

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

RAAD J. KITI	)	AB-6629
dba F & R Market	)	
4740-1/2 Orange Avenue	)	File: 20-192270
San Diego, CA 92115,	)	Reg: 95033291
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
DEPARTMENT OF ALCOHOLIC	)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	October 2, 1996
	)	Los Angeles, CA
	)	

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Raad J. Kiti, doing business as F & R Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended his off-sale beer and wine license for 45 days because appellant, through his employee, sold and furnished narcotics paraphernalia on the licensed premises and possessed a nunchaku, an illegal martial arts weapon, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising out of violations of Business and Professions Code §24200, subdivision (a); Health and Safety

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<sup>1</sup>The decision of the Department dated January 4, 1996, is set forth in the appendix.

Code §11364.7, subdivisions (a) and (c); and Penal Code §12020, subdivision (a).

Appearances on appeal include appellant Raad J. Kiti, appearing through his counsel, Ralph B. Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

#### FACTS AND PROCEDURAL HISTORY

Appellant's license was issued September 5, 1986. Thereafter, the Department instituted an accusation against appellant on April 26, 1995. Appellant requested a hearing.

An administrative hearing was held on October 23, 1995, at which time oral and documentary evidence was received. At that hearing, it was determined that appellant's clerk sold or furnished narcotics paraphernalia on the licensed premises, consisting of a brown bag containing articles used to ingest illegal narcotics, and that appellant possessed, under the counter at the licensed premises, a nunchaku, a martial-arts weapon consisting of two sticks of wood joined together by a short chain. The possession of a nunchaku is a felony under Penal Code §12020, subdivision (a).

Subsequent to the hearing, the Department issued its decision which suspended appellant's license for 45 days, no portion of which was suspended. Appellant filed a timely Notice of Appeal.

In his appeal, appellant raises the following issues:<sup>2</sup> (1) the "brown bag kit" was

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<sup>2</sup> It should be noted that Mr. Saltsman was not the attorney who filed the notice of appeal and appellant's initial brief. Mr. Saltsman also filed a brief on appellant's behalf. Since there is nothing in his brief indicating any intention to rely on issues raised by his predecessor counsel, we have not addressed those issues.

improperly admitted into evidence, since it was a kit manufactured by the Department; (2) the videotape, also allegedly manufactured by the Department, was improperly admitted into evidence; and (3) the requisite scienter for a violation of paraphernalia equipment laws was not established.<sup>3</sup>

## DISCUSSION

### I

Appellant contends that the Administrative Law Judge (ALJ) committed error in receiving into evidence Exhibit 2, which was a "brown bag kit" admittedly assembled by the Department from evidentiary items obtained in other cases, and acknowledged not to have come from appellant's premises [RT 13-15]. The "brown bag kit" was offered to illustrate what it was that was allegedly sold by appellant to an informant. The informant testified that the brown bag sold to him contained the individual items used to ingest rock cocaine [RT 91, 95, 102].

The purpose of the offer of Exhibit 2 was to show the ALJ what a brown bag kit looked like. Exhibit 2 was intended to be demonstrative evidence only [RT 13-15]. There was no contention that Exhibit 2, or any part of it, was what was claimed to have been actually sold. Thus, it is difficult to see how the admission of the brown bag kit could have been prejudicial. There is nothing in the record that would suggest that the ALJ was misled.

The Department argues in its brief that the exhibit was relevant on the issue of

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<sup>3</sup> At the hearing on this appeal, counsel for appellant stated that he did not intend to address any remarks toward that part of the decision and findings involving the presence of the nunchaku on appellant's premises.

knowledge and scienter. The contention was not based on any claim that appellant actually had Exhibit 2 itself in his possession. The Department's contention is that it is reasonable to infer guilty knowledge on the part of one who assembles items of nominal value into an unusual combination commonly used by users of narcotics and then sells the combination at a premium price.

## II

Appellant contends that the Department committed prejudicial error in admitting into evidence a videotape filmed by a San Diego TV news team. The tape, which was viewed by the informant in the course of his testimony, depicted him entering appellant's premises for the alleged purpose of purchasing the brown bag kit. It did not show the transaction itself. The informant testified that the kit he purchased contained the individual items which constituted the narcotics paraphernalia [RT 94-95]. The informant testified and was extensively cross-examined regarding the fact and circumstances surrounding his purchase of the narcotics paraphernalia, as well as his considerable experience with the purposes to which it was to be put [RT 95-98; 104-127].

Appellant's brother, who allegedly made the sale, denied having done so. He testified that the informant was carrying the brown bag when he entered the store [RT 162]. The ALJ, then, was confronted with conflicting testimony, and it was his task to choose whom to believe. As the Department's ruling indicates, he chose to believe the testimony of the informant as to the brown bag purchase.

The credibility of a witness's testimony is determined within the reasonable

discretion accorded to the trier-of-fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644]). Given the existence of oral testimony which, if believed, would support the finding of an unlawful sale of drug paraphernalia, the admission of the videotape, even if in error, would not appear to have been prejudicial. The ALJ made reference to the tape, but it is clear from the facts recited in Finding of Fact III that it was the testimony of the informant upon which he based his findings, and not on the videotape.

Appellant concedes that, upon the establishment of a proper foundation and relevance, videotapes may be admitted into evidence just as other documents are admitted. He contends that neither relevance nor foundation was shown. As to foundation, the informant testified that the tape was an accurate representation of what took place. As stated in Jones v. City of Los Angeles (1993) 20 Cal.App.4th 436, 441, n.5 [24 Cal.Rptr.2d 528], "the requisite foundation ... may be provided by any witness who perceived the events filmed."

The videotape depicts a portion of the transaction about which the informant testified, and assisted the informant in confirming the identification of the employee with whom he dealt. Although appellant claims prejudice from the tape's admission into evidence, he does not explain how the prejudice arose or what it was, other than arguing that the original newscast tape had been edited extensively.<sup>4</sup>

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<sup>4</sup> The tape which was viewed at the hearing before the ALJ was made from a taped newscast of the event. According to counsel for the Department, the TV news team took possession of the brown bag kit which was the subject of the

While the Appeals Board does not consider this a particularly strong case on the facts, it is not disposed to substitute its judgment for that of the ALJ, who observed the informant while he testified and was in a position to assess his demeanor.

### III

Appellant contends that the requisite scienter for a violation of the paraphernalia equipment laws was not established. His argument is directed at the individual items seized in the store. As to these, the ALJ concluded that, other than with respect to the sale of the "brown bag kit," the evidence did not support a finding that appellant possessed narcotics paraphernalia for sale. (Determination of Issues I and II.) As to the brown bag sale, there was evidence (the surreptitious activity of the clerk in telling the informant to wait until another store customer left [RT 121]) which would support a finding that the employee knew he was engaged in wrongdoing.

There was additional evidence in the record which would support a finding of scienter. Appellant knew from prior disciplinary proceedings, and from conversations with Department representatives, that the sale of brown bag kits was illegal. (See, e.g., RT 12; Findings of Fact X and XII (License history).) The scienter issue lacks merit.

### IV

As noted, appellant's counsel did not raise any issue concerning the ALJ's determination that appellant violated Penal Code §12020, subdivision (a), by his possession of a nunchaku. The hearing testimony clearly established that the nunchaku

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witness's testimony, and efforts to subpoena it were unsuccessful.

was behind the store counter in an area under appellant's control [RT 32-34]. Although both appellant and his brother, who also worked at the store, denied ownership of the nunchaku, neither could explain how it otherwise might have gotten where it was. The ALJ chose not to accept their denials. His determination on the issue of credibility is not subject to challenge at this stage of the proceedings.

### CONCLUSION

The decision of the Department is affirmed.<sup>5</sup>

RAY T. BLAIR, JR., CHAIRMAN  
JOHN B. TSU, MEMBER  
BEN DAVIDIAN, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>5</sup>This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.