ISSUED JUNE 11, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

EUN HEE LEE and WOO YOUNG LEE dba J's Liquor 3133 West Artesia Boulevard Torrance, CA 90504, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6923 File: 21-269775 Reg: 97039247 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: April 1, 1998 Los Angeles, CA

Eun Hee Lee and Woo Young Lee, doing business as J's Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their off-sale general license for appellant Woo Young Lee having attempted to purchase cigarettes believing them to be stolen, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §24200, subdivision (a), by reason of violations of Penal Code §§664 and

[1]The decision of the Department, dated July 10, 1997, is set forth in the appendix.

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Appearances on appeal include appellants Eun Hee Lee and Woo Young Lee, appearing through their counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on March 9, 1992. Thereafter, the Department instituted an accusation against appellants charging that on or about October 11, 1996, Woo Young Lee bought cigarettes represented as having been stolen.

An administrative hearing was held on June 2, 1997, at which time oral and documentary evidence was received. At that hearing, Department investigators testified about discussions which took place between the two of them and appellant Woo Young Lee in the course of which they sold to him cigarettes they told him had been stolen from Costco. There were two separate transactions on the same morning. The first transaction consisted of the purchase of 13 cartons of Marlboro brand cigarettes for $91. In the second, larger transaction, supposedly on behalf of another licensee, Lee paid $435 for two cases of Camels and five cartons of Winstons.

Lee testified on his own behalf. He stated that he had no idea the cigarettes were stolen, and thought the $7 per carton price reasonable in light of what he paid to other retailers and wholesalers. On cross-examination, he acknowledged that when he buys cigarettes from Costco and other wholesalers, he pays $14 or

$15.70 for the same brands offered to him by the investigators.

Subsequent to the hearing, the Department issued its decision which determined that Appellant Woo Young Lee had violated the cited Penal Code provisions, and ordered the license revoked.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the Department failed to prove actual knowledge the cigarettes were stolen; (2) the elements of the offense of stolen property were not proven; and (3) the Department abused its discretion by revoking their license. Issues 1 and 2 are closely related, and will be discussed together.

DISCUSSION

I

Appellants contend that Woo Young Lee had no actual knowledge the cigarettes were stolen, an essential element of the crime of receiving stolen property. Appellants also claim the Department failed to prove the essential elements of the crime of receiving stolen property.

As to the latter point, appellants' brief mistakenly focuses on the wrong offense. The accusation charged, and the Department determined, that the crime which had been committed was the attempted receipt of stolen property. That the cigarettes had not actually been stolen is irrelevant. What is relevant was whether appellant Woo Young Lee believed the cigarettes were stolen.

To their credit, appellants acknowledge the decision of the court in Lupo v.

Superior Court (1973) 34 Cal.App.3d 657 [110 Cal.Rptr. 185], which held that it was unnecessary, in an attempt case, to prove that the property had actually been stolen. Lupo was a "sting" case well before that term gained general popularity, in which the police sold items of recovered stolen property.

The Lupo court regarded itself as bound by the decision of the California Supreme Court in People v. Rojas (1961) 55 Cal.2d 252 [10 Cal.Rptr. 465], where the court held, on similar facts, that the crime which had been committed was the attempted receipt of stolen goods, rather than receiving stolen property. The court rejected the reasoning of the Court of Appeal of New York in People v. Jaffe (1906) 185 N.Y. 497 [78 N.E. 169], that, in such circumstances, there could be no attempt where the substantive crime could not have been committed, since the defendant could not have known the property was stolen, since it was in fact no longer stolen property by the time defendant received it. The court cited earlier attempt cases (People v. Camodeca (1959) 52 Cal.2d 142, 146-147 [338 P.2d 903 (attempted theft by false pretenses) and People v. Lavine (1931) 115 Cal.App. 289, 300-301 [1 P.2d 496] (attempted extortion) which it said were decided:

> "on the hypothesis that the defendants had the specific intent to commit the substantive offense and that under the circumstances as the defendants reasonably saw them they did the acts necessary to consummate the substantive offense; but because of circumstances unknown to defendants, essential elements of the substantive crime were lacking."

People v. Rojas, supra, 55 Cal.2d 252 [10 Cal.Rptr. 465, 468].

Thus, it is the actor's belief that is crucial when the charge is an attempt crime, and the fact that his belief does not accord with the true facts is immaterial.

He has manifested a criminal intent and acted pursuant to it. At that point, the crime is complete.

Contrary to appellants' argument, there is substantial evidence in support of the Department's determination that appellant Woo Young Lee possessed the requisite intent. His conversation with the investigators in which he was told the cigarettes had been stolen, and the fact that he paid only one-half his usual wholesale price, are enough by themselves to support such a determination. That he did not ask for nor was given a receipt, again contrary to his usual practice, only adds to the strength of the Department's case.

The Administrative Law Judge (ALJ) heard Woo Young Lee testify, and deemed his denials that he knew the property to be stolen not credible.[2] Thus, appellants' claim that Woo Young Lee heard "Mexico" when the investigator said the cigarettes were stolen from "Costco" was rejected by the ALJ, undoubtedly because Lee regularly purchased from Costco, and would have understood the name.

It is not the Board's function to second-guess the Department on issues of credibility. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640,

[2] Appellants state in their brief that there was no finding of specific intent on the part of Woo Young Lee. Findings V and VI refute this contention.

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II

Appellants contend that the Department abused its discretion by revoking their license. They argue that in other cases the Department has imposed more lenient penalties even though, contrary to the instant case, there were multiple acts of receiving stolen property.

In Oliver (1989) AB-5731, the Department ordered, and the Appeals Board affirmed, an order of revocation which was stayed for 180 days to permit the licensee the opportunity to transfer the license, and suspended indefinitely in the interim. There were three instances where property believed to be stolen was purchased. The Board there noted that in cases it had reviewed where the record did not reflect a criminal conviction of a charge of more than a single incident of receipt or attempted receipt of stolen property, the Department's penalty orders generally imposed straight revocation, citing Cagnolatti (1975) AB-4065; Nelson (1976) AB-4303; Vaz & Lane (1982) AB-4935; Jadallah (1984) AB-5145; and Kim (1985) AB-5262.

In Medeiros (1990) AB-5843, also cited by appellants, revocation was again stayed for 180 days to permit transfer, where there were three incidents involving the purchase of "stolen" property.

The third matter cited by appellants, Barroso (1994) AB-6390, involved multiple incidents of cocaine transactions and, once again, revocation was stayed to permit the licensee an opportunity to transfer the license.

The cases cited by appellants suggest only that the Department does not invariably order a license revoked where the licensee has been implicated in the receipt or attempted receipt of stolen property. They do not stand for the proposition that the Department cannot do so, but merely that in those instances the Department apparently believed that there were circumstances which warranted a less severe exercise of its discretion.

In this case, appellant Woo Young Lee not only twice purchased cigarettes he believed were stolen, he enlisted another licensee in the scheme when the investigators presented the opportunity to him. Under such circumstances, it is difficult to say that the Department abused its discretion.

CONCLUSION

The decision of the Department is affirmed.[3]

RAY T. BLAIR, JR., CHAIRMAN
JOHN B. TSU, MEMBER
BEN DAVIDIAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.