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

AB-7748
File: 21-327056 Reg: 00048990

SON CHA CHUNG dba T and D Liquor Store
3858-60 West Slauson Avenue, Los Angeles, CA 90043,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: September 6, 2001
Los Angeles, CA

ISSUED NOVEMBER 14, 2001

Son Cha Chung, doing business as T and D Liquor Store (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked her license, with the revocation stayed, conditioned on a probationary period of two years and the serving of a 20-day suspension, for appellant's clerk selling drug paraphernalia, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Health and Safety Code §11364.7, subdivision (a).

Appearances on appeal include appellant Son Cha Chung, appearing through her counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated December 7, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 7, 1997. Thereafter, the Department instituted a two-count accusation against appellant charging that, on February 17, 2000, appellant's clerk, Poon Chang, sold drug paraphernalia to Department investigator Gerardo Sanchez (count 1) and that appellant possessed drug paraphernalia with intent to deliver or furnish it to Sanchez (count 2).

An administrative hearing was held on October 3, 2000, at which time documentary evidence was received and testimony was presented by Sanchez and by Chang.

Sanchez testified that, after entering the premises, he asked Chang, "Do you have any pipes?" to which Chang replied, "Yeah, pretty much." Sanchez then told Chang that he had just gotten some crack cocaine and he needed a pipe to smoke it. [RT 12.] Chang said "Yeah, I have pipes, the ones with the flower inside." [RT 15.] Going behind the counter, Chang bent down and retrieved from beneath the counter a small glass cylinder, corked at both ends, with a small rose inside. [RT 13-14.] Sanchez asked Chang if that was a pipe, and Chang said it was a pipe. Sanchez then asked, "Are you sure I can smoke crack cocaine with this?" and Chang said "Yeah, it's a pipe." [RT 15.] Chang then removed one of the corks from the tube and tilted the tube, showing Sanchez how to remove the rose. [RT 17-18.] Sanchez testified that, based on his experience and training, he recognized the glass tube as an item that was commonly used to smoke crack or rock cocaine. [RT 14.]

Subsequent to the hearing, the Department issued its decision which sustained the charge of count 1 (the sale of drug paraphernalia by Chang), but dismissed count 2 (appellant's possession of drug paraphernalia with intent to deliver).

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) the ALJ did not apply the correct standard for determining the seller's intent, and (2) there is not substantial evidence to support the finding of a violation of Health and Safety Code §11364.7, subdivision (a). These two issues are related and will be discussed together.

DISCUSSION

Appellant contends the Administrative Law Judge (ALJ) did not use the proper legal standard in evaluating whether a violation had occurred. Appellant argues that the ALJ erred because he did not require evidence of a pre-existing intent on Chang's part to sell or market the item as drug paraphernalia, but merely examined whether Chang knew or reasonably should have known that the item would be used with a controlled substance. Even if the ALJ had used the correct standard, appellant argues, substantial evidence does not support a finding that Health and Safety Code §11364.7, subdivision (a), was violated.

Health and Safety Code §11364.7, subdivision (a), makes it a misdemeanor for anyone to deliver, or possess or manufacture with intent to deliver, drug paraphernalia, "knowing, or under circumstances where one reasonably should know, that it will be used to . . . ingest, inhale, or otherwise introduce into the human body a controlled substance . . . ." Subdivision (d) states that violation of any of the preceding subdivisions of §11364.7 constitutes grounds to revoke any business or liquor license.

Health and Safety Code §11014.5, subdivision (a), defines "drug paraphernalia" as items "designed for use or marketed for use, in . . . ingesting, inhaling, or otherwise introducing into the human body a controlled substance . . . ." "Designed for use" in this

context "encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, i.e., features designed by the manufacturer." (Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982) 455 U.S. 489, 501-502 [102 S.Ct. 1186, 1195].) "Marketed for use" is defined in §11014.5, subdivision (b), as "advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or materials with controlled substances."

In Jitlada & Sirivat, Inc. (April 2001) AB-7616, this Board explained its understanding, based on People v. Nelson (1985) 171 Cal.App.3d Supp. 1 [218 Cal.Rptr. 279], of "the two-tier scienter requirement" of Health and Safety Code §11364.7, subdivision (a):

> "Whether an item is 'marketed for use' as drug paraphernalia is determined 'solely from the viewpoint of the person in control of the item, i.e., the . . . seller, without reference to a third person's state of mind.' (People v. Nelson (1985) 171 Cal.App.3d Supp. 1, 11 [218 Cal.Rptr. 279].) If that pre-existing intent is shown on the part of the seller, then a violation of Health and Safety Code §11364.7, subdivision (a), occurs when he or she sells the item 'knowing, or under circumstances where one reasonably should known, that it will be used' with a controlled substance."

The ALJ determined that the evidence showed the glass tubes were drug paraphernalia, since they were "designed for use" with a controlled substance. (Det. of Issues II.) He also determined that, for a violation of Health and Safety Code §11364.7, the clerk must have known, or under the circumstances, should have known, that the item he sold to Sanchez would be used to ingest a controlled substance. (Det. of Issues III.)

In Determination VI., the ALJ stated:

> "A. The only factual issue in dispute in this case is whether [appellant's] clerk knew, or under the circumstances reasonably should have known, that the glass vial which he sold to the investigator will be used 'to introduce into the human body a controlled substance.' Resolution of this issue depends on determining whether the clerk knew, or under the circumstances should have know, the word 'cocaine' when the investigator used it.
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> "B. The evidence shows that the clerk knew. As Department counsel noted, when the investigator asked for 'pipes' in the context of smoking crack cocaine, the clerk did not give the investigator a six-inch lead pipe. The clerk also did not bring out the kind of pipe traditionally used for the smoking of tobacco, or, in the alternative, say that the store did not carry pipes. Instead, the clerk handed the investigator a glass vial with a rose in it. Since such a vial may be used as a pipe with which to smoke crack cocaine, the clerk's response to the investigator, and his showing the investigator how to remove the rose, are evidence that the clerk knew the investigator wanted something with which to smoke crack cocaine. The clerk's testimony that he did not show the investigator how to remove the rose is found to be not credible."

Two elements must be established for a violation of Health and Safety Code §11364.7, subdivision (a): a person must have 1) delivered "drug paraphernalia" [as defined in Health and Safety Code §11014.5, subdivision (a)] 2) "knowing, or under circumstances where one reasonably should know, that it will be used to . . . ingest, inhale, or otherwise introduce into the human body a controlled substance . . . ."

The ALJ did not specifically find that Chang had a pre-existing intent to sell the glass tube for use with cocaine, that is, that the tube was "marketed for use" with a controlled substance. Instead, the ALJ applied the alternative basis for establishing that an item is drug paraphernalia, determining that the item was "designed for use" with a controlled substance. (Det. of Issues II.) Under Health and Safety Code §11014.5, subdivision (a), either situation establishes that an item is drug paraphernalia. At that point, the only inquiry necessary under Health and Safety Code

§11364.7, subdivision (a), was whether Chang knew that Sanchez would use the tube with a controlled substance.

Appellant has not challenged the ALJ's determination that the tube was "designed for use" with controlled substances. Nor has he challenged the determination that Chang knew Sanchez intended to use the tube for ingesting a controlled substance. Therefore, the requirements of Health and Safety Code §11364.7, subdivision (a), appear to have been satisfied.

Appellant asserts that the evidence does not show that Chang had a pre-existing intent to sell the glass tube as drug paraphernalia, that is, that he "marketed" the item for use with a controlled substance. The ALJ did not believe he had to make such a finding because he determined that it was "designed for use" with a controlled substance. However, although the ALJ did not explicitly determine that Chang had a pre-existing intent to sell the item for use with a controlled substance, Determination VI-B makes it clear that, not only did Chang understand the investigator's use of the word "cocaine," he already knew what the glass tube was for and intended to sell the tube for use with cocaine:

> "As Department counsel noted, when the investigator asked for 'pipes' in the context of smoking crack cocaine, the clerk did not give the investigator a six-inch lead pipe. The clerk also did not bring out the kind of pipe traditionally used for the smoking of tobacco, or, in the alternative, say that the store did not carry pipes. Instead, the clerk handed the investigator a glass vial with a rose in it. Since such a vial may be used as a pipe with which to smoke crack cocaine, the clerk's response to the investigator, and his showing the investigator how to remove the rose, are evidence that the clerk knew the investigator wanted something with which to smoke crack cocaine."

The ALJ did not add at the end of the last sentence quoted, "and that the clerk had the pre-existing intent to sell the vial for use with crack cocaine," but that conclusion is implicit

from his analysis. He did not need to use "magic words" to establish that the clerk had a pre-existing intent to sell drug paraphernalia.

The evidence discussed in Determination VI-B is similar to the evidence that this Board has consistently found to be indicative of a pre-existing intent to sell an item for use with a controlled substance. The Board has said in such cases that "This is not a case where the seller's intent was unknown; it is, instead, a case where the seller already intended that the object be sold for drug use." (Zakher (12/2/99) AB-7211; see also, Jitlada & Sirivat, Inc., supra; Chima (10/31/00) AB-7491; Hinnant (10/18/99) AB-7101.)

Appellant also argues that it cannot be determined if Chang had a pre-existing intent because Sanchez initially asked for a pipe, without specifying what kind, and Chang answered affirmatively. Thereafter, Sanchez specified that he needed something with which to smoke cocaine, and Chang produced the glass tube. Appellant states "Once the product was identified without conversation pertaining to its potential illicit use, Sanchez was left with the nearly impossible task of resurrecting the investigation in order to ascertain and demonstrate pre-existing intent." Appellant's argument is premised on the assumption that a "pipe" would be normally understood to mean one of the small glass tubes that were hidden under the counter. This argument verges on the frivolous or even the absurd. In the normal course of ordinary commerce in ordinary daily life, a request for a pipe would produce either a conventional tobacco pipe or a piece of metal or PVC piping used for plumbing. It would only be in the context of marketing drug paraphernalia that a non-specific request for a pipe could be interpreted as a request for a small glass cylinder. If Chang did indeed assume that Sanchez wanted a small glass

tube when Sanchez asked for a "pipe," that would only serve to reinforce the conclusion that Chang had the pre-existing intent to sell the item for use with a controlled substance.

In any case, the facts do not support appellant's argument. Although Sanchez initially asked simply for a pipe, Chang did not produce the glass tube from beneath the counter until *after* Sanchez had specified that he needed a pipe for smoking cocaine. Chang readily obliged him, since he knew the glass tubes were cocaine pipes and he intended to sell them as such.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]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.