taken.

Admittedly, some of the Department's evidence was hearsay. Importantly, however, the affidavit executed by Maria Diaz was not. The affidavit was an admission that her spouse was named Jose. While the affidavit executed by Jose Diaz may be considered hearsay, it supplements the affidavit executed by Maria Diaz, in that it also demonstrates a spousal relationship between the two.⁴ Between the two, the affidavits establish that Maria Diaz was the spouse of Jose Diaz in 1980, when the license was applied for.

Thus, Maria Diaz's own affidavit, supplemented by the affidavit executed by Jose Diaz, and linked to the criminal information and guilty plea through the booking number and driver's license number, establishes that, at least in 1980, when the license issued, she was married to the Jose Diaz who, in 1998, entered a guilty plea to a crime which involved moral turpitude. In the absence of any evidence of that marriage having ended,⁵ the provisions of Rule 58 necessarily

⁴ The Department contends in its brief that Maria Diaz submitted the affidavit of Jose Diaz when she applied for the license. If that were true, that affidavit would be an adoptive admission, binding upon Maria Diaz. However, the record does not reflect the circumstances by which the affidavit became part of the license file.

⁵ Once the Department established the two were married, the burden of proof shifted to Maria Diaz to show that the marriage had terminated, or that she and Jose Diaz had separated and were not living together for at least six months.

apply.

ORDER

The decision of the Department is affirmed.⁶

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

See Rule 58, supra.

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.