

Mailing Date: AUG 26 2009

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 08-2953
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W02-383153
	:	
v.	:	LID - 36742
	:	
D & M SHUMBRIS, INC.	:	
T/A THE SWIZZLE STICK	:	
434 MAIN ST.	:	
EDWARDSVILLE	:	
KINGSTON, PA 18704	:	
LUZERNE COUNTY	:	
LICENSE NO. R-AP-SS-8145	:	
	:	

**BEFORE:** JUDGE THAU  
**BUREAU COUNSEL:** Craig A. Strong, Esquire  
**LICENSEE:** Frank J. Aritz, Esquire

**ADJUDICATION**

BACKGROUND:

This proceeding arises out of a citation that was issued on December 19, 2008, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (Bureau) against D & M Shumbris, Inc., t/a The Swizzle Stick (Licensee), License Number R-AP-SS-8145.

The citation<sup>1</sup> charges Licensee with a violation of Section 5514 of the Crimes Code [18 Pa. C.S. §5514], which is incorporated by reference in Liquor Code Section 471 [47 P.S. §4-471] as “other sufficient cause.” The charge is that on October 18, 2008, 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 July 31, 2009 at the Scranton State Office Building, PUC Hearing Room 318, 100 Lackawanna Avenue, Scranton, Pennsylvania.

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1. Commonwealth Exhibit No. C-2, N.T. 8.

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 October 18, 2008 and completed it on November 17, 2008. (N.T. 7)

2. The Bureau sent a notice of an alleged violation to Licensee at the licensed premises by certified mail-return receipt requested on December 5, 2008. The notice alleged a violation as charged in the citation. (Commonwealth Exhibit No. C-1, N.T. 8)

3. On October 18, 2008, a Bureau Enforcement Officer conducted an administrative inspection of the premises sometime after 7:00 p.m., at a time when the premises was open and operating selling alcoholic beverages. The Officer found a slip of paper (Commonwealth Exhibit No. C-3, N.T. 14) along side the cash register. (N.T. 8-15)

4. Earlier in the evening, the bartender came over to M.S. (Licensee's President), with Commonwealth Exhibit No. C-3, because the bartender believed Commonwealth Exhibit No. C-3 had been left at the bar by a patron. M.S. was not aware of what Commonwealth Exhibit No. C-3 represented. (N.T. 23-24)

5. J.S. entered the premises at 6:00 p.m. to begin working. She was assisting the bartender with counting his till. The bartender gave J.S. Commonwealth Exhibit No. C-3 saying: "Your mom said to give it to you." J.S. did not know what it was. She took the document. She had a stack of papers which contained statistics for the pool league. She placed Commonwealth Exhibit No. C-3, on the pile of pool league documents. (N.T. 39-41)

6. When the Officer discovered Commonwealth Exhibit No. C-3, he said: "What's this?" Because the document was part of a stack of papers dealing with the pool league, J.S. remarked that Commonwealth Exhibit No. C-3 was for the pool league. She never actually looked at Commonwealth Exhibit No. C-3 until later in the inspection. (N.T. 42-43)

7. When J.S. finally had an opportunity to take a look at Commonwealth Exhibit No. C-3, she remarked that it was not part of the pool league documents. (N.T. 44-46)

8. The pool league engages in no unlawful gambling. Licensee does not permit any unlawful gambling or lotteries or football pools on the premises. (N.T. 51)

CONCLUSIONS OF LAW:

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

2. The Bureau has **failed** to prove that on October 18, 2008, 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:

I examined Commonwealth Exhibit No. C-3, and readily conclude it constitutes unlawful gambling paraphernalia as it is a betting slip for National Football League games. The deeper question is the application of Pa. *Liquor Control Bd. V. TLK, Inc.*, 544 A.2d 931 (Pa. 1988). Therein, we are advised the Bureau's standard of proof for violations of our criminal laws engaged in by employes or patrons is whether the licensee knew or should have known of the unlawful conduct.

I dismissed the case after hearing testimony. I opined that the Bureau failed to comply with *TLK, Inc.*, supra. Nonetheless, I do find *TLK, Inc.*, supra difficult to apply. At the foundation of *TLK's* pronouncement is the core fact that the criminal activity of employes or patrons occur on the licensed premises or have some meaningful connection to the licensed business.

Instantly, there was no actual criminal activity engaged in by employes or patrons on the licensed premises. Having found Licensee's testimony to be credible, especially since the Bureau had no countervailing evidence, this record contains nothing to support the conclusion that patrons or employes were actually engaged in criminal conduct on the licensed premises.

Based on the credible testimony, it is apparent the single, isolated document (Commonwealth Exhibit No. C-3) was inadvertently left at the premises by a customer. If *TLK, Inc.*, supra, can be read to impute responsibility and possession of criminal paraphernalia to a licensee, no matter how minute the amount, which paraphernalia employes or patrons secrete on their persons or inadvertently leave at a licensed premises, then the holding in *TLK, Inc.*, supra, has been rendered meaningless.

ORDER:

NOW THEREFORE, it is ordered that Citation No. 08-2953, issued against D & M Shumbris, Inc., t/a The Swizzle Stick, is DISMISSED.

**Retaining Jurisdiction**

Jurisdiction is retained to ensure compliance with this Adjudication.

Dated this 25<sup>TH</sup> day of August, 2009.

A handwritten signature in cursive script that reads "Felix Thau". The signature is written in black ink and is positioned above a horizontal line.

Felix Thau, A.L.J.

pm

**NOTICE: MOTIONS FOR RECONSIDERATION CANNOT BE ACTED UPON UNLESS THEY ARE IN WRITING AND RECEIVED BY THE OFFICE OF ADMINISTRATIVE LAW JUDGE WITHIN 15 DAYS AFTER THE MAILING DATE OF THIS ORDER, ACCOMPANIED BY A \$25.00 FILING FEE.**