

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

AB-7616

JITLADA & SIRIVAT, INC. dba Wine Mess Liquor
1770 E. Broadway, Long Beach, CA 90802,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 21-164327 Reg: 99047864

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: February 1, 2001
Los Angeles, CA

ISSUED APRIL 12, 2001

Jitlada & Sirivat, Inc., doing business as Wine Mess Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked its license, with revocation stayed for two years on condition that no disciplinary action occur during the period of the stay and that a 20-day suspension be served, for appellant's employee selling 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 Business and Professions Code §24200, subdivision (a), and Health and Safety Code §11364.7, subdivision (a).

¹The decision of the Department, dated April 6, 2000, is set forth in the appendix.

Appearances on appeal include appellant Jitlada & Sirivat, Inc., appearing through its counsel, M. R. Ward, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele Wong.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 28, 1985. Thereafter, the Department instituted an accusation against appellant charging that, on October 6, 1999, appellant's clerk, Thangsy Khamsue, sold drug paraphernalia to Department investigator Eric Hirata.

An administrative hearing was held on March 8, 2000, at which time documentary evidence was received, and testimony was presented concerning the alleged violation by Department investigator Eric Hirata. Appellant presented no witnesses.

Hirata's testimony established the following facts, as recited in the ALJ's Findings of Fact, about what transpired after he entered the premises:

"III. The investigator asked the clerk, 'Do you sell any crack pipes?' ('Crack' is street slang for crack cocaine.) The clerk replied, 'Yeah', and pointed to a display box containing 4" glass tubes. The display box was on the counter.

"IV. Each tube had a cork on one end and was open on the other end. In each tube was a plastic rose. The investigator asked the clerk how to use the glass tube, since it had a rose in it. The clerk replied that he did not know. The investigator then asked the clerk if the rose comes out of the tube. The clerk replied, 'this way', made a fist with his left hand, and blew into his fist. The investigator took one of the tubes and blew into it, causing the rose to come out of the tube.

"V. The investigator then asked whether the store sold filters or screens. The clerk replied 'Ah, Chore-boy' and pointed to an aisle. The investigator walked down the aisle, picked up a Chore-boy scouring pad located in that aisle, and brought it to the counter."

The investigator paid for the items, left the store, and then returned with other investigators to advise the clerk of the violation. At the hearing, the investigator described how the glass tube, with a small piece of Chore Boy scouring pad as a screen, is used to smoke crack cocaine.

Subsequent to the hearing, the Department issued its decision which determined that the illegal sale of drug paraphernalia had been proven.

Appellant thereafter filed a timely notice of appeal in which it raises the following issue: 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 there was no drug paraphernalia in the store and the clerk's answers to the investigator did not show any intent to sell drug paraphernalia, even though "When all the described items were purchased and put together, it is conceivable that the purchaser could have assembled drug paraphernalia." (App. Opening Br. at 3.)

Health and Safety Code §11364.7, subdivision (a), makes it a misdemeanor for anyone to deliver, or possess or manufacture with intent to deliver, drug paraphernalia, "knowing, or under circumstances where one reasonably should know, that it will be used to . . . ingest, inhale, or otherwise introduce into the human body a controlled substance" Subdivision (d) states that violation of any of the preceding subdivisions of §11364.7 constitutes grounds to revoke any business or liquor license.

Health and Safety Code §11014.5, subdivision (a), defines "drug paraphernalia" as items "designed for use or marketed for use, in . . . ingesting, inhaling, or otherwise

introducing into the human body a controlled substance” Subdivision (b) states:

“For the purposes of this section, the phrase 'marketed for use' means advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or materials with controlled substances.”

Whether an item is "marketed for use" as drug paraphernalia is determined "solely from the viewpoint of the person in control of the item, i.e., the . . . seller, without reference to a third person's state of mind." (People v. Nelson (1985) 171 Cal.App.3d Supp. 1, 11 [218 Cal.Rptr. 279].) If that pre-existing intent is shown on the part of the seller, then a violation of Health and Safety Code §11364.7 occurs when he or she sells the item "knowing, or under circumstances where one reasonably should know, that it will be used" with a controlled substance.

This case presents an issue which the Board has considered in earlier cases, and that is whether the item in question, one which may have both legitimate uses and illegitimate uses, was marketed as narcotics paraphernalia. Two of those earlier cases (Mbarkeh (1998) AB-6882 and Harper (1998) AB-6984)) concluded that the charged violation could not be sustained in the absence of proof of a pre-existing intent to market the item or items in question for narcotics usage, despite knowledge of the buyer's intended use. Those cases, in turn, followed the holding to that effect in People v. Nelson, *supra*.

The Board affirmed the decisions of the Department in other appeals in which drug paraphernalia violations were charged. In all these cases, the officer or investigator involved asked for something with which to smoke rock cocaine and was provided with, or directed to, the same type of glass tubes containing flowers as are

involved in the present appeal. In Hinnant (10/18/99) AB-7101 and Zakher (12/21/99) AB-7211, the clerks got the glass tubes from behind or under the counter in response to requests for crack pipes. In Chang (1/21/98) AB-6830, the clerk first pointed to a display of tobacco pipes, but when the officer said that wasn't what he wanted, the clerk pointed to a display of the glass tubes on the counter and said "This one over here." The clerk in Southland, Assefa, and Woldermariam (11/3/99) AB-7176, not only pointed to the glass tubes, but took one out and demonstrated how it was used to smoke crack.

In each of these cases the Board found that the clerk showed his already existing intent to sell the tubes for use with a controlled substance by his unprompted response to a request for something with which to smoke rock cocaine. In addition, the request of the officer clearly showed that it was at least highly likely that the buyer of the item would use it to "ingest, inhale, or otherwise introduce into the human body a controlled substance."

What distinguishes the present case, and the four appeals noted above where the Department's decision was affirmed, from Mbarkeh and Harper, supra, in which the Board felt compelled to reverse the Department decisions, is that here the evidence is clear that the items in question were pointed out by the clerk without any prompting or suggestion from the investigator that he wanted those specific items. This is a case where the seller already intended that the objects be sold for drug use, as demonstrated by his indicating the glass pipe and the scouring pad in response to the investigator's request for a coke pipe and a filter or screen to use with the pipe.

Appellant appears to be making the same argument on appeal that it made, and the ALJ rejected, at the hearing; that is, that the glass pipe and the scouring pad were

innocuous items with legitimate uses, and could not be used as drug paraphernalia without being modified by the user. The pipe would have to have the cork and flower removed and a small piece of the Chore Boy pad would have to be cut off and inserted in one end of the pipe before one could use them to smoke crack.

The ALJ correctly stated that "in this case, the clerk did not merely sell an innocuous pipe or a scouring instrument." (Finding III. A.) The ALJ went on to explain:

"When the clerk pointed to the glass tubes, he did so in response to the investigator's question, 'Do you sell any crack pipes?' And, when the clerk said 'Ah, Chore-boy' and pointed to the aisle where the Chore-boy scouring pads were, he did so in response to the investigator's question whether the store sold filters or screens, something which is used for the smoking of crack cocaine. Since Chore-boys are usually sold as scouring instruments, as [appellant] correctly argued, the fact that the clerk was selling one to be used as a filter or screen is evidence that he was selling it as drug paraphernalia, just as he sold the glass tube also as drug paraphernalia. . . . ¶ When the clerk sold the glass tube and the scouring pad to the investigator, he knew or reasonably should have known, from what the investigator told him, that the investigator would use those items for the smoking of crack cocaine."

(Findings III. B. and IV.)

The ALJ correctly explained the basis for finding a violation in this case.

ORDER

The decision of the Department is affirmed.²

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

²This 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.