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

AB-8018
File: 48-15534 Reg: 01052043

6259, Inc., dba Candy Canyon
6259 Topanga Canyon Boulevard, Woodland Hills, CA 91367,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 3, 2003
Los Angeles, CA

ISSUED SEPTEMBER 2, 2003

6259, Inc., doing business as Candy Canyon (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 20 days on each of two counts charging that its bartenders served alcoholic beverages to an obviously intoxicated patron, in violation of Business and Professions Code section 25602, subdivision (a), the suspensions to run concurrently.

Appearances on appeal include appellant 6259, Inc., appearing through its counsel, Robert D. Coppola, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on January 1, 1975. Thereafter, the Department instituted an accusation against appellant charging,

[1]The decision of the Department, dated August 8, 2002, is set forth in the appendix.

in separate counts, that appellant's employees, agents or servants, Petra Partello and Suzette Kolaga, each served an alcoholic beverage to Michael Conlin, an obviously intoxicated patron.

An administrative hearing was held on March 1 and May 16, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles police officers Kathleen Burns, Ben Herskowitz, and Lifernando Garcia in support of the charges of the accusation, and by Steven Sexton and Suzette Kolaga on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which sustained both charges of the accusation and imposed the suspensions from which this timely appeal has been taken.

Appellant raises the following issues: (1) the licensee was entrapped; (2) the decision is not supported by the findings; (3) the findings and decision are not supported by substantial evidence; (4) evidence that may have led to an outcome favorable to appellant was improperly excluded; and (5) Exhibit 1 was improperly admitted into evidence. Issues 2 and 3 will be discussed as a single issue.

DISCUSSION

I

Appellant contends that it was the victim of entrapment, asserting that the police officers actively encouraged the patron to become more intoxicated by drinking with him and dancing with him after he was served with the drink upon which Count 1 of the accusation was based.

The record establishes that both police officers accepted Conlin's offer to buy them a drink even though they had already formed the opinion that he was intoxicated.

The record also establishes that the female officer accepted Conlin's invitation to dance prior to his being served the Coors Lite beer which formed the basis for count 2 of the accusation. The question is whether these actions constitute entrapment or outrageous police conduct.

We believe that, while the conduct of the officers could have been more circumspect, it did not rise to the level of entrapment or outrageous police conduct.

This Board has looked to the teachings of *People v. Barraza (*1979*)* 23 Cal.3d 675 [153 Cal.Rptr. 459] in assessing whether a licensee has been the victim of entrapment. In that case, the court, after a discussion of the leading cases on the subject, held that the test was whether "the conduct of the law enforcement agent was likely to induce a normally law-abiding person to commit the offense." (Id. at pp. 689-690.) Continuing, the court explained:

> 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 subject by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime.

(*Id*. at p. 690.)

Officers Burns and Herskowitz both testified that, after Conlin's offer, bartender Partello poured a single drink into a shot glass for Conlin. Conlin then said "No, I said three shots." [RT19.] Partello then poured two more drinks. Conlin consumed part of his drink. The drink was a "buttery nipple," described by bartender Kolaga as a combination of butterscotch Schnapps and Bailey's Irish Cream. Both Schnapps and Bailey's are alcoholic beverages.

Steven Sexton, appellant's doorman, testified that he heard Officer Herskowitz offer to buy Conlin a drink, and heard Conlin insist that he, Conlin, be the one to buy. Partello did not testify, so there is no evidence she heard the interchange between Officer Herskowitz and Conlin. Officer Herskowitz denied offering to buy a drink.

These are the most salient facts surrounding the service of the drink by Partello, and we see nothing in them that suggests entrapment. At the most, the two officers were seated at the bar and accepted an offer to buy them drinks, an offer made by a patron whom bartender Partello should have known was too intoxicated to be served. Other than their drink order when they first entered the premises, it does not appear that either officer spoke to either bartender until after Conlin had been served the Coors Light beer by bartender Kolaga that was the basis for count 2.

Similarly, there is no evidence that either officer did anything to encourage bartender Kolaga to serve Conlin the Coors Light beer. Kolaga, who testified, did not point to anything either officer did that led her to serve Conlin. She saw the two officers sitting beside Conlin, but did not claim either officer even spoke to her.

At best, the evidence indicates that the two officers simply observed alcoholic beverages being served to an intoxicated patron and did nothing to stop it. Although this might suggest poor judgment on the part of the officers, we do not think it rises to the level of entrapment.

II

Appellant contends that the decision is not supported by the findings, and neither are supported by substantial evidence. Appellant claims that Finding 7 is faulty because it does not refer to any evidentiary basis for its conclusion that Coors Light is an alcoholic beverage, and for stating that bartender Kolaga was in the presence of

Conlin for 15 to 20 minutes; Finding 5 lacks evidentiary support for its reference to Conlin having yelled at the bartender for failing to serve drinks to the officers; and there is no evidence that either bartender observed Conlin's intoxicated behavior.

As long ago as 1991, the Board recognized that Coors Light was beer. (See *Georggin* (1991) AB-6030. The Board has heard many cases since that time where the alcoholic beverage in question was Coors Light beer. It is worth noting that throughout her direct and cross-examination the beverage Kolaga served to Conlin was referred to as "beer," without objection or comment. In addition, appellant's doorman identified the "beer bottle" that was in front of Conlin as Coors Light. There was ample basis for the ALJ to conclude that Conlin was served beer, an alcoholic beverage.

Officer Herskowitz testified that 15 to 20 minutes elapsed between the time bartender Kolaga was behind the counter and the time she served Conlin the Coors Light beer. Herskowitz described a number of symptoms of intoxication that Conlin displayed during the period of time Kolaga was in the bar area. We think his testimony is sufficient to support a finding to the effect that Kolaga was or reasonably should have been on notice of Conlin's condition. One of these instances occurred when Conlin attempted to take his seat at the bar after hugging bartender Partello. Conlin attempted sit on the stool next to where appellant's doorman was seated, and, despite three tries, was unable to do so without the doorman's assistance. Kolaga was 10 feet away, facing Conlin and Sexton. Conlin then staggered past Herskowitz to another area of the bar three to five feet from Herskowitz. Conlin yelled for Kolaga, and, pushing his way through other patrons, swept aside several bottles that were on the bar, some falling behind the counter. Conlin yelled for Kolaga to get him a beer. Herskowitz described Conlin's voice as "loud, slurred, exaggerated." Herskowitz also testified that

Conlin's eyes were bloodshot, another symptom of intoxication that should have been apparent to Kolaga when she came close to him to confirm his order.

Similarly, the observations by officers Herskowitz and Burns regarding the symptoms of intoxication they observed shortly after they entered the bar would have been apparent to bartender Partello if she was reasonably observant. Conlin was yelling loudly, slurring his words, he was moving his arms in an exaggerated way, and his eyes were bloodshot.

The law demands that a licensee use substantial efforts in maintaining a lawfully-conducted business. (*Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 534 [1 Cal.Rptr. 446].) Obviously, this would include a duty not to serve an alcoholic beverage to a person displaying symptoms of intoxication.

The term "obviously" denotes circumstances "easily discovered, plain, and evident" which place upon the seller of an alcoholic beverage the duty to see what is easily visible under the circumstances. (*People v. Johnson* (1947) 81 Cal.App.2d Supp. 973 [185 P.2d 105].) Such signs of intoxication may include bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, slurred speech, unsteady walking, or an unkempt appearance. (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611].)

Much of the evidence was in conflict. The ALJ chose to place more weight on the testimony of the police officers than that of appellant's employees. He was entitled to do so. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.2d 315, 323 [314 P.2d 807]; *Lorimore v. State Personnel Board* (1965) 232

Cal.App.2d 183, 189 [42 Cal.Rptr. 640].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Given the behavior exhibited by Conlin, as described by the police officers, there was substantial evidence in light of the whole record to support the findings of the ALJ.

III

Appellant contends it should have been permitted to inquire whether the two officers had been subjected to discipline for their conduct of drinking with Conlin as well as permitting him to continue to drink even though he may have been becoming a danger to himself and others. Appellant's questions sought to discover whether the officers had violated internal police procedures when they accepted Conlin's offer to buy them drinks. Contrary to appellant's contention, he was permitted to explore the subject.

Appellant asked Lifernando Garcia, a Los Angeles Police Department vice supervisor whether he had taken any disciplinary action against the officers in this case. Garcia said he had not discussed the matter with them because he did not view what they did as wrong.

Appellant was also permitted to inquire whether there was a Los Angeles Police Department policy concerning an officer buying a drink for an obviously intoxicated person. Garcia said an officer would not purchase a drink for someone intoxicated, but could buy a drink for a person who was not intoxicated. Garcia was unaware of any specific policy that made it impermissible for an officer to accept a drink offer from an intoxicated person.

Given the marginal relevance of this area of inquiry, we think the ALJ did not abuse his discretion in limiting appellant's questioning.

IV

Appellant contends that no chain of custody was established for the Coors Light beer bottle introduced in evidence as Exhibit 1. Appellant refers to a police report (which is not in evidence) which stated that the bottle had been seized by Officer Herskowitz, when in fact it had not.

Herskowitz and Garcia both testified that Herskowitz, to protect his cover, signaled to Garcia to seize the bottle. Garcia did so, and later gave the bottle to Herskowitz who logged it into evidence. The ALJ was satisfied that a chain of custody had been established, and we are as well.

Appellant also claims that no foundation had been laid for the admission of the bottle because there was no proof it contained an alcoholic beverage. The ALJ overruled appellant's objection, stating that there is a presumption that the bottle contained what it purports to show on the label.

The objection was properly overruled. *(*See *Mercurio v. Department of Alcoholic Beverage Control* (1956) 144 Cal.App.2d 626, 634 [301 P.2d 474], and *Wright v. Munro* (1956) 144 Cal.App.2d 843, 847 [301 P.2d 997],

ORDER

The decision of the Department is affirmed.[2]

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

[2] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.