

Mailing Date: MAY 15 2007

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR
PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 05-2128
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W09-310053
v.	:	
	:	LID - 46791
BROOKE DEREK, INC.	:	
T/A RILEY'S	:	
4505 MAIN ST.	:	
WHITEHALL, PA 18052-1902	:	
	:	
	:	
LEHIGH COUNTY	:	
LICENSE NO. H-AP-SS-1074	:	

BEFORE: JUDGE THAU

APPEARANCES:

For Bureau of Enforcement
Roy Harkavy, Esquire
Pennsylvania State Police
8320 Schantz Road, Second Floor
Breinigsville, PA 18031

For Licensee
Albert Charlie
Corporate Officer

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on October 21, 2005, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against Brooke Derek, Inc., t/a Riley's (Licensee), License Number H-AP-SS-1074.

This citation¹ contains two counts.

The first count charges Licensee with a violation of Section 493(1) of the Liquor Code [47 P.S. §4-493(1)]. The charge is that on May 21, 2005, Licensee, by servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron.

The second count charges Licensee with violations of Section 5513 of the Crimes Code [18 Pa. C.S. §5513] which is incorporated by reference in Liquor Code Section 471 [47 P.S. §4-471] as "other sufficient cause." The charge is that on July 8 and September 1, 2005, Licensee, by servants, agents or employes possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on its licensed premises.

An evidentiary hearing was conducted on March 23, 2007 at the Lehigh County Courthouse, Room 730, 7th Floor, 455 West Hamilton Street, Allentown, Pennsylvania. Licensee was represented by its Corporate Officer, Mr. Albert Charlie.

After review of the transcript of that proceeding, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT:

1. The Bureau began its investigation on April 25, 2005 and completed it on September 6, 2005. (N.T. 14)

2. The Bureau sent a notice of alleged violations to Licensee at the licensed premises by certified mail-return receipt requested on September 27, 2005. The notice alleged violations as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 12)

Count No. 1:

3. A Bureau Enforcement Officer entered the licensed premises on May 21, 2005 at approximately 9:50 p.m., in an undercover capacity. The Officer walked over to the bar. She observed a customer who introduced himself to her. The customer kept saluting. The Officer smelled alcohol on his breath. He was swaying. His eyes were glossy. He repeated his name and saluted approximately three times. The barmaid served this customer a drink which was dark in color. The Officer did not know its exact contents. (N.T. 15-17)

1. Commonwealth Exhibit No. C-2, N.T. 13.

4. Later in the evening, the customer began talking to the Officer. He continued to sway and touching the table to keep his balance. The customer went into another room which had a pool table in it. At about 11:30 p.m., the Officer walked over to that room to talk to the customer. He was playing pool and still drinking. (N.T. 18-19)

5. The Officer engaged the customer in conversation. The Officer asked the customer how many alcoholic beverages he had to drink. The customer responded by saying: "Too many to count. I'm drunk, but don't worry, I am not driving. I got a ride." (N.T. 19)

6. The Officer saw no service of any beverage after the first one. (N.T. 19)

Count No. 2:

7. A Bureau Enforcement Officer visited the premises in an undercover capacity on July 8, 2005. The Officer arrived at 9:00 p.m. (N.T. 21-22)

8. The Officer saw two electronic poker machines. One was being played by a customer. The customer walked over to an employe. He exchanged a few words with the employe. The employe walked back over with him to the machine. The employe pushed buttons or did something to the machine. The employe walked behind the bar to one of the bartenders and exchanged a few words. The bartender made a notation on a piece of paper. The bartender opened the register and put the piece of paper inside. The bartender took an undetermined amount of money out of the cash register and gave it to the employe. (N.T. 37-39)

9. The employe walked over to the customer. The Officer did not see any money exchange hands between the employe and the patron who had been playing the video poker machine. (N.T. 39)

10. A second Bureau Enforcement Officer who was present and in an undercover capacity marked the machine for future identification. (N.T. 44-47)

11. The second Officer saw three video poker machines on the premises. He saw the two that the Officer referred to standing next to each other. There was a third in another location, on the licensed premises. (N.T. 48)

12. On September 1, 2005, Bureau Enforcement Officers entered the premises and seized three video poker machines. The three video poker machines were transported to the District Evidence room for later inspection. (N.T. 40-41)

13. A second Bureau Enforcement Officer has taken sufficient training in the recognition of the characteristics of electronic gambling devices so as to qualify him as an Expert. (N.T. 49-50)

14. The three machines were inspected on September 6, 2005. The machine which the Officer had earlier marked required \$.25 per play. It had a multi-invariable coin feature meaning you could put multiple dollars into it and it would continue to rack up credits. It had a non-activated double up feature. The maximum credits per play was 30 with the ability to raise. The machine simulates the game of poker. The time of play ranged from three to eight seconds. The manner of playing is to take a pre-dealt hand of five cards and discard those which the player finds not helpful. Those cards are replaced by other cards. The device had a knock-off mechanism which was activated by pressing a sequence of buttons on the machine console and a specific time frame. (N.T. 63; 65-68; 71)

15. The Officer next attempted to verify whether the machine had a video accounting mode. In doing so, the Officer was confronted with a password screen. The Officer was unable to go any further in determining whether the electronic video poker machine actually had an accounting mode. (N.T. 72-74)

CONCLUSIONS OF LAW:

1. The notice requirements of Liquor Code Section 471 [47 P.S. §4-471] have been satisfied.

Count No. 1:

2. The Bureau **failed** to prove that on May 21, 2005, Licensee, by servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron.

Count No. 2:

3. The Bureau **failed** to prove that on July 8 and September 1, 2005, Licensee, by servants, agents or employes, possessed or operated gambling devices or paraphernalia or permitted gambling or lotteries, poolselling and/or bookmaking on its licensed premises.

DISCUSSION:

Visible Intoxication

The critical elements in proving a violation are: a patron's noticeable intoxication; an alcoholic beverage was sold, furnished or given to that patron. After service observations, while helpful and relevant, are not dispositive. *EJ's Place, Inc.*, Citation No. 06-0271, www.lcb.state.pa.us/webapp/Legal/PublicAdjudicationSrch.asp; *Sai and Shiv, Inc.*, Citation No. 06-0275, www.lcb.state.pa.us/webapp/Legal/PublicAdjudicationSrch.asp.

In this matter, that the targeted customer was visibly intoxicated is well documented. What is absent is any proof of service to that patron while in that visibly intoxicated condition. There is no verbal evidence of a request for an alcoholic beverage. There is no visual evidence that an alcohol beverage was poured into the patron's drink.

The best that was presented is a service of an unidentified drink. That is not enough.

Unlawful Gambling Transaction

As a matter of sufficiency and weight, I conclude the Bureau cannot sustain the charge based on an unlawful gambling transaction. The Officer's testimony satisfied the elements of consideration and chance but not reward as there was no observation of an actual payoff. *Com. v. Two Electronic Poker Game Machines*, 465 A.2d. 973 (Pa. 1983).

Gambling Device Per Se

This component of the Bureau's case rests entirely on an inspection of one electronic video poker machine. The Bureau inspected three machines. I limited testimony to the one machine which contained the mark placed there as a unique identifying characteristic. I did so because there was no way of knowing whether the remaining two machines, confiscated on September 1, 2005, were the identical devices discovered on the licensed premises on July 8, 2005.

In point of fact, I have been and continue to struggle with the legal theory that supports the Bureau's taking of those two machines. In my understanding, this record contains nothing to justify such a confiscation. Perhaps a mind more sharply honed than mine might find some jurisprudential basis.

I suspect the other two gaming devices were taken based on no more than the name of the game and the manufacturer. I reach this conclusion because of the testimony of the Bureau Expert that he drew some of his conclusions about the clearly marked electronic video poker machine entirely on the make, model and manufacturer. It would not be a long stretch to conclude the other two gaming devices fell within the same criteria.

Expertise

In Pennsylvania, the standard for qualifying as an Expert is a liberal one. The test is whether the witness has any reasonable pretension to specialized knowledge in the subject under investigation. The weight to be given to such testimony is for the trier of fact (PLE, Evidence §402).

The data from which an Expert opinion is formed must be disclosed. An opinion may not be expressed unless it is based on a set of facts supported by the evidence. An Expert will not be allowed to express an opinion based on conjecture (PLE, Evidence §415). Expert opinions are of little weight when based on insufficient facts and should be entirely disregarded when contrary to fact (PLE, Evidence §432).

The critical failing in the Bureau's case rests with the Expert's conclusion the examined machine contained within its components an accounting mode. When that question was posed, the witness responded in the affirmative (N.T. 72). When asked on what factual basis the Expert drew that conclusion, it was discovered that it was not from the inspection of the device in question. The conclusion was grounded in the Expert's general experience regarding devices similar in make, model and manufacturer (N.T. 74-76).

When I heard this, I was taken aback. If the standard were no more than the outward appearance of a gaming device, why do any inspection at all? Why is there even a need for an Expert? All that would be necessary would be to provide make, model and manufacturer. I would do nothing but belabor the obvious to say it is the particular characteristics of the device under examination that controls.

As I remarked at the hearing, it is shocking to discover that an Expert in the electronic and mechanical components of gaming devices was unable to find an accounting mode, assuming one existed, because the Expert was thwarted by a password display (N.T. 74). Perhaps the Expert could not go any further because there was no where to go.

ORDER:

NOW THEREFORE, it is ordered that Citation No. 05-2128, issued against Brooke Derek, Inc., t/a Riley's is DISMISSED.

Dated this 4th day of May, 2007.

Felix Thau, A.L.J.

pm

MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A \$25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.