

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

AB-8243

File: 42-314388 Reg: 03054698

LEONOR SILVA and MANUEL SILVA dba Los Amigos Bar
2069 South Atlantic Boulevard, City of Commerce, CA 90040,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: November 4, 2004
Los Angeles, CA

ISSUED JANUARY 10, 2005

Leonor Silva and Manuel Silva, doing business as Los Amigos Bar (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license for appellant Manuel Silva having possessed cocaine and possessed cocaine for sale while on the licensed premises, violations of Health and Safety Codes sections 11350 and 11351.²

Appearances on appeal include appellants Leonor Silva and Manuel Silva, appearing through their counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated January 22, 2004, is set forth in the appendix.

² We have used the spelling of Manuel Silva's name as it appears on the license application (Exhibit 5) and on his Department of Motor Vehicles record (Exhibit 2), rather than the spelling used in the accusation and decision.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale beer and wine public premises license was issued on January 19, 1996. On March 17, 2003, the Department instituted an accusation against appellants charging that Manuel Silva possessed cocaine and cocaine for sale in violation of Health and Safety Code sections 11350 and 11351.

An administrative hearing was held on November 7, 2003. Subsequent to the hearing, the Department issued its decision, which determined that the charge of the accusation had been established, and issued the order from which this timely appeal has been taken.

Appellants contend that the determination that appellant Manuel Silva possessed cocaine for purposes of sale was 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 [71 S.Ct. 456]; *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].)

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]; *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].)

Appellants' contention that there was not substantial evidence to support the decision is premised on their contention that Department investigator Kenny was not sufficiently qualified to render an opinion that appellant Manuel Silva possessed cocaine for the purposes of selling it. Additionally, appellants assert that the administrative law judge (ALJ) was wrong in concluding that even a person not experienced on the subject of narcotics sales would reasonably conclude that Manuel Silva possessed the cocaine for sale.

When Manuel Silva was arrested, he had in his possession approximately 12 grams of powder containing cocaine, a plastic bag with a 2" spoon, 97 small plastic bags, and \$480 in cash, mostly in \$20 denominations. These were the factors underlying the investigator's opinion on the critical issue whether Manuel Silva planned to sell the cocaine.

Kenny testified that a typical purchase of cocaine for personal use would be 1/4 gram, so, in his opinion, someone in possession of 12 grams would have held it for sale. The small plastic bags were used to package the individual sales of cocaine

typically of 1/4 gram for \$20. The plastic spoon would be used to transfer the cocaine from the large plastic bag to one of the smaller ones. The fact that the currency in Silva's possession was mostly \$20 bills was consistent with the fact that most individual cocaine transactions were for \$20.

Appellants point to what they say are shortcomings in investigator Kenny's qualifications that deprive his opinion of any evidentiary value: he did not know whether the spoon contained any cocaine residue; he could not describe the spoon in question, but assumed it was the kind used at picnics; and, he could not describe the baggies that were retrieved. Appellants also assert that Kenny admitted that it was not unusual for a bar owner to carry cash in his pocket to make change for the operation of the business, but, as we read the record, Kenny appears to have testified to exactly the opposite.

The ALJ summarized Kenny's qualifications and opinion as follows (Findings of Fact VI A-C):

A

Kevin Kenny is a supervising investigator for the Department of Alcoholic Beverage Control. He has received approximately one thousand hours of narcotics training, both in the classroom and in the field. The classroom training included approximately 160 hours offered by the Narcotics Academy of the Orange County Sheriff's Department, and approximately eight four-day conferences offered by the California Narcotics Officers Association. Investigator Kenny also was a member of the Inland Regional Narcotics Enforcement Team, where he participated in the investigation of major drug trafficking in San Bernardino County and participated in several big drug arrests. Investigator Kenny also spent approximately 3000 hours with the San Bernardino County Sheriff's Department in narcotics enforcement. He has participated in approximately 25 to 30 purchases of cocaine "on the streets", the last one occurring in 1996. He has been qualified to testify as an expert on the subject of narcotics in the Orange County courts and at prior Department of Alcoholic Beverage Control hearings.

B

Based on his experience as stated in the paragraph above, Investigator Kenny explained that: 1) the amount of cocaine found on Respondent Manual Silva was too large for personal use; 2) 1/4 gram of cocaine, the amount used by an average cocaine user in one night, has a street value of twenty dollars; 3) sellers of cocaine, not wanting to touch the cocaine with their hands, would use plastic spoons to move cocaine from their bag into baggies; 4) cocaine is sold in baggies.

C

Investigator Kenny concluded that the items retrieved from Respondent Manual Silva's bag show that he possessed the cocaine for sale.

Weighing the alleged shortcomings in Kenny's testimony, which we see as relatively small, and, to some extent irrelevant, against his impressive experience in the field of narcotics enforcement, we have little difficulty in concluding that he met the test approved in *People v. Newman* (1971) 5 Cal.3d 48, 53 [95 Cal.Rptr. 12] for other than lawfully prescribed drugs:

In cases involving possession of marijuana or heroin, experienced officers may give their opinion that the narcotics are held for purposes of sale based upon such matters as the quantity, packaging and normal use of an individual; on the basis of such testimony convictions of possession for purposes of sale have been upheld.

"For purposes of *Newman's* rule, rock cocaine is like marijuana or heroin." (*People v. Carter* (1997) 55 Cal.App.4th 1376, 1378 [64 Cal.Rptr. 2d 747.])³

Appellants' claim that the decision is not supported by substantial evidence lacks merit.

We do not need to reach appellants' alternate contention that the ALJ erred in agreeing with investigator Kenny that even one not experienced in narcotics

³ In *People v. Carter, supra*, the court sustained a conviction where the police officer's opinion that rock cocaine was held for sale was based solely on the quantity seized, 27.4 grams.

transactions would conclude from the evidence that Manuel Silva possessed the cocaine for sale.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.