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

AB-9125
File: 20-443104 Reg: 09072020

WALID MUHARRAM, dba Skyline Mini Mart
722 Skyline Boulevard, Avenal, CA 93204,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 14, 2011
San Francisco, CA

ISSUED AUGUST 30, 2011

Walid Muharram, doing business as Skyline Mini Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for buying or receiving pistachios, believing them to have been stolen, a violation of Business and Professions Code section Penal Code sections 664 and 496, subdivision (a).

Appearances on appeal include appellant Walid Muharram, appearing through his counsel, Derek P. Wisehart, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

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[1]The decision of the Department, dated July 23, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 20, 2006. On October 21, 2009, the Department instituted an Accusation against appellant charging that on or about January 29, 2009,[2] at the premises located at 722 Skyline Boulevard, Avenal, CA, he bought or received pistachios, believing them to have been stolen, a violation of Penal Code sections 664 and 496, subdivision (a).

At the administrative hearing held on June 8, 2010, documentary evidence was received and testimony concerning the violation charged was presented by Christopher Richardson and Jay Winn, both of whom worked for the Kern County Sheriff's Department at the time of the investigation, and Heather Hoganson, an attorney for the Department of Alcoholic Beverage Control.

At the hearing, the Department moved to amend the Accusation to replace words "the premises" with the words "his licensed premises at the time, to wit: 722 Skyline Blvd., dba Skyline Market, or 801 and 803 Skyline, dba T & T Market, license number 387723." This motion was granted, over objection, allowing the disciplinary action to proceed against appellant's license for the store located at 722 Skyline (Skyline Market), based on his actions at his store located at 801/803 Skyline (T & T Market). The status of the license for T & T Market was "cancel" on the day of the

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[2]There is some discrepancy in the dates, which the ALJ discusses in his Determination of Issues:

> . . . the Paramount Farms employee purchased the allegedly stolen pistachios from Respondent's store on December 17, 2008. Therefore, the latest that Respondent could have committed the offense of attempting to buy/receive stolen pistachios was also December 17, 2008. However, the Department alleged that the attempted purchase or receipt was "on or about January 29, 2009," nearly 1 ½ months later. This discrepancy in the dates is not prejudicial error.

hearing, (Exh. 4.) so the only license against which the Department could bring disciplinary action was the license for Skyline Mini Mart.

The testimony was presented that boxes of Wonderful-brand pistachios were stolen from a pistachio wholesaler, Paramount Farms, and that subsequently, on December 17, 2008, an employee of Paramount Farms reportedly saw bags of Wonderful-brand pistachios at T & T Market in Avenal. When law enforcement investigated this report, the lot numbers for the pistachios on display at T & T Market allegedly matched the lot numbers which had been provided by the employee, but neither this employee nor any representative of Paramount Farms ever testified at the hearing to corroborate this allegation.

Appellant was unable to produce a receipt for the pistachios, and ultimately told investigators that they had been purchased from an individual who did not look like a salesperson, and who drove a beat-up white cargo van. The pistachios were purchased for $35 per box, when the usual price for Wonderful-brand pistachios, from OK Produce, was approximately $60 per box, and another, premium brand of pistachios (Sunkist) was $91 per box.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proven and no defense was established.

Appellant filed a timely appeal raising the following issues: (1) the decision erroneously relies upon inadmissable hearsay evidence; (2) relevant evidence may exist which could not be produced at the administrative hearing; (3) the penalty is excessive; (4) the Department did not proceed in a manner required by law; and (5) the findings are not supported by substantial evidence.

DISCUSSION

An appellate body is prohibited from reversing for error unless, after considering the entire record, it is clear that the error has caused a miscarriage of justice. (Cal. Const., art. VI, § 13; Code Civ.Proc., § 475; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 105-106 [87 Cal.Rptr.2d 754].) However, even where no one single error rises to the level of reversible error:

> [t]he Ninth Circuit has held that it is clearly established Supreme Court precedent that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where no single error considered individually rises to the level of a constitutional violation or would independently warrant reversal. *Parle v. Runnels*, 505 F.3d 922, 928 (9th Cir. 2007)(citing, inter alia, *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

(*Jackson v. Knowles*, 2009 U.S. Dist. LEXIS 66216, 79-80 (C.D. Cal. May 15, 2009).)

While *Jackson v. Knowles* and the cases it cites were criminal cases, and involved a higher standard of proof than that in an administrative matter, we believe the underlying rationale is the same: fairness is essential to any type of judicial or quasi-judicial proceeding.

In another factual context, different from the present matter, but involving yet again the same principle, the Court of Appeals said:

> Just as in a judicial proceeding, due process in an administrative hearing also demands an appearance of fairness . . . In fact, the broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor [of] assuring that such hearings are fair.

(Nightlife Partners, Ltd. v. City of Beverly Hills (2003) 108 Cal. App. 4th 81, 90 [133 Cal. Rptr. 2d 234].)

Our first concern with this case is its excessive reliance upon hearsay evidence,

including: the testimony of Investigator Richardson about having located stolen pistachios [RT-16]; Richardson's testimony about what he had been told by Investigator Winn, which was information told to Winn by a Paramount Farms employee [RT-104]; Richardson's testimony about what Winn had told him about the packaging and writing on the packaging of the pistachios in question [RT-18, 20]; Richardson's testimony that the pistachios he saw at T & T Market matched the description of what Winn told him [RT-20]; testimony that Muharram owned both Skyline Mini Mart and T & T Market [RT-83]; and Heather Hoganson's testimony to authenticate a computer printout [RT-185].

In spite of being based *entirely on hearsay*, the ALJ makes the following findings in his proposed decision: that an employee of Paramount Farms saw bags of Wonderful-brand pistachios at T & T Market; that the employee believed the pistachios were the ones stolen from Paramount Farms; that T & T Market belonged to appellant; that the lot numbers of the pistachios seized at T & T Market by investigators matched the lot numbers of the stolen pistachios; and that appellant lied to investigators.

Government Code section 11513, subdivision (c), provides, in relevant part, that "hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding." Where, as here, the entire case is dependent upon hearsay evidence and the inferences to be drawn from it, and there is nothing in the way of physical evidence or direct testimony to support the allegation that appellant was buying or receiving pistachios believing them to have been stolen, we are unable to say that there is substantial evidence, in light of the entire record, that the charge of the accusation has been proven.

In paragraph 1 of the administrative law judge (ALJ)'s Determination of Issues he admits:

> The only evidence that the Wonderful pistachios found in Respondent's store were stolen is the hearsay testimony from one of the officers about what the Paramount Farms representative told him. This testimony, given over hearsay objections, is insufficient to support a finding that the pistachios were stolen. Government Code section 11513(d).

Regarding the use of hearsay evidence in administrative hearings, the court in *Nichandros v. Real Estate Div. of Dept. of Inv.* (1960) 181 Cal.App.2d 179, 182 [5 Cal.Rptr. 274] found:

> [H]earsay evidence standing alone is not a ground for nullifying the action of the board. The rule is stated thusly in *Southern Calif. Jockey Club v. California etc. Racing Board*, 36 Cal.2d 167 at page 176 [223 P.2d 1]: ". . . the applicable rule is, that the admission of irrelevant or incompetent evidence by the board is not ground to annul its action *if there is sufficient competent evidence to support its determination*. [Citations.] [Emphasis added.]

The problem in this matter is that there is no competent evidence to support the accusation - only multiple instances of hearsay, which were not offered to supplement or explain other competent evidence, but which were offered as the only evidence in support of the accusation.

Appellant maintains that it was an abuse of discretion to permit the Department to amend the accusation at the hearing to add the premises known as T & T Market, without advance notice to appellant. Appellant also maintains that it was an abuse of discretion for the ALJ to permit Heather Hoganson, a Department attorney, to testify as a witness at the administrative hearing. Unlike other witnesses, Ms. Hoganson was not excluded during the other witnesses' testimony, and appellant was not given prior notice that she was to be called as a witness. Finally, appellant objects to the admission of evidence obtained by Ms. Hoganson during a hearing recess, namely a

computer printout from the Department's License Query System, again without advance notice to appellant, which was admitted even though it lacked foundation.

Each of these objections, taken separately, would not rise to the level of reversible error. But as the Ninth Circuit has said, ". . . the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair. . . ." (*Jackson v. Knowles, supra.*)

In short, the Department did a haphazard job of prosecuting this case - giving the appearance of disregard for the administrative hearing process as well as for the right of the licensee to have a fair hearing.[3] The accusation stated a date one and a half months after the actual occurrence, and stated the wrong address; the Department was permitted to call one of its own attorneys as a witness, giving the strong appearance of unfairness; and the Department was allowed to introduce evidence in a highly unconventional and unprofessional fashion.

The mistakes on the accusation regarding the date and the address are clearly things which are amendable at trial at the discretion of the ALJ. However we agree with appellant that Ms. Hoganson should not have been permitted to testify after serving as co-counsel to Ms. Vent, and that the printout she offered as evidence was not self-authenticating, lacked foundation, and should not have been admitted. Taken together, these errors call into question the fairness of the administrative hearing to a sufficient

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[3]We also note with disapproval the Department's flippant responses to two of appellant's arguments in its brief to this Board: "There is no argument to respond to" (Dept. Reply Brief at p. 7) and "Appellant's arguments are nothing but noise." (Dept. Reply Brief at p. 8.) This type of response, which fails to give any explanation whatsoever for the Department's position, does not aid this Board in its review and could be interpreted as demonstrating a lack of decorum and respect for the Board's role.

degree to constitute an abuse of discretion.

California Code of Civil Procedure section 1094.5, subdivision (b) provides: ". . . Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." We believe this is the case here.

To prove the crime of attempted receipt of stolen property it was necessary for the Department to prove that the licensee *believed* the pistachios were stolen. Having already found that the strictly hearsay evidence presented was insufficient to support a finding that the pistachios were stolen (Det. of Issues, ¶1), the ALJ goes on to make the determination that appellant believed the pistachios were stolen by using inconsistent reasoning.

First, the ALJ states in Determination of Issues, paragraph 5:

> "'Possession of recently stolen property is so incriminating that to warrant conviction (for receipt of stolen property) there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt. (Citations.)'" People v. Vann (1974) 12 Cal.3d 220, 224, 114 Cal.Rptr. 352.

However, there is no direct evidence, only hearsay evidence, as discussed above, that the licensee was in possession of recently stolen property. The ALJ then goes on to base his "slight corroboration" (Det. Issues ¶6) on evidence about the inadequacy of the price paid for the pistachios - which was entirely based on hearsay evidence - and weak evidence about statements of the licensee to the officer doing the investigation.

We read *People v. Vann* as requiring both possession of stolen property and corroborating evidence tending to show guilt. When the items in question have not

been proven to be stolen, the underlying premise disappears and there is nothing to corroborate - particularly if all the hearsay evidence is excluded. We believe this faulty reasoning of the ALJ in applying the law amounts to legal error and an abuse of discretion.

In sum, we find a lack of substantial evidence to support the decision in this matter, and the strong appearance of unfairness at the administrative hearing. Taken together with the ALJ's use of the wrong legal standard, we can only conclude that the Department has abused its discretion in reaching its decision. The licensee is entitled to a fair hearing, particularly in light of the Department's decision to impose the most severe penalty of revocation.

ORDER

The decision of the Department is reversed and remanded for necessary and appropriate actions in accordance with this decision.[4]

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

[4]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.