

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

AB-9146

File: 21-325048 Reg: 08068823

KHALID NAZIM KHAN, dba Don's Bottle Shop
611 Sixteenth Street, Sacramento, CA 95814,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED AUGUST 10, 2011

Khalid Nazim Khan, doing business as Don's Bottle Shop (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license for his purchase of distilled spirits and tobacco products believing those items to have been stolen, in violation of Penal Code sections 664/496, subdivision (a), and for his unauthorized food stamp credit transactions in violation of Welfare and Institutions Code section 10980, subdivision (g).

Appearances on appeal include appellant Khalid Nazim Khan, appearing through his counsel, Shon Northam, and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

¹The decision of the Department, dated December 1, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 3, 1997. On May 28, 2008, the Department instituted a seven-count accusation charging that appellant, at the licensed premises on five different dates, purchased property, believing it to have been stolen (counts 1, 2, 3, 5, & 7), and on two of those dates, he also engaged in unauthorized food stamp transactions (counts 4 & 6).

At the administrative hearing held on October 13 and 14, 2010, documentary evidence was received and testimony concerning the violations charged was presented by detective Thomas Shrum and officer Corey Morgan of the Sacramento Police Department; Cheryl Sweeney and investigator Scott Landre of the Sacramento County Department of Human Assistance; Department investigator Bret Ajax; and appellant Khalid Nazim Khan.

The licensed premises is a small liquor and grocery store. Department investigator Ajax participated in an investigation of appellant's licensed premises in conjunction with the Sacramento Police Department and the County Department of Human Assistance. Ajax was acting in an undercover capacity and wore a "body wire" device that transmitted and recorded his conversations with appellant.

Ajax offered to sell property (alcoholic beverages and/or tobacco products) to appellant that he represented to appellant as having been stolen from a warehouse. The items were, in fact, purchased by law enforcement for use in the investigation. The items were marked by officers with distinctive markings visible only with a black light.

In addition, Ajax was provided with electronic benefit transfer (EBT) cards – the modern equivalent of food stamps and monetary welfare benefits – by county welfare fraud investigator Landre. The EBT card, which looks similar to an ATM or credit card,

may be used with a personal identification number (PIN) to obtain cash from an ATM machine or to pay for qualified food items, depending on the authorization encoded on them, up to a certain benefit amount. Ajax was given cards that bore fictitious names and were only authorized to be used for qualified food purchases.

Ajax approached appellant Khan at the premises on December 20, 2007, and January 18, January 25, February 8, and February 29, 2008, offering to sell him alcoholic beverages and/or tobacco products. On each of those dates appellant paid Ajax 50 percent or less of the retail value of the items. The money paid came from the premises' cash register. On each occasion, Ajax said that his brother had stolen the items from a warehouse where the brother worked.

On January 25 and February 9, 2008, Ajax also asked appellant to give him cash for the values on EBT cards even though the cards were authorized only for qualifying food purchases. He provided appellant with the PIN's for the cards, appellant swiped each card several times on the EBT card reader, and then appellant gave Ajax money from the premises' cash register drawer, holding some back for himself as a kind of "transaction fee."²

When a search warrant was served on appellant's premises on March 7, 2008, Sacramento Police Department officers discovered some of the distinctively marked items that Ajax sold to appellant. A few of the items were found in a storage room, but some were in a beverage cooler, and some on display shelves behind the counter.

Appellant Khan testified that "a homeless guy" [RT 149, 150], Richard Dix, came in with Ajax and told appellant that Ajax "desperately needed help" [RT 151] because

²The amount taken from the EBT cards totaled \$543.19, of which Ajax received \$360.00 and appellant kept \$183.19.

he was going through a divorce. Appellant said Ajax told him that, because of the divorce, he wanted to get rid of items he had purchased on credit and that he was not working and "just needed help" [RT 158]. Dix was with Ajax, appellant said, on each occasion that Ajax came to the store.

Appellant said he asked Ajax how he got the items. Ajax did not say the items were stolen, but, on each occasion, showed him credit card receipts for the items. Appellant also testified he did not resell any of the items, but gave them away as gifts. The EBT cards, he said, were not used to give Ajax cash; when the EBT cards were swiped, it was because Ajax bought that amount of merchandise from the premises.

During cross-examination, appellant's counsel attempted to ask Ajax about events on December 13, 2007, when Ajax made his first visit to the premises. The Department objected, saying the date was outside the scope of the accusation and not relevant. Appellant's counsel said that he would raise entrapment as a defense and made an offer of proof. The ALJ ultimately sustained the Department's objection to further questions on the issue, but conditionally agreed that the issue could be raised again after appellant's testimony.

Appellant's counsel later made an offer of proof as to what Dix's testimony would be if he were called as a witness. The ALJ rejected the offer and told appellant's counsel not to bring Dix in as a witness.

Subsequent to the hearing, the Department issued its decision which determined that count 1 of the accusation was not established because it appeared that Ajax had not said anything during that visit about the items being stolen until after money had changed hands. All of the other counts were found to have been proven. The license

was ordered revoked as to the counts involving the purchase of purportedly stolen goods and also separately revoked as to the counts involving food stamp fraud.

Appellant filed a timely appeal contending that the ALJ erroneously denied appellant the right to present evidence regarding the defense of entrapment.

DISCUSSION

Appellant contends the ALJ prevented him from mounting a defense to the accusation, thereby violating his right to due process, by not allowing him to present evidence of entrapment. He argues that, by not being allowed to call Dix as a witness, he was not able to present evidence of the conduct, actions, and statements of Ajax the first time he met appellant, on December 13, 2007. This excluded "any evidence of the actions on the part of law enforcement that induced [appellant] to engage in the conduct at issue." (App. Opening Br. at p. 10.)

During cross-examination of Ajax, appellant responded to a Department objection by making what was essentially an offer of proof. He said that Dix was with Ajax on his first visit to the premises on December 13, 2007, that he introduced Ajax to appellant, and that Dix's testimony about that introduction would show "whether or not there was any conduct on the part of law enforcement that was inappropriate in terms of baiting or harassing . . . Mr. Khan into doing something he otherwise wouldn't normally do." [RT 95.]

The ALJ allowed appellant to ask Ajax whether Dix participated in any of the events included in the accusation. Ajax testified that Dix was not present during any of the transactions listed in the accusation and that Dix did not assist him during the investigation on those dates. The ALJ, saying he had heard nothing about Dix being involved in the transactions charged, sustained the Department's objection to further

questions on the issue. Appellant's counsel asked to be allowed to raise the issue again, and the ALJ agreed that appellant could raise it again after appellant's testimony, "if something else comes up that I'm not aware of right now." [RT 100.] Appellant's ability to present the evidence was still intact at this point, subject to evidence being presented that would tie Dix to the transactions charged in the accusation.

Counsel raised the issue again after appellant's testimony. The Department objected, saying that none of the testimony had shown any involvement by Dix in the events covered by the accusation. Appellant's counsel then used a statement made by Dix as the basis for an offer of proof as to what Dix's testimony would be. He summarized the parts of Dix's statement having to do with Ajax or appellant. As related by appellant's counsel, most of the statement was about how Dix and Ajax acquired items to sell by stealing them from another store or a truck and how they split the money appellant gave Ajax for the items. In the statement, Dix alleged that he was directed and encouraged by Ajax to steal items.

The ALJ observed that the offer didn't "even remotely assist in what the defense was, as purported by you, and as testified to by Mr. Khan." [RT 207.] He rejected the offer and told appellant's counsel not to bring Dix in as a witness.

The California Supreme Court has held that the proper test for entrapment is:

[W]as the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect -- for example, a decoy program -- is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.

(*People v. Barraza* (1979) 23 Cal.3d 675, 689-690 [153 Cal.Rptr. 459, 591 P.2d 947].)

While we agree with appellant that the defense of entrapment may be asserted in an Alcoholic Beverage Control disciplinary proceeding, there must be some basis shown for asserting it. Appellant was not allowed to present the evidence he wanted to because he did not show that it was relevant to the defense of entrapment. It is axiomatic that evidence that is not relevant is not admissible. (See 1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 6, pp. 327-328.)

Evidence is relevant if it has "a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

The trial court is vested with wide discretion in deciding relevancy, and its determination will not be disturbed on appeal unless there is a clear showing of abuse. (*San Diego Gas & Electric Co. v. Davey Tree Surgery Co.* (1970) 11 Cal.App.3d 1096, 1103 [96 Cal.Rptr. 889]; *Carpenson v. Najarian* (1967) 254 Cal.App.2d 856, 869 [62 Cal.Rptr. 687].)

An administrative agency is not required to observe the strict rules of evidence enforced in the courts, and the admission or rejection of evidence is not ground for reversal unless there has been a denial of justice. (*Kunimori Ohara v. Berkshire* (9th Cir. 1935) 76 F.2d 204, 207.)

(*McCoy v. Bd. of Ret.* (1986) 183 Cal.App.3d 1044, 1053-1054 [228 Cal.Rptr. 567].)

Neither of appellant's offers of proof showed anything that Dix would testify to that would even suggest that entrapment occurred. Even appellant's own testimony did not show that Ajax engaged in "badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (*Barraza, supra.*) The ALJ was clearly right in ruling that the evidence appellant proposed to offer was simply not relevant. Appellant was not prevented from asserting an entrapment defense; he was simply prevented from presenting irrelevant evidence.

Appellant's arguments based on criminal cases, jury instructions for criminal cases, and discovery provisions in the Code of Civil Procedure are simply not applicable to administrative disciplinary proceedings. His argument that Dix was a "material witness . . . crucial to [appellant's] ability to defend this action" and, therefore, the Department should have been required to disclose his identity, has no bearing on the issue in this appeal. Dix's status as a confidential informant was not established, and his testimony was disallowed because appellant did not show it was relevant, not because the Department asserted a governmental privilege against disclosure.

ORDER

The decision of the Department is affirmed.³

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

³This 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.