

ISSUED OCTOBER 31, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

SANG MOK KIM and MYUNG JA KIM	)	AB-7525
dba Mike's Liquor	)	
2003 North Rosemead Boulevard	)	File: 21-276245
South El Monte, CA 91733,	)	Reg: 99046154
Appellant s/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.	)	August 3, 2000
	)	Los Angeles, CA

Sang Mok Kim and Myung Ja Kim, doing business as Mike's Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 20 days for co-licensee Myung Ja Kim having sold an alcoholic beverage to a person who was then obviously intoxicated, 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 §25602, subdivision (a).

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<sup>1</sup>The decision of the Department, dated October 21, 1999, is set forth in the appendix.

Appearances on appeal include appellant Sang Mok Kim and Myung Ja Kim, appearing through their counsel, Michael B. Montgomery, 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 November 30, 1992. Thereafter, the Department instituted an accusation against appellants charging that, on September 21, 1998, Myung Ja Kim ("Mrs. Kim") sold two 32-ounce bottles of Miller beer to Jose Morales, who was obviously intoxicated at the time.

An administrative hearing was held on September 21 and 22, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented for the Department by two Department investigators, Scott Stonebrook and Kevin Kenny. Mrs. Kim and Los Angeles Police Department Deputy Ray Webb testified for appellants.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the findings are not supported by substantial evidence and (2) appellants were entrapped and subjected to selective prosecution by the investigators.

#### DISCUSSION

Appellants contend that there was not substantial evidence to support the finding that Morales was obviously intoxicated. They argue that what the investigators observed before Morales entered the store is not relevant to the

finding that he was obviously intoxicated at the time of the alcoholic beverage purchase; that the indications of intoxication while Morales was in the parking lot before entering the store were so minor that the investigators could not determine then whether Morales was obviously intoxicated; that the results of later intoximeter tests showing that Morales' blood-alcohol level was extremely high are not relevant, since a sale to an intoxicated person does not violate the statute unless that person's intoxication is obvious to any observer; and a store clerk cannot be held to a higher standard of knowledge or perception than a trained peace officer in evaluating whether or not a person is obviously intoxicated.

Investigator Stonebrook testified at some length about his observations of Morales in the premises' parking lot before Morales entered the store. Appellants are right that this testimony is not really relevant to the question of whether Morales was obviously intoxicated at the time Mrs. Kim sold him the beer, since Mrs. Kim only observed Morales after he entered the store and could only have evaluated his sobriety or intoxication during that time. Similarly, appellants are correct that the test for intoxication is irrelevant to the question, since a person's intoxication must be obvious for the licensee to violate the statute by selling alcoholic beverages to that person. Again however, appellants' argument is not relevant, since the ALJ rightly disregarded the later testing,

The ALJ, however, did not rely on the testimony about Morales before he entered the store or the results of the test for intoxication (see Finding IV). He began his findings of fact at the point that Morales entered the store (Finding III) and, based solely on the facts that he concluded were or should have been

observable by Mrs. Kim, found (Finding IV) that “Morales was obviously intoxicated when Mrs. Kim sold him the beer.”

The term "obviously" denotes circumstances "easily discovered, plain, and evident" which place upon the seller of an alcoholic beverage the duty to see what is easily visible under the circumstances. (People v. Johnson (1947) 81 Cal.App.2d Supp. 973 [185 P.2d 105].) Such signs of intoxication may include bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, slurred speech, unsteady walking, or an unkempt appearance. (Jones v. Toyota Motor Co. (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611].)

The time necessary to observe misconduct and act upon that observation requires some reasonable passage of time. However, the observer must not be passive or inactive in regards to his or her duty, but must exercise reasonable diligence in so controlling prohibited conduct. (Ballesteros v. Alcoholic Beverage Control Appeals Board (1965) 234 Cal.App.2d 694 [44 Cal.Rptr. 633].)

In evaluating whether substantial evidence exists,

“[T]he focus is on the quality, not the quantity of the evidence. Very little solid evidence may be 'substantial,' while a lot of extremely weak evidence might be 'insubstantial.' (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871-872 [269 Cal.Rptr. 647].) . . . .

Substantial evidence is not [literally] *any* evidence--it must be reasonable in nature, credible, and of solid value. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51 [26 Cal.Rptr.2d 834, 865 P.2d 633], italics added.)”

(Mohilef v. Janovici (1996) 51 Cal.App.4th 267, 305 [58 Cal.Rptr.2d 721, 744].)

The ALJ found that Morales had slurred speech, an unsteady walk, and red eyes. (Findings III-A, III-B.) However, Mrs. Kim’s view of Morales was blocked by the undercover investigator, and she was nervous because the investigator was

“just standing there.” (Finding V-A.) Her observation of Morales was not only limited visually, but also limited in time, especially compared to the time the investigators were able to observe him in the parking lot before he entered the premises.

Under the circumstances of Mrs. Kim’s limited opportunity for observation and the relatively minor and ambiguous symptoms of intoxication exhibited by Morales, the evidence supporting the ALJ’s finding that Morales was obviously intoxicated cannot be said to be substantial. The Department’s determination that cause was established for suspension of appellants’ license, therefore, was in error.

In light of our determination regarding the lack of substantial evidence, we need not address the other issue raised by appellants.

#### ORDER

The decision of the Department is reversed.<sup>2</sup>

TED HUNT, CHAIRMAN  
RAY T. BLAIR, JR., MEMBER  
E. LYNN BROWN, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>2</sup>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 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.