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

AB-8142
File: 48-251514 Reg: 02053096

CAPS ENTERPRISES, INC. dba Cap's Saloon
12 West Gabilan, Salinas, CA 93901,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Melissa G. Crowell

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

ISSUED APRIL 14, 2004

Caps Enterprises, Inc., doing business as Cap's Saloon (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for having sold an alcoholic beverage to a police minor decoy and for having attempted to conceal evidence of a crime, violations of Business and Professions Code section 25658, subdivision (a) and Penal Code sections 664/135.

Appearances on appeal include appellant Caps Enterprises, Inc., appearing through its counsel, Robert J. Pia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on October 15, 1993. Thereafter, the Department instituted an accusation against appellant charging

[1]The decision of the Department, dated April 24, 2003, is set forth in the appendix.

that, on May 21, 2001, appellant's owner attempted willfully to conceal evidence of a shooting, in violation of Penal Code sections 664 and 135 (count 1), and that, on October 10, 2001, an employee of appellant sold tequila, a distilled spirit, to a person then 19 years of age, in violation of section 25658, subdivision (a) of the Business and Professions Code (count 2).

An administrative hearing was held on September 12, 2002, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that both charges of the accusation had been proven, and ordered appellant's license revoked.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the decision as to count 1 (willful concealment of evidence) is not supported by substantial evidence; and (2) the sale of tequila to a minor (count 2) does not warrant revocation.

DISCUSSION

I

Appellant contends that there is not substantial evidence in the record, viewed in its entirety, to support the findings and determination that he willfully attempted to conceal evidence of a crime.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a 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] and *Toyota Motor Sales U.S.A., 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].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which 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]; *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 evidence revealed that an unknown male entered appellant's bar and shot in the head a male patron seated at the bar. The assailant and the wounded victim both fled the bar, each taking a different route. The shooter exited the door in the main bar area, while the victim went through an adjacent card room where there was another door to the outside. The victim, who was found outside the bar and later died, left a trail of blood in the bar. Appellant's owner, Jose Curiel, and an employee, Jesus Amillo Tillo, wiped up the blood before police arrived at the scene. A surveillance camera in the bar recorded the two as they did so. Both Curiel and Tillo testified that they began to clean the blood from the floor only after the bartender had yelled that she would

become ill if the blood was not cleaned up. The bartender, who had been employed four days earlier, testified that she witnessed the shooting, and took cover when the shooter fired at a second person seated at the bar. She also testified that she had twice yelled for someone to clean up the blood. She admitted, however, that she had not actually seen any blood, but "imagined that there was a lot of blood on the floor." She called the police after the blood had been wiped from the floor.

Salinas police officer Lance Mirco testified that he was dispatched to the premises after a report of a shooting. Upon arrival he found the victim standing in front of the bar. The victim was bleeding profusely and could not speak. Several seconds later, he collapsed. Mirco then cordoned off the area to establish a crime scene. Mirco entered the bar and found only the bartender in the bar area. Everyone else, six to ten in number, including the owner, was in the cardroom. Mirco asked what happened, and the "consensus" of what he was told in reply by those in the cardroom was "I don't know. I was playing cards." Asked specifically what appellant Curiel had told him, Mirco said that appellant told him he did not know anything that had happened. Still not knowing exactly what happened, Mirco examined the blood spatters outside the premises, and concluded the shooting had taken place around the front of the bar or inside the bar. He saw a large amount of blood by the front door. When he went in looking around the bar, he could not find any blood or any evidence that would indicate the shooting was inside the bar. While he was trying to figure out where the shooting happened, the bartender called him over and whispered that it had happened in the bar. While Mirco was talking to the bartender, he noticed a surveillance camera. He contacted the owner, and was able to view the tape.

Another patron, Francisco Gonzalez Maciel, testified that he was playing cards in

the cardroom and witnessed the shooting. He also testified that the bartender yelled for someone to clean up the blood, and he observed Curiel and Tillo "cleaning it up just a little bit." Another card player, Sixto Mancillas, testified that he heard the first shot, stood and saw the second shot. He, too, heard the bartender call for the blood to be cleaned up. Mancillas said he went to the doorway to the bar, and saw the bartender looking at the blood. The bartender had said she did not look at it.

Appellant contends that the findings that the bartender had screamed for the blood to be cleaned up or she would be made ill (Finding of Fact 3), and the finding that Curiel and Tillo, upon hearing the screams, began to clean the blood from the floor (Finding of Fact 5), together with the fact that Curiel would have had no purpose to conceal anything, because he knew the surveillance camera would have captured everything that happened at the bar, compel the conclusion that he lacked any willful intent to conceal evidence of the shooting.

Appellant also challenges that part of Finding of Fact 6 which states that "Curiel told the officer that they had not seen anything as they were playing cards." Officer Mirco's testimony was that the "consensus" of what the card players told him was that they did not see anything, but he did not say that appellant spoke for all of them. Appellant's premise is that this mistaken finding was the basis for the finding of the administrative law judge that appellant's denial of any intent to conceal evidence was not credible.

Our focus is directed at Findings of Fact 6 and 7:

> Respondent was not candid with Officer Miraco [sic] regarding the incident. It was not true that the men seated in the card room had not witnessed anything. Maciel saw the victim sitting at the bar and saw the shooter put the gun to the victim's neck. Mancillas saw the victim run out of the premises through the card room door. Respondent and Tello [sic] each saw the victim's blood and

concealed it by wiping it away with a rag. (Finding of Fact 6.)

> Curiel testified that he did not believe he was doing anything wrong by cleaning up the blood. He testified that his intent was not to conceal evidence of the homicide, but to appease the screaming bartender. The testimony is not credible. Curiel knew that a crime had taken place in the bar and knew that because of that crime an investigation would take place. Curiel knew that the blood was evidence of that crime. When he willfully removed the blood, he was attempting to destroy or conceal the evidence. Curiel's indifferent attitude to the offense and to the victim, coupled with his disingenuous remarks to Officer Miraco [sic], evidence one whose intent is to prevent the evidence from being produced, not one whose intent is trying to calm an employee. (Finding of Fact 7.)

The ALJ may have erred in concluding that Curiel had purported to speak for all the men in the card room. However, Curiel's statement to Officer Mirco that "he didn't know anything that happened," made to the officer before the officer had been told by the bartender that the shooting had taken place inside the bar, and before the officer had become aware of the surveillance camera, strongly suggests that appellant was less than candid in his dealings with Officer Mirco.

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].

Given one instance of a lack of candor, the ALJ was entitled to draw inferences as to other such instances. For example, appellant could have told Officer Mirco at the outset that the shooting had taken place inside the bar. Had he done so, the "consensus" of the card players that they did not know anything about what happened would have collapsed, and Officer Mirco would have become aware of what had taken place before the bartender whispered her disclosure. Instead, appellant told officer Mirco he did not know what had happened, and his fellow card players apparently told

the same story. At the hearing, however, appellant testified, contrary to what he told Officer Mirco, that he heard the two shots, and saw both the shooter and victim flee from the premises.

It is readily apparent that appellant was reluctant to disclose anything to Officer Mirco that he could avoid. It was not until Officer Mirco learned from the bartender that the shooting had occurred inside the bar and had discovered the surveillance camera that appellant agreed to show him the location of the video recording tape which captured the incident. Such conduct is consistent with an intent to conceal, so it does not strike us as unreasonable for the ALJ to infer that the same intent to conceal was behind his efforts to remove the blood evidence from the floor of the bar.

Appellant makes much of the fact that Officer Mirco's written report of the incident does not state that the bartender "whispered" her disclosure that the shooting took place inside the bar. The fact that it was the bartender who first told Officer Mirco what had happened is important because it emphasizes appellant's false denial of any knowledge of what happened. Whether she whispered to the officer or spoke in a normal tone of voice seems somewhat irrelevant.

We are satisfied that when the record is considered in its entirety, there is ample support for the findings of the ALJ. Appellant's primary concern was the protection of his license - a concern that may explain why neither he nor any of his card playing companions made any effort to go outside to see if the shooting victim needed assistance.

We have considered appellant's remaining arguments concerning whether there was substantial evidence in support of the findings and decision and find them without merit.

II

Appellant contends that the sale to a minor, which appellant concedes, does not justify an order of revocation.

The order of revocation was based upon two violations - the charge that appellant willfully concealed evidence of a crime, and the charge of a sale to a minor:

> The Department seeks revocation of respondent's license. Respondent believes that penalty is too harsh. It is mitigating that this is respondent's first disciplinary action. Nevertheless, there were two distinct violations within a six month period. There were no mitigating circumstances surrounding either transaction. Respondent has not shown a change in business practices, not provided any evidence to show that he has the insight to run his business differently. Given the state of the evidence, revocation would have a rational effect on public welfare and morals.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. *(Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The Department had the following factors to consider: (1) appellant's conduct in attempting to conceal evidence that would show that the shooting took place inside the bar; (2) appellant's lack of candor both at the time of the incident and at the hearing; and (3) the seriousness of the offense. Had the sale to the minor been the only violation, we doubt the Department would have ordered revocation. Considering such factors, the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, 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.