

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

AB-8185

File: 20-274384 Reg: 03054873

NGA TUYET DO and TIEN THANH DO dba Ultra Mar Gas Station
395 West First Street, Tustin, CA 92680,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: June 10, 2004
Los Angeles, CA

ISSUED JULY 29, 2004

Nga Tuyet Do and Tien Thanh Do (“Tien Do”), doing business as Ultra Mar Gas Station (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale beer and wine license for violations of Business and Professions Code section 24200, subdivision (d), in conjunction with Penal Code sections 647.6 and 647, subdivision (k)(1).

Appearances on appeal include appellants Nga Tuyet Do and Tien Do, appearing through their counsel, Larry P. Adamsky, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 27, 1992. Thereafter, the Department instituted an accusation against appellants charging that

¹The decision of the Department, dated September 11, 2003, is set forth in the appendix.

appellant Tien Do had been convicted of crimes involving moral turpitude.²

An administrative hearing was held on August 6 and 22, 2003, at which time oral and documentary evidence was received, and arguments were presented. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) whether a license may be disciplined on a legal ground not pled in the accusation; (2) whether the Department has the authority to revoke an innocent co-licensee's interest in the license; and (3) whether the crimes for which appellant Tien Do was convicted are crimes involving moral turpitude.

DISCUSSION

I

Appellants characterize the administrative law judge's (ALJ) summary recital, in Legal Conclusions 1 and 2, of the provisions of article XX, section 22 of the California Constitution and Business and Professions Code section 24200, subdivision (a), as the findings of violations on uncharged counts. According to plaintiffs, this deprived them of fair notice and due process.

² The accusation charged that appellant Tien Do had been convicted, after jury trial, of willfully and unlawfully looking through a hole or opening, or viewing by means of any instrumentality the interior of an area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of the person inside, a misdemeanor, in violation of Penal Code section 647, subdivision (k)(1). In addition, the accusation charged that Tien Do had been convicted, after jury trial, of willfully and unlawfully annoying or molesting a named female person under the age of 18, a misdemeanor, in violation of Penal Code section 647.6. The record of the convictions is set forth in Exhibit 2.

Article XX, Section 22, of the California Constitution is the constitutional basis for the existence and licensing and regulatory powers of the Department of Alcoholic Beverage Control. The references to it in the accusation and in the decision were not part of the violations charged; they were nothing more than recitals of the underlying constitutional and statutory basis for the filing of an accusation. In so far as the specific charges are concerned, the recitals are surplusage.

Business and Professions Code section 24200 establishes specific grounds for the suspension or revocation of a license. Subdivision (a) states that one of those grounds is when continuance of the license would be contrary to welfare and morals.

Section 24200, subdivision (d), provides, with more specificity, another ground for suspension or revocation - a plea, verdict, or judgment of guilty to any public offense involving moral turpitude. This was the statutory basis for the Department's order of revocation.

Counts 1 and 2 of the accusation clearly set forth the charges against appellant Tien Do. A review of the transcripts of the hearing discloses that the matter was tried only as to the specific charges of the accusation. Any reading of the decision as including findings on uncharged violations is unreasonable.

II

The ALJ reasoned as follows (Conclusion of Law 10) in concluding that the license should be revoked:

Complainant asked to have the license revoked outright. It was pointed out that Respondent Tien Do is required to register as a sex offender pursuant to California Penal Code Section 290. (Findings of Fact, ¶ 7.) The Department ought not to be required to permit such a registrant to be in charge at one of its

licensed businesses. Respondent argued for some sanction short of outright revocation without giving any real explanation as to why Tien Do should be permitted to retain the license. In the alternative, Respondents argued that the non-offending co-licensee ought to be able to retain the license.

Moral turpitude offenses (felony or misdemeanor) routinely result in revocation of the license at issue, almost always outright revocation. Absolutely no evidence in mitigation was presented by Respondents. No reason was established why the Department should continue as a licensee a person who has been ordered to register as a sex offender. Outright revocation is justified, authorized and appropriate as to Respondent Tien Do.

Nga Do is an innocent co-licensee. (Findings of Fact, ¶8.) She is the former spouse of Tien Do. (Findings of Fact, ¶9.) The evidence shows, however, that she presently has nothing to do with the business at the Licensed Premises. (Findings of Fact ¶10.) She does not share in the profit (*Id.*) and it is likely, though not established, that she no longer has any ownership interest at all in the business.

Coletti v. State Board of Equalization (1949) 94 Cal.App.2d 61, 209 P.2d 984, instructs at 94 Cal.App.2d 64, “[t]here is, however, no authority in the Board to revoke a partnership license as to the interest of one of the partners. There was but a single license, although it stood in the names of two partners. It cannot be invalid as to one partner and valid as to the other.” While this is not a hard and fast rule, under the circumstances here, with the ex-wife partner having an uncertain remaining ownership interest in the existing business, the Order [of revocation] which follows appears by far the most appropriate means of protecting the public.

Appellants do not question any part of Finding of Fact 10. Instead, they argue only that the *Coletti* decision cited by the ALJ should be confined to its specific facts. They argue that the facts in *Coletti* are inapposite to the issue of moral turpitude.

In *Coletti*, one of two partners had engaged in the unlicensed sale of distilled spirits at a location other than the licensed premises. There is nothing in the decision that suggests that the court intended to limit its language concerning the rights of an innocent partner to the specific facts of that case. Nor do we see in that case or in the

facts of this case any reason why discipline should be more lenient. Here, as Department counsel pointed out, the conduct warranting the discipline took place at the licensed premises.

Although Nga Do was present at the second hearing, her attorney declined to call her as a witness, and objected to her being questioned. He contended that, since she had not been served with a copy of the accusation, she could not be compelled to testify. Appellants have not renewed that contention in this appeal. Had she testified, she could well have eliminated any uncertainty whether she owned any interest in the business. Not doing so gave the ALJ the right to conclude, as he did, that it was unlikely she retained any interest in the business following her divorce from Tien Do.

In any event, the decision in *Coletti, supra*, is sufficient authority for the order of revocation.

III

Appellants contend that neither of the crimes for which Tien Do was convicted should be considered crimes involving moral turpitude.

Appellant argues that “the concept [of moral turpitude] by nature defies any attempt at a uniform and precise definition.” This may well be true. Nonetheless, we are satisfied that the reasoning in *Rice v. Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30, 36-37 [152 Cal.Rptr. 285] supports the findings and conclusions of the ALJ that the crimes for which Tien Do was convicted are crimes involving moral turpitude.

In *Rice, supra*, the court explained:

The elusive concept of "moral turpitude" has long been the subject of judicial scrutiny; our courts have grappled with the amorphous term in a variety of factual contexts largely involving disciplinary proceedings. [Citations.]

Notwithstanding its frequency of use as a legislatively imposed standard of conduct for purposes of discipline, the concept by nature defies any attempt at a uniform and precise definition. For nearly 40 years our highest court has defined moral turpitude as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Craig* (1938) 12 Cal.2d 93, 97 [82 P.2d 442]) or "everything done contrary to justice, honesty, modesty or good morals." [Citations.] Yet it is innately a relative concept depending upon both contemporary moral values and the degree of its inimical quality [citation] whose purpose as a legislated standard is not punishment but protection of the public. [Citations.]

While not every public offense may involve conduct constituting moral turpitude without a showing of moral unfitness to pursue a licensed activity [citation], conviction of certain types of crimes may establish moral turpitude as a matter of law. [Citation.] Thus, moral turpitude is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of gain or other corrupt purpose [citations] but not in other crimes which neither intrinsically reflect similar inimical factors nor demonstrate a level of ethical transgression so as to render the actor unfit or unsuitable to serve the interests of the public in the licensed activity. [Fn. omitted.]

A conviction for annoying or molesting a child requires proof that the defendant's conduct was motivated by an unnatural or abnormal sexual interest in the child.

(*People v. McFarland* (2000) 78 Cal.App.4th 489 [92 Cal.Rptr.2d 884]. Coupling this kind of conduct with that involving Tien Do's use of a peephole to invade another's privacy, the level of reprehensibility is sufficient to establish the presence of moral turpitude.

It is clear that appellant Tien Do's conduct was the kind from which the public needs and is entitled to protection. A person who has displayed the kind of behavior Tien Do displayed is, certainly in our minds, not the kind of person to whom the

privilege of selling alcoholic beverages should be accorded.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ 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.