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

AB-8773
File: 21-270274 Reg: 07064975

MICHAEL NGUYEN DO and ANNA MY LY, dba Carson Park Liquor
4119 Los Coyotes Diagonal, Lakewood, CA 90713,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: September 4, 2008
Los Angeles, CA
ISSUED DECEMBER 26, 2008

Michael Nguyen Do and Anna My Ly, doing business as Carson Park Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for having purchased distilled spirits believing them to have been stolen, in violation of Penal Code sections 664/496, subdivision (a), and for co-licensee Michael Do pleading nolo contendere to a charge of violating Penal Code sections 664/496, subdivision (a), a crime involving moral turpitude, in violation of Business and Professions Code section 24200, subdivision (d).

Appearances on appeal include appellants Michael Nguyen Do and Anna My Ly, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated November 8, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on February 22, 2002. On February 2, 2007, the Department instituted an accusation against appellants[2] charging that on October 6, 2006, co-licensee Anna Ly purchased distilled spirits believing them to have been stolen; on October 13 and 20, 2006, co-licensee Michael Do purchased distilled spirits believing them to have been stolen; and on March 19, 2007, co-licensee Michael Do pleaded nolo contendere to a charge of violating Penal Code sections 664/496, subdivision (a).

At the administrative hearing held on August 16, 2007, documentary evidence was received and testimony concerning the violations charged was presented by Los Angeles County Sheriff's Department deputies Sergeant John Gannon and Detective Brian Schlosser, and by co-licensees Anna My Ly and Michael Do.

Detective Schlosser's Testimony:

On September 29, 2006, Schlosser went to appellants' store in an undercover capacity. After buying a can of beer from co-licensee Anna Ly, he told her he could get distilled spirits like those on display for half the price charged by Costco because his buddy could sneak them out of the back of Costco. Ly told Schlosser she would be interested in obtaining "high-end" liquor such as Remy Martin and Jose Cuervo. Schlosser said he would see what his buddy could get and he would be back. This conversation was entirely in English and Ly appeared to have no difficulty understanding all that was said.

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[2]The accusation was amended twice, the first time to add count 4 after Do's conviction, and the second time at the hearing to correct the statutory references in the first three counts.

On October 6, 2006, Schlosser returned to appellants' store. Ly said she remembered him. When Schlosser told her he had some "stuff," Ly went out with him to his car to see what he had. After negotiating a price, Ly gave Schlosser two shopping bags that he used to bring in five bottles of Jose Cuervo and two bottles of Hennessey. Ly agreed to pay $16 per bottle for the Hennessey and $6 per bottle for the Jose Cuervo, paying Schlosser with money from the cash register. Schlosser asked Ly to write down what she would like next time, and she wrote "Jack Daniels 750" on a piece of register paper.

Schlosser returned to the store on October 13, 2006. Co-licensee Michael Do was working alone that day. When told that Ly was not working that day, Schlosser asked Do if he were Ly's husband and he said he was. Schlosser told Do he had sold some "stuff" to Ly the week before, and Do said, "Yeah, yeah, I know you."

Schlosser told Do he had some Jack Daniels and they went out to Schlosser's car, where there were three bottles each of Jack Daniel's and Hennessey, one bottle of Hypnotique, and some wine. Do said he would take everything but the wine, and Schlosser took the bottles into the store. He told Do his buddy stole the items out of the back of Costco and Do could buy the liquor for half the price Costco charged. They negotiated a price and Do gave Schlosser $70 from the register. He asked for cases of Remy Martin and Chivas Regal next time.

On October 20, 2006, Do was working alone in the store when Schlosser came in and told Do that he had a case each of Remy Martin and Hennessey. Schlosser and Do agreed on a price of $125 for each case of 12 bottles. Do asked Schlosser if he had any Bailey's and Schlosser told him he didn't, but that he could give the order to his buddy. He said his buddy never knew what to steal from Costco.

During his visits to appellants' store on October 6, 13, and 20, 2006, Schlosser was wearing a recording device. The recordings from those visits were put on a compact disk which was marked and admitted into evidence as Exhibit 10. The recordings were played during the administrative hearing.

ANNA LY'S TESTIMONY

Co-licensee Anna Ly is from Vietnam and her primary language is Vietnamese. On September 29, 2006, Schlosser asked her if she wanted to buy cigarettes or liquor. He did not mention that the alcohol he was offering was stolen. Ly did not want to talk to Schlosser, but he asked again if she wanted to buy anything. While Ly was waiting on a customer, Schlosser reached over the counter, grabbed a piece of paper, wrote his name and phone number, and told her to call him if she wanted to buy anything. She threw away the piece of paper after he left.

Ly was responsible for ordering alcoholic beverages for the store, ordering from various companies. She spoke to sales representatives from the companies in English. She said it was not unusual for sales representatives to have bottles of alcoholic beverages in their cars, and she would negotiate the prices with them.

When Schlosser returned on October 6, 2006, she did not understand that the alcoholic beverages she purchased were stolen. He did not say it was stolen. She walked out to his car, looked at the alcohol he had in the trunk, and they returned to the store. She gave Schlosser two bags and he brought the alcoholic beverages into the store. She paid him in cash, but he did not give her an invoice or receipt. She did not think that the prices they agreed on – $16 for a 750 milliliter bottle of Hennessey and $6 for a 750 milliliter bottle of Jose Cuervo – were unreasonably low prices. She admitted writing "Jack Daniel's 750" on a piece of paper she gave to Schlosser.

MICHAEL DO'S TESTIMONY

Co-licensee Michael Do said he was born in Vietnam and Vietnamese was his primary language. He has owned the liquor license for about 17 years.

Before October 13, 2006, when Do first met Schlosser, Do's wife, Ly, told him that a salesman had come in with a good price for liquor and she thought they should buy some. When he purchased the alcoholic beverages from Schlosser on October 13 and 20, 2006, Do did not think the alcohol was stolen. Schlosser did not tell him on either date that the alcohol was stolen.

Subsequent to the hearing, the Department issued its decision which determined that appellants had purchased alcoholic beverages believing the items to have been stolen, in violation of Penal Code sections 664/496, subdivision (a). It also determined that Do had entered a plea of nolo contendere to, and been convicted of, violations of Penal Code sections 664/496, subdivision (a), crimes involving moral turpitude, which violated Business and Professions Code section 24200, subdivision (d). Appellants' license was ordered revoked.

Appellants have filed an appeal making the following contentions: (1) The Department engaged in improper ex parte communications; (2) the Department did not have effective screening procedures in place to prevent its attorneys from acting as both prosecutors and advisors to the decision maker or to prevent ex parte communication with the decision maker; (3) appellants were denied due process by the amendment of the accusation during closing argument; (4) appellants were prejudiced by denial of their request for a continuance to explore information they received only two days before the hearing; (5) the decision is not supported by the findings; (6) it was improper to refuse to consider testimony demonstrating the facts surrounding Do's plea

of nolo contendere; and (7) the penalty is excessive. Issues 1 and 2 will be discussed together. Appellants also request that the Board withhold its decision until a matter pending in the California Supreme Court is resolved and augment the record with any Report of Hearing and related documents in the Department's file for this case, and with General Order No. 2007-09 and any related documents.

DISCUSSION

I and II

Appellants contend the Department did not adequately screen its prosecutors from its decision maker and engaged in ex parte communications.

The administrative hearing in this case took place on August 16, 2007, after the adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007. A certified copy of the Order is attached to a declaration by Department attorney Kerry K. Winters. The Order sets forth changes in the Department's internal operating procedures which, it states, the Director of the Department has determined are "the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications," changes which consist of "a reassignment of functions and responsibilities with respect to the review of proposed decisions." The Order, directed to all offices and units of the Department, provides:

> **Background**:
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> In 2006 the California Supreme Court found that the Department's practice of attorneys preparing a report following an administrative hearing, and the Director and his advisors having access to or reviewing that report, violated the Administrative Procedures [*sic*] Act's prohibition against *ex parte* communications. Subsequent cases in the courts of appeal extended the reasoning of the Supreme Court in holding that such a statutory violation continues to exist even if the Department adopted the administrative law judge's proposed decision without change. In addition, the courts of appeal placed the burden on the Department to establish that no improper *ex parte* communication occurred in any given case.

Procedures:

Although the Supreme Court held that a physical separation of functions within the Department is not necessary, in light of subsequent appellate decisions the Director has determined that the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications, a reassignment of functions and responsibilities with respect to the review of proposed decisions is necessary and appropriate.

Effective immediately, the following protocols shall be followed with respect to litigated matters:

1. The Department's Legal Unit shall be responsible for litigating administrative cases and shall not be involved in the review of proposed decisions, nor shall the Chief Counsel or Staff Counsel within the Legal Unit advise the Director or any other person in the decision-making chain of command with regard to proposed decisions.

2. The Administrative Hearing Office shall forward proposed decisions, together with any exhibits, pleadings and other documents or evidence considered by the administrative law judge, to the Hearing and Legal Unit which shall forward them to the Director's Office without legal review or comment.

3. The proposed decision and included documents as identified above shall be maintained at all times in a file separate from any other documents or files maintained by the Department regarding the licensee or applicant. This file shall constitute the official administrative record.

4. The administrative record shall be circulated to the Director via the Headquarters Deputy Division Chief, the Assistant Director for Administration and/or the Chief Deputy Director.

5. The Director and his designees shall act in accordance with Government Code Section 11517, and shall so notify the Hearing and Legal Unit of all decisions made relating to the proposed decision. The Hearing and Legal Unit shall thereafter notify all parties.

6. This General Order supersedes and hereby invalidates any and all policies and/or procedures inconsistent to [*sic*] the foregoing.

The obvious purpose of the Order is to amend the internal operating procedures of the Department that have resulted in more than 100 cases having been remanded to

the Department by the Appeals Board for an evidentiary hearing regarding claims of ex parte communications between litigating counsel and the Department's decision makers.[3] Although not identified in the Order, the "appellate decisions" to which it refers undoubtedly include in their numbers the decision by the California Supreme Court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585] *(Quintanar)*, and Court of Appeal decisions in *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th116 [57 Cal.Rptr.3d 6] (*Chevron*), and *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274 [60 Cal.Rptr.3d 295] (*Rondon*), case authorities routinely cited in appellate briefs asserting that the Department engaged in improper ex parte communications.

The Order effectively answers the question raised in earlier appeals, i.e., whether the Department's long standing practice of having its staff attorneys submit ex parte recommendations in the form of reports of hearing, has been officially changed to comply with the requirements of *Quintanar* and the cases following it. It replaces an earlier, less formal procedure used by the Department to address the problems of ex parte communications, one which the Appeals Board found was not an effective cure for the problem endemic within the Department, with one intended to isolate the Department decision maker from any potential advice or comment from the attorney who litigated the administrative matter, as well as the Department's entire Legal Unit.

Appellants have not affirmatively shown that any ex parte communication took place in this case. Instead, they have relied on the authorities cited above *(Quintanar,*

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[3]We understand that these cases were ultimately dismissed by the Department.

supra; Chevron, supra; Rondon, supra), for their argument that the burden is on the Department to disprove the existence of any ex parte communication.

We are now satisfied, by the Department's adoption of General Order No. 2007-09, that it has met its burden of demonstrating that it operated in accordance with law. Without evidence that the procedure outlined in the Order was disregarded, we believe it would be unreasonable to assume that any ex parte communication occurred.

While the Order does not specifically address the question whether there was an adequate screening procedure to prevent Department attorneys who acted as litigators from advising the Department decision maker in other matters, by its terms it appears to resolve that issue by effectively removing the litigating attorneys from the review process entirely.

In light of the result we reach, we see no need to withhold our decision in this matter until the California Supreme Court resolves *Morongo Band of Mission Indians v. State Water Resources Control Board* (rev. granted October 24, 2007, S155589). Similarly, there is no need to augment the record as requested by appellants.

III

Appellants contend that their right to due process was violated by allowing the Department to amend the first three counts of the accusation during closing argument, effectively bringing new charges against them, without notice or an opportunity to present a defense. They claim that they had prepared and conducted their case throughout the administrative hearing based on the original charges against them, and would have conducted their defense entirely differently had they been aware of the charges that would be brought against them after all the testimony and evidence had been completed.

The first three counts of the accusation originally charged that appellants, on three different dates, "bought, received, withheld or concealed property, to-wit: distilled spirits, believing said property to have been stolen in violation of Penal Code Section 496(a)." The accusation was later amended to add a fourth count charging that co-licensee Do was convicted of the criminal charge of violating Penal Code sections 664/496, subdivision (a).

At the hearing, during closing argument, the Department moved to amend the first three counts of the accusation to say that appellants "bought, received, withheld or concealed property, to-wit: distilled spirits, believing said property to have been stolen in violation of Penal Code Section 664/496(a)." The ALJ described, in the last introductory paragraph of the decision, the amendment of the accusation:

> Oral and documentary evidence was received at the hearing on August 16, 2007. During its closing argument, the Department moved to amend Counts 1, 2 and 3 of the Accusation. After hearing arguments from both parties Counts 1, 2 and 3 of the Accusation were amended to read Penal Code Section "664/496(a)" instead of "496(a)". Respondents' counsel requested a continuance so that he could present a defense to the "new" amended charges. That request was denied after argument. However, the parties were given additional time to provide briefs addressing the change from Penal Code Section 496(a) to 664/496(a). Those briefs were received and reviewed. (Respondent's brief is Exhibit A and the Department's brief is Exhibit 11). There was no "good cause" found to continue the matter. . . .
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> Subdivision (a) of Penal Code section 496 provides, in pertinent part:
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> > Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, . . . shall be punished by imprisonment in a state prison, or in a county jail for not more than one year. . . .

Alleged by itself, section 496, subdivision (a), charges the crime of receipt of stolen property.

Penal Code section 664 "which is a general section on attempts to commit crimes" (*People v. Siegel* (1961) 198 Cal.App.2d 676, 683 [18 Cal.Rptr. 268]), provides in pertinent part: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows: . . . "[4] Combining section 664 with section 496, subdivision (a), results in a charge of attempted receipt of stolen property.

The parties appear to agree that the Department was allowed by the Administrative Procedure Act (Gov. Code, § 11370, et seq.) to amend the accusation during closing argument. Government Code section 11507 provides:

> At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, but he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record.

Appellants contend, however, that in doing so the Department cannot violate their due process rights to notice and an opportunity to defend the "new charges."

Appellants have not persuaded us that their rights were violated by allowing the amendment. They were present when the accusation was amended, so they clearly had notice. The ALJ gave the parties time to file briefs addressing the effect of the amendment, so appellants had the opportunity to convince the ALJ that a continuance

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[4]Paragraphs a. through f. which follow, provide that, in general, punishments for attempts are to be one-half of the punishment for the crime attempted, with special provisions applicable in cases of attempted murder of peace officers, firefighters, prison guards, etc.

was required to allow them an additional opportunity to defend the amended charges. However, their post-hearing brief did not address the amendment's effect on their case nor did it convince the ALJ that the matter should be continued.

Even with notice and an opportunity to defend, the amendment might still have been unfair if it had been a surprise to appellants or changed the nature of the allegations in the accusation. There was no surprise, however. Although section 664 was not cited in the accusation, the language, "believing said property to have been stolen," is the language used for an attempt; the language used for charging the completed crime of receipt of stolen property would be, "*knowing* said property to have been stolen." Also, the criminal complaint arising from the same events charged the crimes as attempts under sections 664/496. The very fact that appellants knew the police had conducted a "sting" operation also put them on notice that they could only be charged with attempt, because the police do not steal goods to use in stings.

The nature of the charges and the evidence needed did not materially change because of the amendment. The only difference between the receipt of stolen property and the attempted receipt of stolen property is that the property received is not stolen, even though the recipient believes it to be stolen.

> Thus, a defendant is guilty of an attempt where he has the specific intent to commit the substantive offense and, under the circumstances as he reasonably sees them, does the acts necessary to consummate the substantive offense; however, because of circumstances unknown to him there is an absence of one or more of the essential elements of the substantive crime. . . . [¶] In this case, the watch purchased by defendant from the undercover agent had never been stolen. Defendant, however, believed he was purchasing stolen property and pursuant to such belief he did the acts necessary to consummate the offense of receiving stolen property.

(People v. Wright (1980) 105 Cal.App.3d 329, 332 [164 Cal.Rptr. 207].)

At the hearing, appellants presented the defenses of entrapment and lack of knowledge that the items had been stolen. With one exception, they have not argued on appeal that the amendment required them to use a different defense or to present different evidence or witnesses. In their brief, appellants assert that if they had known about the amendment earlier, they would have changed their defense completely and would not have waived their Fifth Amendment rights by testifying. However, they have not explained, nor can we imagine, what material changes they might have made in their defense had the amendment been made earlier. Nor do we see how their Fifth Amendment rights were implicated, since the criminal charges against both licensees had already been resolved – the charge against Ly was dismissed and Do was convicted of attempting to receive stolen property, based on his plea of nolo contendere, before the administrative hearing.

Appellants have not shown that the ALJ erred in allowing the amendment of the accusation or that they were prejudiced or deprived of due process because of it.

IV

Appellants contend they were prejudiced by the ALJ's denial of their request for a continuance to further investigate information they received from the Sheriff's Department two days before the hearing.

After receiving discovery documents from the Department, appellants served a subpoena duces tecum on the Los Angeles County Sheriff's Department requesting documents for the dates October 6, 13, and 20, 2006. Two days before the hearing, the Sheriff's Department responded to the subpoena duces tecum, including in the documents a list of locations visited on September 29, 2006, a date for which documents had not been requested.

Upon receipt of this information, appellants requested a continuance, which the ALJ denied. Appellants renewed the motion to continue at the hearing, and the ALJ again denied the motion.

Pursuant to Government Code section 11524, the ALJ has the right to grant a request for continuance for good cause. However, there is no absolute right to a continuance; one is granted or denied at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198]; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].)

In determining whether an abuse of discretion has occurred, we must consider whether the requesting party made a sufficient showing of good cause. (*Lewis v. Neptune Soc'y Corp*. (1987) 195 Cal.App.3d 427, 429 [240 Cal.Rptr. 656]; *County of San Bernardino v. Doria Mining & Engineering Corp.* (1977) 72 Cal.App.3d 776, 783-784 [140 Cal.Rptr. 383].) The assertion that a party might be able to discover evidence favorable to the party's position does not entitle the party to a continuance. (*In re Marriage of Young* (1990) 224 Cal.App.3d 147, 152 [273 Cal. Rptr. 495]; *Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal.App.3d 621, 628 [157 Cal.Rptr. 248]; *Johnston v. Johnston* (1941) 48 Cal.App.2d 23, 26 [119 P.2d 158].)

At the hearing, appellants' reason for the request was "so that we would be permitted to actually speak to these other licensees and discover additional information regarding the occurrences at their locations on the 29th." [RT 15.] They also

contended that the information about licensees visited on September 29th was "newly discovered evidence [and] we should be permitted to explore that." [RT 17.]

These "reasons" hardly amount to good cause. As the ALJ noted, appellants apparently did not think this information was important enough to request it in the subpoena duces tecum served on the Sheriff's Department. We agree that investigation of what happened at other locations on September 29th was highly unlikely to produce anything that could be material to their case.[5] All indications are that the operation on the 29th was in the nature of "preliminary groundwork" to see what the reaction would be of various licensees.

Schlosser was asked on cross-examination why, since he wore a recording device on October 6, 13, and 20, he was not wearing one on September 29th. Schlosser replied: "We hadn't planned on selling any alcohol to anybody. It was more of a day to go out to many locations to see if anybody was interested in buying." Given that there were no attempts at making sales on September 29, we fail to see what use appellants could make of "additional information regarding the occurrences at [the] locations [of other licensees] on the 29th."

Appellants think it "noteworthy" that the ALJ denied the motion because they did not include that date in the subpoena. (App. Br. at p. 31.) They assert the ALJ "applied the incorrect standard in ruling on [their] motion." (*Ibid*.) On the contrary, we believe the ALJ used the correct standard of requiring a showing of good cause. It is his reasoning appellants object to. However, we need not consider this issue, since it is the ruling made by the ALJ, not his reasoning, that we review. (*D'Amico v. Bd. of*

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[5]We note that appellants' counsel knew about two of the other locations because they also represent those licensees.

Medical Examiners (1974) 11 Cal.3d 1, 18-19 [520 P.2d 10; 112 Cal.Rptr. 786].) The ALJ did not err in denying appellants' motion to continue.

V

Appellants contend that the decision is not supported by the findings and the findings are not supported by substantial evidence because the Department did not prove that the items sold to appellants were stolen and the Department failed to establish, with reasonable certainty, that either of the appellants had the specific intent to purchase goods that they knew or understood to be stolen.

The first contention, that the Department did not prove the items were stolen, was discussed earlier in this opinion. (See III, above.) The Department did not need to prove the items were stolen.

As to the second contention, appellants have mistaken the standard the Appeals Board must use in reviewing the Department's decision. We do not look to see if the Department established something "with reasonable certainty," but whether there is substantial evidence to support the findings. "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§

23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

In the present case, the requisite substantial evidence exists: Appellants were told that Schlosser's buddy would sneak the goods out of the back of Costco and that he stole them out of the back of Costco. Schlosser said he would charge only half the price Costco charged for the alcohol. Appellants negotiated the price of the alcohol. The goods were "displayed" in Schlosser's car. Ly gave Schlosser shopping bags to carry the bottles in surreptitiously, and Do was concerned that Schlosser did not have a blanket to cover the items as he brought them into the store. Appellants had no trouble using English to talk to Schlosser, to negotiate prices, and to tell him what goods they would like to have from him.

Appellants are asking the Board to reweigh the evidence, which the Board is not authorized to do. There is clearly substantial evidence to support the finding that appellants had the requisite intent.

VI

Appellants contend the ALJ erred when he refused to hear evidence regarding the reasons for Do's plea of nolo contendere. They contend it was not a voluntary plea because Do could not afford the alternative of going to trial.

Business and Professions Code section 24200, subdivision (d), provides that a licensee's plea of nolo contendere to a public offense involving moral turpitude is grounds for suspension or revocation of the alcoholic beverage license. It is the fact of the conviction that is the basis for discipline, not the facts behind the conviction or the plea.

Do wanted to testify about the reasons for his plea to show it was not voluntarily made. This would be an attempt to impeach the conviction, which he may not do.

> [T]he nolo conviction stands as conclusive proof of appellant's guilt of the specific offense charged in the indictment. No extrinsic independent evidence thereof need be introduced. Nor is appellant permitted to impeach that conviction.

(Arneson v. Fox (1980) 28 Cal.3d 440, 452 [170 Cal.Rptr. 778, 621 P.2d 817].)

A superior court judge made specific findings that Do's plea and waiver of his rights was made "knowingly, understandingly, and explicitly" and that the plea had a basis in fact. This Board has neither reason nor authority to look behind the judge's findings. The ALJ did not abuse his discretion by refusing to consider the reasons for Do's plea.

VII

Appellants contend the penalty of revocation is excessive. They argue that revocation was not the sole option available to the Department, that a stayed revocation would protect public welfare and morals just as well, and that revocation is not appropriate because only a few hundred dollars worth of alcohol was involved.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

The Department's penalty guidelines in rule 144 (4 Cal. Code Regs., § 144) show revocation as the penalty both for conviction of a crime involving moral turpitude and for licensees receiving stolen property on the premises. Licensee involvement and a continuing course of conduct are listed as factors in aggravation. The only factor presented by appellants that could even remotely be considered mitigating was their attendance at the Department's L.E.A.D. program.

The ALJ concluded that appellants did not present any mitigating evidence and ended the penalty considerations with the following (Penalty, ¶ 4):

> Based upon Do's nolo contendere plea **alone**, if he were to walk into a Department District Office and apply for a new license today, he would not qualify. Allowing this license to continue would be a great disservice to the thousands of licensees in this state who do comply with all of the rules, regulations and laws that govern an Alcoholic Beverage Control license. Continuation of this license would be contrary to public welfare and morals.

The ALJ stated a perfectly reasonable rationale for the penalty imposed. Under the circumstances of this case, revocation was not an excessive penalty and both the ALJ and the Department were well within the scope of their discretion in imposing it.

ORDER

The decision of the Department is affirmed.[6]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[6]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.