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

AB-8710
File: 20-401159 Reg: 06064154

RAMI MICHELL DARGHALLI and MASHHOUR MASHHOUR, dba Bob's Too Market
511 West Avenue I, Suite A, Lancaster, CA 93534,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 1, 2008
Los Angeles, CA

ISSUED: JULY 23, 2008

Rami Michell Darghalli and Mashhour Mashhour, doing business as Bob's Too Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their off-sale beer and wine license for their clerk, Dani Safi, having sold, transferred and furnished drug paraphernalia (glass pipe and Chore Boy scouring pad) to undercover Department investigator Ricardo Carnet, a violation of Health and Safety Code sections 11014.5, subdivision (a)[2] and 11364.7, subdivision

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[1]The decision of the Department, dated July 19, 2007, is set forth in the appendix.

[2] Health and Safety Code section 11014.5, subdivisions (a) and (b) provide, in pertinent part:
(a) "Drug paraphernalia" means all equipment, products and materials of any kind which are designed for use or marketed for use, in ... ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of
(continued...)

(a),[3] in conjunction with Business and Professions Code section 24200, subdivisions (a) and (b). The order of revocation was conditionally stayed, subject to one year of discipline-free operation and service of a 20 day suspension.

Appearances on appeal include appellants Rami Michell Darghalli and Mashhour Mashhour, appearing through their counsel, Andreas Birgel, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on August 22, 2003. In 2006, the Department instituted an accusation against appellants charging the unlawful sale and transfer of drug paraphernalia.

At an administrative hearing held on March 16, 2007, documentary evidence was received and testimony concerning the violation charged was presented by Department investigator Ricardo Carnet. Appellant co-licensee Rami Michell Darghalli testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined

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[2](...continued)
this division.

(b) 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.

[3] Health and Safety Code section 11364.7, subdivision (a) provides, in pertinent part:

Except as authorized by law, any person who delivers, furnishes, or transfers, possesses with intent to deliver, furnish, or transfer ... 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 ... is guilty of a misdemeanor.

that the charge of the accusation had been established and ordered the conditionally-stayed revocation and 20-day suspension from which this timely appeal has been taken. The Department found that Carnet had asked for a pipe so he could smoke. The clerk took from beneath the counter a cylindrical tube about three inches long, with an appearance similar to a ballpoint pen, with a plastic cap on one end, a writing point on the other, and a removable ink cartridge inside the glass tube, and handed it to Carnet. The clerk answered "yes" when Carnet asked if he could smoke cocaine through the tube. When Carnet asked how to use the tube, the clerk told him to remove the middle portion of the pen. Carnet asked for a filter, and the clerk provided him with a Chore Boy copper scouring pad, an item commonly used as paraphernalia to smoke cocaine.

Appellants raise the following issues: (1) There was insufficient evidence to support the Department's conclusion that appellants violated section 11364.7 of the Health and Safety Code; (2) there was insufficient evidence to support the conclusion that the items sold constituted drug paraphernalia as defined in Health and Safety Code section 11014.5; (3) the item sold could not have been used as drug paraphernalia; and (4) the penalty was excessive. Issues 1 and 2 will be discussed together.

DISCUSSION

I and II

Appellants contend that the evidence at the administrative hearing was insufficient to support the Department's conclusions that appellants violated Health and Safety Code section 11364.7, or that the items sold were drug paraphernalia as defined in Health and Safety Code section 11014.5. They argue that there was no evidence that the clerk sold the items in question with the specific intent that they be used to smoke, inhale, or ingest an illegal drug. Appellants assert that it was the Department

investigator who suggested using the tube to smoke cocaine, and that the clerk attempted to dissuade him from doing so.

The Department argues that the conversation between the Department investigator and the store clerk during which the clerk explained how the item could be used to smoke cocaine and also furnished the investigator a Chore-Boy scouring pad to use as a filter, establishes the clerk's intent to market the item as drug paraphernalia.

This is not the strongest case the Department might have presented on the issue of intent, but the totality of the conversation between the investigator and the clerk establishes that the clerk knew the purpose of the item and intended it to be used by the investigator to ingest a controlled substance.

In *People v. Nelson* (1985) 171 Cal.App.3d Supp. 1, 9 [218 Cal.Rptr. 279], a frequently cited case, the court addressed the issue of intent:

> [W]e conclude that the 'designed for use or marketed for use' language in section 11014.5's definition of 'drug paraphernalia' reflects the Legislature's attempt to assign the appropriate scienter to each category of offender within that section's ambit. [Citation.] In other words, the 'designed for use' phrase pertains to the state of mind of the manufacturer of an item, while the 'marketed for use' phrase refers to the seller, including distributor, of the item. The common denominator in both instances is that the requisite state of mind belongs to the person in control of the item at the time the item is manufactured, or delivered, furnished or transferred, etc.

The evidence established the requisite intent on the part of the clerk.

III

The administrative law judge limited his discussion of the glass-plastic issue to two short paragraphs in Conclusion of Law and Determination of Issues 9:

> Counsel for the respondents argues that no prima facie case was proven because an essential element for a "tube" to be considered as drug paraphernalia is that it be made of glass. It is claimed that there is no evidence in the record that the so called "glass tube" alluded to in Officer Carnet's

> testimony was ever established to be made of glass. If it in fact it [sic] was a plastic tube, counsel's argument would have merit based on the expert testimony.
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> The expert testimony in the record that the tubes in question were in fact made of glass and the language on the cardboard box containing the glass tubes (exhibit 1) stating they were of "glass tube design," are sufficient to establish that the tube in question was made of glass and constitutes drug paraphernalia within the law. The contention is rejected.

In the many cases this Board has heard involving a "glass" tube, not until this case has anyone raised the issue of whether the tube in question was glass or plastic. The clear, transparent cylinder containing a pen, as in more recent cases heard by the Board, or, as in earlier cases, a miniature rose made of fabric, was universally understood by the sellers to be suitable for smoking. The seller in this case proceeded on the same understanding, assuring the investigator he could use the tube to smoke cocaine, and even showing him how to do so. Such an understanding is inconsistent with any understanding that the tube is made from a flammable plastic.

Appellant offered no evidence to rebut the testimony of investigator Carnet, who drew on his experience with similar items in other cases, as well as his sense of touch and feel in distinguishing glass from plastic. The evidence that the tube was made of glass, although not the strongest, cannot be said to be so insubstantial as to warrant a reversal of the Department's decision.

IV

Appellants contend that the penalty is excessive, arguing that the dismissal of counts 2 and 3 of the accusation entitle them to mitigation of the paraphernalia violation.

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 an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Under Department Rule 144 (4 Cal. Code Regs. §144), the Department's Penalty Guidelines, the standard penalty prescribed for a violation like that in this case is an order of revocation, stayed for three years, and a 20-day suspension. Appellant was ordered to serve a 20-day suspension, as provided in the guidelines, but the probationary period of the stay was only one year, rather than the three years permitted under the rule. Thus, appellant was accorded some degree of mitigation. As such, we cannot say the Department abused its discretion.

ORDER

The decision of the Department is affirmed.[4]

TINA FRANK, ACTING CHAIRPERSON
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.