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

AB-7899
File: 48-362045 Reg: 00050060

JOEL SETH CORENMAN and JASON M. MONTELLO dba Le Cannon
21797 Ventura Blvd., Woodland Hills, CA 91364,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: November 14, 2002
Los Angeles, CA

ISSUED FEBRUARY 4, 2003

Joel Seth Corenman and Jason M. Montello, doing business as Le Cannon (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 20 days for furnishing an alcoholic beverage to a patron exhibiting obvious signs of intoxication, arising from a violation of Business and Professions Code section 25602, subdivision (a).

Appearances on appeal include appellants Joel Seth Corenman and Jason M. Montello, appearing through their counsel, Robert D. Coppola, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on February 22, 2000. Thereafter, the Department instituted an accusation against appellants charging one instance of intoxication of a co-licensee, and three instances on one date of

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[1]The decision of the Department, dated October 4, 2001, is set forth in the appendix.

furnishing of alcoholic beverages to patrons exhibiting obvious signs of intoxication.

An administrative hearing was held on July 20, 2001, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that only count 2, one of the furnishing of alcoholic beverage charges, was true and dismissed the other three counts.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) there is insufficient evidence that the patron if intoxicated was sufficiently observed by the bartender (2) the furnishing of the drink to the patron was for the use of another patron, and (3) there was a defective chain of custody of the drink seized by the law enforcement officer.

DISCUSSION

In the review of this matter, there are basic premises upon which we focus our review.

The Department is authorized by the California Constitution to exercise its discretion whether to suspend or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the continuance of such license would be contrary to public welfare or morals. The Department's exercise of discretion "is not absolute but must be exercised in accordance with the law, and the provision that it may revoke ... [or suspend] a license 'for good cause' necessarily implies that its decisions should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to welfare and morals." (Martin v. Alcoholic Beverage Control Appeals Board (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513] quoting from Weiss v. State Board of Equalization (1953) 40 Cal.2d 772, 775).

Contrary thereto, the scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's

decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

"Substantial evidence" is defined as relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corporation v. National Labor Relations Board* (1951) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales USA, Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are essentially attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

I

Appellants contend there is insufficient evidence that the patron, if intoxicated, was observed by the bartender. Before considering the issue of adequate observable

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[2]The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

time, we will insure that the intoxication charge was shown true by substantial evidence.

The bartender testified that Eric Hennings (the patron), a usual customer, arrived at the premises about 8 p.m. He was served a strawberry margarita and a daiquiri between 11 p.m. and 12 midnight. Beer was also served to the patron. The bartender stated the margarita and daiquiri were for friends sitting with the patron, even though ordered by and served to the patron. The bartender testified he did not see any symptoms of intoxication on the part of the patron that evening [RT 197-199, 207-208].

The patron testified he ordered two shots and two beers for himself that evening, and ordered a daiquiri and a strawberry daiquiri for his friend [RT 161-163].

Officer Nakamura testified that he observed the patron exhibiting many symptoms of intoxication [RT 71-73, 75-80, 82-83].[3] The police officer's testimony, his being a percipient witness to the signs of intoxication shown by the patron, was sufficient to meet the requirements of case law, if believed. (Jones v. Toyota Motor, Co., supra; In re William G. (1980) 107 Cal.App.3d 210 [165 Cal.Rptr. 587]; and People v. Murrietta (1967) 251 Cal.App.2d 1002 [60 Cal.Rptr. 56].) Appellants appear to accept the testimony that the patron showed signs of being intoxicated by stating "Although Officer Nakamura's testimony appears to be testimony of substantial symptoms of intoxication, observable by Officer Nakamura, and according to the Department's presumption, by [the bartender] MONTELLO (sic), the

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[3]The observations of the officer appear to come within the descriptions of intoxication as set forth in *People v. Johnson* (1947) 81 Cal.App.2d Supp. 973 [185 P.2d 105] and *Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611].

testimony does not substantiate that MONTELLO knew that [the patron] was obviously intoxicated" [App. Brief, p 9].

It appears to this Board that appellants do not contest the fact that if the testimony of the officer is believed as to the appearance of intoxication, the issue is one of opportunity of the bartender to observe.

The law demands that a licensee (herein the bartender/co-licensee) use substantial efforts in maintaining a lawfully-conducted business (*Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446, 450].

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].)

The Appeals Board has previously grappled with this problem of a reasonable passage of time in order to correct or act upon known facts: *Alfonso's of La Jolla, Inc.* (1981) AB-4785 (a waitress had from five to ten minutes to observe the youthful appearance of a minor); *Belfield, Inc.* (1981) AB-4912 (a bartender had approximately three to five minutes to observe two patrons walk to the bar with a staggered gait); and *Barry* (1982) AB-4983 (an intoxicated employee was observed for five to ten minutes staggering, stumbling, exhibiting loss of balance and poor coordination, and talking in a thick and slurred manner). In *Machlovitz* (1994) AB-6415, appellant therein argued that "it does not follow that because a person (the bartender) was in a position to see certain activities that, therefore, he saw or should have seen those activities." The Board rejected that argument, concluding that the bartender was in a position to see what the officer saw for a sufficient period of time. The Board concluded by stating that the

bartender failed in his affirmative duty to not serve an alcoholic beverage to a patron showing obvious signs of intoxication.

The officer in the present matter testified that there were no obstructions between the bartender and the patron at his booth [RT 76]. While at the booth, the patron's eyelids would close, then open, along with a swaying manner [RT 124]. Additionally, and even more compelling on the issue of the obviousness of intoxication, the patron went to the bar counter, with the officer standing about a foot from the patron, and with the bartender across from the patron, a distance of about two feet. All the symptoms the officer had described, slurred speech, bloodshot eyes, watery eyes, and head bobbling from side to side, could be easily seen by anyone if observant. The patron ordered a daiquiri from the bartender [RT 77-79]. When the bartender returned with the daiquiri, the patron's head was on the bar counter with eyes closed. The bartender called the patron's name once with no reaction, then a second time, before the patron opened his eyes and took the drink [RT 80-84].

Since there were no obstructions between the bartender and the patron, a reasonable inference is that the bartender could have seen what the officer observed, if believed. If so, the bartender would be charged with that knowledge. (Rice v. lAlcoholic Beverage Control Appeals Board (1981) 118 Cal.App.3d 30 [173 Cal.Rptr. 232]; and People v. Smith (1949) 94 Cal.App.2d 975 [210 Cal.Rptr. 98].) The record shows Administrative Law Judge (ALJ) chose to believe the officer's testimony over that of appellants' witnesses. 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].)

It certainly appears to us that the bartender saw sufficiently what was in front of him - an apparently sleeping patron, sufficient to demand inquiry further before the furnishing.

These circumstances of the actions of the patron at the bar clearly demanded the bartender follow his duty to make sure the patron before him was not intoxicated, a scenario showing a failure by the bartender to run a legally sufficient premises.

We determine that there is substantial evidence as to the signs of intoxication and the bartender had sufficient time to observe that which was clearly visible.

II

Appellants contend the furnishing of the drink to the patron was for the use of another patron and not for the personal use of the patron being served.

Appellant argues that the statute is intended to prohibit intoxicated persons from receiving alcoholic beverages for their own use, and cites *Rice v. Alcoholic Beverage Control Appeals Board, supra,* for the proposition that furnishing an intoxicated person a drink intended for another is outside the scope of the statute.

The statute prohibits furnishing or the causing of such, of alcoholic beverages to an intoxicated person. Such intoxicated person is defined as a person who exhibits some of the many signs of intoxication, in an open and obvious manner.

The facts of this matter show that the bartender did furnished the obviously intoxicated patron with an alcoholic beverage. We determine that that was sufficient to come within the terms of the statute.

III

Appellant contends there was a defective chain of custody of the drink seized by the law enforcement officer.

While the chain of custody of the drinks seized is quite tainted as a proof of anything, and quite speculative, it is irrelevant.

The record shows that the patron ordered and was served a daiquiri drink [RT 79, 152-153, 160-162, 164, 198]. It is common knowledge that such drink is a cocktail, a drink of an alcoholic nature. (See Webster's Third International Dictionary, on pages 570 (defining the word "daiquiri"), and 436 (defining the word "cocktail"), respectively).

Therefore, for purposes of this matter, it was established through testimony of the officer, the bartender, and the patron, the patron was furnished by serving an alcoholic beverage.

ORDER

The decision of the Department is affirmed.[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.