

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

DEBBIE J. and JACK L. THOMPSON	)	AB-7250
dba Easton West Saloon)	
5684 South Elm	)	File: 48-288371
Fresno, CA 93706,	)	Reg: 98043497
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Jeevan S. Ahuja
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	November 18, 1999
	)	San Francisco, CA

Debbie J. and Jack L. Thompson, doing business as Easton West Saloon (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their on-sale general public premises license for their having bought, received, withheld and concealed stolen property and for having permitted the possession and operation of slot machines in the premises, and as a result thereof making cash payoffs, being contrary to the universal and generic public

¹The decision of the Department, dated October 8, 1998, is set forth in the appendix.

welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §24200, subdivision (a), and Penal Code §§664/496 and 330.1.

Appearances on appeal include appellants Debbie J. and Jack A. Thompson, appearing through their counsel, Jim T. Elia, and the Department of Alcoholic Beverage Control, appearing through its counsel, John R. Peirce.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on May 4, 1994. Thereafter, the Department instituted an accusation against appellants charging the purchase by appellants of stolen property (cigarettes) and the possession and operation of illegal slot machines. An amended accusation was subsequently filed, adding counts alleging that each of the licensees entered pleas of nolo contendere to an information charging them with the crime of attempting to buy property they believed to have been stolen.

An administrative hearing was held on August 4, 1998, at which time oral and documentary evidence was received. Testimony was presented by Department investigator Chris Espinoza in support of the charges of the accusation relating to the alleged purchase of property believed to have been stolen, and by each of the licensees in opposition to the charges. Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation relating to the purchase of property believed to have been stolen had been established.

Appellants thereafter filed a timely notice of appeal. In their appeal,

appellants raise the following issues: (1) the investigator's actions constituted entrapment; and (2) the decision to revoke the license is not supported by substantial evidence.

DISCUSSION

I

Appellants contend that they were entrapped. They assert that the Department investigators² visited their place of business 13 times over a period of six months, and possibly as many as 20 times, and only in the last month of the investigation were they able to coax appellants into committing any kind of arguable illegal conduct. They contend that in each of the instances where appellants purchased cigarettes, they were sought out by the agents. Appellants admit they believed the cigarettes they purchased had been stolen.

The test for entrapment has been stated in the California Supreme Court case of People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459], as follows:

"We hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (23 Cal.3d at 689-690) (fn. omitted).

² Espinoza was accompanied on his visits to the bar by Phil Lundell, also a Department investigator.

At the most, the evidence shows that, prior to the transactions at issue, the Department investigators frequented the premises on a number of occasions, and during at least some of those visits initiated conversations regarding the possible purchase of narcotics.

There were three purchases of cigarettes.

Debbie Thompson made the first purchase. She testified that Espinoza followed her and her husband from the bar, told them he had a friend who had stolen some cigarettes, and asked if they were interested in purchasing them. She initially expressed reluctance, based upon her "worry about the State Board of Equalization and paying sales tax and so forth," but, after being assured the cigarettes had a "good stamp," agreed to purchase them. Espinoza delivered three cartons to her the next day, in a brown bag, and she paid him \$30. [RT 72-73].

Approximately one week later, she purchased ten cartons of cigarettes for \$80. She testified she first told him she had been told not to do so by her husband, because they did not want to get in trouble, but agreed to buy them only after Espinoza told her he needed money for the weekend, or gas money to get home.

Jack Thompson made the third, and largest purchase. He testified that Espinoza approached him while he leaving the premises:

A: That's when he approached me for something to sell, help him out. He would like to party tonight. He said he had some cigarettes to sell. I said 'Well, let's take a look.'

Q: What did you do?

A: I followed him to his truck and he opened – unlocked his rear door of his truck and there was approximately 30 cases of Marlboro red hard pack cigarettes.

Q: What other conversation took place?

A: I said 'How much do you want?' And he says, '\$100,' and so I paid him.

Q: Was there any conversation about where he got them?

A: No.

Q: Did you have any idea they might be hot or illegal in some way?

A: I imagined at that price, yes.

Q: And so you knew you were doing something wrong potentially at that point?

A: Yes.

Q: Then why did you – would you buy them?

A: I wish I hadn't but I did. I guess simple greed."

Can it be reasonably said that appellants were the victims of entrapment? Or did they simply succumb to the temptation of an illegal bargain purchase of a product? Jack Thompson's candid acknowledgment that he was motivated by greed demonstrates it was the latter.

We do not believe the mere fact that the investigators had visited the bar on enough occasions to have been seen by appellants as regular customers is enough to give rise to an entrapment defense. There was no evidence of improper conduct on the part of the investigators.

In addition, the pleas of nolo contendere are an independent basis for discipline. (See Business and Professions Code §24200, subdivision (d) [plea of nolo contendere to public offense involving moral turpitude as ground for suspension or revocation].)

II

Appellants purport to challenge the order of revocation as not based upon substantial evidence. In reality, they contend the order of revocation is too severe.

The Appeals Board will 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].)

As the Administrative Law Judge noted, appellants acted for personal gain. Personal gain is one of the criteria listed in Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App. 3d 30, 37 [152 Cal.Rptr. 285] for determining if a crime involves moral turpitude.

Given the crimes and the pleas, the Department cannot be faulted for removing appellants as licensees. Its action was well within its discretion.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ 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.