ISSUED JUNE 30, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

PAUL ELGIN SEXTON dba The General Store World Faire 1725 West Pacheco Boulevard Los Banos, CA 93635, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	AB-6735 File: 20-265832 Reg: 96036364 Administrative Law Judge at the Dept. Hearing: Michael B. Dorais Date and Place of the Appeals Board Hearing: June 4, 1997 Sacramento, CA

Paul Elgin Sexton, doing business as The General Store World Faire (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered his off-sale beer and wine license revoked, with revocation stayed for a period of 180 days to permit the transfer of the license to a person acceptable to the Department, the license to be suspended until the transfer is accomplished, for appellant having unlawfully sold one-half pound of marijuana at the licensed premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Health & Safety Code §11360, subdivision (a), and Business and Professions Code §24200, subdivision (d).

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[1] The decision of the Department dated September 19, 1996, is set forth in the appendix.

Appearances on appeal include appellant Paul Elgin Sexton, appearing through his counsel, Sally A. Williams; and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Murphy.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 9, 1991. Thereafter, the Department instituted an accusation alleging that on October 11, 1995, appellant entered a plea of nolo contendere to an information charging him with the felony offense of selling marijuana, in violation of Health and Safety Code §11360, subdivision (a), a crime of mortal turpitude, and violative of Business and Professions Code §24200, subdivision (d).

An administrative hearing was held on July 31, 1996, at which time oral and documentary evidence was received. At that hearing, testimony and documentary evidence was presented concerning the plea entered in the criminal proceeding,[2] appellant's explanation of the circumstances surrounding the transaction for which he was convicted on his plea, and the arresting officer's description of the transaction.

Subsequent to the hearing, the Department issued its decision which determined that the plea of nolo contendere to the charge of a violation of Health and Safety Code §11360, subdivision (a), constituted a public offense involving moral turpitude, and thus constituted grounds for suspension or revocation of appellant's license. Appellant thereafter filed a timely notice of appeal.

[2] Appellant was sentenced to 24 months felony probation and eight months confinement in the county jail. (See Exhibit 2, p.2.)

In his appeal, appellant raises two[3] issues: (1) whether the plea of nolo contendere to the charge of violation of Health and Safety Code §11360, subdivision (a), by itself establishes the requisite "moral turpitude" as set forth in Business and Professions Code §24200, subdivision (d); and (2) whether the Administrative Law Judge erred in limiting the cross-examination of the investigator for the Los Banos Police Department who testified concerning the circumstances of appellant's arrest for the charge upon which he was later convicted pursuant to his plea of nolo contendere.

DISCUSSION

I

Appellant contends that nothing in the Health & Safety Code charges against appellant established moral turpitude. Appellant cites and seeks to distinguish Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30, 38 [152 Cal.Rptr. 285], where the court held to the contrary:

> " ... [W]e hold that proof of conviction of the crimes of possessing cocaine or marijuana for purposes of sale constitute moral turpitude as a matter of law within the meaning of article XX, section 22, and Business and Professions Code §24200 justifying the imposition of administrative sanctions without a further showing of unfitness or unsuitability ... or its effect upon the conduct of the licensed business. (Citations omitted.)

Appellant asserts that appellant never "possessed" marijuana with the intent to sell it.

Appellant's attempted distinction of Rice is without merit. The suggestion that an actual sale of marijuana (Health and Safety Code §11360, subdivision (a)) is in some

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[3] Appellant's brief purports to state three separate issues, but issues 1 and 3 present essentially the same question, whether the crime to which appellant pleaded was one involving moral turpitude, and will be treated as a single issue.

way less offensive than the possession of marijuana for sale (Health and Safety Code §11359) is simply absurd.

Appellant invites the Appeals Board to look behind the plea of nolo contendere, arguing that he "apparently may have allowed another to conduct a single transaction outside the premises." (App.Br., p. 3.) However, the legal effect of a plea of nolo contendere to a crime punishable as a felony is the same as that of a plea of guilty for all purposes. (Penal Code §1016, subdivision (3).) Thus, by virtue of his plea, appellant admitted his guilt to a felony charge. The Department presumably, in an exercise of its discretion, rejected appellant's invitation to look behind the formal record of conviction.

We also reject the invitation to look behind the formal record of conviction. An attempt to assess appellant's motivation in the marijuana transaction could only generate mischief.

The closest appellant came to explaining the purpose of the sale as other than a transaction for profit is his statement [RT 6]:

> "Well, I'm a small business man in Los Banos. I had a friend, and I thought I was helping a friend. And come to find out, it don't pay to help friends if it's not right. My intentions were to do no wrong.
>
> "The transaction was not in the building, and, in fact, never was intended to be there. All I was going to do was try to help him with where he could obtain where it was after. My intentions were to do no wrong."

Dr. Solgaard, appellant's spokesperson at the administrative hearing, testified with respect to transaction that "It did happen on the premises outside the building, and he foolishly allowed the people to use this site as an exchange item [RT 13]."

Sheldon Bryan, the police investigator who was involved in the arrest, testified that the transaction followed his having been informed by an informant that he had witnessed a previous marijuana transaction between appellant and an unidentified purchaser, as a result of which he supplied funds to the informant, who then, accompanied by an undercover narcotics officer, went into the store and arranged for the purchase [RT 21]. A few days later, according to the investigator, appellant advised the informant that the marijuana was available, and after being given $400 told the informant where the marijuana could be found [RT 23].

Bryan also testified to admissions by appellant that the marijuana had been left in the "regular spot," meaning drugs had been left there on previous occasions.

The Department had the opportunity to consider these conflicting versions of appellant's involvement in the drug transaction, either as a knowing participant or as an unwitting conduit for others, and concluded that appellant's "action constituted an intentional effort to violate the law and evade responsibility for his action in doing so." (Finding of Fact IV.)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (substantial evidence supported both the Department's and the license-applicant's position); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v.

Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 229 Cal.App.2d 821 [40 Cal.Rptr. 666].)

In any event, appellant's attempt to minimize his responsibility did manage to achieve some measure of success. Rather than an outright revocation, the order was stayed for six months to permit appellant an opportunity to sell his business to a person acceptable to the Department.

II

Appellant contends that he was improperly limited in his cross-examination of the police investigator. The investigator, called as a rebuttal witness, testified concerning the marijuana transaction for which appellant was charged and convicted.

Dr. Solgaard attempted to inquire into the background of the informant involved in the marijuana transaction [RT 28], suggesting that appellant may have been entrapped. The ALJ ruled such an inquiry irrelevant, in light of appellant's admission of guilt [RT 28]. The following colloquy ensued:

> "Dr. Solgaard: I beg your pardon. I don't understand why he [Bryan] could involve the whole scenario.
>
> The Court: He has appeared as a rebuttal witness to your testimony regarding character.
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> Dr. Solgaard: With all due respect, if he can refer to parts of this man's involvement upon which he bases his case and this man [the informant] has no personal integrity, how can his statements and the entirety be admitted?
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> The Court: If that case is going to be fought out on whether or not that transaction could be defended or defeated, it should have been fought out in another venue. Do you have any further questions of this witness?
>
> Dr. Solgaard: I guess I can't ask if this informant was offered any plea bargain for cooperating in the sting operation or whatever you want to call it.

The Court: It is not relevant to what I have under consideration. It might and it might not have been relevant in the original action, had you chosen to challenge that and not plead nolo.

Dr. Solgaard: I see what you're saying. I see what you're saying."

We have quoted the material from the transcript to demonstrate that appellant's representative realized that his questioning was into a subject that was not relevant.

However, appellant now contends there were other areas that would have been explored: the Los Banos Police Department had a vendetta against appellant as a result of a previous civil matter between the two, and appellant's involvement with the marijuana transaction never included his possession of the marijuana or the money provided by the police.[4]

These additional areas of potential cross-examination were not relevant to the issue before the ALJ. The ALJ needed to do no more than find that appellant had pleaded nolo contendere to a felony charge of trafficking in marijuana, and that issue was simply not contested. The defense of entrapment would have been relevant had appellant fought the criminal case, but he elected not to do so. The Department is not the proper forum for a change of mind.

We do not see any prejudice flowing from any limitation on Bryan's cross-examination. The existence of a vendetta was a subject for the criminal court, not one

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[4] At the hearing before the Board, appellant's counsel suggested that another avenue of cross-examination which was foreclosed to appellant concerned the "regular spot" where the marijuana was to be found. There is no indication in the record that appellant was precluded from cross-examining officer Bryan on this subject after Bryan had testified that appellant referred to the location where the marijuana was placed as the "regular spot" where other transactions had taken place [RT 24-25].

for the Department. The same is true regarding whether or not appellant handled the marijuana or received the money paid for the marijuana. He was an accomplice to the crime, if not a perpetrator, and his conviction is enough to sustain the order.

Business and Professions Code §24200, subdivision (d), provides that a plea of guilty or nolo contendere to a public offense involving moral turpitude constitutes a basis for suspension or revocation of a license. The Department, in its discretion, opted for revocation.[5] Given the content of the record, the Department's discretion appears to have been exercised properly.

CONCLUSION

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[5] Neither the accusation nor the decision cite §24200.5. However, appellant had cited this section, contending that it applied only where there were a series of transactions.

The ALJ rejected appellant's contention, pointing out that the reference to "successive sales" is in reference to what shall constitute evidence of such sales having been "permitted" by the licensee (Determination of Issues III), and stating that when a licensee has personally made a sale upon the licensed premises of a controlled substance or dangerous drug, §24200.5 requires that the Department revoke the license. However, despite this determination, the ALJ based his order of revocation on Business and Profession §24200, subdivisions (a), (b) and (d).

The testimony of Dr. Solgaard, plus the plea itself, would seem to be enough to satisfy §24200.5's requirements, had that section been part of the accusation.

The decision of the Department is affirmed.[6]

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

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[6] This final decision is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said Code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.