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

AB-7565

R.I.P. ROCAS, INC. dba Playtime Bar
13324 Sherman Way, North Hollywood, CA 91605,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 48-158499 Reg: 99046859

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: February 1, 2001
Los Angeles, CA
ISSUED APRIL 12, 2001

R.I.P. Rocas, Inc., doing business as Playtime Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for five days for holding and offering for sale alcoholic beverages that were adulterated, 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, subdivision (a), and Health and Safety Code §110620.

Appearances on appeal include appellant R.I.P. Rocas, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated December 23, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on July 25, 1984. Thereafter, the Department instituted an accusation against appellant charging that, on May 27, 1999, appellant's bartender sold beer to a person who was obviously intoxicated (Count 1), and held and offered for sale alcoholic beverages that were adulterated (Count 2).

An administrative hearing was held on October 15, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning both the alleged sale to a person who was obviously intoxicated and the "buggy bottles." Included in the evidence was a videotape of the bar at the time of the alleged sale to an intoxicated patron.

Subsequent to the hearing, the Department issued its decision which determined that Count 1 was not proven, but Count 2 was proven with respect to three of the four bottles listed.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the ALJ's findings were erroneous, and (2) the findings are not supported by substantial evidence.

DISCUSSION

I

Appellant contends that the ALJ failed to include necessary findings that the bottles in question were available for sale and that the alleged adulterating materials in the bottles were not naturally occurring substances and were in quantities injurious to health.

The accusation charged that appellant "held and offered for sale bottles of alcoholic beverages, a food as defined in Section 109935 of the California Health and Safety Code, which were adulterated . . . by a diseased, contaminated, filthy, putrid or decomposed substance, or were otherwise unfit for food, in violation of Sections 110545, 110560 and 110620 of the Health and Safety Code . . . ." Four bottles were listed as adulterated, two with insects (tequila and vermouth) and two with "debris" (a liqueur and rum). The bottle of vermouth was not offered into evidence and the allegation as to that bottle was excluded from Determination II.

Health and Safety Code §110620 provides that "It is unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is adulterated."

Appellant argues that the word "hold" in this section refers to possession for sale, not simply possession, of adulterated food, and the ALJ, in failing to find the alcoholic beverages in question were available for sale, failed to find the existence of a necessary element of the violation.

Appellant states that "hold," in this context, must mean "hold for sale," because treating it as simple possession leads to absurd and unfair results. Appellant argues that it would be unreasonable to find a violation where a licensee holds an adulterated bottle for the purpose of inventory until it is destroyed or returned, yet contends that a broad reading of "hold" would require that result.

We believe that, even if appellant's argument concerning the word "hold" is correct, the evidence is sufficient to support a reasonable inference that the alcoholic beverages were available for sale at the time the bottles were seized. The Department investigator testified that he went behind the bar counter to inspect the bottles there for

violations and that he discovered the bottles in question behind the fixed bar on a shelf against the wall [RT 49-52]. In addition, three of the four bottles had pour spouts on them [RT 55]. It is reasonable to infer from these facts that the bottles of alcoholic beverages were available for sale to customers at the time they were seized.

Appellant also contends that the ALJ erred when he failed to make any finding regarding whether the items alleged to be in the bottles were naturally occurring substances and whether they were in such quantity as to be injurious to health.

Health and Safety Code §110560 provides that "Any food is adulterated if it consists in whole or in part of any diseased, contaminated, filthy, putrid, or decomposed substance, or if it is otherwise unfit for food." Health and Safety Code §110545 provides:

> "Any food is adulterated if it bears or contains any poisonous or deleterious substance that may render it injurious to health of man or any other animal that may consume it. The food is not considered adulterated if the substance is a naturally occurring substance and if the quantity of the substance in the food does not render it injurious to health."

Appellant contends that the last sentence of Health and Safety Code §110545 is a defense to a charge concerning adulterated food; that is, a food cannot be considered adulterated under either statute if the alleged adulterating substance in the food is one which occurs naturally and the quantity of the substance in the food does not make it injurious to health.

If, as appellant alleges, the last sentence of the statute is a defense to a charge of adulterated food, appellant bears the burden of proving the elements of that defense. The Department bears the initial burden of showing that there were contaminants of some kind in the bottles. It has done so in the present case. When it has done that,

the licensee may raise and provide evidence of the defenses found in Health and Safety Code §110545. Appellant has not done so in this matter. It is not enough that appellant raise the question whether the substance is naturally occurring; it must present evidence that it is naturally occurring. Similarly, it is not enough to question whether there is so much of a substance that it will injure health; appellant must present evidence that it will not injure health.

II

Appellant contends that the Department failed to establish a "chain of custody" for the bottles alleged to be adulterated, and, therefore, there is not substantial admissible evidence to sustain a finding that the bottles were adulterated. In addition, appellant argues that the testimony of the investigator did not constitute substantial evidence to support the finding that the bottles were adulterated.

The Court in People v. Williams (1989) 48 Cal.3d 1112, 1134 [259 Cal.Rptr. 473], had before it the contention that "the prosecution failed to establish a continuous chain of custody, a necessary foundation for the admission of demonstrative evidence," and stated the applicable law as follows:

> "The rules for establishing chain of custody were set forth in the seminal case of People v. Riser [(1956) 47 Cal.2d 566 [305 P.2d 1], overruled on other grounds in People v. Morse (1964) 60 Cal.2d 631, 649 [36 Cal.Rptr. 201]]: 'The burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.' (Id. at pp. 580-581.)"

In Williams, supra, the Court considered "two anomalies" regarding certain fingerprint evidence presented by the prosecution: inconsistencies in the evidence concerning where the card bearing the defendant's fingerprint was found, and the "inexplicable failure" of the prosecution, until several months after the trial started, to compare the latent fingerprint on the card with the exemplar of the defendant. The Court held that the trial court had properly admitted the fingerprint evidence, in spite of the suspicious circumstances, because the defense provided no evidence that the card had been tampered with or substituted for another, and there was no evidence of "prosecutorial bad faith" or denial of a fair trial.

In the present case, appellant points out "anomalies" in the circumstances surrounding the bottles alleged to contain adulterated distilled spirits: the questionable effectiveness of taping up the bottles (the contents of one spilled during the ALJ's examination of it); the uncertainty as to who did the taping and marking; the investigator's failure to make contemporaneous notes of his observations at the time the bottles were seized; the month-long period between seizure of the bottles (May 27, 1999) and their re-examination by the Department investigator (June 30, 1999); and the lack of visible contaminants on June 30, 1999, in one of the bottles that the investigator seized because he observed contaminants in the bottle on May 27, 1999 (this bottle was not included in the accusation).

The "anomalies" noted by appellant are somewhat disturbing, but, in our opinion, do not merit reversal of the decision. The investigator saw an LAPD uniformed officer put tape over the openings of the bottles and place them with the other evidence seized that night at the premises [RT 52-53]. Although he did not witness the actual transport,

the investigator believed, based on the police report, that the bottles were taken to the North Hollywood station and there booked into evidence [RT 53]. His belief was confirmed when he obtained the bottles from the evidence room of the North Hollywood station on June 30, 1999 [RT 66-67]. The bottles he obtained there were the same brand and size and bore the same DR number as the bottles he seized from the premises [RT 68]. Under Evidence Code §664, it is presumed that the duty of the police officers involved to secure and maintain the integrity of this evidence was regularly performed. This presumption is only rebutted by clear evidence to the contrary, and appellant has presented nothing more than the "barest speculation" of irregularity. In such a case, it was proper to admit the evidence. (See People v. Williams, 48 Cal.3d at 1134, supra.)

Appellant relies on Edgerton v. State Personnel Board (2000) 83 Cal.App.4th 1350 [100 Cal.Rptr.2d 491] in which the court held that positive results of employee's drug test were properly ruled inadmissible by the trial court because documentation of the chain of custody for the employee's urine samples was lacking. Appellant cites the following from the Edgerton decision (pp. 1357-1358) in support of its position:

> "In the course of almost one month, there is no documentation of the chain of custody of [appellant's] samples. There is nothing in the record to substantiate the storage and handling of these samples during this period. . . . [¶] It is well settled that chain of custody documentation is required at the collection site and at the testing laboratory where specimens are vulnerable to tampering."

The court in Edgerton held that the Personnel Board could not rely on the Evidence Code §664 presumption that official duty has been regularly performed, because the appellant there rebutted the presumption by showing that the doctor who certified that the chain of custody was complete had reviewed no documentation

regarding the internal chain of custody at the laboratory, the evidence at the hearing showed the lack of an internal chain of custody, and the appellant had refused to stipulate to the existence of an unbroken chain of custody.

Edgerton is clearly inapposite to the case presently before this Board. The decision is premised on the specific federal regulation governing employee drug testing. These regulations have their own rules regarding the procedures and forms to be used in order to establish chain of custody for urine samples used in drug testing. The forms necessary to establish the internal chain of custody at the laboratory pursuant to the federal regulations were not completed or were not made available to the doctor who was required to certify that the chain of custody had been established as required by the regulations. This situation is quite different from the general chain of custody rules that prevail in situations that are not governed by specific federal regulations.

Appellant also contends that the ALJ erred when he based his findings regarding the bottles "on the credible testimony of the investigator, who personally saw the bug and the debris in the bottles." (Finding IX-B.) Appellant argues that there is no substantial evidence to support that finding, since the investigator was not sure what he saw and could not, therefore, be sure that what he saw constituted adulteration of the bottles.

As discussed earlier, the Department was only required to show that contaminants of some kind existed in the bottles, which the Department did in this case. Appellant then must present evidence, more than bare speculation, that what was in the bottle was either naturally occurring or not harmful. Appellant did nothing more than speculate that such might be the case; this is not enough to carry its burden. The

Department investigator was found to be credible in his testimony that there were some kind of contaminants in the bottles, and this Board may not go behind the credibility finding of the ALJ in the absence of compelling factors. There are no factors compelling the Board here. The ALJ was justified in basing his finding on the investigator's testimony.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2]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.