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

AB-8240
File: 41-389629 Reg: 03054686

MARGARITA NUNEZMAGANA dba La Playita Restaurant
14106 Victory Boulevard, Van Nuys, CA 91401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: November 4, 2004
Los Angeles, CA

ISSUED FEBRUARY 7, 2005

Margarita Nunezmagana, doing business as La Playita Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her on-sale beer and wine public eating place license for having misrepresented a material fact (a prior conviction of grand theft) on her application for an alcoholic beverage license, in violation of Business and Professions Code sections 23950,[2] 23951,[3] and 24200, subdivision (c).[4]

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[1]The decision of the Department, dated December 31, 2003, is set forth in the appendix.

[2] Section 23950 provides that an application shall be made on a form provided by the Department, and "shall be accompanied by such other information as the department may require to assist it in determining whether the applicant and the premises qualify for a license."

[3] Section 23951 provides that the application shall contain, among other things, the name of the applicant and the premises for which the license is applied.

[4] Section 24200 sets forth grounds which constitute a basis for suspension or revocation. One of those grounds, set forth in subdivision (c), is "the misrepresentation of a material fact by an applicant in obtaining a license."

Appearances on appeal include appellant Margarita Nunezmagana, appearing through her counsel, Michael Goch, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on October 11, 2002. On March 14, 2003, the Department instituted an accusation against appellant charging that she misrepresented a material fact on her application for an alcoholic beverage license.

An administrative hearing was held on November 14, 2003. Documentary evidence was received establishing that appellant had been convicted on April 16, 2001, on her plea of nolo contendere, of grand theft. Appellant was fined $400, sentenced to one day in jail, and placed on three years summary probation. (Exhibit 1.)

Item number 24 on the Department application form ABC-208-A (Individual Person Affidavit), asks: "Have you ever, anywhere or at any time (1) forfeited bail (2) been convicted (3) fined or (4) placed on probation for any violation of the law," and calls for the applicant to check a box for "Yes" or a box for "No."[5] Applicant placed her initials next to the "No" box. The form also provides space for listing any arrest date, place of arrest, offense, and disposition. This space was left blank. Appellant signed the document under penalty of perjury.

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[5] The form includes the following language with respect to paragraph 24:

> If any of these events has occurred, this question must be answered "Yes" regardless of subsequent court action resulting in expungement, unless an order sealing records under Section 1203.45 of the Penal Code relating to persons under age 18 years has been issued. If no order has been issued, the answer must be "Yes."

Department investigator Sheriff Ali explained that there had been a delay in obtaining the results of a background investigation, so the application was approved on the supposition that what was stated in the application, and what appellant had told him orally, was true. Appellant did not attend the hearing.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and ordered the license revoked.

Appellant has filed a timely notice of appeal. In an opening and reply brief, both filed by Armando H. Chavira, the attorney who represented her at the hearing, appellant argued that the Department's practice of ordering revocation in every case of misrepresentation is an abuse of discretion, and that the decision must be reversed for lack of substantial evidence, in that the record of conviction based upon a plea of nolo contendere is inadmissible under Penal Code section 1016. Thereafter, appellant retained new counsel, Michael Goch, who, with leave from the Board, filed a supplemental brief raising additional issues.[6] In the supplemental brief, appellant contends that (1) the administrative law judge erred in excluding evidence of the expungement of appellant's conviction under Penal Code section 1203.4; and (2) the case should be remanded because she was not competently represented at the administrative hearing.

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[6] In granting appellant's new attorney leave to file a supplemental brief, the Board, by letter dated October 20, 2004, stated that the brief "shall address only issues raised at the administrative hearing." The issues addressed in the supplemental brief were either raised at the hearing or related to matters which, as a practical matter, could not then have been raised.

DISCUSSION

I

Appellant contends that a comment by Department counsel establishes that the Department automatically orders revocation in cases where there has been a material misrepresentation in an application for a license. We set out that comment in italics, along with the balance of counsel's remarks so that they are in context:

> Mr. Wainstein: *Our Department's recommended penalty in this case is revocation. And it is – it is typically the Department's recommendation in these cases and has been in the 30 years I worked for the Department because this is clearly a misrepresentation of a material fact.*
>
> If it were not for this misrepresentation, this license would have been denied. But this misrepresentation was made, and on the basis of a document filed by the Applicant under penalty of perjury, we went ahead and in good faith issued the license pending receipt of certain documents, fingerprints, and so forth.
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> The bottom line is the Department somewhat wasted all that effort. It could have been resolved very simply at the beginning if she had told us about it. I don't know what we would have done. We might have asked her to show some signs of rehabilitation, which we have done in the past. There are several things that might have occurred. But those things that we might have been able to do were in essence cancelled out by this Applicant's misrepresentation by saying she had never been convicted.
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> *It really in the Department's mind is – is no way for that to be anything less than a revocation. It's like someone sells to minors and then he's suspended and while he's suspended, he sells again. If a suspension doesn't work, the only thing appropriate is revocation. Here the only thing appropriate is revocation given the facts of the case.*

Read in context, counsel's remarks are focused on the specific facts of this case, and do not support the assertion that the Department orders revocation in every case of misrepresentation. What he is saying is, that by concealing the conviction with an act of perjury, the applicant forfeited her right to a license. Had she been candid about her criminal past, the possibility was there that something could be worked out that would

ultimately mean she could be licensed.

As we hear so often, the cover-up has greater consequences than the crime. That may be the case here. We cannot say that the Department's argument for revocation in this case necessarily means that it orders revocation in all cases of a material misrepresentation in a license application, or, even if it does, that it was an abuse of discretion in this case. However, as we explain in part IV, *infra*, we think the matter must be remanded to the Department for other reasons.

II

Appellant contends that the record of conviction based upon a plea of nolo contendere is inadmissible under Penal Code section 1016.

Penal Code section 1016 identifies the kinds of pleas to an indictment, information, or complaint. Paragraph 3 of the section discusses the plea of nolo contendere and provides, in pertinent part:

> The legal effect of such a plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes. In cases other than those punishable as felonies, the plea and any admissions required by the court during any inquiry it makes as to the voluntariness of, and factual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.

The certified record of conviction was offered into evidence at the start of the administrative hearing, and was admitted over appellant's hearsay objection. Later in the hearing, appellant's counsel sought to enlarge upon his objection, to include section 1016 as a ground. Department counsel argued that section 1016 was not relevant, because the Department was not proceeding under Business and Professions Code section 24200, subdivision (d), which provides that a plea of guilty or nolo contendere to a public offense that involves moral turpitude is a ground for license suspension or

revocation.[7]

Although the record is not entirely clear whether the ALJ intended to foreclose the enlarged objection as untimely (see RT 31-35), it is clear that he was of the opinion that section 1016 applied only to civil and not administrative proceedings (*Id*., at RT 35). The decision does not cite section 1016, and concludes that appellant did not disclose the conviction on her application even though it would have been fresh in her mind.

The Department contends that section 1016 does not apply, citing Penal Code section 489, subdivision (b). That section provides that grand theft involving theft of other than a firearm, is punishable by imprisonment in a county jail not exceeding one year, *or in the state prison*. For this reason, the Department argues, use of appellant's no contest plea was proper, because her crime was one punishable as a felony. The Department also cites California Evidence Code section 1300 as "the mirror" of section 1016. That section states:

> Evidence of a judgment adjudging a person guilty of a crime punishable as a felony is not made inadmissible by the hearsay rule when offered in a civil action to prove any fact essential to the judgment whether or not the judgment was based on a plea of nolo contendere.

Thus, the question we must address is whether and to what extent Penal Code section 1016 affects the result we reach.

The flaw in the Department's argument that section 1016 does not apply is that appellant's crime was *not* one punishable as a felony. The fact that it was not is seen

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[7] Subdivision (d) of section 24200 was amended in 1978 by the addition of the nolo contendere plea, following the decision of the California Supreme Court in *Cartwright v. Board of Chiropractic Examiners* (1976) 16 Cal.3d 762 [129 Cal.Rptr. 462], which held that, in the absence of a specific statute, neither the nolo contendere plea nor the resulting conviction could be used in a statute authorizing taking disciplinary action based upon a criminal conviction.

by examining other provisions of the Penal Code.

The accusation charged that appellant had been convicted for a *misdemeanor* crime of grand theft under Penal Code section 487, subdivision (a). The certified record of conviction (Exhibit 1), also describes the offense charged as "487A PC MISD - grand theft property over $400.00." It is the fact that the crime was initially charged as a misdemeanor that implicates the provision in Penal Code section 1016.

Penal Code section 17 provides, in pertinent part:

> (b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, *it is a misdemeanor for all purposes under the following circumstances:*
> ...
> (4) *When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor*, unless the defendant at the time of his or her arraignment objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint. [Emphasis supplied.]

The charge appears from the outset to have been made as a misdemeanor. Under such circumstances, it would seem that the provisions of Penal Code section 1016 are applicable.[8] That said, we still must determine their effect. In doing so, it is helpful to look at California case law dealing with the effect and consequences of a plea of nolo contendere.

In *Cartwright v. Board of Chiropractic Examiner, supra,* 16 Cal.3d 762 (*ante*, fn. 7), a licensed chiropractor had been convicted on a plea of nolo contendere of the misdemeanor violation of keeping a disorderly house, in violation of Penal Code section

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[8] Although the Department has not made the argument, we briefly address the question whether Penal Code section 1016 applies in the context of an administrative proceeding. The only case of which we are aware that addresses the question, *County of Los Angeles v. Civil Service Com.* (1995) 39 Cal.App.4th 620, 631-632 [46 Cal.Rptr.2d 256], discussed in the text, held that it does.

316. The Board of Chiropractic Examiners revoked Cartwright's license following his conviction. On writ of mandate, the trial court ordered the Board to set aside its revocation order. The Supreme Court affirmed the trial court.

The Supreme Court concluded, after reviewing California decisional law, that a conviction on a nolo contendere plea does not give rise to consequences adverse to the person so pleading outside of the criminal proceeding: "A review of prior California decisions on this question shows that except in one instance convictions based on nolo contendere pleas have until now been rejected in California as a basis for discipline or other adverse *legal* consequences unless a statute expressly specifies such convictions as a basis for such consequences." (*Cartwright, supra*, 16 Cal.3d at 768; court's emphasis.)[9]

The rational of *Cartwright* and earlier California cases appears to be that, when a criminal case has been resolved by a conviction following a nolo contendere plea, it is as if a bargain has been reached between the prosecutor and the accused:

> The conviction is significant in the statutory scheme only insofar as it is a reliable indicator of actual guilt. When the conviction rests on the verdict or finding of a trier of fact after trial, it means that guilt has been established beyond a reasonable doubt, and when the conviction rests on a plea of guilty, it means that the defendant has voluntarily admitted guilt for all purposes. But when the conviction is based on a nolo contendere plea, its reliability as an indicator of actual guilt is substantially reduced, both because of the defendant's reservations about admitting guilt for all purposes[7] and because the willingness of the district attorney to agree to and the court to approve the plea tends to indicate weakness in the available proof of guilt.

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[9] One of the cases discussed by the court was *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1969) 3 Cal.App.3d 209 [83 Cal.Rptr. 89], in which the court held that, in the absence of statutory authority, the Department could not revoke an alcoholic beverage license after a licensee's plea of nolo contendere to a charge of receiving stolen property, followed by suspension of sentence and probation. After *Cartwright* was decided, Business and Professions Code section 24200, subdivision (d), was revised to include such a plea as a ground for suspension or revocation.

> 7 "Throughout its history ... the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency." (*North Carolina v. Alford* (1970) 400 U.S. 25, 36, fn. 8 [27 L.Ed. 162, 170, 91 S.Ct. 160].
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> Since a conviction after a nolo contendere plea is no more accurate as a reflection of guilt than the plea on which it is based, there appears little if any rational distinction between the basing of administrative discipline on such a conviction and basing it on the plea itself, which is concededly excluded from collateral proceedings.

(*Cartwright v. Board of Chiropractic Examiners*, *supra*, 16 Cal.3d at 773-774, fns. 8 and 9 omitted.)

In *County of Los Angeles* v. *Civil Service Comm. of Los Angeles County, supra,* 39 Cal.App.4th 620 (*ante*, fn. 8), a deputy sheriff was terminated from his employment after having pled nolo contendere to a misdemeanor charge of receiving stolen property. In an administrative action to challenge the termination, the hearing officer excluded evidence of the nolo contendere plea, found that the deputy did not know the items were stolen and recommended a 30-day suspension. The superior court denied the county's request for relief, and the Court of Appeal affirmed, holding that the Supreme Court decision in *Cartwright v. Board of Chiropractic Examiners*, *supra*, barred the use of the deputy's nolo contendere plea in his disciplinary proceeding. The court rejected the county's argument that *Cartwright* was no longer controlling authority because of subsequent legislative enactments and judicial decisions, stating that although legislative action has substantially narrowed *Cartwright's* practical impact in many situations, its holding barring use of nolo contendere pleas in administrative proceedings is still the controlling legal principle unless and until the Legislature has acted to the contrary" (*County of Los Angeles, supra*, 39 Cal.App.4th at pages 628, 629.) The court also held that the "punishable as a felony" language of section 1016 was inapplicable because the amendment of the complaint to charge a misdemeanor

was the equivalent of a misdemeanor complaint from the outset.

Which brings us back to this case. Was the appellant's conviction used in violation of section 1016's ban on the use of the plea "as an admission"? Is the accusation a "civil suit based upon or growing out of the act upon which the criminal prosecution was based"? Does the *Cartwright* decision require reversal? We think the answer to all three questions is "no."

The accusation in this matter charged:

> On or about March 20, 2002, respondent-licensee(s) Margarita Nunezmagana, misrepresented a material fact in connection with her application for the designated license, in that in the completion of a form prescribed by Section 23950 and 23951 of the Business and Professions Code, respondent-licensee(s) certified that she has never, anywhere or at any time; (1) forfeited bail, (2) been convicted, (3) fined, (4) placed on probation for any violation of law, and/or (5) are now actively being prosecuted for a criminal offense; when in truth and in fact, respondent-licensee(s) Margarita Nunezmagana was arrested and convicted for a misdemeanor crime of Grand Theft in violation of Section 487(a) PC, has been fined and is on probation for a violation of law, in violation of the Business and Professions Code Sections 23950, 23951 and 24200(c).

The Department offered in evidence the testimony of one of its investigators that appellant had orally denied ever having been arrested, and the certified record of appellant's conviction. Following the hearing, the Department adopted the decision which is the subject of this appeal. Paragraph 7 of the Findings of Fact states:

> The respondent was not present at the hearing and did not testify. No mitigation or extenuation was established for the misrepresentation. It is found that this misrepresentation was of a material fact in that grand theft constitutes a crime involving moral turpitude and bears directly on the honesty and fitness of a person to become a licensee. Such evidence would undoubtedly be a major issue to be considered in the Department's decision on whether or not to grant the applied-for-license.

Conclusion of Law, Paragraph 7 states:

> The materiality of such a misrepresentation is set forth in findings of fact no. 7. The continuation of the license would be contrary to the public welfare and

morals in that the respondent has failed to demonstrate that her licensure would be compatible with the protection of the consuming public.

We do not think it can be said that the accusation filed by the Department is a civil suit "growing out of the act upon which the criminal prosecution was based." Indeed, the record does not even disclose what specific acts or conduct gave rise to the misdemeanor complaint. Nor do we think it can be said that the Department used the nolo contendere plea as an admission. It would be more accurate to state that the plea of nolo contendere was simply a fact, the existence of which should truthfully have been disclosed in the license application. Whether it would have been appropriate for the Department to deny an application on the basis of such disclosure is not an issue in this case. In this case, the issue is whether its mere existence should have been disclosed.

The Legislature has declared that the manufacture and sale of alcoholic beverages "involves in the highest degree the economic, social, and moral well-being and safety of the State and all its people." To this end, it would seem utterly reasonable for the Department to be fully informed as to any criminal record an applicant may possess, and to require such disclosures under penalty of perjury. Indeed, the Legislature has, in other provisions of the Penal Code, mandated the disclosure of a conviction based upon a plea of nolo contendere even when the defendant has purged his or her record of the offense.

Penal Code section 1203.4 permits a defendant who has completed probation and is not currently serving a sentence or probation for any offense, or charged with the commission of any offense, to withdraw his or her plea of guilty or plea of nolo contendere, and enter a plea of not guilty, after which the court "shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or

she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted ... ." The section further provides that the order shall state, and the probationer be informed, that the order "does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency ... ." It is noteworthy that such disclosure is obligatory with respect to a plea of nolo contendere as well as to a plea of guilty.

If the Legislature believes that a prior conviction, even if based on a nolo contendere plea, must be disclosed in a license application to a state agency, as Penal Code section 1203.4 requires, it obviously thinks that the disclosure of such information is important to the licensing process,[10] even if the applicant has otherwise been relieved from any of the penalties or disabilities flowing from the conviction. We see no reason to read section 1016 as requiring a different, contrary result.

III

Appellant asserts that the ALJ erred in excluding evidence that appellant's conviction had been expunged pursuant to Penal Code section 1203.4. She argues that the fact she performed the requirement for clearing her record, i.e., successfully completing probation, was relevant on the issue of mitigation.

We believe that, even if the Department's case were not premised on the conviction as the reason for revocation, but instead on her misrepresentation, the expungement might well have some relevance on the issue of mitigation. Thus, we think the ALJ abused his discretion in excluding evidence of the expungement. The

[10] The Department's application form makes it unmistakably clear that the Department thinks such information important. (See note 5, ante.)

weight to be given this evidence, of course, will depend upon the circumstances of the case.

IV

Appellant has filed a declaration with her supplemental brief in which she states, among other things, that she completed only a fourth grade education in Mexico, is not fluent in the English language, that she depended upon the Department investigator's explanation to her of the questions on the Personal Affidavit, and that, had she understood question 24 on the Personal Affidavit, she would have answered it correctly. She argues that her prior counsel was derelict in failing to bring her to the hearing or offer her testimony in explanation of the response to question 24 on the Personal Affidavit.

We are aware that it is a common strategy on the part of an unsuccessful litigant to tell an appellate tribunal that his or her trial or hearing counsel did not provide competent representation. At the same time, we are also aware that, for many applicants for alcoholic beverage licenses, English is a second language, if it is a language for them at all.

Appellant claims in her declaration that she depended entirely upon the Department investigator for her understanding of the content of the Personal Affidavit. Her hearing counsel, for reasons not disclosed, chose not to present her testimony to that effect. It may well be that he did not believe she would be a good witness, or be able to present her case in a persuasive manner. For all we know, his decision to forego her testimony was not subject to criticism.

Nonetheless, we are concerned that the ultimate result was that appellant did not

get a fair hearing. It is noteworthy that there is no indication in the testimony of the Department investigator (Sheriff Ali) who handled the licensing application that he was proficient in Spanish. Appellant claims he did not read the document to her in Spanish, that her signature and initials are the only entries she made on the document, and he did not explain why her initials were necessary. If this is true, It is understandable how mis-communications could have occurred. In this respect, we note that item 16 of the Personal Affidavit shows appellant to be the sole owner of the restaurant, yet item 17 of the same document recites that she is not making any contribution to the business. Compounding this discrepancy, appellant's declaration asserts that she paid $51,996 to purchase the restaurant.

We think the interests of justice require that appellant be afforded a hearing on her claim that she was not adequately represented at the original hearing. This Board is not equipped or empowered to hear evidence or make findings of fact which would be necessary in order to address fully the questions appellant has raised with her supplemental brief and declaration. If, however, the claims appellant makes are true, one might well conclude she was not adequately represented and is entitled to relief. We do not make such a finding. We decide only that appellant has demonstrated that fairness requires such a hearing on that issue.

ORDER

The decision of the Department is reversed and the case remanded to the

Department for such further proceedings as may be appropriate in light of our comments herein.[11]

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

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[11] 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.