ISSUED MARCH 27,1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ELIAS MBARKEH and RAFEE MBARKEH dba Rocket Liquor 21413 Vanowen Street Canoga Park, California 91303, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6882 File: 21-237968 Reg: 96038278 Administrative Law Judge at the Dept. Hearing: John A. Willd Date and Place of the Appeals Board Hearing: February 4, 1998 Los Angeles, CA

Elias Mbarkeh and Rafee Mbarkeh, doing business as Rocket Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their off-sale general license revoked, with revocation stayed for a three-year probationary period and subject to appellants serving an actual 20 day suspension, for possessing, and their clerk having sold to an undercover police officer, drug paraphernalia, specifically, a pipe to be used to smoke rock cocaine, being contrary to the universal and generic public welfare and

[1]The decision of the Department, dated May 22, 1997, is set forth in the appendix.

morals provisions of the California Constitution, article XX, §22, arising from violations of Health and Safety Code §§11364.7, subdivision (a), and 11014.5, and Business and Professions Code §24200, subdivision (a).

Appearances on appeal include appellants Elias Mbarkeh and Rafee Mbarkeh, appearing through their counsel, Jeffrey S. Weiss, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on December 14, 1989. Thereafter, the Department instituted an accusation against appellant charging, in two counts, that appellants possessed for sale, and by their clerk, sold, drug paraphernalia, specifically a pipe for smoking rock cocaine.

An administrative hearing was held on March 24, 1997, at which time oral and documentary evidence was received. Police officer Michael Judge testified that he visited appellants' store on September 6, 1996, and asked the clerk then on duty, Haitham Mubarka, if he had anything in which he, the officer, could smoke rock cocaine. Officer Judge further testified that, from where he was standing, he could see miniature pipes hanging along the wall, along with other types of key chains and other items, that he thought could be used to smoke rock cocaine. When Mubarka asked "like what, basically," Officer Judge looked up at the wall at the pipes he had seen when he first entered the store, pointed at them, and said "Oh, what about those" [RT 7-10]. Mubarka pulled one of the pipes off the rack and handed it to the officer, who asked "Do you think I could smoke rock cocaine in this? Mubarka replied, according to Officer Judge, "sure" [RT 10]. The officer

then purchased the pipe, paying "a little over a dollar," proceeded to leave the store, and then returned to issue the citation. Judge testified the conversation with Mubarka was in English, and that he had no trouble obtaining the information from Mubarka which was necessary to complete the citation.

On cross-examination, Officer Judge acknowledged that the pipe was on a key chain, and that there were about 20 other key chains on the wall, some that held photographs, others that held change. He denied using the term "crack," insisting his question about something he could use to smoke referred to "rock cocaine" as the substance to be smoked.

Haitham Mubarka testified, through an interpreter, that although customers of the store speak English, he does not understand everything they say. He stated that the police officer asked two or three times for a smoking pipe, and that when he told the officer he did not have any, the officer told him someone had bought one the previous night. Mubarka claimed he again said he did not have any. The officer then looked behind Mubarka and indicated the pipe in which he was interested, and, according to Mubarka, asked if it could be used for "crack." Mubarka testified he did not understand what the officer meant.[2]

Mubarka was permitted, over objection, to testify there was a key-making machine located within four or five feet of the key chain display, near the cash register. The Administrative Law Judge (ALJ) overruled the objection in response

[2] In its brief, the Department asserts, without citation to the record, that on cross-examination, Mubarka admitted knowledge of what the police officer meant by his request. We have reviewed the testimony given on cross-examination, and find no such admission.

to the contention of appellant's attorney that the testimony related to the purpose for which the items in question were marketed.

On cross-examination, Mubarka denied knowing what rock cocaine is.

In response to questioning by the ALJ, Mubarka said another clerk, who is of Mexican heritage, was near the door when the officer entered, preparing for closing. Speaking to him in English, Mubarka told the other clerk the officer would be the last customer. Mubarka said he had been in the United States two years and two months, and had never before lived in an English-speaking country.

Elias Mbarkeh, one of the co-licensees, testified he has worked in the store since 1984, and owned it since 1989. He said the store carries, in addition to liquor, market-type items such as bread, milk and cigarettes. He also makes keys and sells key chains. He identified the key chain in question as one sold in the store, and pointed it out in a catalog (Exhibit A) he uses to make store product purchases, where it is described as a "'Novelty' pipe key chain," offered in assorted colors mounted 12 on a hanging card. Mbarkeh testified he has discontinued carrying the key chains since the citation issued, even though he did not think they were illegal or used as drug paraphernalia.

On cross-examination, Mbarkeh admitted he had heard of "rock cocaine," but did not know what it was. He gave the same answer with respect to "crack," and said he did not know if rock cocaine is the same thing as crack. He further testified that when he first worked at the store, he was told by his employer, who is now his partner, that if anyone admitted they intended to employ the item they were purchasing for drug usage, he should refuse to make the sale.

Subsequent to the hearing, the Department issued its decision which determined that both counts of the accusation had been established.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issue: the key chain pipe was neither drug paraphernalia nor marketed as drug paraphernalia; therefore, the Department erred in finding a violation of Health and Safety Code §11364.7, subdivision (a).

DISCUSSION

Appellants contend the Department erred in finding violations of the Health and Safety Code, arguing that the key chain pipe in question is not drug paraphernalia and that appellants' clerk had no intention of selling drug paraphernalia.

The Department argues that the miniature pipe in question presented the appearance of drug paraphernalia since it was not the kind of pipe associated with the use of common tobacco, and that once the clerk affirmed it could be used for smoking rock cocaine, it was then marketed for use as drug paraphernalia.[3]

The Department's case rests on the words "like what," uttered by a clerk in response to a question by a police officer whether he had something which could be used to smoke rock cocaine, and the word "sure," when he was asked, after the

[3] Department counsel explained that the untimely filing of its brief in this case followed an internal review which confirmed that the case fell within the Department's "guidelines" for a drug paraphernalia case. The Board is unaware of what these guidelines may state, since they do not appear in the record and are not the subject of any regulation the Department has duly promulgated or published.

officer pointed to a key chain pipe hanging with other key chains on a wall, whether it could be used to smoke rock cocaine.

The Department's reasoning is in this paragraph taken from the ALJ's proposed decision, which the Department adopted without change:

> "Here the clerk did become aware that the customer apparently intended to use this item to smoke rock cocaine, and under these circumstances, he did indeed violate the law. There is some mitigation, however, that deserves consideration. When the officer asked whether the clerk had anything that he might smoke rock cocaine in, the clerk responded "like what." Obviously, at this point the clerk was not aware that the store carried any smoking device. It was the officer who pointed out the existence of the pipe to the clerk. It further appears that this clerk was unaware that the sale of such an item was unlawful, even when the clerk became aware that the intended use of the item might be for the smoking of cocaine. All of these circumstances do not amount to a defense by any means, but it does strongly suggest that the clerk was not in the business of selling drug paraphernalia."

Appellants describe this paragraph as perplexing, and this Board is inclined to agree.

It appears from the ALJ's remarks that he found the violation solely on the basis of the fact that the clerk appeared to agree with the police officer that the key chain pipe could be used for an illicit purpose. It also appears that the ALJ concluded that the clerk should have assumed the police officer intended to use the key chain pipe to smoke rock cocaine solely on the basis of his question whether the device could be used for that purpose, and from that formed the requisite intent or possessed the requisite scienter under the statute. Whether the ALJ was correct in doing so requires that the applicable statute itself be understood.

This is one of two cases currently on appeal to the Board which present issues relating to the sale of alleged drug paraphernalia; the other is Harper (AB-6894). The factual settings in the two cases are very similar, the legal issues posed are the same, and as to both, we are compelled to reverse the decision of the Department. We do so mindful of the serious problems associated with the sale and usage of narcotics and controlled substances, and the harm that flows to society from such activity. We are also mindful of the enormous burdens drug trafficking imposes on law enforcement agencies, and we have not hesitated in the past to acknowledge the efforts of the police and the Department to stamp out such behavior by holders of alcoholic beverage licenses. Nonetheless, on the record in this case, constrained as we are by the law, we are required to reverse the decision of the Department.

The drug paraphernalia statutes of the kind involved in this appeal are sweeping in their nature, embracing almost any object used or useful in any way in connection with controlled substances. Given their necessary scope, their potential for application to innocent persons has engendered numerous constitutional challenges, and an understanding of the reasoning by which the statutes have been sustained in the face of such challenges is crucial to a resolution of this case. For that reason, we have gone beyond the briefs of the parties to set forth what we understand to be the applicable law.

Health and Safety Code §11014.5[4] defines "drug paraphernalia" and establishes criteria for courts to consider when determining what constitutes drug paraphernalia. Section 11364.7 makes it a misdemeanor for anyone to deliver, furnish, transfer, possess, manufacture with intent to deliver, furnish, or transfer drug paraphernalia; provides those who are over 18 years of age and violate these provisions by delivering, furnishing or transferring drug paraphernalia to a minor at least three years their junior may be punished by a fine and/or imprisonment; declares the violation of its provisions cause to revoke any business or liquor license; and provides that all drug paraphernalia is subject to forfeiture and seizure by a peace officer.

In People v. Nelson (1985) 171 Cal.App.3d Supp. 1 [218 Cal.Rptr. 279], the court rejected challenges to the constitutionality of Health and Safety Code §11014.5 and §11364.7, subdivision (a), based upon grounds of vagueness. The court relied heavily on decisions of federal courts other than the Ninth Circuit, and its reasoning guides us to the result we reach in this case.

In People v. Nelson, the defendants were convicted of delivering, furnishing or transferring drug paraphernalia, in violation of §11364.7, subdivision (a). Defendants operated a store which stocked and sold such novelties as T-shirts and posters, but also had a substantial supply of items which, in the opinion of several experts who testified at trial, were drug paraphernalia as that term is defined in §11014.5, described by the court as "the companion section to section 11364.7,

[4] The complete texts of §§11014.5 and 11364.7 are set forth in the Appendix.

subdivision (a)." These items included bongs (small water pipes), roach clips (devices for holding burning marijuana cigarettes), coke kits (packages containing items commonly used for preparing and ingesting cocaine), coke spoons (for inhaling cocaine), as well as items which had legitimate uses such as scales and bulk chemicals but which, in the opinion of the expert witnesses, were stocked by the store for the purpose of weighing and preparing drugs and narcotics. When §11364.7, subdivision (a), took effect, on January 1, 1983, defendants' employees erected signs declaring that the merchandise they had always sold was now being offered for sale only for legitimate purposes. Thereafter, a policeman entered the store, asked to purchase, and was sold, a bong. His purchase was followed by a series of police seizures of suspected drug paraphernalia, and criminal proceedings ensued.

Defendants based their constitutional challenge to the statutes in question on the grounds the terms "designed for use" and "marketed for use" are impermissibly vague in that many items are not solely designed to be drug paraphernalia but are dependent upon the ingenuity or purpose of the purchaser. The court construed their arguments to be an attack on the sufficiency of the mens rea or scienter element of §11364.7, subdivision (a), and in a through and well-researched decision rejected those arguments.

The court first focused on the statutory language itself, observing that while §11014.5 contained no overt scienter requirement:

> "§11364.7, subdivision (a), exhibits what appears to be a two-tier or double scienter standard (i.e., 'intent' and 'knowing or under circumstances where one reasonably should know'".)

It then concluded that the "designed for use" and "marketed for use" language in §11014.5's definition of "drug paraphernalia" reflected the Legislature's attempt to assign the appropriate scienter to each category of offender within the section's reach:

> "In other words, the 'designed for use' phrase pertains to the state of mind of the manufacturer of an item while the 'marketed for use' phrase refers to the seller, including the distributor, of the item. The common denominator in both instances is that the requisite state of mind belongs to the person in control of the item at the time the item is manufactured, or delivered, furnished, transferred, etc."

(People v. Nelson, supra, 171 Cal.App.3d Supp. at 9.)

The court rested its reasoning primarily on the United States Supreme Court decision in Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982) 455 U.S. 489 [102 S.Ct. 1186], which rejected similar challenges to a statute requiring a license to sell items designed or marketed for use with illegal cannabis or drugs. The Court found the phrase "designed for use" unambiguous, since it "at least encompassed an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer." (Hoffman Estates, supra, 455 U.S. at 501-502, 102 S.Ct. at 1194, 1195.) Similarly, the Court found the phrase "marketed for use" "transparently clear":

> "[I]t describes a retailer's intentional display and marketing of merchandise. The guidelines refer to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items.[5] ... The standard requires scienter, since a retailer could scarcely 'market' items 'for' a particular use without intending that use."

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[5] The guidelines for the determination of what is drug paraphernalia referred to are different from those set forth in §11014.5, but, we think, the same reasoning applies with respect to the §11014.5 guidelines.

(Hoffman Estates, supra, 455 U.S. at 502, 102 S.Ct. at 1195.)

Adopting this reasoning, the court in People v. Nelson went on to state (171 Cal.App. 3d Supp. at 11):

> "We therefore follow the cogent reasoning of the Supreme Court in Hoffman Estates and infuse the phrases 'designed for use' and 'marketed for use' in section 11014.5 with the requisite element of scienter, which is construed solely from the viewpoint of the person in control of the item, i.e., the manufacturer or seller, without reference to a third person's state of mind.
>
> "This conclusion is further buttressed by a plain reading of the phrase 'marketed for use' in the context of section 11014.5 as a whole. The unambiguous language of subdivision (b) of that section specifically defines that phrase to mean 'advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or material with controlled substances.' The clear import of this language is to focus only on the intent and actions of the seller. Additionally, subdivision (c) spotlights the owner or anyone in control of the object with regard to two of the seven enumerated factors that may be used to determine whether an object constitutes drug paraphernalia. There is nothing in the language of section 11014.5, however, which would give rise to an inference that the intent of a third person is relevant to the definition of what constitutes drug paraphernalia.
>
> "On the other hand, turning to the phrase 'reasonably should know' in subdivision (a) of section 11364.7, we note that this phrase is already a part of the two-tier scienter component of that subdivision; thus, infusing scienter to clear up any vagueness is inapposite. We also note that this phrase is not further defined, nor is there anything in that section or in a related section which clarifies what that phrase signifies. We therefore must look elsewhere for guidance in this regard."

The court turned to the legislative history preceding the adoption of §11014.5 and §11364.7, subdivision (a), noting that they were intended to eliminate the use and sale of drug paraphernalia, and were patterned after the Model Drug Paraphernalia Act (the "Model Act") drafted by the Drug Enforcement Administration of the United States Department of Justice.

Quoting from Levas and Levas v. Village of Antioch, Illinois (7th Cir. 1982) 684 Fed.2d 446, 449, the Nelson court described the Model Act as:

> ". . . an attempt to write a statute that will be broad enough to deal with the problem effectively, yet not so broad that it impinges on constitutionally protected conduct or so vague that neither the law's targets nor its enforcers know what it means. The distinctive features of the Model Act are two: it attempts to give content to the necessarily general definition of drug paraphernalia by listing examples and factors to be considered; and it contains an intent requirement that is meant to eliminate any definitional uncertainty."

According to the court, the various state statutes patterned after the Model Act have been challenged on vagueness grounds, it being contended either that they encompassed multi-purpose objects with both drug-related and legitimate uses, and innocent items capable of drug use, or that a violation could be established by a transferring a purchaser's intent to use an innocent object with proscribed drugs to an unaware seller. However, according to the Nelson court, every federal circuit that has considered such a challenge has upheld the statute in question. By infusing a scienter element into the statute, a seller of objects which have innocent or legitimate uses as well as potential drug uses is protected from prosecution "in the absence of showing that the seller intended to sell, distribute, etc., the objects for use with controlled substances." (People v. Nelson, supra, 171 Cal.App.3d Supp. at 14.)

As to the "transferred intent" issue, the Nelson court again referred to the line of federal circuit court decisions addressing like statutes, pointing out [at 171 Cal.App.3d Supp. 16-17, emphasis supplied]:

> "These courts essentially concluded that the two-tiered scienter standard of the Model Act, which is tracked by section 11364.7, presents no danger

> that an innocent seller would be at risk of prosecution for the unknown intent of a purchaser for the simple reason that the seller must already have intended that the object be sold for drug use before his knowledge of its use by a buyer comes into play. 'In these circumstances, it is not constitutionally improper that the seller be required to open his eyes to the objective realities of the sale.'"

The court supports its statement with a footnote quoting extensively from the decision of the Eighth Circuit United States Court of Appeal in Casbah, Inc. v. Thone (1980) 651 F.2d 551, 561, which, in a footnote of its own, adopted "the cogent reasoning" of a Delaware federal district judge in Delaware Accessories Trade Association v. Gebelein (D.Del. 1980) 497 F.Supp. 289, 294, who said:

> "In the context of an alleged sale or delivery of drug paraphernalia, the Act requires the state to prove both (1) that the defendant intended that an item would be used for the production or consumption of controlled substances and also (2) that he either knew, or that he acted in a set of circumstances from which a reasonable person would know, that the buyer of an item would thereafter use it for those purposes. So-called constructive knowledge thus has significance only in a situation where the defendant is selling or delivering items which he intends to be used to produce or consume illicit drugs in the first place. The legitimate merchant who sells innocuous items need make no judgment about the purpose of the buyer based upon the surrounding circumstances. The dealer, on the other hand, who sells innocuous items with the intent that they be used with drugs is, in effect, put on notice by the illicit nature of his activity that he must be careful to conform his conduct to the law. Even the illicit dealer, however, is not held legally responsible ... for guessing what is in the mind of a buyer. The seller is safe as long as he does not actually know the buyer's purpose and as long as the objective facts that are there for him to observe do not give fair notice that illegal use will ensue." (Emphasis supplied.)

In Stoianoff v. State of Montana (9th Cir. 1982) 695 F.2d 1214, 1221, the court stated, addressing the constitutional challenge to the "reasonably should know" language of a statute "patterned closely" after the Model Act:

> "[In] light of the unusual nature of the layered state of mind requirements imposed by [the Montana statute], the merchant must already have intended that an item be sold for drug use under the 'intended for use' standard,

> before his or her knowledge of its use by a buyer comes into play. Once the merchant has passed this threshold, the merchant is required to be aware only of the objective facts that would fairly put him or her on notice of the use for which the product was purchased."

The Nelson court expressed its concurrence with the Stoianoff decision's reading of the "reasonably should know" language of the Model Act, and also its belief that such reading was supported by the comments of the drafters of the Model Act [Model Act, Comments, Art. II] which it quoted:

> "The knowledge requirement of Section B is satisfied when a supplier: (I) has actual knowledge an object will be used as drug paraphernalia; (ii) is aware of a high probability an object will be used as drug paraphernalia; or (iii) is aware of facts and circumstances from which he reasonably should conclude there is a high probability an object will be used as drug paraphernalia. Section B requires a supplier of potential paraphernalia to exercise a reasonable amount of care. He need not undertake an investigation into the intentions of every buyer, but he is not free to ignore the circumstances of a transaction. Suppliers of objects capable of use as paraphernalia may not deliver them indiscriminately."

Although at first blush it might appear the quoted comment might apply to all sellers, it must be read in light of the earlier statements in the court's opinion, and in the statements of the federal court decisions which Nelson quotes and relies upon, to be addressing the responsibilities placed upon the seller who "already intended that an item be sold for drug use,"[6] and it is when this threshold is passed that the merchant must be aware of objective facts which would put him on notice of the use for which the product was purchased.

Against this background, resolution of this case is uncomplicated.

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[6] People v. Nelson, supra, 171 Cal.App.3d Supp. at 16 (emphasis supplied).

The object in question, a miniature pipe attached to a key chain, is a novelty item that, at least arguably, may also function for ingesting a controlled substance.[7]

Appellant makes and sells keys, and sells key chains. The key chain with the miniature pipe was one of several types of key chains hanging together on the wall of the store.

The ALJ concluded that until the officer pointed out the pipe to the clerk, the clerk did not even know the store carried any smoking devices. The ALJ nevertheless found liability from the fact the clerk became aware of the customer's intended use of the item, and nothing more. (See Finding V.) This was error. If the clerk did not know the store even carried any smoking device, it cannot be said that he had the requisite scienter under the two-tier scienter test discussed, supra. Since there is no evidence as to how the key chain pipe was marketed by appellant, other than the laconic comments of the clerk, there is insufficient basis upon which it could be found that the key chain was marketed for use as drug paraphernalia. Indeed, from what appears in the record in this case, it was marketed for use as a key chain, and it was not until the clerk was "educated" by the police officer's remarks that he entertained any other notion of what purpose it arguably might serve.

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[7] There is no expert testimony in the record to the effect that the pipe can be used as such, and the police officer was not permitted to testify that it could be so used [RT 11]. The record is not as clear as it might be on the effect of the ALJ's ruling sustaining counsel's objection to the officer's testimony, but we read the ALJ's comment "It's a small pipe" as rejecting the officer's testimony concerning its use.

Such reasoning is incompatible with the thrust of the Nelson decision, that "so-called constructive knowledge thus has significance only in a situation where the defendant is selling or delivering items which he intends to be used to produce or consume illicit drugs in the first place. The legitimate merchant who sells innocuous items need make no judgment about the purpose of the buyer based upon the surrounding circumstances."

We attribute little force to the Department's suggestion that because the key chain pipe was ordered from a catalog which also offered other items that might have been useful as drug paraphernalia, it also was drug paraphernalia. There was no evidence of the presence in the store of any other items claimed to be drug paraphernalia, and the catalog in question also offered many items of unquestioned legitimacy, such as shaving cream, playing cards, baseball caps, combs, and the like.

CONCLUSION

The decision of the Department is reversed.[8]

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

[8]This final order 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 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.