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

AB-8635
File: 48-278935 Reg: 06062373

WAYNE DESHAW and ARTHUR MILLER, dba Lil Otto's
816 West Hamilton Avenue, Campbell, CA 95008,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 10, 2008
San Francisco, CA

ISSUED: SEPTEMBER 25, 2008

Wayne DeShaw and Arthur Miller, doing business as Lil Otto's (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for co-licensee Arthur Miller, on three occasions, and an employee, Kathryn Lichti, on one occasion, having purchased cigarettes and distilled spirits believing the cigarettes and distilled spirits to have been stolen, violations of Penal Code sections 664/496, subdivision (a).[2]

Appearances on appeal include appellants Arthur Miller and Wayne DeShaw, appearing through their counsel, Cindy A. Diamond and Robert W. Lyons, and the

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[1]The decision of the Department, dated September 28, 2006, is set forth in the appendix.

[2] Appellants were also found to have violated Business and Professions Code section 25177, by keeping for sale distilled spirits in a package which has been refilled or partly refilled.

Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Botting.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on March 17, 1994. On March 27, 2006, the Department instituted an accusation against appellants charging them and an employee with having bought, received, withheld, or concealed cigarettes and alcoholic beverages believing them to have been stolen.

At the administrative hearing held on June 29, 2006, documentary evidence was received and testimony concerning the violation charged was presented by Department Investigator Natasha Vasquez and Supervising Investigator Joe McCullough. Arthur Miller testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established, and ordered appellants' license revoked.[3] The evidence established that co-licensee Miller purchased cigarettes and distilled spirits on three separate occasions at sharply discounted prices.

Appellants have filed an appeal making the following contentions: (1) co-licensee Miller was never convicted of receiving stolen property; and (2) the penalty is excessive.

DISCUSSION

I

Appellants have not challenged any of the factual findings regarding co-licensee Miller's purchase of property believed to have been stolen. The Department found that

[3] The license was also suspended for five days for a violation of Business and Professions Code 25177 (refilling bottles of distilled spirits). Appellants have not contested the suspension.

he had knowingly purchased cigarettes and distilled spirits on three occasions at prices well below retail. Instead, appellants argue that, in the absence of a formal criminal conviction, the Department lacks jurisdiction to impose discipline on them. In essence, appellants argue that it does not matter how conclusive the evidence in support of the Department's case, because there is not enough evidence, absent the formal conviction, to establish that Miller violated the law with respect to alcoholic beverages.

Appellants' argument flies in the face of long-established law. As stated in *Cornell v. Reilly* (1954) 127 Cal.App.2d 178, 185 [273 P.2d 572], "this proceeding for the revocation of a liquor license is a disciplinary function of the Board of Equalization"[4] and "the standards to be applied are not those applicable to criminal trials." Indeed, as the court stated in that case, "[e]ven if appellant had been charged criminally and acquitted, such acquittal would be no bar in a disciplinary action based on the same facts looking towards the revocation of a license." (*Id*. at p. 187.)

Thus, it is irrelevant that Miller was successful in getting the criminal charges against him reduced, or indeed, whether he was even prosecuted criminally.

II

Appellants challenge the penalty on two grounds. They claim that Miller was entrapped - "The Department set Mr. Miller up,"[5] and that the Department accumulated multiple violations in order to maximize the penalty - "Why was an arrest in this case not made on September 16, 2005?"[6]

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[4] The Department of Alcoholic Beverage Control is the successor to the Board of Equalization with respect to the regulation of the sale of alcoholic beverages.

[5] App. Br., pages 7-8.

[6] *Ibid.*

The entrapment argument was not raised below, and we need not consider it. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeals §394, p. 444.) In any event, our review of the record disclosed no evidence of the type of conduct considered to constitute entrapment. The test for an entrapment defense is whether the conduct of the public agent was such that a normally law-abiding person would be induced to commit the prohibited act. Official conduct that does no more than offer an opportunity to act unlawfully is permissible. (*People v. Barraza* (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459].)

In *Walsh v. Kirby* (1974) 13 Cal.3d 95 [118 Cal.Rptr.1], a case cited by appellants, the California Supreme Court found that the statute in question was intended to compel compliance with then-existing "fair trade" laws which controlled the minimum price at which the product could be sold. The statute provided for a nominal penalty of $250 for the first violation, and $1,000 for each subsequent violation. The court held that the Department's practice of withholding notice of multiple alleged violations until the ensuing financial penalties were enough to result in a de facto license revocation was contrary to the purposes of the statute, and thus arbitrary and an abuse of discretion.

This case is very different. Here, co-licensee Miller was on notice that he was purchasing what he believed to be stolen goods. Each purchase transaction was a separate event, and each evidenced conduct unacceptable from a holder of an alcoholic beverage license. Unlike *Walsh*, supra, the Department's practice was not contrary to the purpose of any applicable statute, but was to confirm that the licensee's conduct was on-going and intentional.

The Appeals Board may not disturb the Department's penalty orders in the

absence of an abuse of the Department's discretion. *(Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where, as here, an appellant raises the issue of an excessive penalty, the Appeals Board may examine the issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Attempted purchase or receipt of stolen property is a theft-related offense that involves moral turpitude. (See *Rice v. Alcoholic Beverage Control Appeals Bd.* (1979) 89 Cal.App.3d 30, 37 [152 Cal.Rptr. 285] ("[M]oral turpitude is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain, or other corrupt purpose.").)

Under the circumstances, the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

ORDER

The decision of the Department is affirmed.[7]

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

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[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.