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

AB-9431

File: 20-435566 Reg: 13079564

7-ELEVEN, INC. and LUCKY & CO., INC.,
dba 7-Eleven Store #2174-33450B
152 Pine Avenue, Long Beach, CA 90802-4411,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 4, 2014
Los Angeles, CA

ISSUED JANUARY 15, 2015

7-Eleven, Inc. and Lucky & Co., Inc., doing business as 7-Eleven Store #2174-33450B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days, all stayed, because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and Lucky & Co., Inc., through their counsel, Ralph Barat Saltsman and Margaret Rose, of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Kimberly J. Belvedere.

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[1]The decision of the Department, dated April 10, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 3, 2006. On November 26, 2013, the Department filed an accusation against appellants charging that, on September 16, 2013, appellants' clerk, Parminder Singh (the clerk), sold an alcoholic beverage to 18-year-old Corey Gilley. Although not noted in the accusation, Gilley was working as a minor decoy for the Long Beach Police Department at the time.

At the administrative hearing held on February 12, 2014, documentary evidence was received and testimony concerning the sale was presented by Gilley (the decoy); by Detective Juan Gomez of the Long Beach Police Department; and by Sanjeev Kumar, president of appellant Lucky & Co., Inc.

Testimony established that on the date of the operation, the decoy entered the licensed premises and walked to the beer coolers. Because the coolers were locked, the decoy approached the front counter and asked one of the clerks to unlock the cooler doors. After the clerk unlocked the doors, the decoy selected a six-pack of Bud Light beer in cans, walked to the register, and placed the beer on the counter. The same clerk who had unlocked the cooler — later identified as Parminder Singh — rang up the beer and stated the purchase price. The clerk did not ask the decoy for identification, and asked no questions regarding the decoy’s age or date of birth. The decoy paid for the beer and left the premises, then proceeded to the police vehicle and gave the beer to one of the officers.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants received a mitigated penalty of ten days’ suspension, conditionally stayed in its entirety provided no cause for discipline arise in the following year.

Appellants then filed this appeal contending: (1) a violation of 25658(a) does not establish good cause for suspension of a license under section 24200, because the sale of alcohol to a minor is not *per se* contrary to public welfare and morals, and (2) the Department failed to prove good cause for suspension under section 24200. These issues will be discussed together.

DISCUSSION

Appellants contend that the sale of alcohol to minors is not “per se contrary to public welfare and morals” and therefore cannot constitute good cause for suspension of a license under section 24200(a) absent sufficient evidence and relevant findings. (App.Br. at pp. 4-9.) Appellants quote *Boreta Enterprises* and contend that the Department must either “establish good cause and make out its case or draw upon its expertise and the empirical data available to it and adopt regulations covering the situation.” (*Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 106 [84 Cal.Rptr. 113], internal quotations omitted.) Appellants insist “[t]here is not one iota of evidence that a continuation of the license will negatively impact public welfare and morals.” (App.Br. at p. 2.) Notably, appellants concede the fact of the sale-to-minor violation.

The Department responds that this issue was not raised below, and is therefore waived. (Dept.Br. at pp. 3-5.) Except for matters of pure law, the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration on appeal. (See *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Harris v. Alcoholic Bev. Contrl Appeals Bd.* (1966) 245 Cal.App.2d 919, 924 [54 Cal.Rptr. 346] [“The rule that a party may not deprive his opponent of an opportunity to meet an issue in the trial court by changing his theory on appeal does not

apply when the facts are not disputed and the party merely raises a new question of law.”].)

Appellants first contend that the issue was properly raised in their Special Notice of Defense.[2] (App.Br. at p. 6.) In their closing brief and at oral argument, however, appellants insist their case turns on the lack of necessary findings in the decision, and therefore (despite their previous insistence that the issue *was* properly raised) could not have been raised until now. (App.Cl.Br. at p. 3.) Appellants' argument on this point is, at best, muddled.

Nevertheless, any attempts to "enlarge the scope of administrative powers are void," and "courts are obligated to strike them down." (*AFL-CIO v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1035-1036 [56 Cal.Rptr.2d 109]; see also *Morris v. Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689]; *Dyna-Med, Inc. v. Fair Employment and Housing Comm.* (1987) 43 Cal.3d 1379, 1389 [241 Cal.Rptr. 67]; *Dept. of Alcoholic Bev. Control v. Miller Brewing Co.* (2008) 104 Cal.App.4th 1189, 1198-1199 [128 Cal.Rptr.2d 861].) An enlargement of administrative power is unenforceable as a matter of law, and a void judgment is subject to collateral attack at any time. (See, e.g., *Talley v. Valuation Counselors Group, Inc.* (2010) 191 Cal.App.4th 132, 149 [119 Cal.Rptr.3d 300].)

If we assume, *arguendo*, that appellants are correct and the Department has indeed defied California supreme court precedent, erased its own burden of proof, and

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[2]The Special Notice of Defense contains the following boilerplate language: “Respondent(s) demurs and objects to the Accusation on the ground that Respondent(s) has not operated his establishment in such a way that ‘continuance’ of its license would be ‘contrary to public welfare and morals.’” (Special Notice of Defense, Exhibit 1, at ¶ 3.)

improperly declared certain conduct *per se* contrary to public welfare and morals, then that would represent an expansion of power requiring reversal, regardless of whether the issue was raised below. We will therefore consider the issue.

Section 24200 of the Business and Professions Code states, in relevant part:

> The following are the grounds that constitute a basis for the suspension or revocation of licenses:
>
> (a) When the continuance of a license would be contrary to public welfare and morals. However, proceedings under this subdivision are not a limitation upon the department's authority to proceed under Section 22 of Article XX of the California Constitution.
>
> (b) Except as limited by Chapter 12 (commencing with Section 25000), the violation or the causing or permitting of a violation by a licensee of this division, any rules of the board adopted pursuant to Part 14 (commencing with Section 32001) of Division 2 of the Revenue and Taxation Code, any rules of the department adopted pursuant to the provisions of this division, or any other penal provisions of law of this state prohibiting or regulating the sale, exposing for sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors.

Subdivisions (a) and (b) present independent grounds for suspension. Subdivision (b) encompasses conduct that violates a relevant rule or provision of law. Subdivision (a), on the other hand, provides for suspension of a license where continuance would run contrary to public welfare and morals — regardless of whether the conduct at issue violated a rule or provision of law. Thus, depending on the specific conduct, grounds for suspension may exist independently under subdivision (a), subdivision (b), or both.

Appellants rely largely on language drawn from *Boreta Enterprises*, and that case is particularly instructive regarding the burden of proof the Department faces when suspending a license under either subdivision of section 24200. In it, the Department brought a pair of accusations against a licensee. (*Boreta Enterprises*, *supra*, at pp. 90-92.) Each accusation consisted of a single count, and both counts alleged a number of

instances in which the licensee's waitresses exposed their breasts to patrons. (*Ibid.*) Both accusations alleged the conduct violated section 25601, which prohibits keeping a disorderly house, but — significantly — makes no reference to exposed breasts. (*Id.* at pp. 90-92, 97-99; see also Bus. & Prof. Code § 25601.) Both accusations alleged the conduct provided grounds for suspension or revocation under section 24200, subdivision (a), because it ran contrary to public welfare and morals, and subdivision (b), because it violated a provision of the Alcoholic Beverage Act. (*Boreta Enterprises*, *supra*, at pp. 90-92.)

The Court first questioned whether the mere presence of topless waitresses could violate section 25601 and thereby provide grounds for suspension or revocation under section 24200, subdivision (b). (*Id.* at pp. 97-99.) It addressed both the precise language of section 25601 and court cases interpreting the term "disorderly house." (*Ibid.*) Ultimately, it concluded that a charge of operating a disorderly house under section 25601 required "'[Proof] of the commission of illegal or immoral acts on the premises, or resort thereto for such purposes.'" (*Id.* at p. 99, quoting *Stoumen v. Reilly* (1951) 37 Cal.2d 713, 716 [278 Cal.Rptr. 614] [superseded by statute on other grounds].)

With regard to the conduct at issue — the presence of topless waitresses — the Court observed: "No claim is made that the conduct described in the accusations now before us was illegal other than as a violation of section 25601 itself. No case has held such conduct sufficiently immoral to warrant a revocation under section 25601." (*Boreta Enterprises*, *supra*, at p. 99.) The mere presence of topless waitresses was not prohibited by law; *ergo*, in order to prove the existence of a disorderly house under

section 25601 — and thereby establish grounds for suspension or revocation under section 24200(b) — the Department would have to show that the presence of topless waitresses was *immoral*, despite a lack of supporting case law. (See *ibid.*)

This, of course, transitioned neatly into the court's analysis of whether the presence of topless waitresses was *per se* contrary to public welfare and morals under section 24200(a). (*Ibid.*) The Court summarized the Department's position thus:

> While conceding that the use of topless waitresses is not obscene, illegal, or in violation of any rule or regulation duly issued by it, the Department contends that such use is nonetheless per se contrary to public welfare and morals and constitutes in and of itself good cause for the decision to revoke the license.

(*Ibid.*) The court noted that while a licensee's conduct need not violate an express law or regulation in order to run contrary to public welfare and morals (see *id.* at p. 99, fn. 22), there must be something to support that characterization. (See *id.* at p. 99.)

With regard to public welfare, the Court held that "In order intelligently to conclude that a course of conduct is 'contrary to the public welfare' its effects must be canvassed, considered and evaluated as being harmful and undesirable." (*Ibid.*) With regard to the notion of public morals, the Court rejected "the subjective moral notions of the Department" and imposed an "obligation to apply an objective standard." (*Id.* at p. 103.) In sum, the Department could not declare an otherwise legal course of conduct — such as the employment of topless waitresses — *per se* contrary to public welfare and morals, and thereby establish grounds for suspension under section 24200(a). It needed evidence to support that position.

Notably, the Court added:

> There may be cases in which the conduct at issue is so extreme that the Department could conclude that it is per se contrary to public

> morals. By this we mean that it is so vile and its impact upon society is so corruptive, that it can be almost immediately repudiated as being contrary to the standards of morality generally accepted by the community after a proper balance is struck between personal freedom and social restraint.

(*Id.* at p. 101.) While the Court declined to hold that topless waitresses constituted such conduct, it explicitly left open the possibility that particularly egregious conduct could *per se* run contrary to public welfare and morals.

In light of this language, we are confounded by appellants' claim that the *Boreta* court "held that there in fact is no act which is *per se* contrary to public welfare or morals." (App.Br. at p. 6.) The Court acknowledged precisely that possibility. (See *Boreta Enterprises*, *supra*, at p. 101.) We question whether appellants read the entire opinion.

Arguably, the sale of alcohol to minors is so egregious that we might legitimately find it to be *per se* contrary to public welfare and morals. We need not reach such a conclusion here, however. The documented actions of the California legislature make such a determination unnecessary.

As in *Boreta Enterprises*, the Department relied on section 24200, subdivisions (a) and (b), as grounds for suspension. (Determination of Issues ¶ 4.) The similarities between this case and *Boreta*, however, end there.

We will follow the pattern of the *Boreta* court and first determine whether the Department had authority to suspend appellants' license under section 24200(b). Appellants are accused of — and indeed, concede — a violation of section 25658(a). That statute provides: "Except as otherwise provided in subdivision (c), every person who sells, furnishes, gives, or causes to be sold, furnished, or given away any alcoholic beverage to any person under 21 years of age is guilty of a misdemeanor." There are

no dubious terms in this statute; the conduct at issue in this case — the sale of alcohol to a minor — is explicitly illegal. Unlike section 25601 — addressed in *Boreta Enterprises* — this provision does not rely on terms of art (such as "disorderly house") or require reference to outside case law to determine whether appellants' conduct is in fact proscribed. Moreover, unlike *Boreta Enterprises*, appellants in this case have expressly *conceded* a violation of the statute. Appellants cannot reasonably create any doubt that they have violated a provision of law. Applying the logic employed in *Boreta Enterprises*, suspension is undeniably justified under section 24200(b), without any further proof from the Department.

Whether the sale of alcoholic beverages to a minor runs contrary to public welfare and morals, as required by section 24200(a), is a more complex question. According to *Boreta Enterprises*, in order to prove conduct runs contrary to public welfare, "its effects must be canvassed, considered and evaluated as being harmful and undesirable." (*Boreta Enterprises*, *supra*, at p. 99.) Appellants conclude, without support, that absent a duly adopted regulation, this creates a case-by-case evidentiary burden to be borne solely by the Department. (See App.Br. at p. 6.) It does no such thing.

First, the sale of alcoholic beverages to minors is expressly forbidden in the California state constitution:

> The sale, furnishing, giving, or causing to be sold, furnished, or giving away of any alcoholic beverage to any person under the age of 21 years is hereby prohibited, and no person shall sell, furnish, give, or cause to be sold, furnished, or given away any alcoholic beverage to any person under the age of 21 years, and no person under the age of 21 years shall purchase any alcoholic beverage.

(Cal. Const., art. XX, § 22.) The fact that conduct is prohibited by the state constitution

itself is sufficient, in our opinion, to show that it is contrary to public welfare and morals without any additional effort from the Department. However, we need not rest our analysis on this point alone.

Second, section 23001 states the purpose of statutory alcoholic beverage law:

> This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. *It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people.* All provisions of this division shall be liberally construed for the accomplishment of these purposes.

(Bus. & Prof. Code § 23001, emphasis added.) Section 25658(a), which prohibits the sale of alcohol to minors, is part of the division referenced and therefore "involves in the highest degree the economic, social, and moral well-being and safety" of California's citiizens. (*Ibid.*) We are obligated to liberally construe the provision to accomplish the ends designated. Appellants' violation of section 25658 is therefore necessarily contrary to public welfare and morals, because the legislature itself has expressly deemed it so. There is no need for the Department to adopt a subordinate regulation or bear any burden of proof on this point.

Finally, even if such an express statement of intention from the legislature did not exist, extensive case law acknowledges the threat of alcoholic beverage sales to minors. (See, e.g., *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 188 [67 Cal.Rptr. 734] [provisions prohibiting sale of alcoholic beverages to minors are intended to protect minors from "harmful influences"]; *Kirby v. Alcoholic Bev Control Appeals Bd.* (1968) 267 Cal.App.2d 895, 899 [73 Cal.Rptr. 352] [business of selling alcohol, unless strictly regulated, poses threat to welfare of minors];

People v. Baker (1918) 38 Cal.App. 28, 34 [175 P. 88] [concluding that sale of beer to minor "would tend to cause him to lead . . . an idle, dissolute, and immoral life"].) Indeed, *Provigo Corp.*, the very case which affirmed the Department's use of minor decoys, observed,

> Although petitioners discern no clear intent from the available "legislative history" underlying the 1956 constitutional amendment forbidding purchases of alcoholic beverages by minors, the likely purpose underlying provisions prohibiting sales of intoxicating beverages to, or purchases by, minors is to protect such persons from exposure to the "harmful influences" associated with the consumption of such beverages.

(*Provigo Corp. v. Alcoholic Bev. Control Appeals Bd.* (1994) 7 Cal.4th 561, 567 [28 Cal.Rptr.2d 638].)

In sum, state law — be it constitutional, statutory, or judicial — is unanimous in its conclusion that selling an alcoholic beverage to a minor is contrary to public welfare and morals. Where a sale-to-minor violation is admitted or proven, that alone is sufficient to show good cause for suspension under section 24200(a). The Department need not adopt a regulation that would merely parrot higher authorities, and it need not prove, on a case-by-case basis, a conclusion already so deeply ingrained in California law.

Grounds for suspension therefore exists under both subdivisions (a) and (b) of section 24200.

In closing, we note that appellants offer detailed information on actions they have taken to prevent sales to minors both before and after the violation at issue, which, they contend, shows that there is no good cause for suspension. (App.Br. at pp. 9-10.) This evidence, however, does nothing to counter the admitted violation itself, and therefore cannot negate a finding of good cause for suspension. Depending on the case,

evidence of preventative or remedial measures may, as here, lead to a mitigated penalty, but it cannot entirely shield a licensee from discipline.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, 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.