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

AB-7694
File: 47-182057 Reg: 99047319

ACAPULCO RESTAURANTS, INC. dba Acapulco
505 Mendocino Avenue, Santa Rosa, CA 95401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: February 14, 2002
San Francisco, CA

ISSUED APRIL 18, 2002

Acapulco Restaurants, Inc., doing business as Acapulco (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for having permitted the consumption of alcoholic beverages by Mathew Radic ("Radic") and Scott Schelter ("Schelter"), both of whom were minors, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §25658, subdivision (b), in conjunction with §24200, subdivisions (a) and (b).

Appearances on appeal include appellant Acapulco Restaurants, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the

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[1]The decision of the Department, dated August 31, 2000, is set forth in the appendix.

Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on March 21, 1986. Thereafter, the Department instituted an accusation against appellant charging that on May 5, 1999, appellant permitted Radic and Schelter, both minors, to consume alcoholic beverages in violation of Business and Professions Code §25658, subdivision (b).[2]

An administrative hearing was held on April 19, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the two minors, by a police officer who apprehended the minors while in appellant's premises, and three of appellant's representatives.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained. Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Administrative Law Judge (ALJ) misapplied the law by deleting the "knowingly" requirement from a violation of Business and Professions Code §25658, subdivision (b); (2) the ALJ determined credibility without a factual basis therefor; (3) documents concerning an alleged prior violation were improperly admitted; (4) Business and

[2] Section 25658, subdivision (b) provides: "Any person under the age of 21 years who purchases any alcoholic beverage, or any person under the age of 21 years who consumes any alcoholic beverage in any on-sale premises, is guilty of a misdemeanor."

Professions Code §25658.1 is unconstitutional; (5) the "prior violation" is subject to collateral attack for failure to follow Rule 141; and (6) the prior violation is subject to collateral attack as a constitutional right.

DISCUSSION

I

Appellant contends that the ALJ erred in his application of Business and Professions Code §25658, subdivision (b), by eliminating the requirement that appellant have knowledge of the consumption by the two minors.

The ALJ concluded that, since Business and Professions Code §25658, subdivision (b), required only that consumption by a minor in fact occur in the licensed premises, knowing permission of such consumption was unnecessary.

The Board has previously considered this issue. In AMF Bowling Center, Inc. (2000) AB-7232, a minor was observed sipping from her husband's beer. The Department charged a violation of Business and Professions Code §25658, subdivision (b). Despite the fact that there was no evidence that the manager or any employee had seen the minor drinking, the Board affirmed the decision of the Department which found a violation. In so doing, the Board stated that it was incumbent upon the Department to connect the illegal act of the minor with some type of knowledge or assent, or failure to act upon presumptive knowledge of the consumption in order to avoid the demand in Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779] that there be no strict liability.

Laube v. Stroh, addressing the issue of the extent of knowledge required before liability may be imposed for "permitting," stated:

> "The concept that one may permit something of which he or she is unaware does not withstand analysis." (2 Cal.App.4th at 373).
>
> "We ... hold that a licensee must have knowledge, either actual or constructive, before he or she can be found to have 'permitted' unacceptable conduct on a licensed premises. It defies logic to charge someone with permitting conduct of which they are unaware. It also leads to impermissible strict liability of liquor licenses when they enjoy a constitutional standard of good cause before their license - and quite likely their livelihood - may be infringed by the state." (2 Cal.App.4th at 377.)

The Board read this language as leaving room for cases where, although proof of actual knowledge may not be present, "circumstances might warrant inferring the existence of such." This would appear to be such a case.

Appellants contend they took extraordinary steps to prevent alcoholic beverages from getting to minors. Appellant's witnesses testified to the presence of numerous security personnel throughout the premises; the requirement that proof of legal drinking age be shown prior to entering the premises; the use of stamps and wrist bracelets to identify those of legal drinking age; meetings in anticipation of the Cinco de Mayo festivities; the clearing of minors from the premises after 8:00 p.m. However, in spite of all these steps, Radic and Schelter managed to gain entrance, remain for an extended period of time, and, according to their testimony, purchase and drink several beers and a shot of tequila prior to being apprehended by Officer McDonald.

Officer McDonald testified that his attention was drawn to Radic and Schelter shortly after he entered the premises. They appeared to him to be minors, and brief questioning quickly established that to be the case. One cannot help but wonder why, with the elaborate security precautions claimed by appellant, none of appellant's representatives had taken action before the police arrived. This is especially curious, in light of the apparently spontaneous remark of appellant's manager to McDonald, upon

seeing Radic and Schelter, that they appeared "too young to drink."

Viewed as a whole, these facts are enough to convince us that, if not having had actual knowledge, appellant must be charged with constructive knowledge of the fact that Radic and Schelter were consuming alcoholic beverages while in appellant's restaurant on May 5, 1999.

The cases cited by appellant are, for the most part, of little assistance. Reyes v. Kosha (1998) 65 Cal.App.4th 451 [76 Cal.Rptr.2d 457] held that because he was aware of and exercised control over a migrant labor camp on the property, a lessee of farm property owed a duty to migrant farm workers to maintain the camp in a reasonably safe condition. People v. Laster (1997) 52 Cal.App.4th 1450, 1467 [61 Cal.Rptr.2d 680] held that Penal Code §12034, subdivision (b), which defines the offense of permitting the discharge of a firearm from a vehicle, was not unconstitutionally vague because it imposed liability only if the driver or owner "knowingly" permits the discharge:

> "The statute itself defines the class of persons who have a duty to act; drivers and owners of vehicles. It therefore imposes a legal duty on such drivers and owners to prevent the discharge of firearms from their vehicles. Obviously, a driver or owner can be held criminally liable for affirmatively assenting to, or authorizing the discharge; but he or she can also be held criminally liable for failing to prevent the discharge (provided, of course, he or she had the power or ability to prevent it). Finally, the statute imposes criminal liability only where the driver or owner 'knowingly' permits the discharge. Thus, it is not vague with respect to the necessary mental state."

In re Ramon A (1995) 40 Cal.App.4th 935 [47 Cal.Rptr.2d 59] held that the only knowledge required for proof of a violation of Penal Code §12034, subdivision (a) (knowingly permitting another person to bring a firearm into a vehicle in violation of Penal Code and Fish and Game Code provisions relating to loaded weapons) was knowledge that a weapon was present in the vehicle; actually knowledge that the

weapon was loaded was unnecessary.

II

Appellant contends that the ALJ made a credibility determination without a factual basis for such determination. Specifically, it contends that the ALJ was not entitled to believe the testimony of Radic and Schelter because it was, in appellant's words, "internally inconsistent, conflicting and inherently unbelievable."

Appellant relies upon a decision of a federal appeals court in Holohan v. Massanari (April 2001) 246 F.3d 1195 (9th Cir.), a Social Security disability case which holds that a federal administrative law judge must spell out the specific facts which lead him or her to believe the testimony of one or more witnesses over that of a claimant.

We do not believe this rule applies to state administrative law judges. Evidence Code §780 sets out the standards which are to guide an ALJ in making a credibility determination, and there is no evidence the ALJ in this case was not guided by those standards.

In any event, despite the various conflicts and inconsistencies between Radic and Schelter, their testimony as a whole leaves little doubt that they were in appellant's premises an extended period of time and consumed several alcoholic drinks while they were there. How they gained entry, whether separately or together, may be unclear. What is clear is that appellant's security measures, once the two gained entry to the premises, were patently ineffective.

Appellant's contention that none of the witnesses who testified on behalf of appellant had seen either Radic or Schelter in the premises is unpersuasive. Appellant's operation is sizeable, and the fact that three or four employees, out of

many, may not have seen the two minors is not proof they were not there. Indeed, one must ask why no one apparently saw them until Officer McDonald came on the scene.

III

The Department introduced certified copies of a decision of the Department which determined that appellant had violated Business and Professions Code §25658, subdivision (a) (Exhibit 2). The decision was accompanied by an executed stipulation and waiver, an accusation, and a copy of an order granting an offer in compromise The decision recited that it was entered pursuant to the stipulation and waiver. The stipulation and waiver, in turn, acknowledged the receipt of the accusation, stipulated that disciplinary action could be taken on the basis of the accusation, and that appellant waived "all rights to a hearing, reconsideration and appeal, and any and all other rights which may be accorded pursuant to the Alcoholic Beverage Control Act or the Administrative Procedure Act." Exhibit 2 was introduced to support an enhancement of the penalty.

Appellant now contends that Exhibit 2 lacked a proper foundation for admissibility, since there was no proof in the record that the person who signed the stipulation was authorized to do so.

The contention is devoid of merit. The time to challenge the decision in question is long past. If, upon learning of the entry of the decision, a copy of which was served on appellant by certified mail the day of its entry, appellant had any bona fide belief that some unauthorized person had executed the stipulation on its behalf, it could have taken appropriate action at that time to remedy the situation. Instead, appellant ratified the stipulation and waiver by entering into a compromise agreement with the Department pursuant to which it paid a fine in lieu of serving a suspension. By

accepting the benefits of the offer in compromise, appellant effectively admitted that the person who executed the stipulation was authorized to do so. For it now to suggest the stipulation was flawed borders on bad faith.

IV

Appellant contends that Business and Professions Code §25658.1 is unconstitutional because, by creating mandatory penalties, it violates the Separation of Powers provisions of the California and United States Constitutions. Appellant asserts that the legislature has usurped the executive function of assigning penalties to violations of the Alcoholic Beverage Control Act. Appellant points to that part of §25658.1 which denies to a licensee who has committed a second or subsequent sale-to-minor violation within a 36-month period the privilege of petitioning for an offer in compromise. Drawing an analogy to the manner in which criminal convictions are considered under the "three strikes" law, appellant contends that only if prior violations are subject to collateral attack is this constitutional problem avoided. Appellant further contends that the ALJ erred in declining to consider the constitutional issue.

The Appeals Board, like the Department and other administrative agencies, is barred by the California Constitution from holding an act of the Legislature unconstitutional. It is the customary practice of the Board, therefore, to decline to address an issue involving a constitutional challenge to a California statute.

However, we see no need to do so in this case, since we are satisfied there is no constitutional defect in §25658.1. We are further satisfied that the decision of the Legislature to deny the benefits of an offer in compromise in the case of a second or subsequent violation within a 36-month period is well within the authority granted it by the provisions of the California Constitution creating the Department of Alcoholic

Beverage Control.

The California Constitution provides, in article 20, §22, that the Department shall have the exclusive power, in accordance with acts of the Legislature, to license the manufacture, importation and sale of alcoholic beverages in the state. It seems to us that §25658.1 simply creates a limitation on the power of the Department to consider an offer in compromise in such circumstances. This limitation on the power of the Department is true as well of §23095, which denies to a first-time offender suspended for more than 15 days the privilege of petitioning for an offer in compromise.

Appellant's references to rulings under the criminal "three strikes" law are not on point. Appellant has not exposed any constitutional defect tainting the prior violation, so there is no reason to go behind the decision in that case, or that it not be considered for purposes of penalty enhancement.

V

Appellant contends that given an opportunity, it would have shown that the prior violation was generated by a decoy operation which did not comply with Rule 141. Thus, appellant contends that the prior decision is subject to collateral attack because it is incumbent upon the Department to demonstrate compliance with Rule 141. Rule 141, of course, is the Department rule which governs decoy operations.

As pointed out earlier herein, when appellant entered into the stipulation and waiver and accepted the decision of the Department, it waived "all rights to a hearing, reconsideration and appeal, and any and all other rights under the Alcoholic Beverage Control Act or the Administrative Procedure Act." (See Exhibit 2.)

Had it so chosen, appellant could have litigated the accusation in that

proceeding, and had the opportunity at that time to raise any objection it may have had to the Department's pleading or proof. It ill behooves appellant to raise such objections at this time, long after accepting the benefits of its earlier strategy.

We are not impressed by appellant's contention that the stipulation and waiver was executed without any explanation by the Department of the nature and extent of the document or that it could impact future proceedings. Aside from the lack of any kind of support for such a claim, the time to raise this objection in a legitimate manner was during the time for which an appeal was permitted from the decision which was entered pursuant to the stipulation. That time is long past, as is any ground for complaint.

VI

Lastly, appellant contends that it has a constitutional right to attack the prior decision collaterally, because the decision suffers from some unspecified constitutional infirmity. As best we can understand appellant's argument on this point, it is that the Department imposed a penalty pursuant to an illegal underground regulation, resulting in an enhanced penalty.

Appellant cites and quotes[3] from Thomas v. Department of Motor Vehicles (1970) 3 Cal.3d 335 [90 Cal.Rptr. 586], a case which held that a prior conviction offered for purposes of punishment enhancement could be attacked on constitutional grounds. We have no quarrel with its holding. It simply has no application in this case.

Aside from the fact that improper reliance upon an underground regulation would

[3] Erroneously, at that. The court wrote: "Ordinarily a judgment is presumed valid if collaterally attacked, unless it is void on its face." Appellant's brief would have us read the quotation as "presumed invalid if ... ." (App.Br. at page 30.)

not appear to be error of constitutional stature, appellant has offered no evidence that the Department acted pursuant to an underground regulation.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] 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.