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

AB-8273
File: 20-364488 Reg: 03055293

SYLMAR OIL INC. dba Sylmar Chevron
13153 Foothill Boulevard, Sylmar, CA 91342,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 3, 2005
Rehearing May 5, 2005
Los Angeles, CA

ISSUED JUNE 30, 2005

Sylmar Oil Inc., doing business as Sylmar Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license, the order of revocation being conditionally stayed, subject to one year of discipline-free operation and a 10-day suspension, for its clerk, Manuel Valer, having delivered drug paraphernalia to Hilary Rappe, an undercover Los Angeles police officer, a violation of Health and Safety Code section 11364.7, subdivision (a).

Appearances on appeal include appellant Sylmar Oil Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 19, 2000.

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[1]The decision of the Department, dated March 25, 2004, is set forth in the appendix.

Thereafter, on June 24, 2002, the Department instituted an accusation against appellant charging the delivery, furnishing, or transfer by its clerk of drug paraphernalia.

An administrative hearing was held on December 12, 2003 and January 16, 2004, at which time oral and documentary evidence was received. Los Angeles police officer Rappe testified that, in the course of an investigation into the possible sale of narcotics paraphernalia, she entered the licensed premises and asked the clerk behind the counter if he had a glass pipe to smoke rock cocaine. The clerk reached beneath the counter and placed a glass tube containing a small flower on the counter. She then asked him whether he had copper wire to use as a screen for the pipe. The clerk pointed to a shelf of wire scouring pads. She paid $2.70 for the two items, and left the store. She identified Exhibit 1 as the pipe that had been placed on the counter, and Exhibit 2 as the scouring pad she selected from the public area of the store. Exhibits 1 and 2 were excluded from evidence, the administrative law judge (ALJ) ruling that there were too many open questions on the chain of custody. Appellant's manager, Fred Farivar, denied knowing that the items in question could be considered narcotics paraphernalia. Farivar and Guillermo Flores, a clerk at the store, also described the bullet-proof glass booth inside which the clerk/cashier works. David Valer, the clerk who sold the items in question, denied hearing officer Rappe use the word cocaine, and explained that he offered her the glass tube because that is what he thought she was referring to when she asked for a pipe. Valer testified that he was unable to hear Rappe clearly because of the glass enclosure.

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

Appellant thereafter filed a timely notice of appeal, and now launches a multi-

faceted attack on the decision, asserting (1) Finding of Fact 6 precludes a finding that appellant caused or permitted a violation of Health and Safety Code section 11364.7; (2) the so-called items of drug paraphernalia were not admitted into evidence, so there is no evidence to support the findings that drug paraphernalia was sold; (3) police officer Rappe was not qualified to testify as an expert on the subject of drug paraphernalia; and (4) a bulletproof glass barrier between Rappe and the clerk prevented the clerk from hearing any reference to cocaine. Appellant has also filed a Motion to Augment Record, requesting that a document entitled "Report of Hearing" be included in the administrative record, and has asserted that the Department violated its due process rights when the attorney who represented the Department at the hearing before the ALJ provided a Report of Hearing to the Department's decision maker after the hearing, but before the Department issued its decision.

DISCUSSION

I

Health and Safety Code section 11014.5 defines “drug paraphernalia” and establishes criteria for courts to consider when determining what constitutes drug paraphernalia. Section 11364.7 makes it a misdemeanor for anyone to deliver, furnish, transfer, possess, manufacture with intent to deliver, furnish, or transfer drug paraphernalia; provides those who are over 18 years of age and violate these provisions by delivering, furnishing or transferring drug paraphernalia to a minor at least three years their junior may be punished by a fine and/or imprisonment; declares the violation of its provisions constitutes cause to revoke any business or liquor license; and provides that all drug paraphernalia is subject to forfeiture and seizure by a peace officer.

Citing subdivision (d) of section 11364.7,[2] appellant argues that Finding of Fact 6 precludes a determination that appellant violated, or caused or permitted a violation.

Finding of Fact 6 states:

> Mr. Farivar, an officer of the licensee, testified that there was no intent on the part of the licensee to carry glass tubes or scouring pads for anything but legitimate purposes, and furthermore, that he was ignorant of the fact that such items could be used as contraband and only learned of this fact when he renewed his license with the Department almost 2 months after the violation.
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> Farivar is a credible and law abiding individual and has been commended on two occasions for actions on the part of his employees in refusing to sell alcoholic beverages to minors in police conducted minor decoy operations. However, findings of fact no. 7 below established the requisite intent on the part of clerk Valer that the glass tube and scouring pad were meant to be sold for cocaine use.

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (*Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504, 514 [22 Cal.Rptr. 405]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315]; and *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149, 153 [2 Cal.Rptr. 629].)

It is ironic that appellant claims the credit when one of his employees refuses to sell to a minor, but disclaims any responsibility when a different employee sells an item knowing it is intended to be used to ingest an illegal substance. Suffice it to say, Finding of Fact 6 is no barrier to liability for the conduct of clerk Valer, described in

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[2] Section 11364.7, subdivision (d) provides;

> The violation, or the causing or permitting of a violation, of subdivision (a), (b), or (c) by a holder of a business or liquor license issued by a city, county, or city and county, or by the State of California, and in the course of the licensee's business shall be grounds for the revocation of that license.

Finding of Fact 7.

II

The ALJ determined that there were "too many loose ends" to the chain of custody with respect to the glass tube (Exhibit 1) and the scouring pad (Exhibit 2) to conclude that the two items were the same two items officer Rappe purchased. Appellant now claims there is no evidence any paraphernalia was sold.

It is clear from the record that appellant never claimed that Officer Rappe was not sold a glass tube with a flower inside, and a copper scouring pad, in response to her request for a glass pipe with which to smoke crack cocaine and copper wire for a screen for the pipe. She testified that the glass tube and scouring pad she purchased were identical to the items marked for identification as Exhibits 1 and 2. The testimony throughout accepted as undisputed fact that such items were in fact sold - the basic dispute was whether the clerk understood what it was Officer Rappe said.

We think that Officer Rappe's description of the items in question, a description which underlaid the testimony of every witness who testified on the subject, is sufficient to permit findings to be made that they were sold as drug paraphernalia, even in the absence of their physical presence in the record.

III

Appellant established through the testimony of Officer Rappe that she had never been qualified as an expert witness in any federal or state court or administrative agency. Appellant argued, on the basis of such testimony, that she should not have been permitted to give her opinion that the glass tube and the scouring pad were commonly used as narcotics paraphernalia.

It might seem odd that the question whether an experienced police officer was

competent to opine that items such as those in question were commonly associated with drug usage, given the many appeals this Board has heard involving the flower-containing glass tubes and scouring pads as drug paraphernalia.

Nonetheless, appellant pursued this argument at the hearing, stressing the minimal amount of time Officer Rappe devoted to the specific subject of glass tubes such as the items in question.

Although the ALJ made no finding with respect to Officer Rappe's expertise, he addressed the argument when her opinion was elicited, stating [Vol. I RT 42]:

> I'd feel more comfortable if she did have - - if she was recognized as an expert by some administrative agency or court prior to this hearing. No question about that. That certainly would help me. But she hasn't.
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> So the record is clear. Does she have the sufficient expertise beyond what an ordinary police officer would have as Mr. Ainley framed it to qualify her as an expert in this particular case? So that's the question I have.
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> And, quite frankly, I think she does have the expertise. It's a judgment call, Counsel. As I've indicated earlier, things could be a lot different in a perfect world. We wouldn't even have to address the issue. But under the circumstances and the evidence in the record as to her qualifications, I am satisfied that she does have such expertise. So I'm going to overrule any objection to the question asked with respect to her expertise.

Officer Rappe testified that she had attended roll calls at which the items in question were discussed as drug paraphernalia, and that the subject was discussed at a five-day class she attended at the police academy after she had been on the force four years.

"A wealth of California cases ... allow expert testimony in the field of narcotics." (*People v. Harvey* (1991) 233 Cal.App.3d 1206, 1226 [285 Cal.Rptr. 158].) Defendant bears the burden of showing the trial court abused its discretion in allowing such evidence. Such an abuse of discretion must be affirmatively demonstrated and will

require reversal only when it clearly appears that a prejudicial abuse of discretion has occurred. (*Id*., at p. 1228.)

We have reviewed Officer Rappe's testimony regarding her background and training in the field of narcotics, and are satisfied that Judge Gruen properly exercised his discretion in allowing such testimony. We do not believe that a great deal of technical expertise is required to understand the ways in which glass tubes and copper scouring pads are used by those who smoke crack cocaine, especially given the apparent frequency with which it is done in the world of drug users.

Nor do we think Judge Gruen improperly placed on appellant the burden of disproving Officer Rappe's expertise. His decision to allow such testimony was premised on her testimony about her experience and training, and not upon any failure of appellant to offer evidence to the contrary.

IV

Appellant's clerk testified that Officer Rappe asked only if he had a glass pipe, and denied hearing her ask if he had glass pipes to smoke cocaine. [Vol II RT 28.] He blamed his failure to hear the word cocaine on the fact that he was working inside a booth enclosed with bulletproof glass. Since appellant conceded that Officer Rappe had used those words [II RT 51], the question was simply one of credibility whether the clerk knew the officer asked for something with which to smoke cocaine. The ALJ chose not to believe the clerk.

The ALJ explained his decision to reject the clerk's testimony in Finding of Fact 7:

The second contention is that at the time of the violation, a totally enclosed

> bulletproof glass security shield was in place designed to separate the cashier from the patron. Testimony was offered that with the shield pulled down, the clerk had difficulty hearing customers speak as their speech was muffled. This is the claim of clerk Valer in this matter.
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> Valer denies ever hearing the officer use the words "rock cocaine or screen," but claims that she used the words "metallic sponge." His recollection of what was and was not said is selective and self-serving. With the claimed hearing impediment of the glass shield, there are doubts concerning the credibility of his assertion that he heard the words "metallic sponge" and did not hear the words "rock cocaine or screen." The officer did not use the words "metallic shield" [sic] and this appears to be a recent fabrication.
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> Further, the officer asked Valer for a glass pipe to smoke cocaine. There was no mention of a glass tube, yet Valer construed the statement to mean, "glass tube." The box from which he pulled the glass tube did not have the word "pipe" printed on it and it is difficult to imagine that anyone construing the words glass pipe to mean "glass tube," would do so without some familiarity that the words tube and pipe were interchangeable terms for drug paraphernalia. Valer's denial of knowledge and intent is not credible.

We are not persuaded that the ALJ's credibility assessment should be disregarded. The credibility of a witness's testimony is ordinarily determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]*; Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

In this case, it is clear that the clerk knew the glass tube's intended use as a device with which to smoke cocaine. With the officer having said nothing other than "Do you have a glass pipe to smoke rock cocaine," appellant's clerk immediately reached beneath the counter to produce the glass tube containing the flower.

There is sufficient evidence to support the findings that appellant, through its clerk, marketed the glass tube and scouring pad as drug paraphernalia.

The fact that Mr. Farivar may not personally have known that the glass tube and copper scouring pad could be marketed and/or used as drug paraphernalia until he

received the notice that accompanied his license renewal does not exonerate appellant from the knowing conduct of its clerk.

V

Appellant asserts the Department violated its right to procedural due process when the attorney (the advocate) representing the Department at the hearing before the ALJ provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellant also filed a Motion to Augment Record (the motion), requesting that the report provided to the Department's decision maker be made part of the record. The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the Motions and issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").[3]

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting

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[3]The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615 [25 Cal.Rptr.3d 821]. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. (127 Cal.App.4th 615; ___ Cal.Rptr.3d ___). The Department has petitioned the California Supreme Court for review. The court has yet to act on the petition.

attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . .[citation] will be skewed. (*Howitt*, *supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the administrative law judge (ALJ) had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellant at the hearing. Appellant has not alleged that the proposed decision of the ALJ, which the Department adopted as its

own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellant has not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellant, it appears to us that appellant received the process that was due it in this administrative proceeding. Under these circumstances, and with the potential of an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellant is not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no relevant purpose that would be served by the production of any post-hearing document. Appellant's motion is denied.

ORDER

The decision of the Department is affirmed.[4]

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4] 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.