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

AB-9449
File: 48-281451 Reg: 13079043

HA PENNY BRIDGE TRADING COMPANY, INC.,
dba McGovern's Bar
215 East 4th Avenue, San Mateo, CA 94401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 8, 2015
Sacramento, CA

ISSUED JANUARY 30, 2015

Ha Penny Bridge Trading Company, Inc., doing business as McGovern's Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 20 days for permitting a person under the age of 21 years to enter and remain in the licensed premises without lawful business therein, a violation of Business and Professions Code section 25665.

Appearances include appellant Ha Penny Bridge Trading Company, Inc., through its counsel, Beth Aboulafia and Rebecca Stamey-White of the law firm Hinman & Carmichael LLP, and the Department of Alcoholic Beverage Control (Department), through its counsel, Kelly Vent.

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[1]The decision of the Department, dated May 28, 2014 set forth in the appendix together with the proposed decision of the administrative law judge.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on May 10, 1993. On August 14, 2013, the Department filed an accusation against appellant charging that, on January 26, 2013, appellant permitted Amanda Harper, someone who was then only twenty years old, to enter and remain in appellant's bar without lawful business therein, a violation of Business and Professions Code section 25665.[2]

At the administrative hearing held on December 19, 2013, documentary evidence was received and testimony was presented by Harper (the minor); by Colby Darrah, a police officer for the City of San Mateo; by Garrett Agie, a doorman who worked at appellant's bar on the date of the violation (the doorman); and by James McGovern, the owner of the licensed premises.

The fact that the violation occurred is not disputed. What is disputed, however, is whether the minor showed false proof of majority to the doorman prior to entering the establishment, and whether police officers searched the minor for identification during the ensuing investigation. The doorman testified the minor had come to the licensed premises with two of her friends, and that he remembered checking each of them for proof of majority, which they provided. He specifically remembered that the minor's identification was from California, showed her age to be 22 as of the night of the

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[2]Section 25665 states:

> Any licensee under an on-sale license issued for public premises . . . who permits a person under the age of 21 years to enter and remain in the licensed premises without lawful business therein is guilty of a misdemeanor. Any person under the age of 21 years who enters and remains in the licensed public premises without lawful business therein is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars ($200), no part of which shall be suspended.

violation, and provided a physical description and picture that matched the minor. He could not recall the name printed on the identification. McGovern testified that, even though he did not see the minor enter the establishment, the minor must have presented proof of majority because the doorman was checking all IDs at the door, and McGovern did not see the doorman fail to perform his duties at any time during the evening of January 26, 2013.

Conversely, the minor testified that while she did come to the bar with two of her friends, she believed the doorman only checked one of them for identification. The minor further claimed, not only was she *not* asked for identification upon entering the licensed premises, she intentionally did *not* have any identification on her person at all on that evening, fake or otherwise.

According to Darrah, the doorman and minor related to him these conflicting versions of events during his investigation. In order to resolve the conflict, the doorman suggested that Darrah search the minor for the alleged false identification, but Darrah declined to do so. Darrah testified that the reason he chose not to search the minor was that his issue was that the minor was not 21 — which he was able to confirm independently — and not whether she had fake ID. However, Darrah testified he did not know if his partner, who stood with the minor while Darrah verified her identity, performed a search of the minor. Conversely, the minor testified that she was indeed searched and, consistent with her version of events, no identification was found. Darrah's partner did not testify at the hearing and, needless to say, there was no identification offered into evidence by either party.

After the hearing, the administrative law judge (ALJ) issued the Proposed Decision in which he assigned little to no credibility to the minor's testimony. He

ultimately determined that the minor had shown the doorman identification on the night in question, but no search to turn up the alleged identification was performed — even though Darrah was aware of the conflicting stories about its existence. The ALJ concluded that the failure to search for the identification had in effect made the defense to the violation provided by Business and Professions Code section 25660[3] meaningless for appellant. He found that to impose a penalty under such circumstances would be to allow the Department to improperly benefit from police inaction. Thus, the ALJ proposed a penalty of 15 days' suspension with all 15 days stayed subject to one year of discipline-free operation.

Pursuant to Government Code section 11517(c)(2)(E), the Department declined to adopt the Proposed Decision and opted instead to decide the matter itself. In the Decision, the Department noted the conflict between the testimony of the minor and that of the doorman, but found the minor to be more credible. It determined, based exclusively on the minor's testimony, that the minor did *not* show any identification to the doorman upon entry into the premises, that she *was* searched by one of the officers at the scene, and that no identification was found. Having made the latter determination, the Department indicated it did not have to resolve the question of whether the officer(s) had a duty to search for the identification to preserve appellant's affirmative defense under section 25660. Ultimately, the Department imposed a

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[3]Section 25660, subdivision (b), states:

> Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section . . . 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

penalty of 20 days' suspension.

Appellant filed a timely appeal raising the following issues: (1) the Department abused its discretion by making its own credibility determinations and relying on facts not in evidence; and (2) the penalty imposed by the Department is excessive because investigating officers deprived appellant of its ability to raise a defense when they failed to search for exculpating evidence although they had a duty to do so.

DISCUSSION

I

Appellant first challenges the Department's decision not to adopt the ALJ's findings that were predicated upon witness credibility determinations made by the ALJ after observing the testimony firsthand. Appellant cites *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640] and *Brice v. Department of Alcoholic Beverage Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807] for their respective holdings that witness credibility determinations are matters within the province of the trier of fact. (App.Br. at p. 10.)

There are two aspects of this argument we find curious. First, the Department outright failed to address this particular argument, either in its brief or at oral argument, even though it would seem that, depending on the outcome, the argument has the potential to dispose of the Department's case entirely. We also note, however, that absent from appellant's opening and closing briefs is any discussion of the pertinent statute governing this very issue. Government Code section 11425.50(b) addresses the weight to be given to a factual finding based on a witness credibility determination by the trier of fact. That section states, in pertinent part:

If the factual basis for the decision includes a determination based

> substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

(Gov. Code § 11425.50(b).)

This section was discussed extensively in *California Youth Authority v. State Personnel Board* (*CYA*) (2002) 104 Cal.App.4th 575 [128 Cal.Rptr. 514]. There, the court held the statute's mandate that observation-based credibility determinations be given "great weight" applied not only to agency decisions, but also to proposed decisions by administrative law judges upon review by the deciding agency. (*Id.* at p. 595.) However, citing language from the Law Review Commission in that section, the court concluded that section 11425.50 did not apply to the case before it because, in that proposed decision, the ALJ "[had not identified] any observed demeanor, manner, or attitude of the witnesses." (*Ibid*., internal quotation marks omitted.)

Obviously, because appellant opted to forego discussion of section 11425.50 in its argument, and because the Department failed to address appellant's argument altogether, we are left without guidance from either party's perspective as to whether and to what extent section 11425.50 comes into play in this case. Fortunately, the Board need not resolve these issues here. Even assuming, *arguendo*, that the Department acted within its authority under section 11425.50 when it declined to follow the ALJ's credibility determinations, its decision still must pass muster under the remainder of appellant's argument on this point, which can be summarized thus: the Decision is not supported by substantial evidence.

When an appellant contends 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. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In short, we are confined to reviewing the decision for error guided by the applicable "substantial evidence" standard of review.

Application of the "substantial evidence" standard was explained by *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627 [29 Cal.Rptr.2d 191];

> There are two aspects to a review of the legal sufficiency of the evidence. First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences.[fn.] [Citations.] Second, one must determine whether the evidence thus marshaled is substantial. While it is commonly stated that [an appellate court's] "power" begins and ends with a determination that there is substantial evidence [citations],[fn.] this does not mean [it] must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal "was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review." (*Bowman v. Board of Pension Commissioners* (1984) 155 Cal.App.3d 937, 944 [202 Cal.Rptr. 505].) "[I]f the word 'substantial' [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable . . . , credible, and of solid value . . . ." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54].) The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the whole record. [Citations.] While substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citations]; inferences that are the result of mere speculation or conjecture cannot support a finding. [Citations.]

(*Id.* at pp. 1632-1633, emphasis in original.)

As mentioned above, there are two interrelated factual issues at the heart of this

case: whether the minor showed false proof of majority to the doorman prior to entering the establishment, and whether police officers searched the minor for identification during the ensuing investigation. The Department found, based exclusively on the minor's testimony, that the minor had not shown ID to the doorman that evening, and that police officers had searched the minor and no ID was recovered. Conversely, the ALJ found, based on the testimony of Darrah and the doorman, that the minor had shown the doorman false proof of majority. Further, the ALJ believed Darrah's testimony that he had not searched the minor refuted the minor's testimony that she was searched, and hence no search to turn up the alleged identification was conducted. In light of the standard identified by *Kuhn*, we are convinced that the record, viewed as a whole, is devoid of sufficient reasonable and credible evidence of solid value to enable any factual finding on either issue, one way or the other.

The evidence concerning the minor's alleged presentation of identification to the doorman is a proverbial toss up — the doorman said she did, the minor said she did not. Testimony from both witnesses throughout the hearing was rife with bias, conflict, and inconsistency, and there is no additional evidence in the record to support one witness's version of events over the other's regarding this issue. The ALJ expressly based his finding that the minor showed the doorman her California driver's license on the doorman's testimony. (See Proposed Decision, Finding of Fact II.) However, when discussing appellant's potential defense under section 25660, the ALJ observed that the doorman's detailed testimony concerning the specific attributes of the minor's license he observed that night was "much too thorough to be credible." (See Proposed Decision, Determination of Issues II.) It defies all logic and reason for the ALJ to have exclusively based a factual finding on a witness's testimony in one context, only to

subsequently find the *same testimony* from the *same witness* to be less-than-credible in another.

The Department's resolution of this issue fares no better. First, the Department's finding was, in part, based on the minor's repeated insistence about not having any identification on her, which she told to the officers on the night of the incident. (Decision, Findings of Fact V.) We fail to see how this fact alone can support the finding because the doorman was equally adamant that the minor *had* shown identification to him that evening, and his assertion was also consistent with what he told Darrah during the investigation. (See RT at pp. 50-53, 55, 59, 60-61.) The Department writes off the doorman's version of events because of his overly detailed testimony concerning the features of the minor's identification, but, in doing so, it fails to make any effort to resolve the conflicts in the minor's testimony — which were noted in the Proposed Decision — that make hers questionable as well.[4] (Decision, Findings of Fact V.)

Finally, the Department's determination that the minor did not show ID to the doorman on January 26, 2013 also hinges on its finding that officers searched the minor on the evening in question and found no identification. (See Decision, Findings of Fact V.) The minor's testimony concerning the search proceeded as follows:

[MR. RAMIREZ:]

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[4]For instance, the minor testified that both officers were outside the bar with her for "the whole time," which she approximated to be an hour and a half to two hours. (See RT at pp. 21-22.) On the other hand, Darrah stated that his partner alone stood with the minor while Darrah verified her identity, and while he could not approximate how long he and his partner were on the scene, they left after they issued citations to the minor and the establishment. (RT at pp. 44-46.) The doorman estimated that the minor and her friends were with the officers for about five to ten minutes before the officers left. (RT at p. 55.)

Q. And when the officer and you were outside on the bench, what if anything did he ask you out there?

A. He had just asked for -- originally for the ID. And I said I didn't have it. He said may I check your -- my clutch. He -- I said yes. He opened it. Nothing in there. Checked my pockets. He then checked my friend's [*sic*] purse and their pockets as well. Found no ID, like I said. And then from there --

Q. You [*sic*] checked your pockets. How did he check your pockets?

A. He had me empty them out for him to show there was nothing in there.

Q. So your pocket had an insert you could pull out?

A. Yes. They were jeans. Gold, glitter jeans I was wearing at the time.

Q. How about your back pockets?

A. My back pockets I don't -- I'm not sure, but those can't come out. And you would see if there's anything in them.

Q. I'm sorry?

A. You would see if there's anything in them.

Q. You could see there was nothing in them?

A. Correct.

Q. At least that's what you're assuming?

A. I mean, I believe he checked. He went around the back of me, so unless --

Q. He didn't pat you down?

A. No.

Q. Okay.

A. But I mean you can see the ID sticking out of the pocket.

(RT at pp. 19-20.)

It is unclear from the minor's testimony which of the two officers she is claiming

searched her. Testimony from Darrah, who all parties seem to agree is credible, established that he did not search the minor, and that he was unaware of whether his partner did although his partner stood by the minor while Darrah verified her identity. (*Id*. at pp. 42-45.) The Department found, "there were two police officers at the scene. While it may be true that Officer Darrah did not search [the minor], there is no evidence that the other officer did not search her." (Decision, Findings of Fact V.) By contrast, the ALJ found the minor's insistence that the police officer who cited her also searched her for an identification was refuted by Darrah's testimony that he did not search her. (See Proposed Decision, Finding of Fact II.) We find neither position to be supported by substantial evidence.

Contrary to the Department's finding, there was at least some evidence that the minor attributed the search to Darrah. During direct examination, and notably before the topic of the search even arose, the minor seemed to attribute the search to Darrah:

> MS. VENT:
>
> Q. And were there any employees or were there any persons asking for money to get into this place?
>
> A. No one was asking for money to get into the place.
>
> Q. Did anyone check for your identification?
>
> A. There was someone in the front. No one checked my ID. I didn't have an ID on me, which I said the police officer can attest to because *he checked my pockets*.

(RT at p. 8, emphasis added.) The minor's statements appear to reference an officer who is about to testify, and the topic of the second officer had not yet been brought up. There was only one officer (Darrah) present at the hearing, and the minor had seen him there prior to testifying. (See RT at pp. 16-17.) Presumably, then, the minor was

insinuating that Darrah was "the officer" who searched her. Without disposing of this ambiguity and the resulting conflict between the testimony of the minor and Darrah — who from reading the transcript seems to us the most credible witness — it potentially created, we do not believe that any reasonable fact finder could have found that the other officer must have searched the minor, particularly after overturning a credibility determination made by the trier of fact who observed the witnesses testify. As such, the Department's determination that the search occurred is not supported by substantial evidence. (See *Kuhn*, *supra*, at pp. 1632-1633.)

The ALJ's finding concerning the search is also questionable, however. First, we share the Department's concern that the ALJ outright failed to reference the presence of the second officer anywhere in his Proposed Decision. Also, although the minor claimed "the officer" who searched her also ticketed her (see RT at pp. 22-23), contrary to the ALJ's finding, the record is unclear as to whether that officer was Darrah. (See Proposed Decision, Findings of Fact II.) It is impossible to discern from Darrah's testimony which officer actually cited the minor:

> [MR RAMIREZ:]
>
> Q. Did you stay outside the bar interviewing Ms. Harper for a period of one-and-a-half to two hours after she had told you she didn't have any ID?
>
> A. I don't know how long we were outside.
>
> Q. How long -- what would your estimate be if you had one?
>
> A. I don't know. We -- we were out there long enough to pull her outside. My partner talked with her friends, we talked with her. Issued her a citation. Issued McGoverns a citation, and I believe that was the end of it.

(RT at pp. 46-47.) Finally, contrary to appellant's contention, Darrah did not testify that the minor was not searched, only that *he* did not search her. (RT at pp. 42-45.) Darrah

also testified that he was unaware whether his partner searched the minor, but that his partner stood by the minor while Darrah verified her identity. (*Id*. at p. 44.)

Unfortunately, the only thing that *is* certain about the minor's testimony is that it is uncertain which officer she was referring to in various instances, as evinced by the following colloquy:

> [MR. RAMIREZ:]
>
> Q. Okay. And how many police officers came in?
>
> A. There was -- I don't know if they both -- there was two working. The officer here. And one other. I don't know if they both came in or if one came to get me and asked to see me outside.
>
> THE COURT: Just so the record is clear, when the witness said here, you meant outside?
>
> THE WITNESS: I'm sorry.
>
> THE COURT: There's no police officer in this room --
>
> THE WITNESS: Oh, yes. The one that was sitting.
>
> THE COURT: All right. Go ahead.
>
> MR. RAMIREZ:
>
> Q. And when the officer came in the bar, did he go straight to you?
>
> A. Yes.

(RT at pp. 16-17.) Neither counsel for appellant nor counsel for the Department made any additional efforts to clarify the minor's testimony, or to have her attribute specific acts to a specific officer. Therefore, her extensive testimony concerning "the officer" is, at best, ambiguous, and supports neither the finding of the Department nor that of the ALJ concerning the search. The only way either fact finder could have determined whether the minor attributed the search to Darrah was by inferences based on mere

speculation or conjecture — inferences that are insufficient to support a factual finding. (See *Kuhn*, *supra*, at p. 1633.)

In sum, we find the record plainly inadequate to support any finding concerning either the minor's alleged presentation of proof of majority to the doorman or whether the officers searched the minor. To the extent the decision of the Department attempted to definitively resolve these issues, the Decision is reversed.

II

We turn to the question of proper disposition of this case. For obvious reasons, appellant argues for outright reversal. (App.Br. at pp. 16-17.) Appellant cites a previous decision of this Board and claims that remanding for another full hearing in this matter would give the Department a "second bite at the apple" without showing that the Department's initial failure of proof was excusable. (*Ibid*., quoting *BF Dealings* (2011) AB-8959.) This argument is simply misplaced because, in raising it, appellant ignores the procedural posture of this case.

First and foremost, there is no dispute that appellant violated section 25665 in this case — the minor unquestionably entered the licensed premises on January 26, 2013 and was allowed to remain there for approximately one hour without lawful business. That point established, the Department need not prove anything further and, by default, some discipline of appellant's license is warranted.

Second, a defense under Business and Professions Code section 25660 is an affirmative defense, with the burden of proof lying with the party asserting it — here, appellant. Therefore, to the extent that appellant seeks to use the search, or lack thereof, to support its contention that it was denied the opportunity to raise its 25660 defense, it stands to reason appellant bears the burden of proving that the search did

not occur. We recognize, as did the ALJ, that this burden is essentially heavy. We reiterate, however, that this heavy burden is properly placed on appellant because appellant committed the violation in the first place, and hence any attempt to shift its burden to the Department — particularly after the violation has been established — is rejected. As discussed in Section I, *supra*, there is insufficient evidence in the record to determine whether or not a search took place in this case, even though such evidence presumably could have easily been ascertained.[5] Thus, appellant failed to carry its burden of proving either its affirmative defense or that it was denied the opportunity to raise one, and it therefore cannot benefit from an outright reversal as if the defense had successfully been established. Moreover, were we to remand this matter for another full hearing on the merits of appellant's defense, we would in effect be giving appellant the very "second bite at the apple" it warns of, without appellant showing why its initial failure of proof regarding its affirmative defense was excusable. (See *BF Dealings*, *supra*, at p. 7.)

Next, because both parties extensively briefed the issue of whether officers have a duty to search for exculpatory evidence, we feel the issue warrants some discussion here. Appellant maintains that Department agents have a duty to search for false identification or, in other words, exculpatory evidence. (App.Br. at pp. 12, 15.) Appellant essentially argues that it was denied due process by the alleged failure to

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[5]For example, appellant could have called the other officer to testify to put this issue to rest definitively and, had the officer been unable to attend the hearing, moved for a continuance. At the very least, appellant could have made some effort to unambiguously pin the minor's testimony to the fact that Darrah was the officer who searched her. As mentioned above, this would have established a clear conflict in testimony, which would no doubt have been resolved in Darrah's favor as the most credible and unbiased witness. Appellant did neither.

search because it deprived appellant of its ability to raise a potential defense under section 25660. The Department responds by claiming the officers had no duty to perform the search. The Department likens the question of duty in this case to one at issue in a civil lawsuit, and cites authority holding that "officers had no duty to an injured individual to investigate an accident, let alone preserve evidence for civil claims." (Dept. Hearing Br. at p. 6, citing *Williams v. State of Cal.* (1983) 34 Cal.3d 18 [193 Cal.Rptr. 233]; Dept.Br. at p. 13.) The parties' arguments present two questions: (1) should the principles of due process, relating to the right of an accused to exculpatory evidence, and which are typically associated with criminal proceedings, apply to administrative proceedings; and, if so, (2) do those principles create a duty for officers or Department agents to search for or gather exculpatory evidence?

With regard to the first question, we do not accept the Department's contention that administrative disciplinary proceedings, such as the one at bar, should be governed by the same duty principles applicable to civil lawsuits. As one court has observed:

> The purpose of administrative hearings . . . is to provide due process to a person who is potentially subject to administrative sanctions. [Citations.] It would be anomalous to hold that a person who faces suspension of his driver's license is entitled to procedural due process, but that the principles of due process relating to the integrity of the fact-finding function do not apply simply because they were enunciated in a criminal case. That anomaly aside, it is simply too late in the day to argue that fundamental principles of due process do not apply to administrative proceedings. [Citations.]

(*Scott v. Meese* (1985) 174 Cal.App.3d 249, 256 [219 Cal.Rptr. 857], overruled on other grounds.) Thus, the general principles of due process pertaining to the right of an accused to exculpatory evidence should and do apply in administrative disciplinary proceedings. (*Ibid*. [holding that the due process principles of *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528], *infra*, apply to administrative disciplinary

proceedings].) The Department's contention is therefore rejected.

Provided that the principles of due process relating to the integrity of the fact finding process apply in this forum, the question becomes whether, under California law, those principles create a duty for law enforcement to search for and/or collect exculpatory evidence. Appellant contends that California courts do not appear to have dealt with this precise issue.[6] (App.Br. at p. 15.) While appellant is technically correct that no California court that has directly addressed officers' duty to *search* for exculpatory evidence, numerous California courts have considered whether officers have a duty to *gather* or *collect* exculpatory evidence.

The current state of the law regarding law enforcement agencies' duty to preserve evidence stems from two United States Supreme Court decisions, *Trombetta*, *supra*, and *Arizona v. Youngblood* (1988) 488 U.S. 51, 57-58 [109 S.Ct. 333, 102 L.Ed.2d 281.)

> Under *Trombetta* and *Youngblood*, [l]aw enforcement agencies must preserve evidence only if it possesses exculpatory value apparent before it was destroyed, and not obtainable by other reasonably available means [Citations.] The state's responsibility is further limited when the defendant challenges the failure to preserve evidence of which no more can be said than that it could have been subjected to tests that might have helped the defense. [Citation.] In such a case, unless the defendant can show bad faith by the police, failure to preserve potentially useful evidence does not violate his due process rights.

(*People v. Velasco* (2011) 194 Cal.App.4th 1258, 1262 [124 Cal.Rptr.3d 238], citing *People v. DePriest* (2007) 42 Cal.4th 1, 41-42 [63 Cal.Rptr.3d 896], internal quotation marks omitted.)

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[6]Appellant relies on language from a federal district court opinion from the Western District of New York. (App.Br. at p. 15, citing *Schnitter v. City of Rochester* (W.D.N.Y. 2013) 931 F.Supp.2d 469, 477.)

Several California cases have considered whether the principles in *Youngblood* and *Trombetta* (hereinafter, the *Trombetta* standard), which apply to the state's duty to *preserve* evidence, also apply to the state's duty to *gather* or *collect* evidence in the first place. As the California Supreme Court has stated, "although this court has suggested that there might be cases in which the failure to collect or obtain evidence would justify sanctions against the prosecution at trial, we have continued to recognize that, as a general matter, due process does not require the police to collect particular items of evidence. (*People v. Frye* (1998) 18 Cal.4th 894, 943 [77 Cal.Rptr.2d 25], disapproved of on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see also *People v. Harris* (1985) 165 Cal.App.3d 324, 329 [211 Cal.Rptr 493] ["To date there is no authority for the proposition that sanctions should be imposed for a failure to *gather* evidence as opposed to a failure to preserve evidence."].)

In *Velasco*, *supra*, the state failed to retain boxer shorts that an inmate was wearing which were said to have been modified to conceal a weapon. (194 Cal.App.4th at p. 1261.) The inmate claimed his conviction was made possible by the state's failure to gather and preserve the shorts which, in turn, resulted in a violation of his due process rights. (*Ibid*.) The court found:

> In such circumstances, we doubt that any due process violation can occur. Due process requires the state preserve evidence *in its possession* where it is reasonable to expect the evidence would play a significant role in the defense. [Citations.] There is no evidence that the state ever possessed the shorts. It is axiomatic that the constitutional due process guaranty is a bulwark against improper state action. The core purpose of procedural due process is ensuring that a citizen's reasonable reliance is not frustrated by arbitrary government action. [Citations.] If the state took no action, due process is not a consideration, because there is no loss of evidence attributable to the Government. [Citation.] The state might transgress constitutional limitations if it exercised its sovereign powers so as to hamper a criminal defendant's preparation for trial.

[Citation.]

(*Id*. at p. 1263, internal quotation marks omitted, emphasis in original.)

Notably, however, the court did not end its analysis there. Rather, it went on to discuss *Miller v. Vasquez* (9th Cir. 1989) 868 F.3d 1116, 1121, which unequivocally held "a bad faith failure to collect potentially exculpatory evidence would violate the due process clause." (*Velasco*, *supra*, at p. 1264, quoting *Miller*, *supra*, at p. 1121.) The *Velasco* court stated:

> If police officers saw exculpatory evidence but deliberately ignored it and left it in place so that it would not hamper a later prosecution, failing not only to preserve it but even to obtain it, that could violate a criminal defendant's due process rights. If "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant" (*Youngblood*, *supra*, 488 U.S. at p. 58) and fail to preserve it, that shows bad faith on the part of the police" (*ibid*.) that violates the due process clause of the Fourteenth Amendment. *Miller* seems to us to extend logically from *Youngblood* to cases in which police see that evidence is likely to be exculpatory but avoid collecting it because of that perception.

(*Id*. at p. 1265.) Other cases have held in accord. (See, *e.g*., *In re Michael L*. (1985) 39 Cal.3d 81 [216 Cal.Rptr. 140] [the failure of officers to seize a videotape used by witnesses to identify the defendant did not warrant exclusion of evidence of the videotape because, although the officers may have been negligent in failing to obtain the tape, they did not act in bad faith or with any intent to deprive appellant of the evidence]; *Frye*, *supra*, at p. 944 [even assuming that the failure to collect evidence comes within the scope of *Trombetta*, *supra*, officers' failure to gather bloodstained items at a murder scene did not violate *Trombetta* standards]; *People v. Douglas* (1990) 50 Cal.3d 468, 513 [268 Cal.Rptr. 126] [officer who preserved names and phone numbers of witnesses claiming to have seen murder victims after alleged date of crime

and who turned information over to defense investigator on request was not required to conduct further investigation].)

To date, although courts seem somewhat receptive to the idea of applying it, no California court has found the *Trombetta* standard satisfied based on the state's failure to gather or collect evidence. That said, until the matter is decisively resolved in a court of appeal or the California Supreme Court, the *Trombetta* standard provides the proverbial "best shot" for an appellant claiming the state's failure to gather evidence resulted in a violation of its due process rights. At the very least, we would expect an appellant to reconcile the contention that officers have a duty to search for exculpatory evidence with the aforementioned line of authority. Suffice it to say, this was not done here.

Additionally, while appellant may quibble about the difference between the failure to search for potentially exculpatory evidence and the failure to gather or collect such evidence, the distinction only belies appellant's argument. First, it would defy reason to imagine a rule where courts would impose upon officers a duty to search for evidence, the very existence of which is in doubt, that is more stringent than the duty to gather evidence whose existence is not in question, particularly when the latter duty itself has not been unequivocally established. Moreover, "officers [have] no due process requirement to keep investigating a crime once they have established probable cause." (*Velasco*, *supra*, at p. 1265, citing *Kompare v. Stein* (7th Cir. 1986) 801 F.2d 883, 890, internal quotation marks omitted.) Thus, as in this case (see RT at pp. 42-46), as soon as officers have enough evidence to establish probable cause that a violation has occurred, it would seem there is no due process requirement for them to keep searching for exculpatory evidence.

The cases addressing the prosecution's duty to search for and disclose exculpatory evidence support this conclusion. "A prosecutor has a duty to search for and disclose exculpatory evidence if the evidence is possessed by a person or agency that has been used by the prosecutor or investigating agency to assist the prosecution or the investigating agency in its work." (*People v. Superior Ct.* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1315 [96 Cal.Rptr.2d 264]; see also *Barnett v. Superior Ct.* (2010) 50 Cal.4th 890, 903 [114 Cal.Rptr.3d 576]; *In re Steele* (2004) 32 Cal.4th 682, 697 [10 Cal.Rptr.3d 536].) This duty extends to not only the prosecutor but also the prosecution team including both investigative and prosecutorial agencies and personnel. (*Barrett*, *supra*, at pp. 1314-1315.) "Thus, the prosecution is responsible not only for evidence in its own files but also for information possessed by others acting on the government's behalf that were [*sic*] gathered in connection with the investigation." (*Steele*, *supra*, at p. 697.) "The important determinant is [therefore] whether the person or agency has been 'acting on the government's behalf[.]'" (*Barrett*, *supra*, at p. 1315, citing *Kyles v. Whitley* (1995) 514 U.S. 419, 437 [115 S.Ct. 1555]; *In re Brown* (1998) 17 Cal.4th 873, 881 [72 Cal.Rptr.2d 698].)

As one court has observed:

> [A] prosecutor does not have a duty to disclose exculpatory evidence or information to a defendant *unless the prosecution team actually or constructively possesses that evidence or information*. Thus, information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or to disclose such material.

(*Barrett*, *supra*, at p. 1315, emphasis added; see also *Steele*, *supra*, at p. 697; *Barnett*, *supra*, at p. 903.) California case law seems clear, then, that the further the state is

removed from actual or constructive possession of exculpatory evidence, the more reluctant courts are to impose a duty on the state to obtain, preserve, or disclose it to the defense. Regardless, we note that we need not resolve this issue here. Even if we were to hold that officers have a duty to search for exculpatory evidence — which we most certainly do not — given the deficient, ambiguous record in this case, neither party could successfully convince us that it was or was not satisfied.

Appellant also maintains, however, that the Department abused its discretion in imposing an aggravated penalty. (App.Br. at p. 16, citing Decision, Determination of Issues III.) The Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. 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 Bev. 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 its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Rule 144 provides that "[d]eviation from [the Penalty Guidelines] is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist." (Cal. Code Regs., tit. 4, § 144.) Aggravating factors listed by the rule include the licensee's prior disciplinary history and a continuing course of pattern or conduct, while mitigating factors include positive action by the licensee to correct the problem,

documented training of the licensee and employees, and cooperation by the licensee in the investigation. (*Ibid*.)

The Penalty Policy Guidelines for rule 144 further address the discretion involved in the Department's penalty determination:

> **Penalty Policy Guidelines:**
>
> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the *proper exercise* of the Department's discretion.

(Emphasis added.)

In this case, the Department's penalty determination proceeded as follows:

> As to penalty, this is Respondent's second violation of Business and Professions Code section 25665 within approximately 6 months. The doorperson, Mr. Agie, had been working for Respondent for approximately one year prior to this incident, yet he did not go to any formal training until July 24, 2013, some 6 months following this violation. Neither aggravation nor mitigation has been established. At the hearing, the Department recommended a 20-day suspension of the license. Under all of the circumstances this is a reasonable level of discipline.

(Decision, Determination of Issues III.)

We assume that the Department's decision to impose a 20-day suspension was based, at least in part, on its finding that the doorman failed to check the minor for identification on the night of the violation. Because we believe that the finding is not supported by substantial evidence (see Section I, *supra*), it should not and cannot in

any way be used as a basis for an aggravated penalty. In light of the gross inadequacies in the entire record for this case, we find a 20-day suspension with no stay to be excessive and an abuse of discretion. For that reason, we believe the penalty merits reconsideration by the Department.

III

Lastly, as we discussed at oral argument, some parting suggestions of measures that can be taken by appellant or those similarly situated to avoid such messy and near-unresolvable "she said, he said" issues in the future. For instance, licensees might consider having patrons temporarily surrender their proofs of majority at the door prior to entry. This protocol would render the relied-upon identification readily available to both licensees and law enforcement should the need to support a section 25660 defense arise. At oral argument, counsel for appellant suggested that such a protocol would cost licensees the business of patrons who are wary of privacy concerns. We are unconvinced such a problem would arise for two reasons: first, there are numerous businesses who require the temporary surrender of identification without fear of losing customers (e.g., equipment rental operations; bars and/or pool halls that require a patron's driver's license before providing billiard balls or game equipment; etc.); second, countless bar patrons readily surrender their credit cards, which carry equally vast privacy and financial concerns, to a bartender in order to open a tab.

Another alternative — one which we observe is already in use by a large number of convenience stores and liquor stores across the state — is to have the doorperson hold the proof of majority up to a nearby camera for a couple seconds. This would no doubt dispel counsel for appellant's privacy concerns because it is very unlikely the information on the license would be discernable from a quick glance and/or snapshot by

a camera. However, as would have been particularly helpful in this case, it would also definitively resolve the issue of whether the doorperson actually requested and was shown proof of majority, bona fide or otherwise. While the licensee would have to go further to prove his or her section 25660 defense, in light of the woefully deficient record in this case, any evidence is better than no evidence.

ORDER

To the extent that it held (1) the minor did not show proof of majority to the doorman, and (2) the minor was searched by officers for said proof of majority, the decision of the Department is not supported by substantial evidence and is therefore reversed. This matter is remanded to the Department for a redetermination of the penalty in light of this opinion. In imposing the penalty, the Department is advised to take into consideration, not only the aggravating *and* mitigating evidence, but also the gross inadequacy of the record below, and that it cannot be definitively established whether the doorman requested or was shown proof of majority by the minor.[7]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[7]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.