

Mailing Date: MAR 31 2008

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 06-2258
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	Incident No. W01-335236
	:	
PLUNKETT'S PLACE INC.	:	
4254-56 RICHMOND ST.	:	LID - 46974
PHILADELPHIA PA 19137-1927	:	
	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-AP-SS-OPS-9533	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

ERIK S. SHMUKLER, ESQ.

FOR THE LICENSEE:

EDWARD B. McHUGH, ESQ.

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on September 29, 2006, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against Plunkett's Place, Inc., License Number R-AP-SS-OPS-9533 (hereinafter "Licensee").

An Administrative hearing was held on Tuesday, March 27, 2007, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation.

The citation charges Licensee with violation of Section 493(1) of the Liquor Code, 47 P.S. Section 4-493(1), in that on June 22, 2006, Licensee, by its 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.

FINDINGS OF FACT:

1. J. Bernesky is employed by the Bureau of Enforcement and at the time of hearing had been so employed for approximately three years. On June 22, 2006 at 10:05 p.m., he visited the licensed premises where he observed a female bartender rendering service of alcoholic beverages to approximately sixteen patrons (N.T. 6-7).

2. Officer Bernesky took a seat at the bar by the pool table. At this time, he observed a white male patron seated at the end of the bar near the front entrance door. The officer was approximately eighteen to twenty feet from the patron (N.T. 7).

3. The officer saw the patron seated at the bar and noted that he had his elbows on the bar with his head resting in his hands. The patron was drinking a twelve ounce bottle of Budweiser beer. The officer observed him sipping the beer. On one occasion, the officer noted that the patron's right elbow slipped off the bar. He regained his balance and put his elbows back on the bar (N.T. 8).

4. At approximately 10:20 p.m., Officer Bernesky observed the patron get up from the barstool and walk towards the men's room. The officer noted that the patron was unsteady. The patron brushed up against the wall to catch his balance and held onto one or two barstools on the way to the men's room. The patron was in the men's room for about three minutes. At approximately 10:30 p.m., the patron exited the men's room and walked back to the barstool in the same manner. The patron took a seat at the bar and continued to sip his beer (N.T. 8).

5. The female bartender looked at the patron and addressed him as "Leon." She asked, "Leon, you okay you are worrying me?" She then said, "You look drunk. Do you want me to call a cab?" Leon shook his head "no." He sat at the bar and took a sip from his beer and placed the beer back on the bar. Leon then got up from the bartstool and walked back towards the area where the officer was seated. The patron's walk was unsteady. He brushed up against the wall. He stopped and talked to patrons that were seated two barstools to the officer's left and about three feet away from the officer (N.T. 9).

6. At this point, the officer noted that Leon's eyes were bloodshot and glassy. As he talked to the patron, the officer noted that the patron's speech was very slurred. At one point, the patron dropped something on the floor and bent over to pick it up. As he attempted to pick it up, he staggered, but then stood back upright (N.T. 9).

7. At approximately 10:26 p.m., the patron walked back to where the pool tables were located. At this time, the female bartender took his can of beer that was on the bar where he had left it and brought it from one end of the bar to the other, where Leon was standing at the pool table. The bartender then asked "Leon, do you want your beer?" Leon shook his head indicating that he did not. The female bartender on several occasions continued to ask Leon if he wanted his beer. He continued to shake his head "no" (N.T. 9-10).

8. At 10:30 p.m., Leon walked back to his original seat at the bar and sat down. The female bartender placed the original can of beer back in front of Leon (N.T. 10).

9. The officer departed the premises at approximately 10:45 p.m. leaving about fifteen patrons behind to include Leon (N.T. 11).

10. Christopher Plunkett is the owner and manager of the licensed premises and manages the daily operations of the premises (N.T. 19-20).

11. Mr. Plunkett indicated that the premises has a digital camera system for security that is run through a computer and that he reviewed the tapes of that evening once he got the notice of violation and found no activity like that which the officer described. He found no one in there who was intoxicated and did not see anyone who he believes could have been Leon. The person that he did observe was name John and not Leon. John lives across the street from the premises (N.T. 22-27).

12. Mr. Plunkett observed the officer that the bartender indicated was the man who was in the bar on that evening (N.T. 27-28).

13. The Licensee indicated that they do not sell individual cans at the bar, at least not at that time (N.T. 29-30).

14. Mr. Plunkett indicated that he has a written policy against selling to visibly intoxicated patrons. Licensee's employees do attend R.A.M.P. training (N.T. 30-31).

15. Mr. Plunkett indicated that they have a breathalyzer at the bar so if the employees are suspected of drinking, they can be breathalyzed (N.T. 36).

16. Licensee indicated that they do have a disabled individual who frequents the premises and who has a speech impediment (N.T. 39).

17. Licensee did not save the video (N.T. 46-47).

CONCLUSIONS OF LAW:

There is insufficient evidence to conclude that on June 22, 2006, Licensee, by its 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, in violation of Section 493(1) of the Liquor Code, 47 P.S. Section 4-493(1).

DISCUSSION:

At the conclusion of this hearing, there were some questions raised, which were never answered to the satisfaction of this Court. From the bartender and Licensee's perspective, it appeared that the bartender knew that Leon was intoxicated or believed that he was and offered him assistance consistent with her alcoholic beverage server training. The incredible part of this testimony was that a bartender would ask such a question and then continue to pursue and encourage an individual to consume an unfinished portion of a drink, after she had determined the person might be intoxicated. In addition, the Court does not know what, if any portion of the beer, remained in the can.

There is a question in the mind of this Court as to whether the bartender actually **served** this individual a drink, after he became intoxicated. The twelve ounce can of beer was in the possession of the patron. The Court found no credible evidence that the patron abandoned the beer or that the bartender repossessed that beer. If this was a matter of a purchase, it would be a simple question, but it is a matter of furnishing. If, as the officer testified, he stated that he did not want the beer, that was an opportunity for the bartender to take it away or dispose of it or to otherwise prevent him from continuing to drink. According to the officer's testimony, the bartender continued to ask him if he wanted the beer and he continued to say no. There is no indication that he even picked up the can again.

In these bizarre circumstances, the Court is not willing to find that the bartender served him while visibly intoxicated. The Court is not satisfied with the officer's conclusion that she furnished him after he became intoxicated. In essence, the Court concludes that the bartender allowed the intoxicated person to retain possession of an alcoholic beverage, even though he was visibly intoxicated, but found no additional service or furnishing of an alcoholic beverage.

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby Ordered that Citation No. 06-2258 is **DISMISSED**.

In order to insure compliance with this Order, jurisdiction of this matter is retained.

Dated this 24th day of March, 2008.

Tania E. Wright, J.

Plunkett's Place, Inc.
Citation No. 06-2258

NOTE: 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.

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