

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

7-ELEVEN, INC., PENGKIE KAUR, and INDNESH P. SINGH
dba 7-Eleven Store #13976
16925 Randall Avenue, Fontana, CA 92335,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7508

File: 20-320274 Reg: 99046222

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: December 12, 2000
Los Angeles, CA

ISSUED: MARCH 23, 2001

7-Eleven, Inc., Pengkie Kaur, and Indnesh Singh, doing business as 7-Eleven Store #13976 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 30 days for permitting their clerk to remain in the premises while in an intoxicated condition and unable to exercise care for himself or others, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §24200, subdivision (a), and Penal Code §647, subdivision (f).

Appearances on appeal include appellants 7-Eleven, Inc., Pengkie Kaur, and Indnesh Singh, appearing through their counsel, Ralph B. Saltsman, Stephen W.

¹The decision of the Department, dated September 16, 1999, is set forth in the appendix.

Solomon, and Joseph R. Budesky; and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 9, 1996.

Thereafter, the Department instituted an accusation against appellants charging that, on November 25, 1998, they permitted their clerk, Jagir Singh Aulkh, to remain in the premises while in an intoxicated condition and unable to exercise care for himself or others in violation of Penal Code §647, subdivision (f).

An administrative hearing was held on July 23, 1999, at which time documentary evidence was received and testimony was presented concerning the violation by Fontana police officer Brian Heaviside. Appellant Indnesh Singh testified regarding the store's training and the clerk's discharge after his arrest.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) there is not substantial evidence to support the findings, and the findings do not support the determination, that appellant's clerk violated Penal Code §647, subdivision (f); (2) if a violation occurred, appellants did not "permit" it; and (3) the penalty is excessive.

DISCUSSION

Appellants contend there is no evidence in the record that the clerk was unable to care for his own safety or the safety of others, nor is there a finding or determination that the clerk was unable to care for his own safety or the safety of others. Therefore,

they argue, no violation of Penal Code §647, subdivision (f), was established.

A person "found in any public place under the influence of intoxicating liquor . . . in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others . . ." is guilty of disorderly conduct, a misdemeanor. (Pen. Code §647, subd. (f).)

The facts, which are essentially undisputed, are described by the ALJ in Finding III as follows:

"A. Fontana Police Officer Brian Heaviside was dispatched to respondents' premises in response to a radio call advising of a drunk clerk at the location. He arrived at the premises about 9 minutes after 10:00 p.m. As he was approaching the front door of the store, a female came up to the Officer and told him to check on the clerk inside because she thinks he's drunk.

"B. Officer Heaviside entered the store, walked behind the clerk's counter and stood approximately 6 feet behind clerk Aulkh where he could see over his shoulder. Aulkh was the only person working at the store at that time. There were perhaps 5 or 6 customers in line to be served and as many as 10 patrons inside the store.

"C. Heaviside stayed in that position for between 3 and 5 minutes. During that time, Aulkh waited on two customers. Heaviside noticed that Aulkh swayed from side-to-side as he worked and had "great difficulty" working the keys to the cash register. Heaviside could not tell whether the transactions were done properly or not. To this point Aulkh had said nothing to Officer Heaviside and Heaviside had said nothing to the clerk.

"D. The next customer was attempting to purchase a case of Budweiser beer. Aulkh could not get the cash register to open. At this point, Heaviside stepped in, told the patrons that the clerk was not going to be selling anything more, and proceeded to talk with Aulkh.

"E. Officer Heaviside got Aulkh's attention. Aulkh spoke haltingly, with slurred speech. He smelled of alcoholic beverages and his eyes were bloodshot and watery. Heaviside asked Aulkh what was going on and why was he acting the way he was. Aulkh indicated that nothing was wrong. He indicated that he was suffering from no medical difficulty, but he acknowledged having a drink or two.

"F. Heaviside formed the opinion that Aulkh was intoxicated and administered a breath test using a hand-held device. Aulkh's blood alcohol level read '.30.' Heaviside took Aulkh into custody and transported him to the police station."

The ALJ found that the clerk violated Penal Code §647, subdivision (f), and rejected appellants' arguments in Determination of Issues I:

"[Appellants] argued that the Department did not establish its case because there was no evidence that Aulkh was falling down, belligerent, bumping into things or in any fashion acting dangerously toward himself or others. They claim that is the standard, the Department did not meet it and the accusation must be dismissed. In addition, [appellants] argue that they did not 'permit' him to remain in the store in that condition.

"Those arguments are rejected. Aulkh, as a seller of alcoholic beverages, if nothing more, protects the public from difficulties associated with their unlawful sales. In the condition Heavyside found him, he was in no condition to judge or ensure that such beverages were sold only to those of legal age and he was in no shape to ensure that no alcoholic beverages were sold to anyone who was already intoxicated. In that way alone, in the condition he was in, he was a danger to others. One could go on and on.

"As for permitting, a licensee can be held to have permitted a violation by a showing that the act itself took place. If there is evidence that a violation occurred on the premises, the licensee is responsible for it. *Munro v Alcoholic Beverage Control Appeals Board* (1957) 154 Cal.App.2d 326."

To establish that the clerk violated Penal Code §647, subdivision (f), the Department must show, and the decision must find, that "(i) he was intoxicated in a public place (see People v. Kelly (1969) 3 Cal.App.3d 146, 150, fn.2 [83 Cal.Rptr. 287]) and (ii) he was unable to exercise care for his own safety or the safety of others (see People v. Engleman [(1981) 116 Cal.App.3d Supp. 14, 19 [172 Cal.Rptr. 474]], and cases cited), . . ." (Mercer v. Department of Motor Vehicles (1991) 53 Cal.3d 753, 769, fn. 25 (emphasis in original) [280 Cal.Rptr. 745].) Evidence that a person is intoxicated in a public place is not sufficient to support a finding of a violation of Penal Code §647, subdivision (f); a "necessary element" is evidence that the person is unable to care for his or her own safety or the safety of others. (People v. Engleman, *supra*, 116 Cal.App.3d Supp. at 19.)

Most of the cases dealing with the ability of an intoxicated person to care for his own safety or the safety of others in the context of Penal Code §647, subdivision (f), have involved inebriates sitting in cars parked along a street or highway. The arresting officers in those cases did not see the individuals driving and so were precluded from arresting them for driving under the influence, but could have charged them with the misdemeanor of "public drunkenness" under Penal Code §647, subdivision (f), since "an intoxicated person behind the steering wheel of a car, with keys in the ignition, is unsafe to himself and others in his way." (People v. Lively (1992) 10 Cal.App.4th 1364, 1371 [13 Cal.Rptr.2d 368]; see also Mercer v. Department of Motor Vehicles, *supra*, 53 Cal.3d 753; People v. Kelley (1969) 3 Cal.App.3d 146 [83 Cal.Rptr. 287].)

In People v. Murrietta (1967) 251 Cal.App.2d 1002 [60 Cal.Rptr. 56], a CHP officer found the defendant sitting next to a car with a broken windshield. The defendant was unsteady on his feet, had dilated pupils, slurred speech, swaying body, a cut on his face, and a contusion on his forehead. He refused aid or to be taken to the hospital. The court held that an experienced CHP officer could reasonably conclude from these observations that the defendant was under the influence of alcohol or drugs and unable to care for himself. The defendant's refusal to be treated for his injuries indicates that he was unable to care for his own safety.

No automobile was involved in the case of In re William L. G. (1980) 107 Cal.App.3d 210 [165 Cal.Rptr. 587], in which a minor was arrested for violation of Penal Code §647, subdivision (f). A police officer observed the minor, around midnight, "walking precariously" along a public road, staggering badly, and very unsteady on his feet. He also had slurred speech, his eyes were bloodshot, and he had the strong odor

of alcohol about him. The minor argued that nothing in the record indicated he was unable to care for his own safety, but the court held that the officer's observations of the minor's conduct provided sufficient grounds to conclude that the minor was unable to exercise care for his own safety. The minor clearly did not exercise care for his own safety when he was "walking precariously" and unsteadily along a public road at night in an inebriated condition.

In all the cases referred to above, the inebriated person was in a situation which, if allowed to continue, posed a high risk of imminent physical harm coming to himself or others. In contrast, the court in People v. Rich (1977) 72 Cal.App.3d 115 [139 Cal.Rptr. 819], found insufficient evidence to support a finding that the defendant violated Penal Code §647, subdivision (f), where the arresting officer testified that he observed the defendant in a store, displaying symptoms which led him to conclude that the defendant was under the influence of an opiate, but described no conduct of the defendant that indicated he was unable to exercise care for his own safety or the safety of others. The court held that the officer's observations supported only an arrest for violation of Health and Safety Code §11550 (under the influence of an opiate).

The court in People v. Lively, supra, explained that not all instances of a person being intoxicated in a public place present equal justification for an arrest under Penal Code §647, subdivision (f):

"In an arrest for public intoxication, the totality of circumstances must be considered in determining whether the intoxicated person can exercise care for his or her own safety or the safety of others. An inebriated person behind the wheel of a car or power boat or plane or train poses a greater danger to himself or herself and others than the same person lying on a park bench."

(10 Cal.App.4th at 1372-1373.)

In the present case, Officer Heaviside testified that the clerk's speech was slurred, he was unstable on his feet, his eyes were bloodshot and watery, and the odor of alcohol was on his breath. Using a field alcohol sensor, Heaviside obtained a blood alcohol reading of .30 (.08 is the maximum allowable for operating a motor vehicle). However, this reading was not verified by administering an additional test when the clerk was taken to the station. Heaviside testified that he formed the opinion that the clerk was unable to care for himself or others. [RT 11-13.]

The difficulty with this case is that while the evidence supports a finding that the clerk was intoxicated, there was no evidence presented supporting the opinion of the officer that the clerk was unable to care for his own safety or the safety of others. The ALJ rationalized that the clerk "was a danger to others" because he might, as a result of his inebriation, make an unlawful sale of an alcoholic beverage. This does not appear to be what the statute means by "unable to care for his own safety or the safety of others."

The cases discussing Penal Code §647, subdivision (f), make clear that this section is designed to protect the inebriate and the public from a high risk of *imminent physical danger or harm* as a result of a person's inebriation in a public place. (People v. Belanger (1966) 243 Cal.App.2d 654, 665 [52 Cal.Rptr. 660] ["The language of section 647, subdivision (f) clearly indicates that its purpose is to protect the offender himself from the results of his own folly, as well as to protect the general public from the dangers and evils attendant upon the presence of such persons upon the streets and highways and in other public places."].) It is not designed to protect the public from the possibility of some speculative "difficulties associated with . . . unlawful sales [of

alcoholic beverages]." Other provisions, primarily in the Alcoholic Beverage Control Act, serve that function. (See, e.g., Bus. & Prof. Code §25602 (sale to obviously intoxicated person); §25658 (sales to minors).)

The clerk may have been more likely to make an unlawful sale to a minor or an obviously intoxicated person when inebriated, but that is not the same as being unable to exercise care for the safety of others. Such an unlawful sale may put in motion a series of events that could eventually lead to a risk of danger for someone, but the statute is not designed to apply to such an attenuated possibility of danger. There must be evidence of a more or less *immediate* threat to someone's *safety* posed by the clerk's intoxication.

The only problems noted in the performance of the clerk's duties were that he "had 'great difficulty' working the keys to the cash register" and that he "could not get the cash register to open." (Finding III.) There was no evidence that the clerk was unable to check identification or identify an intoxicated person, so even the speculative risk that the ALJ used to find a violation does not have support in the record.

We conclude that the Department simply did not prove a "necessary element" of a Penal Code §647, subdivision (f), violation. This determination makes it unnecessary to discuss appellants' remaining contentions.

ORDER

The decision of the Department is reversed.²

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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 order as provided by §23090.7 of said code.

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

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