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

AB-7839
File: 47-29255 Reg: 99047373

SANTOS B. VILLALBA, JR., dba Blockers Bar
1246 E. Santa Clara Street, San Jose, CA 95116,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: July 11, 2002

ISSUED JANUARY 15, 2003

Santos B. Villalba, Jr., doing business as Blockers Bar (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 20 days, with 5 days thereof conditionally stayed for one year for appellant's employee selling or furnishing an alcoholic beverage to an obviously intoxicated person, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, section 22, arising from a violation of Business and Professions Code section 25602, subdivision (a).

Appearances on appeal include appellant Santos B. Villalba, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

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[1]The decision of the Department, dated May 24, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on May 17, 1978. Thereafter, the Department instituted a two-count accusation against appellant charging that, on July 9, 1999, one of appellant's bartenders sold or furnished beer to Refugio Lopez, who was obviously intoxicated (count 1), and another bartender sold beer to Jesus Garcia, who was obviously intoxicated (count 2), both counts being violations of Business and Professions Code section 25602, subdivision (a).

An administrative hearing was held on December 27, 2000, and March 6, 2001, at which time documentary evidence was received and testimony concerning the charges of the accusation was presented. Two surveillance videotapes made on the night in question were entered into evidence as Exhibits A and B.

San Jose police officer Pedro Urrutia entered appellant's premises at about 11:30 p.m. on July 9, 1999, with fellow officer Joseph Stewart. They were working undercover at the premises in response to reports of "various nuisance-type crimes: Public fighting, public urination, intoxicated people." [RT 22.][2] Upon entering, the officers took seats at a table near the bar counter. [RT 23.] After a few minutes, Stewart left the table and went to another part of the premises. [RT 24.]

Shortly after entering the premises, Urrutia noticed a patron, later identified as Refugio Lopez, sitting slumped over at the bar counter almost directly in front of Urrutia, about eight feet away from him. Urrutia noticed that Lopez's eyelids were droopy, his eyes watery and bloodshot, and his movements slow and deliberate. [RT 24-26.] When Urrutia went up to the bar counter and took a seat next to Lopez, he noted that

[2]The transcript of the hearing on December 27, 2000, is designated in this decision as "RT," while that for the hearing on March 6, 2001, is designated "2RT."

Lopez had a strong odor of alcoholic beverage on his breath, and his speech was extremely slurred, making it difficult for Urrutia to understand what Lopez was saying.[3] [RT 26.] When Lopez got up and walked to the patio, Urrutia saw him bumping into people and nearly falling down. [RT 27.] Once or twice while seated at the bar, Lopez put his head down on the counter, and Urrutia thought Lopez had either fallen asleep or passed out. Another patron came over and roused Lopez. [RT 27.]

During the time Urrutia was observing Lopez, he saw the bartender conversing with Lopez several times. [RT 27.] After he had observed Lopez for 20 to 30 minutes, Urrutia saw Lopez take out a one dollar bill, and speak to the bartender. The bartender just waved her hand and walked away from Lopez, leading Urrutia to believe that Lopez had run out of money and the bartender had refused to take his order for another drink. [RT 28.] Urrutia had, by that time formed the opinion that Lopez was obviously intoxicated. [RT 28-29.]

Seated next to Lopez at the bar, Urrutia "spoke to [the bartender] and made it clear to her that I was buying a drink for Mr. Lopez, and she took the order." [RT 28.] The bartender came back to where Urrutia and Lopez were seated, carrying two drinks. Urrutia "motioned to her that one drink was for Mr. Lopez, and she placed the drink in front of him." [RT 29, 207.]

After the undercover operation, Urrutia prepared a report about the incident, but he did not include the fact that he purchased an alcoholic beverage for Lopez. [RT 80-81.] He testified that he intentionally did not include that fact in his report because he

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[3]Urrutia is certified as Spanish/English bilingual. [RT 26.] It appears that he spoke to Lopez and to the bartender in Spanish [RT 59] and that Lopez spoke in Spanish [RT 74], although that was not definitely established.

thought it would hamper the Department proceeding against appellant [RT 80-83]. He consulted with Lydia Engdol [RT 33], the local district administrator for the Department, who, he said, told him there was no problem with his purchase of the alcoholic beverage for Lopez, and that he should simply write a supplemental report stating those facts. [RT 41.] Urrutia testified that he wrote the supplemental report the week after the undercover operation, sometime around the middle of July 1999 [RT 48-50]. However, the supplemental report was not received by the Department's San Jose District Office before some time in October 1999 [RT 9,10].

Urrutia initially testified that he recalled having one beer and one shot of tequila at appellant's premises [RT 70]. After viewing Exhibit B, a videotape of the bar area during the time he was at the bar counter with Lopez, Urrutia stated he ordered five beers and a shot of tequila [RT 192-193]. He said only three of the beers he ordered were for himself and he drank only part of each one, effectively consuming about two beers, as well as the shot of tequila, during the 50-60 minutes he was in the premises [RT 193-194, 197-198].

Subsequent to the hearing, the Department issued its decision which determined that as to count 1, the violation occurred as charged in the accusation and no defense was established, and count 2 was dismissed.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the officer's conduct was improper and his testimony was unreliable and untruthful; (2) the "usual" tests for intoxication were not administered to Lopez; and (3) it was prejudicial for the Department to refer to the premises as a bar rather than a restaurant.

DISCUSSION

I

Appellant contends the decision should be reversed because the only alcoholic beverage served to Lopez after Urrutia had determined that Lopez was obviously intoxicated was purchased for Lopez by Urrutia and Urrutia intentionally omitted this fact from his initial report because he thought it would hamper the disciplinary administrative proceeding against appellant [RT 80-83]. In addition, appellant asserts, Urrutia's testimony was unreliable and untruthful.

The ALJ concluded that Urrutia did nothing more than offer the bartender the opportunity to furnish an alcoholic beverage to the obviously intoxicated Lopez, and that the defense of entrapment was, therefore, not established. Appellant contends that Urrutia's purchase of the beer for Lopez, while perhaps not entrapment, is misconduct that requires reversal of the Department's decision.

We agree that Urrutia's conduct does not fit within the definition of entrapment set by the California Supreme Court in *People v. Barraza* (1979) 23 Cal.3d 675, 689-690 [153 Cal.Rptr. 459]:

> "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." (Fn. omitted.)

We do, however, believe that Urrutia did more than simply "offer the opportunity" for the bartender to violate section 25602, subdivision (a); *he himself* violated that

section by buying the beer for Lopez. Business and Professions Code section 25602, subdivision (a), provides:

> "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor."

It is undeniable that Urrutia furnished, or caused to be furnished, a Corona beer to Lopez, a person whom Urrutia knew to be obviously intoxicated.

This Board has refused before to sanction disciplinary action for violations that occurred only because of the unfair or overreaching conduct of a law enforcement officer, even if there was not technically entrapment. In *Piccone* (1997) AB-6776/6777, the premises had an off-sale beer and wine license and an on-sale public premises licenses, the latter applying to a small tasting area located within the store. An undercover Department investigator attended a wine-tasting event at the premises, and purchased a small, partially-filled glass of wine to taste. He saw the signs posted indicating that drinking was to be confined to a specified area, he heard verbal instructions to the patrons around him, and he was himself told he had to stay in the appropriate area when he tried to use the rear exit. In spite of this, he walked through the off-sale area with his wine glass and left the premises with it.

The appellants in *Piccone* asserted the Department entrapped them. While concluding that the situation did "not readily fit within the traditional bounds of the entrapment defense," this Board saw the "overriding question" to be the determination of where the line is "to be drawn between proper police (or Department) observation of a crime (or license violation) and actual participation in, if not creation of, the wrong-doing." The Board reversed the decision of the Department because it viewed the "overeager" investigator's conduct as exceeding the bounds of proper law enforcement.

The Board's decision in *Piccone* was based on its analysis of the law of entrapment and its corollary, the defense of outrageous police conduct. The Board observed:

> "In explaining the evolution of the entrapment defense, the court in Barraza described 'a developing awareness that "entrapment is a facet of a broader problem,"' citing examples of what it termed 'lawless law enforcement.' In the court's view, the examples spring from common motivations, each a substitute for skillful and scientific investigation, and each condoned by the 'sinister sophism' that the end justifies the means. (People v. Barraza, supra, 23 Cal.3d at 689.) Quoting an observation of Chief Justice Warren in Sherman v. United States (1958) 356 U.S. 369, 372, the court stated that 'the function of law enforcement manifestly "does not include the manufacturing of crime."'
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> "As Witkin has observed in his criminal law treatise, the defense of entrapment rests on broad grounds of good morals and public policy. (1 Witkin & Epstein, California Criminal Law, 2d ed., §260.) Those broad grounds of good morals are especially important here, where it is the Department, whose primary function is to protect the public welfare and morals of the people of California, that is, through its investigative agent, the motivating force in the creation of the violation for which it now seeks to discipline the licensee."

Several California cases have discussed "outrageous police conduct" and cited with approval the "four factor test" of *People v. Isaacson* (1978) 44 N.R.2d 511 [406 N.Y.S.2d 714, 378 N.E.2d 78] (*Isaacson*), although none of the courts found the standard met by the facts they had before them. (See e.g., *People v. Wesley* (1990) 224 Cal.App.3d 1130, 1142-1143 [274 Cal.Rptr. 326]; *People v. Harris* (1985) 165 Cal.App.3d 324, 331 [211 Cal.Rptr. 493]; *People v. Peppars* (1983) 140 Cal.App.3d 677, 686 [189 Cal.Rptr. 879] .) The court in *People v. Harris*, *supra*, 165 Cal.App.3d at p. 331 described the defense as "somewhat similar to the defense of entrapment, because it focuses on the legality and propriety of police conduct but it is much broader in scope and is based on considerations of due process."

Isaacson, *supra*, 378 N.E.2d at p. 83, listed four factors as illustrative of considerations pertinent to determining whether a due process violation has occurred:

> (1) whether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity [citations]; (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice [citations]; (3) whether the defendant's reluctance to commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation in the face of unwillingness [citation]; and (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace.

The court advised that none of the factors listed was, by itself, determinative, but that they should be considered along with all other aspects of the case, "and in the context of proper law enforcement objectives . . . ." (*Ibid*.)

In the present appeal, we have an "overeager" officer, who apparently could not wait to see if the obviously intoxicated Lopez would be served, so he bought him a beer. This is a violation that may have never happened, had not Urrutia intervened. Additionally, in doing so, Urrutia himself violated the statute. The first two factors in *Isaacson* are clearly present, and we find no evidence that Urrutia's conduct was designed to do anything other than to obtain an arrest. While the purpose of the police bar visits may have been to "protect the public" in a general sense, the creation of this violation by Urrutia does not further that goal, but puts into question the interest of the police in protecting the rights of the people they serve.

After creating the violation, Urrutia consciously chose to omit that fact from his report. At some point he had doubts about the propriety of his furnishing the beer and the omission of that fact from his report. He consulted with the Department's district administrator, who saw no problem with Urrutia's conduct and merely advised that he should prepare a supplemental report. After the supplemental report was prepared, it was not provided to appellant as part of discovery, but appellant's attorney learned of it

about a week before the administrative hearing. He was told he could go to the district office to see the supplemental report, but that he could not have a copy of it. Department counsel, after a request by the ALJ, finally provided appellant's counsel with a copy of the supplemental report during the administrative hearing. We perceive in all this an institutional failure on the part of the Department to recognize the line between fairness and unfairness. What Urrutia did may not have been entrapment, but it was clearly lacking "'that fundamental fairness essential to the very concept of justice'" (*Isaacson*, *supra*, 378 N.E.2d at p. 83, quoting *People v. Leyra*, 302 NY 353, 364) We cannot affirm discipline by the Department in such a case.

II

Appellant contends the decision should be reversed because Urrutia's testimony was unreliable, the "usual" tests for intoxication were not administered to Lopez, and it was prejudicial for the Department to refer to the premises as a bar rather than a restaurant. Because our decision regarding Urrutia's conduct requires that this matter be reversed, we need not discuss these issues in order to resolve this appeal.

We will say, however, that we found the testimony of Urrutia unreliable. He changed his testimony regarding the number of drinks he had and recanted his testimony that he did not offer any of the 10 or more toasts made between himself and Lopez. His omission of his questionable conduct from his original report, and his sometimes vague answers to questions regarding the supplemental report also seriously undermine his credibility. While this Board will ordinarily defer to the trier-of-fact's credibility determination, were we called upon to decide this, we would have to say that we find the ALJ's credibility determination unreasonable.

With regard to the lack of standard tests for intoxication, we have said in numerous cases that such tests are not necessary in determining whether an individual is "obviously intoxicated": "nothing more [is] required than the most rudimentary, commonplace experience and the willingness to see what [is] plainly in front of one." (*Marafrando, Inc.* (2002) AB-7853.)

No prejudice was shown to have existed because the premises was referred to as "Blockers Bar." This was the name on the license and no evidence was introduced that this was not the name of the premises.

ORDER

The decision of the Department is reversed.[4]

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

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[4]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.