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

AB-8275
File: 21-320578 Reg: 03055039

GEORGE M. KASSAB and JOANDARK A. KASSAB, dba Mr. D's Liquor & Deli
4101 Market Street, San Diego, CA 92102,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 3, 2005
Los Angeles, CA

ISSUED FEBRUARY 11, 2005

George M. Kassab and Joandark A. Kassab, doing business as Mr. D's Liquor & Deli (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license, but stayed the revocation for a one-year probationary period, and suspended their license for 30 days for appellant George Kassab and his son, Steve Kassab, selling drug paraphernalia, as defined in Health and Safety Code section 11014.5, to a Department investigator, in violation of Health and Safety Code section 11364.7, subdivision (a).

Appearances on appeal include appellants George M. Kassab and Joandark A. Kassab, representing themselves, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated April 8, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 17, 1996. On June 10, 2003, the Department filed an accusation against appellants charging that, on October 23, 2001, appellants' agent, Steve Kassab, sold drug paraphernalia to a Department investigator, and on October 24, 2001, appellant George Kassab sold drug paraphernalia to the same investigator.

At the administrative hearing held on January 8, 2004, documentary evidence was received, and testimony concerning the violations charged was presented by Department investigator Luis Madriz, San Diego police detective Steven Riddle, appellants George and Joandark Kassab, and their son, Steve Kassab.

The testimony established that on October 23, 2001, investigator Madriz, in an undercover capacity, entered appellants' premises with Juan Smith, who works for a local drug rehabilitation center. Madriz selected a bottle of Miller High Life beer and a bottle of Dos Equis beer from the beer cooler and took them to the counter where a clerk, later identified as Steve Kassab (Steve), was on duty. Smith asked Steve for a "rose hookup." Steve said he didn't have the roses, but he had the air fresheners.[2] Steve asked if they wanted the air freshener instead, and Madriz asked "if the air freshener would work." Steve told him that "everybody uses it to smoke stuff," so Madriz said that would be fine. Steve put an air freshener into a small brown paper bag and also put in a Chore Boy copper scouring pad and a disposable lighter, even though neither Smith nor Madriz had asked for them. The air freshener came from a display on

[2]The air freshener is a small glass tube, 3 to 4 inches long, filled with a scented liquid, with a screw cap on one end. The capped end of the tube is stopped up with a small pad of absorbent material that keeps the scented liquid inside, but allows the scent to escape as the liquid evaporates.

the counter, and the Chore Boy and the lighter both came from areas behind the counter not accessible to customers. Madriz paid $11.50 for the items in the bag and the two beers, and he and Smith left.

The next day, October 24, 2001, Madriz and Smith again went to the premises and Madriz took a King Cobra Malt Liquor from the cooler. He took it to the counter, where co-licensee George Kassab (George) was on duty. Smith asked George for a "brown bag hookup," and George asked if he needed a lighter and a Chore Boy. Smith said he did, and George put an air freshener, a lighter, and a Chore Boy into a small brown paper bag. Madriz paid $10 for the beer and the items in the bag.

A few hours later, investigators returned to the store and issued citations to both Steve and George. Madriz also seized the box displaying the air fresheners and the box of Chore Boy scouring pads.

Madriz testified, based on his experience and training in narcotics enforcement, that a "rose hookup" and a "brown bag" were synonymous terms referring to a combination of items, usually a small glass tube, a cigarette lighter, and a copper scouring pad, used to smoke rock or crack cocaine.

At the hearing, detective Riddle, a narcotics expert, testified that the term "brown bag" referred to a rock cocaine smoking kit. He also testified that an air freshener, a lighter, and a copper scouring pad, collectively, had no use of which he was aware other than for ingesting rock cocaine, although individually, each had legitimate, legal uses. Riddle described how the glass tube of air freshener could used to smoke rock cocaine: the tube would be emptied, opened at both ends, and a small piece of copper scouring pad would be placed in one end to hold a piece of rock cocaine and to spread the heat when the cigarette lighter was used to light the rock cocaine.

Subsequent to the hearing, the Department issued its decision which determined that the violations had occurred as charged in the accusation. Appellants filed an appeal making the following contentions: 1) The findings are not supported by the evidence; 2) the ALJ improperly disregarded a videotape that proved the investigator did not make a purchase; 3) the Department charged appellants with a violation before Business and Professions Code section 24200.6 became effective; and 4) appellants were entrapped.

DISCUSSION

I

Appellants contend the findings are not supported by the evidence. They argue that Madriz could not have purchased a Dos Equis beer because they did not carry that brand, that Madriz did not obtain a receipt verifying his purchases, and that in a transcript of a police interview with Juan Smith, Smith never mentions appellants' premises as the site of one of his undercover operations. These things, appellants assert, show that the findings are not supported by the evidence. They also contend no evidence was presented showing that Steve and George knew that the items sold could be used as drug paraphernalia.[3]

When an appellant charges that the findings in a Department decision are not supported by the evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if

[3]Appellants expressed concern, in correspondence and at oral argument, that the Appeals Board had not received all the exhibits in this case, noting that their Petition for Reconsideration and its supporting declarations and exhibits were not included on the list of exhibits. These documents, however, are all contained in the file transcript from the Department.

contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Board* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 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].) In making its determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that 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, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *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].)

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility and to resolve any conflicts and inconsistencies in their testimony. (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334 [96 P.3d 194; 17 Cal.Rptr.3d 906]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

Appellants rely for this contention almost entirely on their own version of the facts, which the ALJ rejected in Finding of Fact VI:

> The testimony of Respondent George Kassab and the testimony of Respondents' son, Steve Kassab, were found to be self-serving and not credible. This credibility determination was made after considering the factors set forth in Evidence Code Section 780, including demeanor, the capacity to recollect and the existence or nonexistence of a bias or motive.

Madriz testified that he purchased a bottle of Dos Equis beer when he was in appellants' premises on October 23, 2001. Appellants assert that this cannot be true because they do not carry that brand of beer, as shown by Exhibit C, titled "Invoice Detail Inquiry." This appears to be a listing of alcoholic beverage purchases appellants made during 2001 from an unnamed distributor. Appellants are correct; Dos Equis does not appear on the list. However, neither does King Cobra Malt Liquor, the brand Madriz purchased on October 24, 2001. Yet appellants have not alleged that they did not carry King Cobra. We have no way of knowing if this was the only distributor appellants purchased from or who this distributor is. This is not "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs," as required by Government Code section 11513, subdivision (c). The ALJ was not persuaded by this, and neither are we. Even if appellants had proved that they did not carry Dos Equis beer at that time, that would not necessarily mean that the Department was using evidence from another case in this one.

The transcript of Juan Smith's interview with police, which appellants believe supports their position that the findings are not supported by the evidence, is not part of the record and is, therefore, unavailable for the Board's consideration.

Contrary to appellants' assertion, there is evidence showing they knew the items could be used as drug paraphernalia. To constitute a violation, the law requires that the

items be "marketed for use" as drug paraphernalia by the seller, and that the seller knew, or reasonably should have known, the items were going to be used to ingest narcotics. Both requirements were satisfied in this case.

Health and Safety Code section 11364.7, subdivision (a), makes it a misdemeanor for anyone to deliver drug paraphernalia, "knowing, or under circumstances where one reasonably should know, that it will be used to . . . ingest, inhale, or otherwise introduce into the human body a controlled substance." Subdivision (d) states that violation of any of the preceding subdivisions of section 11364.7 constitutes grounds to revoke any business or liquor license.

Health and Safety Code section 11014.5, subdivision (a), defines “drug paraphernalia” as items “designed for use or marketed for use, in . . . ingesting, inhaling, or otherwise introducing into the human body a controlled substance.” Subdivision (b) states:

> For the purposes of this section, the phrase "marketed for use" means advertising, distributing, offering for sale, displaying for sale, or selling in a manner which promotes the use of equipment, products, or materials with controlled substances.

Whether an item is "marketed for use" as drug paraphernalia is determined "solely from the viewpoint of the person in control of the item, i.e., the . . . seller, without reference to a third person's state of mind." (*People v. Nelson* (1985) 171 Cal.App.3d Supp. 1, 11 [218 Cal.Rptr. 279].) If that pre-existing intent is shown on the part of the seller, then a violation of Health and Safety Code section 11364.7 occurs when he or she sells the item "knowing, or under circumstances where one reasonably should know, that it will be used" with a controlled substance.

The Board addressed these issues in a similar case, *Jitlada & Sirivat, Inc*. (2001) AB-7616. What the Board said there is equally applicable in the present matter:

> This case presents an issue which the Board has considered in earlier cases, and that is whether the item in question, one which may have both legitimate uses and illegitimate uses, was marketed as narcotics paraphernalia. Two of those earlier cases (Mbarkeh (1998) AB-6882 and Harper (1998) AB-6984) concluded that the charged violation could not be sustained in the absence of proof of a pre-existing intent to market the item or items in question for narcotics usage, despite knowledge of the buyer's intended use. Those cases, in turn, followed the holding to that effect in People v. Nelson, supra.
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> The Board affirmed the decisions of the Department in other appeals in which drug paraphernalia violations were charged. In all these cases, the officer or investigator involved asked for something with which to smoke rock cocaine and was provided with, or directed to, the same type of glass tubes containing flowers as are involved in the present appeal. In Hinnant (10/18/99) AB-7101 and Zakher (12/21/99) AB-7211, the clerks got the glass tubes from behind or under the counter in response to requests for crack pipes. In Chang (1/ 21/98) AB-6830, the clerk first pointed to a display of tobacco pipes, but when the officer said that wasn't what he wanted, the clerk pointed to a display of the glass tubes on the counter and said 'This one over here.' The clerk in Southland, Assefa, and Woldermariam (11/3/99) AB-7176, not only pointed to the glass tubes, but took one out and demonstrated how it was used to smoke crack.
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> In each of these cases the Board found that the clerk showed his already existing intent to sell the tubes for use with a controlled substance by his unprompted response to a request for something with which to smoke rock cocaine. In addition, the request of the officer clearly showed that it was at least highly likely that the buyer of the item would use it to 'ingest, inhale, or otherwise introduce into the human body a controlled substance.'

The present appeal is essentially indistinguishable from the four appeals noted in *Jitlada & Sirivat, Inc.*, *supra*, where the Board affirmed the Department's decisions. The evidence shows that Steve and George offered the combination of items to the investigator in response to the investigator's request for a "rose hookup" or a "brown bag" without any prompting or suggestion from the investigator that he wanted those specific items. This is a case where the sellers indicated by their responses that they

already intended to sell the objects for drug use. This brings the air freshener/lighter/ scouring pad combination within the Health and Safety Code section 11014.5 definition of drug paraphernalia. Because Steve and George sold them under circumstances where one reasonably should have known that the objects would be used with a controlled substance, they violated Health and Safety Code section 11364.7.

We conclude that the findings are supported by substantial evidence.

II

Appellants contend the ALJ improperly disregarded a videotape that proved the investigator did not make a purchase. They state that the ALJ did not review the store surveillance tape covering the relevant days and did not refer to the tape in the decision.

Department attorney John Lewis reviewed the tape after appellants revealed its existence during the hearing. The ALJ asked him to repeat for the record what he had said while off the record about viewing the tape [RT 158-159]:

> MR. LEWIS: Yes, Your Honor. What I saw was a split screen, which actually is four different camera angle views on the tape. And the quality of the video is so poor, I can barely make out what's on it.
>
> The dates are partially readable on some of the frames, and it begins, I believe, on 10-21. I don't know exactly where and when it ends as far as the date that's stamped on there because I didn't go that far.
>
> Quite frankly, I was unable to discern anything from the video itself.

The videotape was admitted into evidence as Exhibit L and the ALJ said that he would "try to view it and see if there is anything helpful from it."

Although the decision does not mention the videotape, that does not mean the ALJ ignored it. The ALJ is not obligated to discuss every evidentiary item. He may well have found that it was not particularly helpful[4], but he was not required to say so.

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[4]Having viewed the videotape, the Board must agree with the assessment made by attorney Lewis.

III

Appellants contend the Department has not proceeded in the manner required by law because it charged appellants with a violation before Business and Professions Code section 24200.6 became effective. Section 24200.6, effective January 1, 2003, provides:

> The department may revoke or suspend any license if the licensee or the agent or employee of the licensee violates any provision of Section 11364.7 of the Health and Safety Code. For purposes of this provision, a licensee, or the agent or employee of the licensee, is deemed to have knowledge that the item or items delivered, furnished, transferred, or possessed will be used to plant, propagate, cultivate, grow, harvest, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance, if the department or any other state or local law enforcement agency notifies the licensee in writing that the items, individually or in combination, are commonly sold or marketed for that purpose.

Appellants contend they had no notice the items in question could be used as drug paraphernalia until after this section became effective.

Section 24200.6 provides that, if he or she has been notified in writing that an item or combination of items are used as drug paraphernalia, a licensee is deemed to have knowledge that the item or combination of items is drug paraphernalia. The section appears to have created a rebuttable presumption of knowledge dependent upon written notice.

This does not mean, however, that licensees are immune from prosecution until they receive written notice. Health and Safety Code sections 11014.5 and 11364.7 have been in effect since the early 1980's. Before section 24200.6 was effective, to sustain an accusation, the Department had to prove the licensee knew that an item was usable as drug paraphernalia and that it had been marketed as such. Section 24200.6

did not make any change in the law except to create a presumption in certain situations, thus relieving the Department from always having to prove that the licensee knew the item was used as drug paraphernalia and marketed it as such.

IV

Appellants contend they were entrapped because the investigator told Steve and George to place the items in a brown paper bag, thereby causing them to "prepackage" the items as drug paraphernalia.

The California Supreme Court stated the test for entrapment in *People v. Barraza* (1979) 23 Cal.3d 675, 689-690 [153 Cal.Rptr. 459]:

> We hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? 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 suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime. (Fn. omitted.)

There was no allegation in the accusation of any "prepacking" of the items. Nor was there evidence introduced at the hearing of the badgering, cajoling, or importuning condemned by the Court in *Barraza*, *supra*. Appellants have not shown that the investigator entrapped them.

V

Appellants also raised several challenges to the constitutionality of the Health and Safety Code sections involved. Article III, section 3.5, of the California Constitution prohibits administrative agencies, such as this Board, from declaring a statute unconstitutional, unless a court has determined that such statute is unconstitutional.

Under the circumstances, we do not consider appellants' constitutional challenges. We note, however, that Health and Safety Code sections 11014.5 and 11364.7 have been found *not* to be unconstitutionally void for vagueness. (*People v. Nelson*, *supra*.)

We find that the numerous other issues mentioned by appellants are without merit.

ORDER

The decision of the Department is affirmed.[5]

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

[5]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.