

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

AB-7941

File: 21-334373 Reg: 01050970

GURDARSHAN SINGH and SAHABAG SINGH VIRK dba Mac's Bottle Shop
5909 Watt Avenue, North Highlands, CA 95660,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: March 13, 2003
San Francisco, CA

ISSUED MAY 1, 2003

Gurdarshan Singh and Sahabag Singh Virk, doing business as Mac's Bottle Shop (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale general license for their having negotiated for and purchased cigarettes believing the cigarettes were stolen, in violation of Penal Code sections 664 and 496.

Appearances on appeal include appellants Gurdarshan Singh and Sahabag Singh Virk, appearing through their counsel, Brian J. Davis, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on November 13, 1997. Thereafter, on June 14, 2001, the Department instituted an accusation against appellants charging that, on three separate dates in September 1999 (September 10,

¹The decision of the Department, dated January 31, 2002, is set forth in the appendix.

17, and 23), appellants purchased a total of 16 cartons of various brands of cigarettes from an undercover Department investigator, believing them to have been stolen. The accusation also charged that co-appellant Gurdarshan Singh pled nolo contendere to a complaint charging him with a violation of California Penal Code sections 664/496, attempting to receive stolen property, a crime involving moral turpitude.

An administrative hearing was held on December 6, 2001, at which time oral and documentary evidence was received. Michael Parr, a Department investigator, testified about his meetings with each of the appellants and the negotiations which led to their purchases of the cigarettes from him after he had told them the cigarettes had been stolen. Chris Espinoza, another Department investigator, testified that cigarettes recovered during the execution of a search warrant bore markings which had been placed on the cigarettes sold to appellants by investigator Parr. Gurdarshan Singh testified that he was called to the store on September 23, 1999, was taken into custody upon his arrival, and later went to court and admitted his guilt.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established. Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the Department did not proceed in the manner required by law; and (2) the decision is not supported by admissible evidence. Both issues relate to the Administrative Law Judge's in camera review of a portion of the testimony of investigator Espinoza, and will be discussed together.

DISCUSSION

Appellants contend that they were denied due process when the ALJ permitted Department investigator Espinoza to testify in camera regarding the location of secret identifying marks placed by the Department on packs of cigarettes which Investigator

Parr had sold to appellants, and refused to permit appellants' counsel to cross-examine Espinoza concerning those marks. Espinoza had testified that, in executing a search warrant at appellants' premises, he recovered four individual packs and one carton of cigarettes bearing the secret marks.

It appears to be appellants' theory of the case that, without proof that the cigarettes seized by Department investigator Espinoza were in fact stolen cigarettes, there was a failure of proof.

Appellants' theory misses the mark in several respects. It is simply irrelevant that the cigarettes in question were not stolen cigarettes, but simply cigarettes described as stolen. What is relevant is what appellants believed or should reasonably have believed when they attempted to purchase them. (See *People v. Osborne* (1978) 77 Cal.App.3d 472 [143 Cal.Rptr. 582]: "Where the property has not actually been stolen, but the person has the intent to receive stolen property and *believes* that the property is in fact stolen, the crime committed is that of *attempted* receiving of stolen property.")

In *People v. Wright* (1980) 105 Cal.App.3d 329 [164 Cal.Rptr. 207], the defendant had purchased a watch a police undercover officer had told him was stolen. Said the court:

[A] defendant is guilty of an attempt where he has the specific intent to commit the substantive offense and under the circumstances as he reasonably sees them, does the acts necessary to consummate the substantive offense; however, because of circumstances unknown to him there is an absence of one or more of the essential elements of the substantive crime.

(105 Cal.App.3d at p. 332.)

In the present case, the ALJ's findings that appellant Singh was told the cigarettes he purchased had been stolen (Finding of Fact IV), and that appellant Virk was aware of circumstances which would lead a reasonable person to believe the

cigarettes were stolen (Finding of Fact V; Determination of Issues II), are amply supported by the evidence.

We do not see how appellants' case would have been advanced by knowing where the secret markings were on the packs of cigarettes. At most, proof that the cigarettes seized by Espinoza were the same cigarettes sold by Parr would simply corroborate Parr's testimony.

It should not be overlooked that appellant Singh pled nolo contendere to a charge of having violated Penal Code sections 664 and 496. As the ALJ determined, appellants purchased the cigarettes for personal gain, buying them for little more than a third of their normal price. This in itself is enough to support the order of revocation. (See Bus. & Prof. Code, §24200, subd. (d).)

ORDER

The decision of the Department is affirmed.²

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

² 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.