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

AB-7936
File: 48-317762 Reg: 01051674
MILTON M. and YOLANDA E. VELASQUEZ, and FELIX VALENCIA dba Yolanda's
8011 Florin Road, Sacramento, CA 95828,
Appellants/Licensees

and

AB-7937
File: 48-222381 Reg: 01051675
MILTON M. VELASQUEZ and YOLANDA E. VELASQUEZ dba Yolanda's Northgate Club
2224 Northgate Boulevard, Sacramento, CA 95833,
Appellants/Licensees

and

AB-7938
File: 48-273762 Reg: 01051676
MILTON M. VELASQUEZ and YOLANDA E. VELASQUEZ dba Yolanda's 47 Club
3709 47th Avenue, Sacramento, CA 95824,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: October 24, 2002
San Francisco, CA

ISSUED JANUARY 24, 2003

Milton M. Velasquez, Yolanda E. Velasquez, and Felix Valencia,[1] doing business as Yolanda's[2] (appellants), appeal from a decision of the Department of Alcoholic

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[1]The Department's decision states that Felix Valencia, a co-licensee at the Florin Road premises only, made no appearance at the Department's hearing held on December 20, 2001.

[2]The business name of each of the premises is Yolanda's, with additional wording (except the Florin Road premises) for each of the other two premises as shown

Beverage Control[3] which revoked their licenses for co-licensee Milton Velasquez purchasing and receiving property which was represented to him as being stolen, in violation of Penal Code sections 664 and 496, subdivision (a).

Appearances on appeal include appellants Milton Velasquez and Yolanda Velasquez, appearing through their counsel, Patricia Tsubokawa Reeves, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises licenses were issued on June 25, 1996, March 17, 1992, and July 31, 1992, respectively, according to the “AB” numbers set forth in the caption. Thereafter, the Department instituted accusations against appellants charging that co-appellant Milton Velasquez, bought and received property on March 20, March 27, April 4, and April 18, 2001, which property was represented as stolen. The accusation lists 44 cartons of cigarettes and 98 bottles of distilled spirits purchased during the four sales dates at the Yolanda’s 47 Club premises. The accusation also charged that appellants’ employee Karry Hernandez at the Yolanda’s 47 Club premises attempted to purchase and receive property which was represented as stolen.

An administrative hearing was held on December 20, 2001, with the accusations consolidated for hearing. Oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the licenses

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in the caption.

[3]The decision of the Department, dated February 14, 2002, is set forth in the appendix.

should be revoked.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the record does not support revocation of all three licenses, (2) co-appellant Yolanda Velasquez was innocent of the illegal conduct, (3) the Administrative Law Judge (ALJ) misapplied the law, and (4) co-licensee Valencia was not given notice of the pending accusation and proceedings. Contentions 2 and 3 will considered together.

Appellants stipulated to the factual correctness of the allegations in the accusation [RT 15-16]. The four counts of the accusation, are set forth below combined as if one count:

> "On or about [each of four dates], [co-appellant Milton Velasquez], bought or received property, to wit: [a total of 44] cartons of cigarettes and [a total of 98] bottles of distilled spirits, represented as having been stolen in violation of Penal Code Sections 664 and 496(a)."

DISCUSSION

I

Appellants contend the record does not support revocation of all three licenses. Essentially, appellant is contending that the penalty is excessive.

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].)

Appellants argue that there is no evidence that a profit was made from the illegal purchases. Notwithstanding, co-appellant Milton Velasquez testified that he gave away

some spirits, kept some for himself, and sold others to customers. He had bought the spirits at "substantially reduced prices" and realized a profit [RT 42-43]. Profit is not the basis of the crime; the purchasing and receiving of property believed to have been stolen is the foundation for the crime.

Appellants also argue that there is no evidence the cigarettes and spirits were in fact used or sold in any of the premises.[4] We find little merit in this argument, as the crime is the purchase and receipt of property believed to be stolen. However, some of the spirits were found at the Northgate Club (not the premises where the spirits were purchased) in storage cabinets, and behind the bar, some with pour spouts in the bottles [RT 94, 102].

The conclusion by appellants is that there was no crime of moral turpitude proven, an impossibility according to appellants: "This is practically impossible when the criminal sentence was relatively light so that a heavy handed ABC revocation decision appears harsh and unwarranted by comparison ...."

The theory of the Department's course of action is based upon various sections of the State Constitution and statutes. The California Constitution, article XX, section 22, states in part:

> "... the Department shall have the power, in its discretion, to deny, suspend, or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare and morals ...."

That provision of the Constitution is modified somewhat by a preceding provision which states:

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[4]Appellants in their brief state that the Florin Road premises was closed and as of May 2001, the premises had been sold [RT 71, 107].

> "The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with the laws enacted by the Legislature ...."

The bridge between Penal Code sections 664/496, subdivision (a), and the Constitution is constructed by Business and Professions Code section 24200, subdivision (a), which states a license may be suspended or revoked:

> "... when the continuance of a license would be contrary to the public welfare and morals. However, proceedings under this subdivision are not a limitation upon the department's authority to proceed under Section 22 of Article XX of the California Constitution."

In the case of *H. D. Wallace and Associates, Inc.* v. *Department of Alcoholic Beverage Control* (1969) 271 Cal.App.2d 589 [76 Cal.Rptr. 749, 752], the court held:

> "Properly construed, the public welfare and morals clause permits license termination for law violations not involving moral turpitude but having a rational relationship with the operation of the licensed business in a manner consistent with public welfare and morals."

No definition of what constitutes "moral turpitude" has been given by the Legislature. However, the courts have found certain acts involve moral turpitude, such as crimes involving theft, receiving stolen property, extortion, and fraud. (*In re Rothrock* (1944) 25 Cal.2d 588 [154 P.2d 392]; *Re Application of McKelvey* (1927) 82 Cal.App. 426 [255 P. 834]; *Re Application of Stevens* (1922) 59 Cal.App. 251 [210 P. 422]; and *Re Application of Thompson (1918) 37 Cal.App. 344* [174 P. 86].

The court in *Clerici* v. *Department of Motor Vehicles* (1990) 224 Cal.App.3d 1016, 1027-1028 [274 Cal.Rptr. 230], stated that moral turpitude has been defined to embrace:

> "... any crime or misconduct committed without excuse, or any 'dishonest or immoral' act not necessarily a crime. The definition depends on the state of public morals and may vary according to the community or the times, as well as on the degree of public harm produced by the act in question. Its purpose as a

> legislative standard is not punishment, but protection of the public. ... Crimes which reveal a defendant's dishonesty, general 'readiness to do evil,' bad character or moral depravity involve moral turpitude." (Citations omitted.)

The court in *Rice* v. *Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30, 37 [152 Cal.Rptr. 285], stated that "moral turpitude is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain ...."[5]

In *H. D. Wallace & Associates* v. *Department of Alcoholic Beverage Control, supra,* at 76 Cal.Rptr. at 751 and 752:

> "The California decisions reviewing the public welfare or morals disqualification describe two general kinds of misbehavior or breach: first, that which occurs on the licensed premises or affects the business conducted there; second, that which reveals lack of person fitness of the person controlling the license. ... The moral turpitude provision is absolute, permitting license termination for an offense coming within its terms regardless of its effect upon the conduct of the licensed business."

We cannot agree with appellants that the relatively light criminal sentence, for whatever reason, should in some manner impact and soften the Department's power to impose revocation of the license. This regulatory power over licenses is to protect the public welfare and morals – the public itself.

The present matter concerns a licensee who was dishonest in his dealing with other members of society, by trafficking in, to him, stolen goods. The sale of alcoholic beverages, in and of its self, is a traffic fraught with danger to society. The sale of alcoholic beverages and the obvious dangers associated with it, can produce within a civil society, a variety of evils, thus demanding strict adherence to basic honor and honesty. In this co-appellant Milton Velasquez failed. The penalty, we contend, is best

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[5]See also *Ullah* (1994) AB-6414, where the crimes of insurance fraud, grand theft, and perjury were held to be crimes of moral turpitude, and were substantially related to the duties, functions, and qualifications of a licensee.

left to the Department for its discretionary expertise. We find no arbitrary action by the Department in deciding the licenses should be revoked.

II

Appellants contend co-appellant Yolanda Velasquez was innocent of the illegal conduct, and the Administrative Law Judge (ALJ) misapplied the law. Appellants eloquently argue that the equities in this matter should accrue to the innocent spouse, the innocent spouse did not know of the illegal conduct, and Department's Rule 58 (Cal. Code Regs. Tit. 4, §58), allows the innocent spouse to obtain the license free of the revocation.

The case of *Coletti* v. *Board of Equalization* (1949) 94 Cal.App.2d 61 [209 P.2d 984],[6] concerned a partnership, but not by marriage as in the present matter. The court made the following comments at 209 P.2d 986:

> "... There was but a single license,[7] although it stood in the names of the two partners. It cannot be invalid as to one partner and valid as to the other. (¶) Certainly the [Board of Equalization] does not act arbitrarily in revoking a partnership license where one partner has been found guilty of violations of law which call for revocation. There is no force in the argument that one partner in a liquor license cannot be bound by the unauthorized acts of a co-partner which place the license in jeopardy. When two or more persons apply for a partnership license, each of them necessarily assumes responsibility for the acts of the others with relation to the conditions under which the license is held. It is immaterial here that the offense of [one partner] were committed at the Atlantic Boulevard café in which [the innocent partner] had no interest...."

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[6]In considering appellate decisions, it must be remembered the any rule set forth in an appellate decision is based upon the facts in the particular case. The rule from the cited case must be cautiously used within a reasonable context of the factual similarities between that cited case and the matter under a present review. (*Harris v. Capital Growth Investors VIX* (1991) 52 Cal.3d 1142 [278 Cal.Rptr. 614]).

[7]Notwithstanding in the present matter that there were three licenses, the fact remains that the crimes committed at one of the premises, by a partner in the partnership, could affect all three licenses.

As the partnership in the present matter is one of husband and wife, the case of *Rice v. Alcoholic Beverage Control Appeals Board, supra,* 89 Cal.App.3d at 33 - 34 and 39 - 40, has some instruction: there were two premises under revocation, with one license under sole license of the accused partner-husband (where the criminal acts took place), and the other license under partnership with the innocent wife:

> "...The fact that unconditional revocation may appear too harsh a penalty does not entitle a reviewing agency or a court to substitute its own judgment therein... nor does the circumstance of forfeiture of the interest of an otherwise innocent co-licensee sanction a different and less drastic penalty." (Citations omitted.)

The rules of the Department appellants also contend, play an important part in the consideration of the equities and concerns of the innocent spouse. Rule 58 in pertinent part states that a business held by a husband and wife as community property may have the license held in the names of both spouses or either of them. The terms of the Rule make plain that whether the license is in one name or both, both spouses must be qualified to hold the license. In the case of *Hackwood* (1998) AB-6983, we stated that "Rule 58 is clear in its mandate that 'the unlicensed spouse must have the qualifications required of a holder of a license unless the husband and wife are not living together and have not lived together for at least six months."

The requirements of Rule 58, subdivision ©), say of the unlicensed spouse, not our case herein, that if they are not living together for six months, the unlicensed spouse need not be obligated to be qualified. But the husband and wife in this matter are licensed, so the Rule does not apply. While the innocent spouse in the present matter does not come within the Rule, she did file for dissolution of marriage, and moved away from her husband in September or October 2000, about six months before the first illegal sale date.

The decision of the Department states very bluntly:

> "Respondents Milton and Yolanda Velasquez have been living separately since about September 15, 2000, and Respondent Yolanda Velasquez has filed for divorce ... Respondents Milton and Yolanda Velasquez' attempts to distinguish Rice, supra, cannot succeed. In Rice, supra, the argument about the innocent spouse/co-licensee was rejected, and is rejected here...."

The Department's position is a technical one – the wife was as of the date of the hearing, still married, thus *Rice, supra,* applies. Appellants contend that the wife is innocent, did not know of the crimes, and filed for divorce six months before the first of the criminal acts.

Elzofri and Saif (1996) AB-6601, concerned stolen property as in the present matter. The Board found that there was a partnership – not a husband and wife though. But the Board concluded that the license was indivisible and revocation terminated all partners' interests. The matter was reversed on a non-related issue of due process.

The case of *Ivankovich* (1985) AB-5206/5207, a case also concerning an innocent wife who operated two premises, with the husband not connected with the operation of the premises. The licenses were revoked due to the husband's illegal activities. Apparently, he became un-qualified as a licensee, and therefore under Rule 58, the license was revoked.

The case of *Sanwall* (2000) AB-7423, concerned a husband and wife partnership in a license, which was conditionally revoked to permit transfer. The wife committed a crime. The Board concluded that: "He may well be the 'innocent partner' who suffers because of the other partner's (the wife) wrongdoing." Rule 58 is not applicable.

In the present matter, the facts are somewhat different than the law cases and

Board cases cited. The innocent wife in the present matter filed for divorce and moved away from the husband about six months before the commission of the crimes. She was, after the filing for divorce, not connected with the operation of the premises.

Considering all these factors, it appears co-appellant Yolanda has not supported her plea that the Department should consider her as a sole licensee, in the usual manner fo staying revocation to permit a sale. We do not know what, if anything, co-appellant Yolanda could have presented. But it is her burden to show an alternative is reasonable, where unconditional revocation is not. But when we consider the law with our cases and the facts therein, and the present matter, we are left still, with a license which is indivisible (*Coletti, supra),* and our duty under the law (*Rice, supra)* not to substitute our views for the Department's views, without sufficient in the record to support a deviation from the authorities found. While we acknowledge the authorities are not squarely in point, within the context of this matter's facts, something more is needed, but not found.

While the Department could have ordered a conditional revocation to permit transfer, possibly to co-appellant Yolanda, it did not, and there is insufficient evidence in the record to support a conclusion the decision of the Department was an abuse of discretion to consider this alternative.

III

Appellants contend that co-licensee Valencia (a partner at the Florin Road premises only), was not given notice of the pending accusation and proceedings.

The record shows that one of the licensees (presumably Valencia) at the Florin Road premises was going to be dropped from the partnership, as the premises had been closed and sold as of May 14, 2001 - a period of about two months following the

first illegal purchase [RT 107-108]. The license rights of Valencia were surrendered to the Department on May 30, 2001. This surrender document signed by Valencia was submitted to the Department but apparently not processed due to the pending accusation [RT 6]. That surrender document shows an address of 23 Durazno Court, Sacramento, CA 95833.

An accusation was filed on October 10, 2001, showing the Velasquezes only. Dora Gonzalez, an attorney, was acknowledged as counsel for all three partners by the Department in an acknowledgment dated October 2001.

The present attorney, showing the same address as attorney Dora Gonzalez, filed a Notice of Defense on October 24, 2002, for co-licensee Milton M. Velasquez, only. Filing by one partner for all other partners is a proper procedure according to the Department, as testified to by the present attorney [RT 11].

A Notice of Hearing dated November 8, 2001, was mailed to all three partners at the Florin Road premises and the Durazno Court address (an address where the Velasquezes lived together until September or October 2001 when Yolanda Velasquez moved out, and Milton Velasquez remained - RT 30). That notice was also sent to the present attorney.

The Department's decision dated February 14, 2002, was mailed to all three licensees at the Durazno Court address.

Notice of Appeal by the present attorney was filed on February 28, 2002, showing only Milton M. Velasquez and Yolanda E. Velasquez, as clients. Such notice was also sent to Valencia at a Rancho Adobe address, in Sacramento.

It is presumed that Valencia was notified of the accusation filed against he and his partners as he was shown to be represented by attorney Gonzalez. But the hearing

was held and Valencia did not attend. Notice of the hearing was sent to all three partners at the Florin Road address (the premises was sold as of May 2001, some five months before), and the Durazno Court address. Valencia was also notified of the Department's decision, as well as the notice of appeal filed for the Velasquezes.

Valencia was one of the partners. He had notice of the essential proceedings.

The ALJ's characterization that a default was taken against him is not true [RT 12]. No default can be taken against only one partner, binding all other partners. Essentially, Valencia's partnership interests runs with the other two partners.

Notwithstanding the above, we feel that the two partners to the appeal, cannot raise this issue as essentially, nothing would accrue to them. The Appeals Board has attempted to contact Valencia, with no success.

Considering the sale of the premises where Valencia was a partner, his notification that proceedings were going forward, and the irrelevance of this issue in this appeal, we hold that this is a non-issue even though it reasonably appears Valencia had proper notice of the pending proceedings.

ORDER

The decision of the Department is affirmed.[8]

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

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[8]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.