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

AB-9092
File: 41-424683 Reg: 08069096

KULWANT RAI MAHI and VIJENDRA PRASAD, dba Country Club Market
5531 Pentz Road, Paradise, CA 95969-6642,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: April 7, 2011
San Francisco, CA

ISSUED APRIL 28, 2011

Kulwant Rai Mahi and Vijendra Prasad[1], doing business as Country Club Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[2] which revoked their on-sale beer and wine public eating place license for appellant co-licensee Kulwant Rai Mahi having entered a plea of nolo contendere to a public offense involving moral turpitude, a violation of Penal Code section 261.5, subdivision (c) (unlawful sexual intercourse with a minor), constituting grounds for discipline under Business and Professions Code section 24200, subdivision (d).

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[1]Although Mr. Finch stated at the Board hearing that he was appearing only on behalf of Mr. Mahi, the Notice of Appeal was filed on behalf of both licensees. Mr. Prasad was not present at the Board hearing, nor did he attend the administrative hearing. No issue has been raised relating to his absence at either hearing.

[2]The decision of the Department, dated January 5, 2010, is set forth in the appendix.

Appearances on appeal include appellants Kulwant Rai Mahi and Vijendra Prasad, appearing through their counsel, R. Bruce Finch, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public eating place license was issued on June 22, 2005. On June 30, 2008, the Department instituted an accusation against appellants charging, among other things, that in October 2007, co-licensees Kulwant Rai Mahi and Vijendra Prasad committed public offenses involving moral turpitude. An amended accusation, filed on or about October 7, 2009, charged, in the count relevant to this appeal, that Kulwant Rai Mahi (hereinafter "appellant") was the subject of a plea, verdict, or judgment of guilty or pled nolo contendere to a charge of unlawful sexual intercourse, an offense involving moral turpitude, in violation of Penal Code section 261.5, subdivision (c) (count 6).

At the administrative hearing held on November 3, 2009, documentary evidence was presented by Department counsel and Kulwant Rai Mahi testified in his own behalf.

Subsequent to the hearing, the Department issued its decision which determined that appellant Mahi had entered a plea of nolo contendere to a charge of unlawful sexual intercourse with a minor (Penal Code section 261.5, subdivision (c)), and that the license in question should be revoked.[3]

Appellants have filed an appeal making the following contentions: (1) The Department erred in determining that co-licensee Kulwant Rai Mahi's plea of nolo

[3] Counts 1 through 5, and count 7, were dismissed. Discussion of the charges set forth in those counts and the reasons for their dismissal is not essential to this appeal.

contendere to a charge of unlawful sexual intercourse with a minor authorized revocation of his alcoholic beverage license; and (2) the Department erred in the weight given to mitigating factors. These issues will be discussed together.

DISCUSSION

Is a plea of nolo contendere to a charge of having engaged in unlawful sexual intercourse, in violation of Penal Code section 261.5, sufficient to permit the Department to revoke an alcoholic beverage license? It is. Is one who has entered such a plea entitled to attack the underlying basis for such a plea by denying the conduct which was the subject of such plea? He is not.

Appellant Mahi argues that, when he entered the plea of nolo contendere to the charge of unlawful sexual intercourse, he never intended to admit having committed the offense. Instead, he argues, "he was not admitting that he had committed the charged crime" because he had "never done anything wrong." (AOB at p. 10.) He did not know his no contest plea was "the same for purposes of sentencing as if [he] had pled guilty." (*Ibid*.)

Appellant argues that under *People v. West* (1970) 3 Cal.3d 595 (*West*) and *North Carolina v. Alford* (1970) 400 U.S. 25 (*Alford*), Mahi has qualified his plea, and thereby asserts that his nolo contendere plea was not an admission of guilt. Rather, appellant argues, an *Alford*/*West* plea permits the licensee to plead nolo contendere to the charge while affirming his innocence. (AOB at p. 7)

We believe that Mahi's arguments are nothing more than a collateral attack on his conviction, and do not persuade us that he is entitled to relief on the basis that this nolo contendere plea was qualified under *Alford/West* (i.e. not the legal equivalent of a plea of guilty).

Mahi was represented by an attorney when he entered his plea of nolo contendere in Butte County Superior Court. The transcript of that hearing (Ex. A, unnumbered p. 5) includes the following admonition by the court, and Mahi's acknowledgment of it:

> THE COURT: All right. Mr. Mahi, again, when you plead No Contest, *it has the same legal effect as a plea of guilty*. And when you plead No Contest, you're giving up your rights to a jury trial, to confront witnesses, to present evidence, your right against self-incrimination. Do you understand your rights and give them up. (Emphasis added.)
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> THE DEFENDANT: Yes, Your Honor.

The issues in this case are very similar to those in *Masannat and Younan* (2005) AB-8325, where appellants sought to avoid the consequences of their plea of nolo contendere to charges of having purchased and attempted to purchase stolen property, crimes involving moral turpitude. Rejecting this collateral attack on their plea, the Board explained:

> The ALJ considered and rejected the same arguments that appellants now present to the Board. He cited and quoted from several decisions of the Appeals Board in which the Board affirmed Department orders of revocation in cases where the underlying ground for revocation was a licensee's commission of a public offense involving moral turpitude. (*Velasquez* (2003) AB-7936; *Abdeljawad* (2001) AB-7648; *Taleb* (2001) AB-7639.)
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> Appellants are correct in their observation that Business and Professions Code section 24200, subdivision (d), does not mandate revocation where a licensee has pled nolo contendere to a public offense involving moral turpitude. The section does, however, authorize revocation in such circumstances, and the Board is not empowered to reverse such an order.
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> In *MacFarlane v. Dept. of Alcoholic Bev. Control* (1958) 51 Cal.2d 84, 91 [330 P.2d 769], an order of revocation was claimed to be excessive. In language that provides guidance to the Board in this case, the court said:
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> > Petitioner also urges that revocation, rather than mere

> suspension of license is too harsh. On the record this might seem to some of us to be a just criticism. But no such determination is within our proper function. The conduct for which the license was revoked constituted a crime under the laws of this State, and was thus at least technically contrary to public welfare and morals. The Constitution expressly authorizes license revocation in the discretion of the Department under such circumstances, and this court is not free to substitute its own discretion as to the matter, even if it were so inclined to do so.

In the present case Business and Professions Code section 24200, subdivision (d), expressly authorizes revocation, in the discretion of the Department, and this Board is likewise not free to substitute its own discretion in the matter, even if it were inclined to do so.

The Board went on to say in *Masannat and Younan*, *supra*:

> We do not believe it is in the interest of justice to permit what is essentially a collateral attack in another forum upon a plea voluntarily and intelligently made in the context of a plea bargain in a criminal proceeding. We think the ALJ was correct in concluding that Nabil Masannat's motives were irrelevant.

The California Supreme Court has said in regard to a plea of nolo contendere and subsequent administrative hearings:

> Regardless of the various motives which may have impelled the plea, the conviction which was based thereon stands as conclusive evidence of appellant's guilt of the offense charged. To hold otherwise would impose upon administrative boards extensive, time-consuming hearings aimed at relitigating criminal charges which had culminated in final judgments of conviction.

(Arneson v. Fox (1980) 28 Cal.3d 440, 449 [170 Cal.Rptr. 778].)

In the instant case, we believe revocation is within the discretion of the Department, and that appellant is not entitled to relitigate the original charge by denying the conduct which was the subject of such plea, or by asserting that the plea was not an admission of guilt.

In addition, the weight to be given mitigating evidence is a matter within the

reasonable discretion of the Department, and we are unable to find an abuse of that discretion.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]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.