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

AB-8356
File: 48-362045 Reg: 04056792

JOEL SETH CORENMAN and JASON M. MONTELLO dba Le Cannon
21797 Ventura Boulevard, Woodland Hills, CA 91364,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 1, 2005
Los Angeles, CA

ISSUED: NOVEMBER 9, 2005

Joel Seth Corenman and Jason M. Montello, doing business as Le Cannon (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 45 days, 15 of which were conditionally stayed subject to one year of discipline-free operation for its bartender, Nicole Murtha ("the bartender") having sold and furnished beer to Robert Allen Soto ("Soto"), an obviously intoxicated person, a violation of Business and Professions Code section 25602, subdivision (a).[2]

Appearances on appeal include appellants Joel Seth Corenman and Jason M. Montello, appearing through their counsel, Robert D. Coppola, Jr., and the Department

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[1]The decision of the Department, dated November 10, 2004, is set forth in the appendix.

[2] Business and Professions Code section 25602 provides in pertinent part:

(a) Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.

of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on February 22, 2000. Thereafter, the Department instituted an accusation against appellants charging the unlawful sale of an alcoholic beverage to an obviously intoxicated person.

An administrative hearing was held on October 5, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation concerning the sale of an alcoholic beverage to an obviously intoxicated patron. Appellants thereafter filed a timely appeal. They raise a total of nine issues, several of which are interrelated: (1) the decision is not supported by the findings and the findings are not supported by substantial evidence; (2) there is insufficient evidence to uphold the decision; (3) there was an insufficient passage of time to permit the bartender to observe the patron's symptoms of intoxication; (4) irrelevant evidence was erroneously admitted; (5) opinion evidence was improperly admitted; (6) photographic evidence was improperly excluded; (7) the refusal to permit questioning about other citations issued that evening was an abuse of discretion; (8) the transaction was concluded when the bartender accepted the patron's credit card; and (9) evidence of appellant's and the credit card industry's business practices was improperly excluded. These issues overlap in a number of respects, and will be addressed accordingly.

DISCUSSION

I

Appellants' challenge to the sufficiency of the evidence and the findings is essentially a claim that the decision is not supported by substantial evidence.

"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].)

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, 51 [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 challenge the sufficiency of the evidence to support the findings that address the symptoms of intoxication displayed by Soto and the bartender's awareness of those symptoms. Appellants argue that Findings of Fact 5 through 9[3] are not

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[3] Findings 5 through 9 state:

5. Upon reaching the bar, Soto grabbed the bar counter with his hand to stabilize himself and maintain his balance. Of the 2 bartenders working the bar,

supported by substantial evidence and that Conclusion of Law 4[4] is incorrect.

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, 532 [1 Cal.Rptr. 446].) The term "obviously" denotes circumstances

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bartender Murtha had approached Soto and took his order for 2 bottles of Heineken beer. Soto's speech was extremely slurred and he had trouble pronouncing the name "Heineken." His shirt was pulled out of his pants and crumpled. His face was flushed and his eyes were red and watery.

6. Despite the symptoms displayed by Soto, bartender Murtha proceeded to fill the order and placed the beer on the bar counter in front of Soto. Murtha then asked him for $8.00 in payment, and turned away momentarily to serve other patrons while awaiting payment.

7. Meanwhile, Soto grabbed a wad of currency out of his pocket with one hand while holding onto the bar fixture with the other hand to stabilize himself. Suddenly laughter erupted in the area. Murtha turned to observe that Soto had lost his balance; had fallen on the floor at the bar and was in the midst of being helped to his feet by other patrons.

8. Soto then handed his credit card to Murtha in payment for the beer. Murtha processed the transaction and asked Soto whether he would be able to sign the receipt. It is clear that Murtha having observed Soto's manifestations of intoxication knew or should have known that she was serving an obviously intoxicated individual and this was made evident by her question to Soto.

9. Prior to signing off on his credit card purchase, Soto was told by Murtha that he was drunk and this would be the last beer of the night for him. At this point, the glasses of beer were still sitting on the counter where Murtha had placed them. Soto had not yet signed off on the purchase with his credit card, and Murtha could have removed the beer from the counter in light of the evidence of Soto's condition. She did not, and merely sent Soto away with the beer with an admonition that there would be no further service that evening.

[4] Conclusion of Law 4 states:

The sole issue in defense to the violation is in regard to whether certain incriminating statements made on the part of the bartender should be excluded in determining whether Mr. Soto was obviously intoxicated at the time bartender Murtha sold him the beer as more fully set forth in findings of fact nos. 10 & 11.

easily discovered, seen or understood, plain or 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].)

Los Angeles police officer Joseph Kalyn's description of Soto's behavior leaves little doubt that Soto was intoxicated and that one in a position to observe that behavior would have been on notice that he was intoxicated. Murtha did not testify, and appellants' argument that she could not reasonably have observed Soto's behavior leaves us unpersuaded. They argue that Murtha did not have time to observe the symptoms displayed by Soto, that Kalyn had more time than Murtha to observe him, and that such considerations as noise, press of business, distance and angle of observation undercut the findings. In effect, we are being asked to reweigh the evidence, and to view each element of what occurred in isolation. We lack the power to do so. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2004) 118 Cal.App.4th 1429, 1446 [13 Cal.Rptr.3d 826].)

Murtha was three feet away from Soto when Soto placed his order for two bottles of Heineken. The administrative law judge could reasonably have inferred that she was in a position at that time to observe Soto's red and watery eyes, as described by Kalyn, as well as Soto's slurred voice and difficulty in pronouncing the word "Heineken." While Murtha may not have actually seen Soto fall, she was in a position to see him being helped to his feet. Yet, aware of these classic symptoms of intoxication, and even though Soto had not taken possession of the beer, Murtha made no effort to halt the transaction.

II

Appellants objected to testimony by Officer Kalyn that Murtha asked Soto if he was going to be able to sign the credit card receipt, that Soto was grabbing onto the bar to prevent himself from falling, and that Murtha told Soto he was drunk and this was the last beer he would get, claiming these events occurred after Murtha had taken Soto's credit card for payment. Citing no authority, appellants assert that it is well settled that evidence of conduct, statements or observations subsequent to service is irrelevant on the issue of what was known to the server at the time of service.

Again, appellants would dismember the transaction into supposedly unrelated stages, masking the reality of an on-going transaction. Their argument assumes that Murtha was powerless to halt the transaction once a credit card had been tendered, even if she realized that Soto was intoxicated. That is not our view of the law. The transaction was on-going, and there can be no doubt that Murtha had been put on notice that she should halt the transaction.

We do not think the question turns on whether or not the credit card receipt was signed. Until Soto took possession of the beer, Murtha could have negated the entire transaction. Choosing instead simply to tell him he was cut off from further beers fell short of the response the law requires.

Nor do we agree with appellants that Officer Kalyn's descriptions of Soto's behavior was improper opinion evidence. Kalyn was testifying factually about his visual observations; it is a strain to describe his observations as opinion testimony.

III

Appellants sought to introduce into evidence a series of photographs (Exhibits A and B) taken by the police, purporting to show the interior of the bar as it would have been at the time of the transaction. Exhibit A consisted of four reproductions of photos

on a white paper background. The ALJ refused to admit the Exhibit A photographs, stating:

> And in this photograph it is highly unlikely – I can't – I couldn't distinguish anything. They're basically black photographs. And it doesn't appear to me from this photograph that one can recognize any people or labels. And that's just looking at the photographs.
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> For me to draw conclusions based on these photographs would be misleading based on the evidence in the record.

Exhibit B consisted of six reproductions of photos on a white paper background. Two of the photos were of Soto, and one was of Murtha. These were admitted into evidence. The remaining three photos on Exhibit B were taken inside the bar. Only one of these (the photo on the bottom left) was admitted. The remaining two photos on Exhibit B were found to contain the same flaws as those on Exhibit A, and were excluded.

We have examined the exhibits in question. They are of very poor quality, and largely illegible. It is understandable that the ALJ felt he would be speculating as to what the photos were supposed to show. Appellants argued that the photos would show that visibility in the bar was poor, perhaps explaining why Murtha was not in as good a position as Kalyn to observe Soto's symptoms of intoxication.

The ALJ chose instead to rely on the testimony of Joel Corenman as to the issue of visibility, and we cannot say it was an abuse of discretion to do so.

It is well settled that the ALJ has a great deal of discretion with respect to the admission of evidence, and his decision to admit or exclude evidence will not be set aside in the absence of an abuse of that discretion. Where, as here, the quality of the evidence in question is so poor that one can only speculate as to what it purports to show, it was clearly not an abuse of discretion to refuse its admission.

In any event, it is readily apparent from the ALJ's efforts to derive something meaningful from the exhibits that their formal exclusion from the record can hardly be said to have affected the result.

IV

Appellants contend that the ALJ abused his discretion by refusing to permit them to question Officer Kalyn with regard to other citations he may have issued that same evening. They argue that the probative value of such an examination "might have been extremely important," and would have taken only a few minutes.

Section 352 of the Evidence Code provides that a judge, in his discretion, may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate an undue consumption of time.

What is an undue consumption of time is a relative term, and must be evaluated in context. Appellants were attempting to conduct a fishing expedition, with nothing more than a hope that they might discover something important. Even a few minutes, in such circumstances, may be an undue amount of time.

We think it was well within the ALJ 's discretion to disallow such questioning.

V

Appellants contend that co-licensee Corenman was not permitted to testify about his business's custom and practice with respect to credit card transactions. They argue that this ruling precluded them from introducing evidence sufficient to establish the time of service.

Appellants argued at the hearing that Soto's signature on the credit card receipt was not essential to the completion of the transaction. The Department contended that the sale was not complete until the receipt was signed by Soto.

The ALJ agreed with the Department, concluding that the sale was not complete and title to the beer had not vested in Soto until the promised consideration was delivered in the form of an executed promise to pay, as evidenced by the signature on the credit card receipt.

In Finding of Fact 9, the ALJ recognized that Murtha was in a position to halt the transaction if Soto refused or was unable to sign the credit card receipt. Despite Corenman's testimony that the credit card issuer required a signed receipt only if the transaction was disputed, the facts of this particular transaction included Murtha's concern that he sign the receipt. In that light, it was not unreasonable for the ALJ to infer that the transaction was not complete when Murtha commented on Soto's intoxication.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5] 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.