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

AB-8163
File: 47-355714 Reg: 03054469

N & L NILAR CORPORATION dba Buddies
8153 Aspen Avenue, Rancho Cucamonga, CA 91730,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 2, 2004
Los Angeles, CA

ISSUED NOVEMBER 19, 2004

N & L Nilar Corporation, doing business as Buddies (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for its corporate president, Lawrence Guarnieri, having pleaded nolo contendere to an information charging him with the crime of assault with a deadly weapon or force likely to produce great bodily injury, a violation of Penal Code section 245, subdivision (a)(1). The order of revocation was stayed for a period of 180 days to permit transfer of the license.

Appearances on appeal include appellant N & L Nilar Corporation, appearing through its counsel, Matthew O. Strathman, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated June 26, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on September 22, 1999. Thereafter, the Department instituted a two-count accusation against appellant charging that appellant had permitted the premises to be used in a manner contrary to welfare and morals, in that Guarnieri had committed an assault with a deadly instrument on another person, with his hands and with a knife, and had entered a plea of nolo contendere to a charge of assault with a deadly weapon or force likely to produce great bodily injury.[2]

An administrative hearing was held on May 8, 2003, at which time oral and documentary evidence was received. At that hearing, the parties stipulated to the admission into evidence of a police report (Exhibit 3) describing the incident which gave rise to the criminal complaint. The police report details witness accounts of an altercation between Guarnieri and one of his employees, in the course of which, GuarnieriI pulled the employee from the dining room into the kitchen, thrust his thumbs in the employee’s eyes, and, while holding a large knife, threatened to stab the employee, before being restrained by other employees. Guarnieri testified on his own behalf, blaming the altercation on his attempt to control an employee who was engaging in irrational behavior, as if under the influence of a mind-altering substance or suffering a psychotic episode. Subsequent to the hearing, the Department issued its decision

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[2] Guarnieri was charged under Penal Code section 245, subdivision (a)(1), which provides:

> Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding $10,000 or by both the fine and imprisonment.

which determined that the charges of the accusation had been established. Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: the crime of assault with a deadly weapon is not a crime involving moral turpitude; there was no nexus between the crime and the license held by Guarnieri. Appellant also questioned the severity of the penalty.

DISCUSSION

I

This case has remarkable similarity to an appeal heard by the Board in 1999. In *First Born Inc.* (1999) AB-7138, the president and sole shareholder of the licensee, had pleaded guilty to a charge of assault with a deadly weapon using a baseball bat. The Board affirmed a Department decision which had revoked the license pursuant to Business and Professions Code section 24200, subdivision (d), having found that the crime of assault with a deadly weapon constituted a crime involving moral turpitude. In this case, Guarnieri, the president and major shareholder of the licensee, pleaded nolo contendere to a charge of assault with a deadly weapon using a knife.

In addressing the question whether the crime of assault with a deadly weapon was one involving moral turpitude, the Board cited the definition of moral turpitude given in *In re Craig* (1938) 12 Cal.2d 93, 97 [82 P.2d 442]: “an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.”

Appellant relies on *In Re Rothrock* (1940) 16 Cal.2d 449 [106 P.2d 907), a case in which the California Supreme Court ruled that an attorney’s conviction on a charge of assault with a deadly weapon under Penal Code section 245 was not ground for

disbarment under a statute which called for disbarment for a conviction of a felony or misdemeanor involving moral turpitude. After analyzing a number of decisions in California and elsewhere, the court reasoned:

> In the absence of a statutory definition indicating that evil intent is inherent in the commission of the crime, the courts generally are reluctant to classify the crime of assault with a deadly weapon as one involving moral turpitude as a matter of law.
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> ...
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> Our statute ... does not define assault with a deadly weapon so as to indicate that it is an offense which by these tests involves moral turpitude as a matter of law. That it did not involve moral turpitude in the particular case may be reflected by the record of conviction, which is all that is before the court in this proceeding. That record consists of the charge of the offense to which the defendant pleaded guilty; the plea; and the judgment of conviction. ... The light sentence imposed on the attorney indicates that the trial court was of the opinion that the offense to which the plea of guilty was entered did not involve moral turpitude. Our consideration of the record leads us to the same conclusion.

In *People v. Castro* (1985) 38 Cal.3d 301 [211 Cal.Rptr. 719], a divided Supreme Court, construing article 1, section 28, of the California Constitution,[3] held that, subject to the trial court's discretion under Evidence Code section 352, subdivision (f) of section 28 authorizes the use, for purposes of impeachment, of any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty. The court recognized constitutional limitations on the use for impeachment of felony convictions for crimes which do not involve moral turpitude: "'Can it be said with substantial assurance that the credibility of a witness is adversely affected by his

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[3] Enacted in 1982 as part of Proposition 8 (Victims' Bill of Rights), subdivision (f) provides, in pertinent part:

> Any prior felony conviction of any person, in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding.

having suffered this conviction?' If the answer is 'no,' impeachment is prohibited by due process." (*People v. Castro, supra*, 38 Cal.3d at p. 313.)

Stating that the modern justification for felony impeachment "must be" that the prior felony convictions "may, somehow, be relevant to the witness' veracity," (*Id*. at p. 314), the court quoted from the "classic statement" of the rationale for felony impeachment by Justice Holmes when a member of the Massachusetts Supreme Court:

> [W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the *general readiness to do evil* which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in a particular case, and thence that he lied in fact. (*Gertz v. Fitchburg Railroad* (1884) 137 Mass. 77, 78.)

(*People v. Castro, supra*, at p. 314; italics added by court.)

Continuing, Justice Kaus wrote:

> The People point to no other rationale for felony impeachment. It follows, therefore, that if the felony of which the witness has been convicted does not show a "readiness to do evil," the fact of conviction will not support an inference of readiness to lie. We make no attempt to list or even further define such felonies. At this point it is enough to note that the codes are littered with them, if only because in this state it is a felony to conspire to commit a misdemeanor. (Penal Code, §182.)

(*Id*. at p. 314.)

Observing that it may more easily be inferred that a witness is lying if the crime for which he was convicted involved dishonesty as a necessary element rather than one which merely indicates a "bad character" and "general readiness to do evil," Justice Kaus found it "undeniable" that a witness' moral depravity of any kind has some tendency in reason to "shake one's confidence in his honesty." (*People v. Castro, supra*, at p. 315.)

After the decision in *People v, Castro*, *supra*, a number of appellate courts wrestled with the question whether the crime of assault with a deadly weapon constituted a crime involving moral turpitude. These courts uniformly concluded, albeit with a certain amount of disagreement in the reasoning processes employed, that it did.

In *People v. Cavazos* (1985) 172 Cal.App.3d 589 [218 Cal.Rptr. 269] and *People v. Thomas* (1988) 206 Cal.App.3d 689 [254 Cal.Rptr. 15], cases cited in the Department's brief, felony assault with a deadly weapon was held to be a crime involving moral turpitude for purposes of impeachment. Both courts looked at the elements of the crime. The Court in *Cavazos* reasoned that:

> assault with a deadly weapon ... does require proof of an unlawful *attempt* to inflict physical force upon another person. ... Because an attempt to commit a battery requires a specific intent to commit the battery and a direct but ineffectual act done toward its commission [citations] and because a deadly weapon is used to effectuate the attempted battery, it follows that the 'least adjudicated elements' of the crime of an assault with a deadly weapon involve some degree of moral turpitude. It is the use of the deadly weapon which elevates the assault to a moral turpitude crime. (Italics in original.)

(*People v. Cavazos, supra*, 172 Cal.App.3d at 595.)

Both *Cavazos, supra*, and *Thomas, supra*, distinguished *In re Rothrock, supra*. *Rothrock* had found that an assault with a deadly weapon did not necessarily involve moral turpitude for purposes of attorney disbarment proceedings, since an attorney's conviction of a violent crime does not automatically call into question his or her fitness to practice law.[4]

The Appeals Board concluded, in *First Born, Inc*., *supra*, that the result in

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[4] *People v. Williams* (1985) 169 Cal.App.3d 951, 957 [215 Cal.Rptr. 612] (battery by a jail inmate on a non-inmate); and *People v. Jackson* (1985) 174 Cal.App.3d 260, 266 [220 Cal.Rptr. 39] (assault with a deadly weapon), also cited by the Department, held that those crimes involved moral turpitude, again for purposes of impeachment.

Rothrock was not controlling in the case of an alcoholic beverage license, because such a conviction does reflect on the licensee's fitness to hold a license. We reach the same result here. Where people are drinking alcoholic beverages, such as in appellant's restaurant, violence, or the potential for violence, is a very real, everyday concern. The Department reasonably considers evidence of a licensee's propensity for violence as an unacceptable risk to public welfare and morals. We have no difficulty in agreeing with the California Supreme Court's definition of moral turpitude as "an act of baseness, violence or depravity ... contrary to the accepted and customary rule of right and duty between [people]." (*In re Craig*, supra.) Even under appellant's reading of *In re Rothrock,* that the crime of assault with a deadly weapon cannot involve moral turpitude "unless the facts and circumstances underlying the particular crime are such as to compel a finding of moral turpitude" (App. Br., at p. 6), the record supports the decision.

Appellant is wrong when he asserts that the ALJ failed to examine the facts underlying Guarnieri's plea to determine whether the crime involved moral turpitude, and that he made no findings linking the facts behind Guarnieri's plea to moral turpitude. The ALJ did this in Determination of Issues II, citing Findings of Fact IV and V in support of his conclusion that the offense involved moral turpitude.

Guarnieri's attack on his employee's eyes, and his threat to stab the employee, tell us that he displayed the kind of violence and depravity that the California Supreme Court may well have had in mind when explaining what moral turpitude is. As president of appellant, its manager and major shareholder, it follows that his conduct, and his potential for violence, must impact appellant's license.

II

Appellant contends that there was no nexus between Guarnieri's crime and the license. It claims such a nexus is required because the license is "a fundamental vested property right," one that cannot be revoked unless there is a "clear substantial nexus between [Guarnieri's] crime and the license held by Nilar." (App. Br., at p. 9.)

Guarnieri is the president and major stockholder of Nilar, the holder of the license. Guarnieri's crime, assault with a deadly weapon, was committed on the premises while appellant was open for business and exercising the privileges of the license. The incident had an impact on several innocent employees, including one who sustained a minor cut while relieving Guarnieri of the knife with which he had threatened Burroughs. To claim there is no nexus is to deny the obvious.

Appellant argues that a higher standard of proof is required to support the order of revocation, and a more rigorous standard of review governs the Appeals Board because of the nature of the license involved.

Appellant cites *Wright v. Munro* (1956) 144 Cal.App.2d 843 [301 P.2d 997] for the proposition that the Department was entitled to revoke Nilar's license only upon a showing of clear and convincing evidence.

The Appeals Board addressed this issue in *Bruno* (1993) AB-6307, and concluded that the contention lacked merit. The Board stated:

> It is true that the ABC Act case of Wright v. Munro ... mentions a clear and convincing standard of proof. A careful reading of that case, however, can only lead one to conclude that the court was actually applying the preponderance of the evidence as the standard. This is so because the following language appears in Wright/Munro:
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> > In the instant case, the evidence as to the nature of the liquid consumed is weak. It was in the power of the arresting agents, in a non-emergency case, to secure and produce stronger evidence. Sound police practice

> suggests that they should have done so. The tendency of some law enforcement officers to be satisfied with the bare minimum of evidence where better evidence is available is not good police practice. But, whatever we may think of the police methods in the present case and the failure to produce stronger evidence, the evidence produced, although weak, supports the findings and judgment, and that is all that is required.

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The standard of proof required in license disciplinary cases in California is either "clear and convincing" evidence – for professional licenses (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 858; 185 Cal.Rptr. 601) or preponderance of the evidence – for nonprofessional licenses (*Pereyda v. State Personnel Board* (1971) 15 Cal.App.3d 47, 52; 92 Cal.Rptr. 746.) This dichotomy is referred to in California Administrative Hearing Practice (Cont. Ed. Bar 1984) §3.59, pp. 202-203. As there is no minimum educational requirement for an ABC license, an ABC license falls into the nonprofessional category.

Appellant also contends that its license is a vested property right, so that the Department's decision must be reviewed under the "independent judgment standard" rather than the substantial evidence standard. Appellant cites *Brewer v. Department of Motor Vehicles* (1979) 93 Cal.App.3d 358, 362 [155 Cal.Rptr. 643], which held that a conviction for child molestation, even though a crime involving moral turpitude, was not a sufficient ground for the revocation of a license to sell motor vehicles.

A license to sell alcoholic beverages is not a property right. *Kirchhubel v. Munro* (1957) 149 Cal.App.2d 243, 247-248 [308 P.2d 432] held:

> As said in *People v. Jemnez* 49 Cal.App.2d Supp. 739, 741 [121 P.2d 543]: "It has long been uniformly held that there is no inherent right in a citizen to engage in the business of selling alcoholic beverages [citations], and that 'The regulation of that business is governed by legal principles different from those which apply to what may be termed inherently lawful avocations.' [Citation] The governing authority may, therefore, in the exercise of the police power for the protection of the public morals, health and safety grant the privilege of selling alcoholic beverages upon such terms and conditions as it may determine."

(See also, *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 299 [4 Cal.Rptr.2d 280]: "While a license to practice a trade is generally considered a vested

property right, a license to sell liquor is a privilege that can be granted or withheld by the state"; *State Board of Equalization v. Superior Court* (1935) 5 Cal.App. 2d 374, 377 [42 P.2d 1076]; "[T]here is no inherent right in a citizen to sell intoxicants (citations) and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution"; *Cooper v. State Board of Equalization* (1955) 137 Cal.App.2d 672, 679 [290 P.2d 914]: ("[A] license is not a proprietary right ... . It is but a permit to do what would otherwise be unlawful.")

We conclude that there is sufficient evidence of a nexus between Guarnieri's conduct and the order of revocation. It must be kept in mind that Guarnieri's use of physical force began in the dining room, in the presence of patrons, and, when it moved to the kitchen, put otherwise uninvolved employees at risk when they attempted to restrain him from further violence.

III

Appellant asserts that the penalty is more severe than warranted. 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: Guarnieri's conduct occurred on the licensed premises, endangered other employees, and constituted a serious criminal offense having a direct nexus to the operation of the premises.

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.[5]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5] 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.