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

AB-8575
File: 42-382554 Reg: 05060770

JOSE GUADALUPE GOMEZ, dba El Coyote
20903 Sherman Way, Canoga Park, CA 91303,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED JULY 30, 2007

Jose Guadalupe Gomez, doing business as El Coyote (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for permitting numerous instances of drink solicitation, violations of Business and Professions Code sections 24200, subdivisions (a) and (b); 24200.5, subdivision (b); 25657, subdivisions (a) and (b); California Code of Regulations section 143; and Penal Code section 330, subdivision (a).

Appearances on appeal include appellant Jose Guadalupe Gomez, appearing through his counsel, Armando H. Chavira, 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 June 1, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public premises license was issued on April 3, 2002. On September 1, 2005, the Department instituted a 56-count accusation against appellant charging him with permitting drink-solicitation violations under various statutes by several women on May 13 and 20, and June 3 and 10, 2005.

At the administrative hearing held on February 21, 2006, documentary evidence was received and testimony concerning the violations charged was presented by Department investigators Ricardo Carnet and Jeremy Suetos.

Carnet testified that he entered the licensed premises on May 13, 2005, and ordered a can of Tecate beer at the fixed bar from the female bartender, Luz Alvarado, who charged him $4. Suetos entered the bar a short while later, sat at the fixed bar next to Carnet and ordered a can of Tecate beer from Alvarado, for which he was charged $4.

After Carnet and Suetos each ordered another beer, Alvarado asked Carnet to buy her a beer. Carnet agreed, and paid $4 to purchase a can of Tecate beer for her, which she proceeded to drink. Alvarado asked Carnet again to buy a drink for her. Carnet agreed, and Alvarado mixed a drink for herself of Tequila, apple juice, and ice, charging Carnet $6 for the drink. When Carnet asked her why it cost so much, Alvarado told him, "Now you have to pay to talk with me." She subsequently solicited Carnet to buy her two more of the Tequila and apple juice drinks, which he paid for and she drank.

Carnet asked Alvarado if there were someone to sit with Suetos, and Alvarado called over a women who was later identified as Olimpia Molina. Another woman, identified only as Alma, also came over to sit with the investigators. Both Molina and

Alma asked the investigators to buy them drinks. Carnet and Suetos agreed, and Alvarado fixed each of the women a Tequila and apple juice drink, charging the investigators $6 for each drink. Molina asked Carnet twice more to buy her drinks, which he did. After she had consumed the second of these drinks, she asked Carnet to buy her another one. When Carnet told her to slow down on her drinking, Molina responded that she needed to make money and that she got $5 for every $6 drink that he bought her. Carnet asked Alvarado, who was standing just across the bar counter from them, if this were true. Alvarado said it was, and fixed another drink for Molina, which Carnet paid for. Molina solicited Carnet for one more drink that evening. During the evening, Alma solicited Suetos four times for drinks, and Alvarado asked Suetos to buy another drink for Alma. Each time, Suetos agreed, and paid $6 for each drink.

On May 20, 2005, Carnet entered the premises alone. Alvarado was the bartender again. She asked Carnet to buy her a drink, he agreed, she prepared a drink for herself, and charged him $6. He saw her punch in the number seven on the cash register, and then the number 6. When he agreed to buy her another drink, the same sequence occurred. Carnet asked her if the seven she entered in the cash register was an employee number, and she said that each bar girl had an employee number. Carnet testified, based on his experience with these types of investigations, that assigning numbers was a method for keeping track of each bar girl's solicitations on a given night. He said that Alvarado told him the bar girls would get either $3 or $5 per drink solicited, paid to them at the end of the night by the bartender or the owner. Molina then came into the premises and asked Carnet to buy her a drink, which he did. After Molina solicited, and Carnet paid for, another drink, Carnet left the premises.

Again, on June 3, 2005, Carnet and Suetos went to the premises and ordered beer from Alvarado, who was bartending. Molina came over and asked Carnet to buy her a drink, which he did. When he gave Alvarado $6 for Molina's drink, Alvarado went to the cash register and Carnet saw her enter the number 12 and then 6. Carnet asked Molina if 12 was her employee number, and she said "Yes." The same sequence of events occurred when Molina solicited three more drinks from Carnet that evening.

Shortly thereafter, another woman, later identified as Viridiana Silva, joined them and sat next to Suetos. Silva asked Suetos to buy her a drink, he agreed, and Alvarado mixed a Tequila and apple juice drink for Silva, charging Suetos $6. Silva solicited two more drinks from Suetos, for which he paid $6 each. Suetos then ordered a Tequila and apple juice drink for himself, which Alvarado prepared, charging Suetos $4 for it. Silva asked Suetos to buy her another drink and he agreed, but Alvarado told him that the Tequila and apple juice drink for Silva was now $10. Suetos paid the $10 and shortly thereafter the two investigators left the premises.

On June 10, Carnet entered the premises with investigator Robles. Alvarado, who was not bartending at the time, sat between Carnet and Robles, and asked Carnet to buy her a drink. Silvia Medina, the bartender, prepared the drink for Alvarado, and Carnet paid for it. Medina went to the cash register and entered the number seven and then six. Molina came in and joined them at the bar. When Carnet subsequently paid for a drink Molina had asked him to purchase for her, Medina entered the numbers 12 and 6 in the cash register. That night back-up officers were called in and the investigation was concluded.

When the back-up officers entered, Carnet saw the licensee go to the cash register, rip off the receipt tape, and attempt to hand it to Medina, but it was intercepted

by an officer and booked into evidence. On the tape were printed, among other entries, Dept 7, followed by $6, and Dept 12, also followed by $6, corresponding to the drinks solicited by Alvarado and Molina from Carnet that night.

Appellant presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that all the counts were established, with the exception of counts 17, 20, 22, 26, 29, 44, 47, 50, 53, and 56, which were dismissed, no evidence having been presented regarding them.

Appellant filed an appeal, conceding count 41 (regarding the slot machine), but contending that the remaining counts sustained by the decision were supported only by hearsay evidence.

DISCUSSION

Appellant contends the findings are supported only by the testimony of the investigators about what others in the licensed premises told them. This testimony, he argues, constitutes inadmissible hearsay evidence which, by itself, is not sufficient to sustain a finding.[2] The cash register tape was the only evidence that was not hearsay, appellant argues, but the Department was unable to show that the numbers on it related to any of the hearsay evidence.

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter

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[2]Government Code section 11513, subdivision (d), addresses hearsay evidence in administrative hearings:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

stated." (Evid. Code, § 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (*Id*., subd. (b).)

Not all out-of-court statements, however, are hearsay. A statement is not hearsay if it is not offered to prove the truth of the matter stated. A solicitation for prostitution or drinks is a classic example of such non-hearsay:

> Los Robles argues in this regard that the testimony of the agents of the department regarding their conversations with the girls, Pattie and Jean, was inadmissible "administrative" hearsay. It was not inadmissible upon any theory. Although admitted in an administrative hearing, it would have been equally admissible under common law rules. Solicitation for prostitution was the very fact in issue. The truth of the girls' statements was not important. The fact they were made was. The declarations were admissible as original evidence. They were "operative facts." (See Witkin, Cal. Evidence (2d ed. 1958) p. 425 et seq.; *People v. Contreras*, 201 Cal.App.2d 854, 857 [20 Cal.Rptr. 551]; *Greenblatt v. Munro*, 161 Cal.App.2d 596, 601-602 [326 P.2d 929]; *People v. Gaspard*, 177 Cal.App.2d 487, 489 [2 Cal.Rptr. 193].)

(Los Robles Motor Lodge, Inc. v. Department of Alcoholic Beverage Control (1966) 246 Cal.App.2d 198, 205-206 [54 Cal.Rptr. 547].)

The California Supreme Court stated an even more general rule in this regard:

> [A]n out-of-court statement is hearsay only when it is "offered to prove the truth of the matter stated." (Evid. Code, § 1200.) Because a request, by itself, does not assert the truth of any fact, it cannot be offered to prove the truth of the matter stated.

(People v. Jurado (2006) 38 Cal.4th 72, 117[41 Cal.Rptr. 3d 319, 131 P.3d 400].)

Since the women's requests themselves constitute the violations, they are considered "operative facts," and not hearsay. (See 1 Witkin, Cal. Evidence (4th ed. 1997) Hearsay, §§ 31-34, and cases cited therein.)

The other statements of the women regarding how much they were paid, who paid them, and how the solicitations were tracked, were properly admitted as

administrative hearsay that supplemented or explained the direct evidence presented by the investigators.

The record clearly contains substantial competent and admissible evidence to support the findings and the decision.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]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.