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

AB-8128
File: 21-186264 Reg: 02054000

BHINDER SANDHU and BALYOG SANDHU dba Sandhu's Liquor & Grocery
2400 Sacramento Street, Vallejo, CA 94590,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 8, 2004
San Francisco, CA

ISSUED APRIL 22, 2004

Bhinder Sandhu and Balyog Sandhu, doing business as Sandhu's Liquor & Grocery (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for a violation of Health and Safety Code section 11364.7, subdivision (a) in conjunction with Health and Safety Code section 11014.5. The order of revocation was conditionally stayed, subject to discipline-free operation for three years and service of a 25-day suspension.

Appearances on appeal include appellants Bhinder Sandhu and Balyog Sandhu, appearing through their counsel, Osby Davis, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 8, 1986. On

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[1]The decision of the Department, dated March 20, 2003, is set forth in the appendix.

November 12, 2002, the Department instituted an accusation against appellants charging that their agent, servant, or employee Raj Kumar, delivered, furnished, or transferred drug paraphernalia to Department investigator Bautista, in violation of Health and Safety Code section 11014.5

An administrative hearing was held on February 4, 2003, at which time oral and documentary evidence was received. At that hearing, Ricardo Bautista testified on behalf of the Department, and Raj Kumar and Bhinder Sandhu testified on behalf of appellants.[2] Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven.

Appellants thereafter filed a timely appeal in which they contend that the decision is not supported by substantial evidence.

DISCUSSION

“Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are 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].)

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[2] Cheryl Hill, an employee of Genesis House in Vallejo, a drug and treatment program, also testified, explaining what was required in order to be able to use a glass pipe to smoke rock cocaine.

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].) 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].)

This case is much like others which have come before the Appeals Board involving the sale of glass pipes like the item in question. Referred to by investigator Bautista as a "four-inch glass rose pipe," the item is a small glass tube which contains a small artificial rose.[3] Bautista testified that he entered the premises, walked to the counter, and asked the clerk if he had any crack pipes. The clerk responded "Pipes?," and when Bautista said "Yes," the clerk opened a drawer behind the counter and handed Bautista one of the glass rose pipes. Bautista further testified that he asked the clerk "How do I smoke my crack with a rose in it?" The clerk took the pipe and banged it on the counter in an effort to remove the rose. Bautista asked if the clerk had a filter, and was told he did not at that time. Bautista then paid for the glass pipe, left the store,

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[3] The administrative law judge described the item with greater detail: "A short glass tube, about six to eight inches long, containing a small red rose or replica thereof. The glass tube was sealed at one end with a piece of removable aluminum foil."

and returned with additional investigators. Kumar was informed he had violated section 11364.7 of the Health and Safety Code, and the investigators then searched the premises. Additional rose pipes were found underneath the counter and in a drawer behind the counter. The investigators seized a total of 279 glass pipes.

Bautista testified that he received training about items which can be considered drug paraphernalia, and that the glass pipes were one of such items, commonly used to smoke crack cocaine.

Raj Kumar, appellants' clerk, testified that when Bautista came into the store, he said "Give me a glass pipe." Kumar then gave him the pipe in question, which Kumar referred to as a "Love Rose in pipe." Kumar said there were such pipes on the counter, but he took one from the drawer because it was more convenient. Kumar denied that Bautista asked for a crack pipe, claiming he had said "glass pipe." Kumar claimed to know nothing about crack cocaine smoking.

Appellant Bhinder Sandhu testified that, at the time of the sale to Bautista, appellants carried the pipes in their three licensed stores and a 99 Cent store they own. He denied ever having been told that the pipes could be used to smoke crack cocaine.

Health and Safety Code section 11014.5 defines "drug paraphernalia" and establishes criteria for courts to consider when determining what constitutes drug paraphernalia. Section 11364.7 makes it a misdemeanor for anyone to deliver, furnish, transfer, possess, manufacture with intent to deliver, furnish, or transfer drug paraphernalia; provides those who are over 18 years of age and violate these provisions by delivering, furnishing or transferring drug paraphernalia to a minor at least three years their junior may be punished by a fine and/or imprisonment; declares the violation of its provisions cause to revoke any business or liquor license; and provides

that all drug paraphernalia is subject to forfeiture and seizure by a peace officer.

In *People v. Nelson* (1985) 171 Cal.App.3d Supp. 1 [218 Cal.Rptr. 279], the court rejected challenges to the constitutionality of Health and Safety Code sections 11014.5 and 11364.7, subdivision (a), upon grounds of vagueness. The court relied heavily on decisions of federal courts other than the Ninth Circuit, and its reasoning guides us to the result to be reached in this case.

In *People v. Nelson*, *supra*, the defendants were convicted of delivering, furnishing or transferring drug paraphernalia, in violation of section 11364.7, subdivision (a). Defendants operated a store which stocked and sold such novelties as T-shirts and posters, but also had a substantial supply of items which, in the opinion of several experts who testified at trial, were drug paraphernalia as that term is defined in section 11014.5, described by the court as "the companion section to section 11364.7, subdivision (a)." These items included bongs (small water pipes), roach clips (devices for holding burning marijuana cigarettes), coke kits (packages containing items commonly used for preparing and ingesting cocaine), coke spoons (small spoons for inhaling cocaine), as well as items which had legitimate uses such as scales and bulk chemicals but which, in the opinion of the expert witnesses, were stocked by the store for the purpose of weighing and preparing drugs and narcotics. When section 11364.7, subdivision (a), took effect, on January 1, 1983, defendants' employees erected signs declaring that the merchandise they had always sold was now being offered for sale only for legitimate purposes. Thereafter, a policeman entered the store, asked to purchase, and was sold, a bong. His purchase was followed by a series of police seizures of suspected drug paraphernalia, and criminal proceedings ensued.

Defendants based their constitutional challenge to the statutes in question on the

grounds the terms “designed for use” and “marketed for use” are impermissibly vague in that many items are not solely designed to be drug paraphernalia but are dependent upon the ingenuity or purpose of the purchaser. The court construed their arguments to be an attack on the sufficiency of the mens rea or scienter element of section 11364.7, subdivision (a), and in a thorough and well-researched decision rejected those arguments.

The court first focused on the statutory language itself, observing that while section11014.5 contained no overt scienter requirement:

> section 11364.7, subdivision (a), exhibits what appears to be a two-tier or double scienter standard (i.e., “intent” and “knowing or under circumstances where one reasonably should know”).

(*People v. Nelson, supra*, 171 Cal.App.3d Supp. at Supp. 9.)

It then concluded that the “designed for use” and “marketed for use” language in section 11014.5's definition of “drug paraphernalia” reflected the Legislature’s attempt to assign the appropriate scienter to each category of offender within the section’s reach.

> In other words, the “designed for use” phrase pertains to the state of mind of the manufacturer of an item while the “marketed for use” phrase refers to the seller, including the distributor, of the item. The common denominator in both instances is that the requisite state of mind belongs to the person in control of the item at the time the item is manufactured, or delivered, furnished or transferred, etc.”

(Ibid.)

The court rested its reasoning primarily on the United States Supreme Court decision in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489 [102 S.Ct. 1186], which rejected similar challenges to a statute requiring a license to sell items designed or marketed for use with illegal cannabis or drugs. The Court found the phrase “designed for use” unambiguous, since it “at least

[encompassed] an item that is principally used with illegal drugs by virtue of its objective features, *i.e.*, features designed by the manufacturer." (*Hoffman Estates, supra*, 455 U.S. at pp. 501-502, 102 S.Ct. at pp. 1194-1195.) Similarly, the Court found the phrase "marketed for use" "transparently clear":

> [I]t describes a retailer's intentional display and marketing of merchandise. The guidelines refer to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items.[4] ... The standard requires scienter, since a retailer could scarcely "market" items 'for' a particular use without intending that use.

(Hoffman Estates, supra, 455 U.S. at p. 502, 102 S.Ct. at p. 1195.)

Adopting this reasoning, the court in *People v. Nelson* went on to state (171 Cal.App. 3d Supp. at pp. Supp. 10-11):

> We therefore follow the cogent reasoning of the Supreme Court in *Hoffman Estates* and infuse the phrases "designed for use" and 'marketed for use' in section 11014.5 with the requisite element of scienter, which is construed solely from the viewpoint of the person in control of the item, i.e., the manufacturer or seller, without reference to a third person's state of mind.
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> This conclusion is further buttressed by a plain reading of the phrase "marketed for use" in the context of section 11014.5 as a whole. The unambiguous language of subdivision (b) of that section specifically defines that phrase to mean "advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or material with controlled substances." The clear import of this language is to focus only on the intent and actions of the seller. Additionally, subdivision (c) spotlights the owner or anyone in control of the object with regard to two of the seven enumerated factors that may be used to determine whether an object constitutes drug paraphernalia. There is nothing in the language of section 11014.5, however, which would give rise to an inference that the intent of a third person is relevant to the definition of what constitutes drug paraphernalia.
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> On the other hand, turning to the phrase "reasonably should know" in subdivision (a) of section 11364.7, we note that this phrase is already a part of the two-tier scienter component of that subdivision; thus, infusing scienter to

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[4] The guidelines for the determination of what is drug paraphernalia referred to are different from those set forth in section 11014.5, but, we think, the same reasoning applies with respect to the section 11014.5 guidelines.

> clear up any vagueness is inapposite. We also note that this phrase is not further defined, nor is there anything in that section or in a related section which clarifies what that phrase signifies. We therefore must look elsewhere for guidance in this regard.

The court turned to the legislative history preceding the adoption of sections11014.5 and 11364.7, subdivision (a), noting that they were intended to eliminate the use and sale of drug paraphernalia, and were patterned after the Model Drug Paraphernalia Act (the "Model Act") drafted by the Drug Enforcement Administration of the United States Department of Justice.

Nelson quoted with approval the description of the Model Act in *Levas and Levas v. Village of Antioch, Illinois* (7th Cir. 1982) 684 Fed.2d 446, 449:

> an attempt to write a statute that will be broad enough to deal with the problem effectively, yet not so broad that it impinges on constitutionally protected conduct or so vague that neither the law's targets nor its enforcers know what it means. The distinctive features of the Model Act are two: it attempts to give content to the necessarily general definition of drug paraphernalia by listing examples and factors to be considered; and it contains an intent requirement that is meant to eliminate any definitional uncertainty.

(People v. Nelson, supra, 171 Cal.App.3d Supp. at p. Supp.12.)

According to the court, the various state statutes patterned after the Model Act have been challenged on vagueness grounds, it being contended either that they encompassed multi-purpose objects with both drug-related and legitimate uses, and innocent items capable of drug use, or that a violation could be established by transferring a purchaser's intent to use an innocent object with proscribed drugs to an unaware seller. However, according to the *Nelson* court, every federal circuit that has considered such a challenge has upheld the statute in question. By infusing a scienter element into the statute, a seller of objects which have innocent or legitimate uses as well as potential drug uses is protected from prosecution "in the absence of showing

that the seller intended to sell, distribute, etc., the objects for use with controlled substances." (*People v. Nelson, supra*, 171 Cal.App.3d Supp. at 13-14.)

As to the "transferred intent" issue, the *Nelson* court again referred to the line of federal circuit court decisions addressing like statutes, pointing out [at 171 Cal.App.3d pp. Supp. 16-17, emphasis supplied]:

> These courts essentially concluded that the two-tiered scienter standard of the Model Act, which is tracked by section 11364.7, presents no danger that an innocent seller would be at risk of prosecution for the unknown intent of a purchaser for the simple reason that <u>the seller must already have intended that the object be sold for drug use before his knowledge of its use by a buyer comes into play.</u> "In these circumstances, it is not constitutionally improper that the seller be required to open his eyes to the objective realities of the sale." [Fn. omitted.]

The court supports its statement in a footnote quoting extensively from the decision of the Eighth Circuit United States Court of Appeals in *Casbah, Inc. v. Thone* (1980) 651 F.2d 551, 561, which, in a footnote of its own, adopted "the cogent reasoning" of a Delaware federal district judge in *Delaware Accessories Trade Association v. Gebelein* (D.Del. 1980) 497 F.Supp. 289, 294, who said:

> "In the context of an alleged sale or delivery of drug paraphernalia, the Act requires the state to prove both (1) that the defendant intended that an item would be used for the production or consumption of controlled substances and also (2) that he either knew, or that he acted in a set of circumstances from which a reasonable person would know, that the buyer of the item would thereafter use it for those purposes. <u>So-called constructive knowledge thus has significance only in a situation where the defendant is selling or delivering items that he intends to be used to produce or consume illicit drugs in the first place. The legitimate merchant who sells innocuous items need make no judgment about the purpose of the buyer based upon the surrounding circumstances</u>. The dealer, on the other hand, who sells innocuous items with the intent that they be used with drugs is, in effect, put on notice by the illicit nature of his activity that he must be careful to conform his conduct to the law. Even the illicit dealer, however, is not held legally responsible ... for guessing what is in the mind of a buyer. The seller is safe as long as he does not actually know the buyer's purpose and as long as the objective facts that are there for him to observe do not give fair notice that illegal use will ensue." (Emphasis supplied.)

In *Stoianoff v. State of Montana* (9th Cir. 1982) 695 F.2d 1214, 1221, the court stated, addressing the constitutional challenge to the "reasonably should know" language of a statute "patterned closely" after the Model Act:

> [I]n light of the unusual nature of the layered state of mind requirements imposed by [the Montana statute], the merchant must already have intended that an item be sold for drug use under the 'intended for use' standard, before his or her knowledge of its use by a buyer comes into play. Once the merchant has passed this threshold, the merchant is required to be aware only of the objective facts that would fairly put him or her on notice of the use for which the product was purchased."

The *Nelson* court expressed its concurrence with the *Stoianoff* decision's reading of the "reasonably should know" language of the Model Act, and also its belief that such reading was supported by the comments of the drafters of the Model Act [Model Act, Comments, Art. II] which both courts quoted:

> "The knowledge requirement of Section B is satisfied when a supplier:
> (I) has actual knowledge an object will be used as drug paraphernalia;
> (ii) is aware of a high probability an object will be used as drug paraphernalia; or
> (iii) is aware of facts and circumstances from which he reasonably should conclude there is a high probability an object will be used as drug paraphernalia. Section B requires a supplier of potential paraphernalia to exercise a reasonable amount of care. He need not undertake an investigation into the intentions of every buyer, but he is not free to ignore the circumstances of a transaction. Suppliers of objects capable of use as paraphernalia may not deliver them indiscriminately."

(*People v. Nelson, supra*, 171 Cal.App.3d Supp., at p. Supp.17; *Stoianoff v. State of Montana, supra*, 695 F.2d at p. 1221.)

Although at first blush it might appear the quoted comment might apply to all sellers, it must be read in light of the earlier statements in the court's opinion, and in the statements of the federal court decisions which *Nelson* quotes and relies upon, to be addressing the responsibilities placed upon the seller who "*already intended that an*

item be sold for drug use,"[5] and it is when this threshold is passed that the merchant must be aware of objective facts which would put him on notice of the use for which the product was purchased.

Against this background, resolution of this case is uncomplicated.

It is true, as appellant contends, that the glass rose pipe can have a use other than as drug paraphernalia. But in this case, it is clear that the clerk knew its intended use as a device with which to smoke cocaine.[6] Without the investigator having said anything other than "Do you have any crack pipes," appellants' clerk sold him the glass rose pipe. When the investigator asked how to use it, the clerk showed him that he would need to remove the rose. The clerk obviously knew the pipe could be used to smoke crack cocaine, knew or should have known from the investigator's request for a "crack pipe" of its intended use, and offered it to the investigator believing that to be its intended use. By so doing, he brought himself squarely within the prohibitions of the cited sections of the Health and Safety Code.

Appellant argues with some force that more is required than merely knowledge that the pipe can be used as a means of ingesting a controlled substance. He contends that, until a filter, fashioned from a brass scouring pad or Brillo pad, is inserted in the glass pipe, none of which, according to the evidence, the store stocked, it cannot be

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[5] *People v. Nelson*, *supra*, 171 Cal.App.3d Supp. at p. Supp. 16. (Emphasis supplied).

[6] The ALJ chose not to believe Kumar's denials of any knowledge about crack cocaine or the way it is smoked. 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. Control* (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

considered drug paraphernalia. Therefore, he asserts, the requisite intent required by the statute has not been shown.

It may well be true that the pipe needs a filter before it can be used to smoke crack cocaine. It may also be true that appellant did not stock those products which could be used to fabricate a filter. Nonetheless, we are not persuaded that these facts exonerate appellant. The pipe was marketed for drug use, so, in our mind, it should be considered paraphernalia whether considered a complete product or a critical element in a finished product. Therefore, scienter was established.

ORDER

The decision of the Department is affirmed.[7]

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

[7] 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.