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

AB-8256
File: 21-388045 Reg: 03055455

FADI JARRAH and GEORGE JARRAH, dba Roswood Liquor
13767 Roscoe Boulevard, Panorama, CA 91402,
Appellants/Licensees

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 JANUARY 10, 2005

Fadi Jarrah and George Jarrah, doing business as Roswood Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license, with revocation stayed for a probationary period of one year, and suspended their license for 15 days, for appellants' clerk furnishing drug paraphernalia to an undercover police officer, a violation of Health and Safety Code section 11364.7, subdivision (a).

Appearances on appeal include appellants Fadi Jarrah and George Jarrah, appearing through their counsel, Jeffrey S. Weiss, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated February 11, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants hold an off-sale general license. The Department filed an accusation against appellants charging that, on January 9, 2003, appellants' clerk, Mounib Malih, furnished drug paraphernalia to Los Angeles police officer Tracy Callis.

At the administrative hearing held on November 25, 2003, documentary evidence was received and testimony concerning the violation charged was presented by officer Callis, by clerk Malih, and by co-licensee Fadi Jarrah.

Callis testified at the hearing that she asked Malih, "Do you sell pipes here?", and Malih asked, "What kind of pipe?" Callis replied, "The kind I can smoke cocaine in." Malih looked at her questioningly and asked, "Cocaine?" Callis said, "Yes, cocaine," and Malih took a cylindrical glass tube from a display on the counter, gave it to Callis, and told her the price. The tube was about 3 inches long, and looked similar to a ballpoint pen, with a plastic cap on one end, a writing point on the other, and a removable ink cartridge inside the glass tube. Callis asked if Malih had a screen for it, and he told her, "The Chore Boy is over there."

When Callis returned to the counter with a Chore Boy scouring pad, she asked if the pipe would work for her purpose, noting that it was not the same as the glass pipe with an artificial rose in it that was usually used to smoke cocaine. Malih responded that it would work the same. Callis then paid for the items and left the store.

Malih testified, but denied that Callis asked him for a cocaine pipe. He said that Callis herself picked up the glass tube pen from the counter display, and asked only if you could write with it. He said that he scribbled on a paper bag (later used, according to Malih, to package her purchases) to show it could be used as a pen. She asked for a Chore Boy, Malih said, and he directed her to the aisle with cleaning supplies.

Co-licensee Fadi Jarrah testified that in August 2002 he had removed a display of glass tubes with roses in them when he was told by a police officer that they were used for smoking cocaine, and that the officer had not mentioned the glass tube pens that were also on display.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged. Appellants filed an appeal in which they raise the following issues: (1) The items sold were not marketed for use as drug paraphernalia, and (2) the decision is not supported by the evidence.

DISCUSSION

I

Appellants contend that to be considered drug paraphernalia, the items in question must have been "marketed for use as drug paraphernalia." Neither they nor their clerk, they argue, had a pre-existing intent to display or market the items for use as drug paraphernalia and, therefore, there was no violation of Health and Safety Code section 11364.7, subdivision (a).

Health and Safety Code section 11364.7, subdivision (a), makes it a misdemeanor for anyone to deliver, or possess or manufacture with intent to deliver, drug paraphernalia, "knowing, or under circumstances where one reasonably should know, that it will be used to . . . ingest, inhale, or otherwise introduce into the human body a controlled substance . . . ." Subdivision (d) states that violation of any of the preceding subdivisions of section 11364.7 constitutes grounds to revoke a liquor license.

Health and Safety Code section 11014.5, subdivision (a), defines “drug paraphernalia” as items “designed for use or marketed for use, in . . . ingesting,

inhaling, or otherwise introducing into the human body a controlled substance . . . ."

Subdivision (b) states:

> For the purposes of this section, the phrase 'marketed for use' means advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or materials with controlled substances.

Whether an item is "marketed for use" as drug paraphernalia is determined "solely from the viewpoint of the person in control of the item, i.e., the . . . seller, without reference to a third person's state of mind." (*People v. Nelson* (1985) 171 Cal.App.3d Supp. 1, 11 [218 Cal.Rptr. 279].) If that pre-existing intent is shown on the part of the seller, then a violation of Health and Safety Code section 11364.7 occurs when he or she sells the item "knowing, or under circumstances where one reasonably should know, that it will be used" with a controlled substance.

This case presents an issue which the Board has considered in earlier cases: whether the item in question, which may have both legitimate uses and illegitimate uses, was marketed as drug paraphernalia. Two of those earlier cases, *Mbarkeh* (1998) AB-6882 and *Harper* (1998) AB-6984, concluded that the charged violation could not be sustained, despite the clerks' knowledge of the buyers' intended use, without proof of a pre-existing intent to market the items in question for use with narcotics. Those cases followed the holding to that effect in *People v. Nelson*, *supra*.

The Board has affirmed decisions in other appeals where the Department found that licensees or their clerks sold drug paraphernalia. In these cases, the officer or investigator involved asked for something with which to smoke rock cocaine or "crack" and was provided with, or directed to, small glass tubes containing flowers. In *Hinnant* (1999) AB-7101 and *Zakher* (1999) AB-7211, the clerks got the glass tubes from behind

or under the counter in response to requests for crack pipes. In *Chang* (1998) AB-6830, the clerk first pointed to a display of tobacco pipes, but when the officer said that wasn't what he wanted, the clerk pointed to a display of the glass tubes on the counter and said "This one over here." The clerk in *Southland, Assefa, & Woldermariam* (1999) AB-7176, not only pointed to the glass tubes, but took one out and demonstrated how it was used to smoke crack.

In each of these cases the Board found that the clerk showed his already existing intent to sell the tubes for use with a controlled substance by his unprompted response to a request for something with which to smoke cocaine. In addition, the request of the officer clearly showed that it was at least highly likely that the buyer of the item would use it to "ingest, inhale, or otherwise introduce into the human body a controlled substance."

The ALJ found in the present case that the items in question were offered by the clerk without any prompting or suggestion from the investigator that she wanted those specific items. As in the prior cases affirmed by the Board, this is a case where the seller already intended that the objects be sold for drug use, as demonstrated by his indicating the glass tube pen and the scouring pad in response to the investigator's request for a cocaine pipe and a screen to use with the pipe.

The ALJ made his findings based on the testimony of the investigator, finding that the clerk's testimony was "undercut by his protestations that he never had any knowledge with respect to drugs and drug paraphernalia." It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].) The

Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

As pointed out by appellants, the glass tube pens were not displayed as drug paraphernalia; however, the actions of the clerk demonstrated that he intended to market them for use as drug paraphernalia within the meaning of the statute and case law. Although appellants themselves may not have intended to sell the items as drug paraphernalia, it is well settled in Alcoholic Beverage Control Act case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. etc. Appeals Bd*. (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779]; *Kirby v. Alcoholic Bev. Etc. Appeals Bd*. (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

II

Appellants contend the decision is not supported by substantial evidence because the glass tube pen and the bag in which the clerk placed it were not produced at the hearing. They suggest the finding that the clerk was not credible might have been different if the bag had been produced, since it would support the clerk's testimony that he scribbled on the bag to prove that one could write with the glass tube pen. They also question the officer's credibility because the bag was destroyed, and the officer did not testify that the clerk used the glass tube pen as a writing instrument.

Appellants state that the officer did not testify about the clerk scribbling on the bag during the Department's case-in-chief nor was she called to rebut the clerk's statement. They contend that "the Department's silence as to the testimony of Mr. Malih was in fact an affirmation as to the truth of his statement." (App.Br. at p. 10.)

The basic problem with appellants' contention is that, had the officer produced a scribbled-upon bag at the hearing, it might have supported the clerk's statement that he demonstrated that the glass tube pen could be used as a writing implement, but it would have done nothing to support the rest of his testimony. The ALJ found the clerk's credibility to be "undercut by his protestations that he never had any knowledge with respect to drugs and drug paraphernalia." It is highly unlikely that evidence tending to prove that one of the clerk's statements was true (if in fact the evidence existed) would be enough to cause the ALJ to believe all of the clerk's testimony and reject the officer's testimony as unreliable.

Appellant's allegation that the officer said nothing about the clerk scribbling on the bag is incorrect. The officer was asked during cross-examination if the clerk "ever scribbl[ed] anything on a piece of paper with [the glass tube pen] to demonstrate that the pen would write," to which she answered "No." [RT 31.] She was not silent on the subject, but denied the act happened, so she made no "adoptive admission" by her silence. As to the Department's failure to recall the officer to rebut the clerk's testimony, that was unnecessary because she had already testified that the clerk did not scribble on the paper bag.

Appellant cites the case of *People v. Hines* (1997) 15 Cal.4th 997 [64 Cal.Rptr.2d 594] for the proposition that "law enforcement agencies have a duty to preserve evidence that might be expected to play a significant role in a licensee's defense." (App.Br. at p. 10.) The context of the language cited by appellant shows that several requirements must be met before a finding will be made that the failure to preserve evidence resulted in a denial of due process:

> Law enforcement agencies have a duty to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488 [104 S.Ct. 2528, 2533, 81 L.Ed.2d 413]; *People v. Beeler* (1995) 9 Cal.4th 953, 976 [39 Cal.Rptr.2d 607, 891 P.2d 153]; *People v. Webb* (1993) 6 Cal.4th 494, 519 [24 Cal.Rptr.2d 779, 862 P.2d 779]; *People v. Zapien* (1993) 4 Cal.4th 929, 964 [17 Cal.Rptr.2d 122, 846 P.2d 704].) To fall within the scope of this duty, the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Trombetta*, *supra*, 467 U.S. at p. 489 [104 S.Ct. at p. 2534]; *Beeler*, *supra*, 9 Cal.4th at p. 976.) Furthermore, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [109 S.Ct. 333, 337, 102 L.Ed.2d 281]; *Beeler*, *supra*, 9 Cal.4th at p. 976; *Webb*, *supra*, 6 Cal.4th at p. 519.)

(People v. Hines, supra, 15 Cal.4th at p. 1042.)

People v. Hines is of no use to appellant because the evidence did not "fall within the scope of this duty" to preserve evidence. It was not clear that the paper bag had any exculpatory value, that any such value was apparent before the hearing, or that appellant showed bad faith on the part of LAPD when it destroyed the bag.

In any case, a license disciplinary proceeding is not a criminal or quasi-criminal prosecution. The purpose of such a proceeding is not to punish, but to afford protection to the public. (*Borror v. Department of Investment* (1971) 15 Cal.App.3d 531, 540 [92 Cal.Rptr. 525].) Therefore, an administrative agency is not required to conduct these proceedings subject to criminal law theories or rules. (*Ibid.*; *Lax v. Board of Medical Quality Assurance* (1981) 116 Cal.App.3d 669, 676 [172 Cal.Rptr. 258]; see, e.g., *Foster v. McConnell* (1958) 162 Cal.App.2d 701, 707 [329 P.2d 32] [accusations and representations in license revocation proceeding are not required to be proved beyond a reasonable doubt].)

We conclude that the ALJ's determinations of the substantiality of the evidence and the credibility of the witnesses were not affected by the inadvertent destruction of the paper bag.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]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.