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

AB-8038
File: 47-345762 Reg: 02052741

DENNIS J. MANCUSO and KEVIN D. MANCUSO, dba Mancuso's Live From New York
1535 Novato Boulevard, Novato, CA 94947,
Appellants/Licensees
v.
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Anne E. Sarli

Appeals Board Hearing: January 8, 2004
San Francisco, CA

ISSUED APRIL 16, 2004

Dennis J. Mancuso and Kevin D. Mancuso, doing business as Mancuso's Live From New York (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their bartender serving two obviously intoxicated patrons and for allowing patrons to consume alcoholic beverages in an unlicensed area of the premises, violations of Business and Professions Code[2] sections 25602, subdivision (a); 23300; and 23355.

Appearances on appeal include appellants Dennis J. Mancuso and Kevin D. Mancuso, appearing through their counsel, Frank A. D'Alfonsi, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated September 19, 2002, is set forth in the appendix.

[2]Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued on November 16, 1998. Thereafter, the Department instituted an accusation against appellants charging that on February 1, 2002, appellants' bartender, Robert Trites, served alcoholic beverages to Ian McDonald and Anthony Leotta when both were obviously intoxicated, and appellants allowed patrons to consume alcoholic beverages in an unlicensed area of the premises.

An administrative hearing was held on August 7 and 8, 2002, at which time documentary evidence was received and testimony concerning the charges was presented. Subsequent to the hearing, the Department issued its decision which determined that the violations charged had been proved.

Appellants have filed an appeal raising the following issues: 1) The decision is not supported by substantial evidence, and 2) appellants were denied a fair hearing due to ineffective assistance of counsel.

DISCUSSION

I

Appellants contend that substantial evidence does not support the determinations that MacDonald and Leotta were obviously intoxicated or that appellant allowed consumption of an alcoholic beverage in an unlicensed area of the premises.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence,

the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].) The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

A. Obvious Intoxication

Appellants contend that a violation of section 25602, subdivision (a) [hereafter, section 25602(a)] is proven by showing that the person alleged to be intoxicated was willfully under the influence of alcohol and was in a condition that the person was unable to exercise care for his or her safety and the safety of others. Further, they

assert that the opinions of the investigators, the licensee, and the bartender as to the state of intoxication of McDonald and Leotta must be given equal weight and that the Department failed to establish by expert testimony that any condition observed was actually due to the influence of alcohol.

Appellants are applying the wrong standard for determining violation of section 25602(a). They rely on the California Jury Instructions for Penal Code section 647, subdivision (f), which involves public drunkenness. Section 25602(a), however, does not use the same standard as Penal Code section 647, subdivision (f).

The court in *Rice v. Alcoholic Beverage Control Appeals Board* (1981) 18 Cal. App.3d 30, 35-36 [173 Cal.Rptr. 232], summarized the law with regard to section 25602(a):

> Courts have long recognized that the outward manifestations of intoxication are well known and easily recognized. In *Coulter v. Superior Court* (1978) 21 Cal.3d 144, 155 [145 Cal.Rptr. 534, 577 P.2d 669], the court said: "Defendants have argued that the term 'obviously intoxicated' is too broad and subjective to serve as a satisfactory measure for imposition of civil liability. However, the phrase is contained in section 25602, a *criminal* statute, and the courts have experienced no discernible difficulty in applying it. (See *Samaras v. Dept. Alcoholic Bev. Control* (1960) 180 Cal.App.2d 842, 844 [4 Cal.Rptr. 857]*; People v. Smith* (1949) 94 Cal.App.2d Supp. 975 [210 P.2d 98]*; People v. Johnson* (1947) 81 Cal.App.2d Supp. 973, 975-976 [185 P.2d 105].) As described in *Johnson*, 'The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are "plain" and "easily seen or discovered." If such outward manifestations exist and the seller still serves the customer so affected he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.'" (Original italics.)
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> Because the manifestations of intoxication are so well known, nonexpert witnesses may offer opinion testimony based upon their observations as to a person's intoxication. (*People v. Conley* (1966) 64 Cal.2d 310, 325 [49 Cal.Rptr. 815, 411 P.2d 911].)

Signs of intoxication may include bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, slurred speech, unsteady walking, or an unkempt appearance. (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611].)

The Department investigators testified that McDonald and Leotta had watery, bloodshot eyes, swayed back and forth, and spoke in a loud, boisterous manner. Leotta had difficulty getting and staying on the barstool and put his head on the bar, appearing to fall asleep. McDonald's speech was slurred, he staggered when he walked, and he almost missed the table when putting down his glass. The bartender, Trites, was across the bar, only three or four feet away from Leotta and McDonald, serving customers. During this time, Trites was in a position to see all the things observed by the investigators.

Appellant Kevin Mancuso and bartender Trites testified that they knew Leotta and McDonald as regular customers who usually walked or took a cab home. Mancuso did not think the two were so intoxicated that they could not walk home. Trites testified that the two were tired from work, but appeared normal, with no signs of intoxication, so that he would have served them whether or not they were taking a cab home.

The ALJ found specifically that "Mancuso and Trites were not credible on the subject of whether McDonald and Leotta were intoxicated." (Finding 12.) She also found that the symptoms described by the investigators supported their conclusion that McDonald and Leotta were intoxicated. (*Ibid*.)

The ALJ, who is charged with determining the credibility of witnesses, found that appellants' witnesses were not as credible as the Department's witness with respect to the intoxication of the two customers. She was not required to give equal weight to all

testimony, disregarding its credibility or lack thereof. Nothing indicates that her credibility determination was an abuse of discretion.

No contention was made that the symptoms observed by the investigator were caused by anything other than alcoholic beverages. The symptoms observed were ones commonly associated with intoxication from alcohol. Whether or not the customers had reached a blood alcohol level indicative of intoxication, the symptoms displayed were obvious signs of intoxication. Under the circumstances, no expert testimony was needed to prove that the conditions observed were caused by intoxication.

B. Unlicensed Portion of the Premises

On February 1, 2002, Department investigator Troy Wright bought a beer at a makeshift bar in a patio area that was enclosed with a wooden fence and covered with a tarp. The investigator consumed some of the beer while there. The patio area was not licensed for service or consumption of alcoholic beverages.

Co-appellant Kevin Mancuso testified that he erroneously believed that the patio area was licensed because the City of Novato had approved use of the patio for smoking and drinking. Appellants argued that it was reasonable for them to believe that the Department had also approved use of the patio.

Appellants do not deny that the patio was unlicensed or that the investigator purchased and consumed beer in an unlicensed portion of the premises. They assert that the enclosed patio did not expand the size of the premises because they used the enclosed patio instead of a front patio area that was licensed. They argue that this "remodeling . . . should not be deemed as a violation." These facts should have been considered in mitigation, according to appellants.

Appellants raised these contentions at the administrative hearing, and the ALJ discussed them in Findings 13 through 15. She found, based on the application appellants filed with the City of Novato and appellants' relatively recent involvement in the Department licensing process, that it was "not credible that Kevin Mancuso could confuse the City of Novato zoning process with an application to the ABC for licensure of the patio area." (Finding 15.)

It is the province of the ALJ to make credibility determinations. We have no reason to question those determinations or her conclusion that appellants violated sections 23300 and 23355 by serving alcohol in an unlicensed area of the premises.

II

Appellants contend that, because furnishing an alcoholic beverage to an obviously intoxicated person is a misdemeanor, they are essentially criminal defendants, and, therefore, entitled to the effective assistance of counsel. They contend they were denied the effective assistance of counsel because their trial counsel did not subpoena McDonald and Leotta, the two patrons alleged to be obviously intoxicated, but relied on their willingness to attend and testify voluntarily. The failure of McDonald and Leotta to testify, appellants argue, proved fatal to their case, because the ALJ had only the subjective observations of the investigators, the licensee, and the bartender on which to base her decision, while McDonald and Leotta would have been best able to describe their conditions that night.

Appellants are wrong in this contention for at least three reasons: A proceeding to discipline a license is a civil, not a criminal, proceeding, and they are not constitutionally entitled to effective assistance of counsel; even if they were entitled to effective assistance of counsel, they did not show that their trial counsel provided

ineffective assistance; and even if trial counsel's assistance was ineffective, reversal is not an appropriate remedy.

"A proceeding before an administrative agency to determine whether a license should be revoked is not a criminal or quasi-criminal prosecution." (*Skipitar v. Munro*, (1959) 175 Cal.App.2d 1, 6 [345 P.2d 508]; *Molina v. Munro* (1956) 145 Cal.App.2d 601, 606 [302 P.2d 818].) The court in *Kim v. Orellana* (1983) 145 Cal.App.3d 1024, 1027 [193 Cal.Rptr. 827], explained:

> In a criminal prosecution the defendant has the right to competent representation at trial based on the constitutional right to the assistance of counsel for his defense (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15). (*People v. Pope* (1979) 23 Cal.3d 412, 422 [152 Cal.Rptr. 732, 590 P.2d 859, 2 A.L.R. 4th 1].) There is no equivalent constitutional right in a civil proceeding. There, the due process clause (U.S. Const., 14th Amend., § 1; Cal. Const., art. I § 7, subd. (a)) guarantees the right of a party to appear by counsel retained at his own expense. (See *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [157 Cal.Rptr. 874, 599 P.2d 65]; *Mendoza v. Small Claims Court* (1958) 49 Cal.2d 668, 673 [321 P.2d 9].) Appellant was afforded that right. Due process does not include the further requirement that competent representation be furnished by counsel in a civil action. The only conduct proscribed by the due process clause of the United States Constitution is conduct that may be fairly attributed to the state; the same is true with respect to the corresponding procedural due process provision of the California Constitution. (*Martin v. Heady* (1980) 103 Cal.App.3d 580, 586 [163 Cal.Rptr. 117].) Any lack of adequate representation on the part of appellant's retained counsel cannot be attributed to the state.

Appellants did not have a constitutional right to effective assistance of counsel.

Even if appellants had a right to effective assistance of counsel, they have not shown that trial counsel rendered ineffective assistance. Appellants would have to show that trial counsel: 1) did not "act in a manner expected of reasonably competent attorneys acting as diligent advocates; and 2) [that] such failure deprived [appellants] of a potentially meritorious defense, or [that] it is reasonably probable that a determination more favorable to [appellants] would have resulted but for counsel's failings." *(Adoption*

of Michael D. (1989) 209 Cal.App.3d 122, 136 [256 Cal.Rptr. 884].)

Appellants allege that trial counsel failed to render effective assistance because he did not subpoena Leotta and McDonald, and the lack of their testimony "proved fatal" to appellants' cause. This argument fails, however, because appellants cannot show that the failure of Leotta and McDonald to testify deprived them of a defense or that a determination favorable to them would have resulted but for that failure.

This is because the standard used here is whether Leotta and McDonald were obviously intoxicated. That determination must be made by an observer, not by the individual alleged to be obviously intoxicated. Appellants, in their brief, ask the question, "Who better [than Leotta and McDonald] could describe the condition they were in on the night in question than the two parties judged to be 'obviously intoxicated'?" The short answer is, almost anyone else who could observe them. The failure of Leotta and McDonald to testify did not doom the case; it was the failure of the bartender to observe what was plainly visible.

Even if we were to assume that appellants were entitled to effective assistance of counsel and that they had been able to prove that counsel did not provide effective assistance (which we do not), they would still not be entitled to reversal of the Department's decision:

> [W]hile an attorney's asserted failure to exercise the requisite skill and care may give rise to a legal malpractice action grounded on breach of contract as well as tort (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 181 [98 Cal.Rptr. 837, 491 P.2d 421]), it does not furnish a basis for the reversal of a judgment entered against the client because of such failure on the part of his attorney.

(Kim v. Orellana, *supra*, 145 Cal.App.3d at p. 1028.)

ORDER

The decision of the Department is affirmed.[3]

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

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[3]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.