

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

| | | |
|----------------------------|---|--------------------------|
| MARGARITA RAHIM and NOVROZ |) | AB-6885 |
| ALI RAHIM |) | |
| 610 W. Olive Ave. |) | File: 20-311837 |
| Porterville, CA 93257, |) | Reg: 96037817 |
| Appellants/Licensees, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | Sonny Lo |
| |) | |
| DEPARTMENT OF ALCOHOLIC |) | Date and Place of the |
| BEVERAGE CONTROL, |) | Appeals Board Hearing: |
| Respondent. |) | March 4, 1998 |
| |) | San Francisco, CA |
| |) | |

Margarita Rahim and Novroz Ali Rahim (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which unconditionally revoked their off-sale beer and wine license, for purchasing cigarettes which co-appellant Novroz Ali Rahim believed were stolen, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from violations of Penal Code §§664/496.

¹The decision of the Department, dated May 15, 1997, is set forth in the appendix.

Appearances on appeal include appellants Margarita Rahim and Novroz Ali Rahim, appearing through their counsel, Ralph B. Jordan III, and the Department of Alcoholic Beverage Control, appearing through its counsel, John R. Peirce.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 2, 1995.

Thereafter, the Department instituted an accusation against appellant charging that co-appellant Novroz Ali Rahim (hereinafter referred to as "appellant"), on four different occasions, purchased cigarettes that he believed to be stolen, in violation of the above-referenced Penal Code sections. An amended accusation was filed adding a count alleging that appellant was convicted in superior court of attempted receiving stolen property.

An administrative hearing was held on April 3, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Blake Graham, the Department investigator who conducted the sting operation, and by appellant Novroz Ali Rahim, concerning the transactions referred to in the accusation. Appellant also testified that he had previously been licensed at other premises, without any disciplinary actions, as early as 1987.

Subsequent to the hearing, the Department issued its decision which ordered appellants' license revoked. Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) there is new evidence concerning the conviction which the Department should consider; (2) co-appellant

Novroz Ali Rahim was entrapped; and (3) the length of licensure should work as mitigation.

DISCUSSION

I

Appellants contend there is new evidence concerning the conviction which the Department should consider. Appellants have properly presented to the Appeals Board a declaration and certified documents showing that appellant's conviction has been set aside and vacated and the original criminal complaint dismissed pursuant to Penal Code §1203.4.² Because of the court's order withdrawing the plea and dismissing the case, appellants argue, any action based on appellant's plea or conviction must be reversed.

However, expungement under Penal Code §1203.4 does not

“release an offender from all consequences of his conviction in the nature of a penalty or disability, e.g., . . . revocation of business and professional licenses (Ready v. Grady, 243 Cal.App.2d 113 [52 Cal.Rptr. 303]; Copeland v. Department of Alcoholic Beverage Control, 241 Cal.App.2d 186 [50 Cal.Rptr. 452]; Epstein v. California Horse Racing Board, 222 Cal.App.2d 831 [35 Cal.Rptr. 642]; . . .”

The court of appeal in Copeland v. Department of Alcoholic Beverage Control, supra, addressing an argument similar to appellant's, stated:

²Penal Code §1203.4 provides that a defendant who has been discharged prior to the termination of probation shall be allowed to withdraw his or her plea of nolo contendere and enter a plea of not guilty and “the court shall dismiss the accusations or information against the defendant and . . . he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted” According to the Petition filed in the court, appellant has been discharged from probation.

“As used in section 1203.4 of the Penal Code the words 'penalties and disabilities' have reference to criminal penalties and disabilities or to matters of a kindred nature. . . . It is settled that proceedings to suspend or revoke business or professional licenses are not included among the penalties and disabilities that are released by a dismissal pursuant to section 1203.4. [Citations omitted.]”

We conclude that the expungement of appellant's record with regard to the conviction for attempting to purchase stolen property has no effect on the Department's discipline of appellants' license.³

II

Appellants contend that appellant Novroz Ali Rahim was entrapped. They contend that there was substantial evidence of entrapment. Specifically, they argue that 1) this was the investigator's first sting operation; 2) no investigation occurred and there was no evidence of criminal activity before the Department presented the opportunity; 3) the appellants do not speak English; 4) the

³ The Department contends that the language of Business and Professions Code §490 controls this situation and makes the order under Penal Code §1203.4 irrelevant. Business and Professions Code §490 states in pertinent part:

“Any action which a board is permitted to take following the establishment of a conviction may be taken . . . irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.”

However, Business and Professions Code §490 (Bus. & Prof. Code, div. 1.5, ch. 3, §490) is made inapplicable to the Alcoholic Beverage Control Laws by Business and Professions Code §476 (Bus. & Prof. Code, div. 1.5, ch. 1, §476) which states, in pertinent part:

“Nothing in this division [1.5] shall apply to the licensure . . . of persons pursuant to . . . Division 9 (commencing with Section 23000) [the ABC act]”

The Copeland case noted in the text, however, makes clear that §1203.4 expungement has no effect on alcoholic beverage act disciplinary proceedings even though Business and Professions Code §490 is not applicable.

investigator did not make it sufficiently clear that the cigarettes were stolen; 5) the investigator told appellant lies; and 6) the investigator became a friend of appellant.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.

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] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); 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]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Many of the items listed by appellants depend upon whose testimony was believed--that of the investigator or that of the appellant. 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] and Lorimore v. State Personnel Board (1965) 232

Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) The ALJ simply did not find the testimony of the appellant as credible as that of the investigator on such matters as whether the investigator became a friend of appellant and improperly played on that friendship to induce appellant to buy stolen goods, or whether the appellant was fully apprised that the goods were purportedly stolen. The credible testimony of the investigator constitutes substantial evidence sufficient to support the findings.

The test for entrapment has been stated in the California Supreme Court case of People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459], as follows:

"We hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (23 Cal.3d at 689-690.) (Fn. omitted.)

There simply was no "badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime."

The case of Patty v. Board of Medical Examiners (1973) 9 Cal.3d 356 [107 Cal.Rptr. 473], which appellants cite as "a discussion of the law of entrapment in light of facts very close to those of this case" (App. Br. at 4), is not pertinent, since it uses the "subjective" or "origin-of-intent" test for entrapment that was rejected

by the California Supreme Court in People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459].

III

Appellants contend that the length of licensure should work as mitigation. In essence, appellants are contending that the penalty is excessive.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The Department had the following factors to consider: (1) appellant on four separate dates purchased cigarettes which he believed were stolen; (2) the price agreed upon was approximately one-half of the normal cost for cigarettes; (3) after three sales, appellant purchased 420 cartons of cigarettes for the sum of \$3,380; (4) the ALJ, who was the trier of fact, found appellant's disclaimer of knowledge and defense of trying to help a friend (the investigator) not credible; and (5) buying or receiving purported stolen property is a crime of moral turpitude, because it involves dishonesty in business dealings.

Good behavior of a licensee over time may work as a mitigating factor in assessing a penalty. However, there was no evidence submitted supporting appellant's assertion of being licensed since 1987 with no disciplinary action and

the ALJ made no finding regarding mitigation. Considering such factors, we conclude that the penalty imposed does not exceed the Department's scope of discretion.

CONCLUSION

The decision of the Department is affirmed.⁴

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

⁴This 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.