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

AB-7840
File: 48-251763 Reg: 99047685

DAN BERTOLUCCI and JAMES HOLMES dba Sand Bar
3639 Taraval Street, San Francisco, CA 94116,
Appellants/Licensees

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 MAY 16, 2002

Dan Bertolucci and James Holmes, doing business as Sand Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their on-sale general public premises license with revocation stayed during a three-year probationary period on condition appellants serve a 60-day suspension, for permitting the sales of controlled substances within the premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from a violation of Business and Professions Code §24200.5, subdivision (a), and Health and Safety Code §§11351 and 11352.

Appearances on appeal include appellants Dan Bertolucci and James Holmes, appearing through their counsel, Frank A. D'Alfonsi, and the Department of Alcoholic

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[1]The decision of the Department, dated June 14, 2001, is set forth in the appendix.

Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on November 4, 1990. Thereafter, the Department instituted an accusation against appellants charging that illegal sales of controlled substances, cocaine, had been negotiated and consummated within the premises on three occasions. The three sales occurred in the presence of appellants' bartenders.

An administrative hearing was held on March 29 and November 15, 2000, and May 10, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the sales. Subsequent to the hearing, the Department issued its decision which determined that the sales had occurred and the license was conditionally revoked.

Appellants thereafter filed a timely appeal in which they raise the issue that there is no substantial evidence supporting the findings or the decision.

DISCUSSION

Appellants contend that there is no substantial evidence supporting the findings or the decision, arguing that appellants or its employees did not know of or permit the illegal acts.

The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals.

The scope of the Appeals Board's review is limited by the California

Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.[2]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

In their brief, appellants state that the illegal acts were by patrons, and beyond the knowledge of appellants or their employees.

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[2]The California Constitution, article XX, §22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

The case of McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], appears at first glance to support appellants' cause. The case concerned several transactions which occurred on the premises involving patrons selling or proposing to sell controlled substances to undercover agents. While the licensee and its employees did not know of the specific occurrences, they knew generally of contraband problems and had taken numerous preventive steps to control such problems. The McFaddin court held that since (1) the licensee had done everything it reasonably could to control contraband problems, and (2) the licensee did not know of the specific transactions charged in the accusation, the licensee could not be held accountable for the incidents charged. The facts of the present matter do not come within the safety of McFaddin.

The case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], is also instructive. The case was actually two cases--Laube and Delena, both of which involved restaurants/bars--consolidated for decision by the Court of Appeal.

The Laube portion dealt with surreptitious contraband transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge–and the court ruled the licensee should not have been required to take preventive steps to suppress that type of unknown patron activity. Again, this portion of Laube does not apply due to the facts of the present matter.

The DeLena portion of the Laube case concerned employee misconduct, wherein an off-duty employee on four occasions sold contraband on the licensed premises. The court held that the absence of preventative steps was not

dispositive, but the licensee's penalty should be based solely on the imputation to the employer of the off-duty employee's illegal acts.

Thus, the issue appears to be the question of the imputation to appellants of the employees' on-premises knowledge and misconduct, which legal theory is well settled in Alcoholic Beverage Control Act case law. (See Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; and Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395 [300 P.2d 366, 370-371].)

Appellants state in their brief on page 2: "It was never established that any owner or employee ever directly participated in any such sale and/or negotiation. Only that they were aware of and did nothing about it." Such concession would seem to agree with the Department's accusation and decision: that employees either knew or should have been aware, thus they did permit the illegal acts. Appellants further state on page 2: "the Appellants' position is that the sales may have occurred, but no employee or owner ever had any participation in any sale." Again, the issue as we see it is not whether the employees participated in the sales, but they permitted such by seeing and doing nothing about the illegal conduct.

Two female officers went to the premises and were denied service as one of the officers could not show proper identification. The officers left. While the officers were outside the premises, a patron exited the premises, talked to the officers, and the patron showed to them purported cocaine. The patron went into the premises and

returned with another patron, Jonathon Dunn (Dunn). A sale was later made but was not charged and therefore not a part of this matter [RT 3/29, pp. 8-9].

A day following the sale by Dunn, cocaine was sold to the officers within the premises, again by Dunn. Thereafter, on two other days, sales were made by Dunn to the officers. The site and location of each of the three sales was at the bar counter, with a bartender within a few feet (on the opposite side of the bar counter) of each of the sale transactions with Dunn [RT 3/29, pp. 20, 22, 25]. Apparently, Dunn received many phone calls, in the presence of the officers, through the bartender on duty, as he was sitting in his usual place at the bar counter. Also, Dunn would meet others at the premises, talk and go outside the premises, and return [RT 3/29, pp. 22, 27, 34, 39, 62, 76, 83].

During the sales process with the officers, the bindles from Dunn were in his hand, usually cupped, in plain sight, with his hand on top of the bar counter. The money for the cocaine was delivered also in plain view on top of the bar counter [RT 3/29, pp. 19, 25-26, 36-37, 58-59, 77, 81-82].

The officers testified that the bartenders were in the immediate area of the transactions, such they could hear the "coded" conversations and see the transactions [RT 3/29, pp. 19-20, 22, 37, 65-66, 81-82].

While co-appellant Bertolucci testified that he had a "hands on" relationship with the operation of the premises, his sparse time at the premises was mainly centered on "bookkeeping" activities. The other partner was non-involved [RT 5/10, pp. 15, 18-19, 20].

Apparently, the administrative law judge believed the officers. The credibility of

a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

We turn to the question of Business and Professions Code §24200.5(a), and the presumption it raises: that successive negotiations or sales over a period of time should be deemed evidence of "permission" or "knowledge."

The §24200.5(a) presumption is that a licensee knowingly permits sales or negotiations for sales of contraband where there are successive transactions over a continuous period of time. Two appellate court cases discussing the "knowingly-permitted" phrase in §24200.5(a) held that the statute gives rise to a rebuttable presumption, treated the presumption as evidence,[3] and were decided prior to the enactment of Evidence Code §600, which precluded a presumption from being evidence.

Witkin: California Evidence, 3rd ed., Vol. I, Ch. III, Burden of Proof and Presumptions, and the Comments of the Law Revision Commission and the Assembly Committee on Judiciary in West's Annotated California Codes, Evidence Code §600 et seq., however, do not find the existence of presumptions and their

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[3]In Endo v. State Board of Equalization (1956) 143 Cal.App.2d 395, 300 P.2d 366, the Court of Appeal regarded the presumption as evidence when it stated: "The evidence (including the statutory presumption) which supports the finding is substantial ..." (300 P.2d at 369). In Kirchhubel v. Munro (1957) 149 Cal.App.2d 243, 308 P.2d 432, the same panel of the Court of Appeal again regarded the presumption as evidence when it stated: "The presumption is not made conclusive but merely evidence of permission which may be overcome by a contrary showing." (308 P.2d at 436.)

no longer being regarded as evidence as irreconcilable. Instead, presumptions should be classified as either presumptions affecting the burden of proof (public policy presumptions other than those facilitating proof) or presumptions affecting the burden of producing evidence (proof-facilitating presumptions). The Kirchhubel case declared that the presumption in §24200.5(a) was a rebuttable one (308 P.2d at 436). Evidence Code §602 provides that "A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption." Accordingly, the presumption involved in §24200.5(a) is one affecting the burden of proof.

In People v. Hampton 1965) 236 Cal.App.2d 795 [46 Cal.Rptr. 338], it was held that Labor Code §212(a), which creates a presumption of knowledge that there are insufficient funds when employer/defendants issue checks that are later dishonored, imposed the burden of proving the nonexistence of knowledge on defendants, and held that their testimony of no knowledge was insufficient to meet the presumption. To prove no knowledge, defendants had to prove that reasonable steps had been taken to inform themselves on whether funds would be available.

Dunn appears to have had a thriving business at the premises, with the bartenders taking his phone calls and giving Dunn access to talking over the phone, from his usual seat at the bar counter [RT 3/29, p. 34]. The record is replete with evidence that the bartenders were intimately involved in socializing with Dunn during phone calls and sales at the bar counter. The record is sufficient to show the bartenders were in a position, and did observe or reasonably should have observed, the illegal conduct going on in front of them.

The sales were blatant in this near empty premises at the times the cocaine and money were exchanged on the top of the bar counter in front of the bartender on duty on each of the three days of sales. While appellants argue they and their employees did not take part in the sales, the sales were executed with the tacit knowledge and consent of the bartenders.

The penalty of a stayed revocation and a 60-day suspension, seems extremely fair under the circumstances as shown in this matter. The penalty essentially says that greater vigilance is needed to protect the premises, or lose the license upon other occurrences such as are set forth in the record.

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 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.