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

AB-7886
File: 20-347840 Reg: 00049902

SAEED KOHANOFF dba Union 76 Mini Market
16111 Valley Boulevard, Fontana, CA 92335,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 4, 2002
Los Angeles, CA

ISSUED AUGUST 14, 2002

Saeed Kohanoff, doing business as Union 76 Mini Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license, with revocation stayed for 2 years on the conditions that no cause for disciplinary action occur during the probationary period and that a suspension of 20 days be served, 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 Business and Professions Code §24200, subdivision (a), in conjunction with Health and Safety Code §11364.7, subdivision (a).

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[1]The decision of the Department, dated September 13, 2001, is set forth in the appendix.

Appearances on appeal include appellant Saeed Kohanoff, appearing through his counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on February 25, 1999. Thereafter, the Department instituted an accusation against appellant charging that, on September 16, 2000, appellant's clerk, Deepak Bawa, sold a crack pipe, an item of drug paraphernalia, to Department investigator Eric Hirata.

An administrative hearing was held on June 14, 2001, at which time documentary evidence was received and testimony concerning the transaction was presented by investigator Hirata and by Bawa, the clerk.

Hirata's testimony at the hearing was that he asked Bawa, "Do you sell any crack pipes?", to which Bawa replied, "You mean this?", and removed a glass tube with a rose in it from a display on the counter. Hirata then asked, "How do I smoke my cocaine with a flower inside?", and Bawa responded, "It comes out." When asked if he sold filters, Bawa said "No." Hirata asked, "Do a lot of people use this as a cocaine pipe?" and Bawa said, "Yeah, that's why they use it. Otherwise, they don't use it." [RT 13-14.] Hirata then purchased the glass tube and a disposable lighter and left the store.

Hirata re-entered the store with his partners and informed Bawa of the violation. Bawa stated he knew cocaine was illegal, but he did not know about the laws prohibiting sales of drug paraphernalia. [RT 15.] Another employee at the premises, Chablis LaKemp, told Hirata that she had told Bawa the glass tubes were crack pipes, based on her previous experience working at another store. [RT 16.]

Hirata did not recall whether tobacco products were sold in the premises, but

Bawa testified that the store sold cigarettes. [RT 38.] Bawa denied that Hirata had asked him for a crack pipe, saying that Hirata picked up the glass tube himself from the counter display, and asked only, "People buy it?" [RT 34-36, 38.] Bawa also denied knowing at that time that the glass tube could be used as drug paraphernalia, believing instead that it was simply a gift item. [RT 36, 37.] He did not remember LaKemp telling him that the glass tubes could be used as drug paraphernalia. [RT 36-37.]

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

Appellant thereafter filed a timely notice of appeal in which he raises the following issues: (1) the decision is not supported by the findings and the findings are not supported by substantial evidence, and (2) the penalty imposed constitutes cruel and unusual punishment.

DISCUSSION

I

Appellant contends that the Department failed to establish the necessary elements of the violation charged, in that there is no substantial evidence establishing that the small glass tube containing an artificial rose is an item of drug paraphernalia.

Appellant argues that the Department did not present expert testimony regarding the use of this glass tube as drug paraphernalia, that no one in control of the premises or the object admitted that the tube could be used as drug paraphernalia, and no descriptive materials, instructions, advertising, or manner of displaying the tubes indicating that the item could be used as drug paraphernalia.

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 . . . ." Subdivision (b) states:

> "For the purposes of this section, the phrase 'marketed for use' means 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."

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 occurs when he or she sells the item "knowing, or under circumstances where one reasonably should know, that it will be used" with a controlled substance.

This Board addressed these issues in a very similar case, Jitlada & Sirivat, Inc. (2001) AB-7616, and what the Board said there is equally applicable in the present matter:

> "This case presents an issue which the Board has considered in earlier cases, and that is whether the item in question, one which may have both legitimate uses and illegitimate uses, was marketed as narcotics paraphernalia. Two of those earlier cases (Mbarkeh (1998) AB-6882 and Harper (1998) AB-6984)) concluded that the charged violation could not be sustained in the absence of proof of a pre-existing intent to market the item or items in question for narcotics usage, despite knowledge of the buyer's intended use. Those cases, in turn, followed the holding to that effect in People v. Nelson, supra.

> "The Board affirmed the decisions of the Department in other appeals in which drug paraphernalia violations were charged. In all these cases, the officer or investigator involved asked for something with which to smoke rock cocaine and was provided with, or directed to, the same type of glass tubes containing flowers as are involved in the present appeal. In Hinnant (10/18/99) AB-7101 and Zakher (12/21/99) AB-7211, the clerks got the glass tubes from behind or under the counter in response to requests for crack pipes. In Chang (1/21/98) AB-6830, the clerk first pointed to a display of tobacco pipes, but when the officer said that wasn't what he wanted, the clerk pointed to a display of the glass tubes on the counter and said 'This one over here.' The clerk in Southland, Assefa, and Woldermariam (11/3/99) AB-7176, not only pointed to the glass tubes, but took one out and demonstrated how it was used to smoke crack.
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> "In each of these cases the Board found that the clerk showed his already existing intent to sell the tubes for use with a controlled substance by his unprompted response to a request for something with which to smoke rock cocaine. In addition, the request of the officer clearly showed that it was at least highly likely that the buyer of the item would use it to 'ingest, inhale, or otherwise introduce into the human body a controlled substance.'"

The present appeal is essentially indistinguishable from the four appeals noted in Jitlada & Sirivat, Inc., supra, where the Board affirmed the Department's decisions. As in those cases, the evidence shows that the clerk offered the glass tube to the investigator in response to the investigator's request for a crack pipe without any prompting or suggestion from the investigator that he wanted that specific item. This is a case where the seller indicated by his response that he already intended to sell the object for drug use. This brings the glass tube within the Health and Safety Code §11014.5 definition of drug paraphernalia, and the clerk sold it under circumstances where one reasonably should know that it would be used with a controlled substance, in violation of Health and Safety Code §11364.7.

Appellant's arguments in his brief all depend upon accepting the testimony of the clerk as to what happened. The ALJ, however, specifically found the clerk's testimony to be not credible. 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].) Nothing has been presented that would cause this Board to question the ALJ's finding in this instance.

II

Appellant contends the penalty constitutes cruel and unusual punishment.

Again, this Board has addressed this issue previously in the appeal of Chhina (2000) AB-7502, a case involving the sale of drug paraphernalia in which the penalty was the same as that imposed in the present matter. What the Board said in that case applies equally well here:

> "Appellant contends the penalty constitutes cruel and unusual punishment. However, the constitutional provisions cited by appellant apply to criminal, not administrative, proceedings. As explained in Yapp v. State Bar (1965) 62 Cal.2d 809 [44 Cal.Rptr. 593, 597], the purpose of a criminal proceeding is to punish a wrongdoer, while a disciplinary proceeding is for the protection of the public.
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> "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].) Health and Safety Code §11364.7, subdivision (d), provides:
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> > 'The violation, or the causing or the permitting of a violation, of subdivision (a), (b), or (c) by a holder of a business or liquor license issued by a city, county, or city and county, or by the State of California, and in the course of the licensee's business shall be grounds for the revocation of the license.'
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> "The Department decision determined that appellant had permitted the violation of Health and Safety Code §11364.7, subdivision (a). Under the circumstances, we do not find the 20-day suspension with a stayed revocation at all shocking or even suggestive of an abuse of discretion."

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.