

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

AB-8530

File: 48-325263 Reg: 05060337

FREDASVINDA GUTIERREZ and PABLO CERVANTES PEREZ dba El Diamante
3524 East First Street, Los Angeles, CA 90063,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: May 3, 2007
Los Angeles, CA

ISSUED JULY 17, 2007

Fredasvinda Gutierrez and Pablo Cervantes Perez, doing business as *El Diamante* (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for co-licensee Perez having pled nolo contendere to an information charging him with two counts of possessing counterfeit trademarks, a violation of Business and Professions Code section 24200, subdivision (d), in conjunction with Penal Code section 350, subdivision (a)(2).²

Appearances on appeal include appellants Fredasvinda Gutierrez and Pablo Cervantes Perez, appearing through their counsel, Armando H. Chavira, and the

¹The decision of the Department, dated February 2, 2006, is set forth in the appendix.

² Section 350 criminalizes the willful manufacture, intentional sale or knowing possession of any counterfeit of a registered trademark. Subdivision (a)(2) sets forth the possible fine and/or imprisonment when the number of such counterfeit items exceeds 1000. Appellant Perez admitted to being in possession of over 65,000 packs of counterfeited cigarettes, some of which were found in the licensed premises. (Finding of Fact 7.)

Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.³

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on January 22, 1997. Thereafter, the Department instituted an accusation charging that co-licensee Perez entered a plea of nolo contendere to charges of possessing counterfeited trademarked items. An administrative hearing was held on November 29, 2005, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which concluded that the charge of the accusation had been established, and ordered appellants' license revoked.

Appellants filed a timely notice of appeal. Appellants' brief, filed one month late, argues that the decision must be reversed because the Department failed to make a specific finding of a nexus or relationship between his conviction and the fitness to hold a liquor license.

Appellants argue that the Department erroneously misconstrued Perez's conviction as "moral turpitude 'per se'" instead of applying a "prima facie" moral turpitude standard, one which requires a specific finding of the relationship between the crime and protection of the public. Appellants cite *Brewer v. Dept. of Motor Vehicles (DMV)* (1979) 93 Cal.App.3d 358, 365 [155 Cal.Rptr. 643] for the proposition that moral turpitude is a "legal abstraction until it is applied to a specific occupation and given

³ Prior to the late filing of appellants' brief, the Department filed a motion to dismiss the appeal for their failure to file their brief in timely fashion. While we are reluctant to dismiss an appeal because of dereliction of counsel, and could continue the matter to permit the Department to file its opposition, we see no reason to do so here. The issues raised by appellant are legally unsupportable, and we see no reason to delay the inevitable. The motion to dismiss is denied.

content by reference to fitness for the performance of that vocation.”

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.”)

In *Brewer, supra*, unlike here, there was no issue of honesty or integrity. The issue was whether there was a relationship between a conviction for annoying or molesting a child and the moral character required for a vehicle salesman license. The DMV statute provided that a conviction was only prima facie evidence of a lack of moral character. In this case, Perez’s lack of honesty and integrity is inherent in the crime for which he was convicted.

As stated in *Rice v. Alcoholic Bev. Control Appeals Bd.* (1979) 89 Cal.App.3d 30

[152 Cal.Rptr. 285), a crime committed for purposes of personal gain is a crime involving moral turpitude per se. Moreover, under Business and Professions Code section 24200, subdivision (d), a plea, verdict, or judgment of guilty, or a plea of nolo contendere “to any public offense involving moral turpitude,” is a ground for suspension or revocation. Section 24200, subdivision (d), makes no distinction between “prima facie” and “per se” moral turpitude.

In any event, contrary to appellants’ arguments, there are specific determinations (Conclusions of Law 6 and 7) of a sufficient nexus between Perez’s conduct and the order of revocation:

The crimes of which Respondent Pablo Perez was convicted are the very sort that disqualifies a person from holding a Department license. Matters much less serious than the knowing possession of large quantities of counterfeit goods evidenced in the case, e.g., petty theft, routinely result in revocation of a Department license in the Department’s continuing effort to protect the public from unscrupulous operators.

...

Discipline in matters such as this does not have as its purpose the further punishment of Respondent Pablo Perez. Instead, the purpose is protection of the public. It is impossible to see how the public will be protected so long as Perez remains intimately connected with Respondents’ licensed business. The only prudent course of action is to revoke the license.

ORDER

The decision of the Department is affirmed.⁴

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

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.