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

AB-8772
File: 21-384137 Reg: 07065201

THUY THI BUI and VIET TAT VU, dba Mr. Paul's Liquor
16100 South Woodruff Avenue, Bellflower, CA 90706,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: September 4, 2008
Los Angeles, CA

ISSUED DECEMBER 18, 2008

Thuy Thi Bui and Viet Tat Vu, doing business as Mr. Paul's Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for Viet Tat Vu purchasing, on three different dates, distilled spirits that he believed to have been stolen, and having pled nolo contendere to a charge of having done so, violations of Business and Professions Code section 24200, subdivision (d), and Penal Code sections 664/496, subdivision (a).

Appearances on appeal include appellants Thuy Thi Bui and Viet Tat Vu, appearing through their counsel, Fredrick M. Ray, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated October 22, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on February 22, 2002. On March 7, 2007, the Department instituted an accusation against appellants charging that co-licensee Vu purchased distilled spirits, that he believed to have been stolen, on three dates in November 2006: November 3 (count 1), November 9 (count 2), and November 10 (count 3). The accusation was amended in June 2007 by the addition of count 4 (erroneously designated in the amendment as count 5) charging the entry by Vu of a plea of nolo contendere to charges of violating Penal Code sections 664/496, subdivision (a), thereby violating Business and Professions Code section 24200, subdivision (d).

At the administrative hearing held on August 10, 2007, documentary evidence was received and testimony concerning the violations charged was presented by Detective Brian Schlosser, a Los Angeles County Sheriff's deputy. Viet Tat Vu testified on behalf of appellants.

Schlosser described the three transactions with Vu, and also testified that he had made an audio recording of the two transactions on November 9 and 10, 2006. Appellants' counsel claimed surprise, asserting they were not provided the recordings as part of the Department's discovery. Department counsel stated he had not learned until the previous day that the recordings were still in existence, but a report noting that recordings were made had been made available to appellants' counsel as part of the discovery provided by the Department. Appellants' counsel acknowledged receipt of the report and the reference to a recording, but stated he had not known "if it still existed." [RT 21.] The administrative law judge (ALJ) stated he would permit the recording to be played, and if appellants' counsel thought additional time would be

needed to pursue his cross-examination of Schlosser, he would "entertain that a little bit later on." [RT 21-22.] The hearing was then recessed so that appellants' counsel could listen to the recordings. When the hearing resumed, the recordings were played, their content authenticated by deputy Schlosser, and Department counsel concluded his direct examination of Schlosser. After appellants' counsel completed his cross-examination of Schlosser, Department counsel introduced Exhibits 5 and 6, certified copies of court documents evidencing the criminal charges against Vu and his plea of nolo contendere to those charges.

At the conclusion of the Department's case, appellant objected to the audio tapes as "a hearsay police report," albeit acknowledging that admissions by Vu were exceptions to the hearsay rule. The ALJ overruled the objection.

Vu testified on appellants' behalf through an interpreter. He said he was born in Vietnam, and came to the United States in 1984. After helping his brother manage an apartment in Berkeley, he operated several small businesses in southern California before he bought the liquor store in 2002. Vu denied knowing that the distilled spirits he purchased had been stolen, claiming he could buy them so cheaply because they were left over from a party, and that he bought them for his friends.

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.

Appellants have filed an appeal making the following contentions: (1) the administrative law judge erred in admitting into evidence audio recordings not made available to them until the day of the hearing; and (2) the penalty is excessive.

DISCUSSION

I

Appellants contend they were denied a fair hearing by the Department's failure to provide to them, in discovery, audio recordings of the transactions on November 9 and 10, 2006, between Vu and Schlosser giving rise to counts 2 and 3 of the accusation.

There are number of reasons why this contention lacks merit. First, appellants' claim that had they been given more time to review the recordings they could have been better able to analyze them and point out deficiencies, was waived by their failure to request a continuance after the recordings were played. Second, appellants' claim of surprise was groundless, since they were admittedly on notice of the potential existence of the recordings from a report furnished to them as part of the Department's discovery. Like the Department, appellants simply did not know if the recordings continued to exist. It was not disputed that the Department first learned of their continued existence the day before the hearing.

Third, appellants' argument that the Department was obligated to furnish the recordings as part of the discovery owed appellants is misdirected, since the recordings were in the possession of the Sheriff's Department. Fourth, appellants are incorrect in asserting they could only have obtained the recordings from the Department, and, therefore, the Department was obligated to obtain the recordings from the Sheriff and make them available to appellants. Appellants mistakenly contend they could not subpoena the Sheriff for copies of the recording. Although they correctly state that Government Code section 11507.6 is the exclusive provision for discovery "between the parties," the Sheriff's Department is not a party to the administrative proceeding, and may be brought in voluntarily or by subpoena. (Gov. Code, §§ 11450.05 - 11450.50.)

Additionally, appellants have not challenged any of the factual findings, nor have they claimed any taint to the evidence, relating to the November 3 transaction (count 1), admittedly the smallest of the three transactions, but nonetheless, a criminal violation.

Most importantly, appellants do not contest the fact that appellant Vu pled nolo contendere to a crime involving moral turpitude, his plea established by Exhibits 5 and 6, admitted without objection.

At most, appellants' objection to the recordings is that the dialogue between deputy Schlosser and Vu is not probative because of uncertainties caused by language barriers. The ALJ listened to the recordings, and found them comprehensible. In any case, there was ample evidence from the testimony of deputy Schlosser alone to support the findings, even without the recordings.

II

Appellants contend the penalty of revocation is excessive. They argue that a more suitable penalty would have been an order of stayed revocation, avoiding the severity of an outright revocation.

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].)[2] However, where an appellant raises the issue of an excessive penalty, the Appeals Board will

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[2] Appellants state in their closing brief that the Department has erroneously cited "*Martin v. ABC Appeals Board* (1961) 55 Cal.2d 867" for the proposition that the Appeals Board will not usually disturb the Department's penalty order. Actually, the Department's brief contains the correct citation to *Martin v. Alcoholic Beverage Control Appeals Board* (1959) 52 Cal.2d 287 [341 P.2d 296]. Appellants have apparently become confused by the similarity in case names, leading them to a palpably incorrect reading of the 1959 *Martin* decision.

examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

In this case, the evidence established a violation of Business and Professions Code section 24200, subdivision (d), in addition to Penal Code violations. Section 24200, subdivision (d), states, in pertinent part, that "[t]he plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude . . . charged against the licensee," is one of the grounds that constitute a basis for the suspension or revocation of licenses.

"Moral turpitude" has been said to be "inherent in crimes involving fraudulent intent, intentional dishonesty for personal gain or other corrupt purpose [citation omitted]." (*Rice v. Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30, 37 [152 Cal.Rptr. 285].)

The Department's penalty guidelines, found in Department rule 144 (4 Cal. Code Regs., §144), prescribe revocation as the standard penalty following a **conviction** for a crime involving moral turpitude. Similarly, the rule calls for revocation in the case of a **commission** on the premises of a crime involving moral turpitude, and revocation stayed for minor crimes (petty theft or shoplifting) committed away from the premises. In this case, Vu's conduct authorized the Department to order revocation in either case, since the unlawful conduct took place entirely on the premises.

As the Board said in *Pal* (2007) AB-8524:

> If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

> Appellants object to the penalty as punitive. Every penalty, however, is punitive to some extent. Were that not the case, a penalty would have no deterrent value. The "standard" penalty listed in Department rule 144 for conviction of a crime involving moral turpitude is revocation.

We are unable to say, on this record, that the penalty of revocation was an abuse of discretion.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]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.