

Mailing Date: May 26, 2010

[Appeal](#)

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 09-1876
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W01-397624
v.	:	
	:	LID - 50671
275 BANHAN INC	:	
275-277 S 60 th ST	:	
PHILADELPHIA PA 19139-3846	:	
	:	
PHILADELPHIA COUNTY	:	
LICENSE NO. R-SS-EHF-8061	:	

JUDGE SHENKLE
BLCE COUNSEL: James E. Dailey, Esq.
LICENSEE COUNSEL: Edward A. Taraskus, Esq.

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on August 11, 2009. There are three counts in the citation.

The first count alleges that on July 12, 2009, Licensee, by its “servants, agents or employees, possessed a controlled substance” on the licensed premises in violation of Sections 471 and 493(31) of the Liquor Code, 47 P.S. §§4-471 and 4-493(31), and §780-101 *et seq.* of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. §780-101 *et seq.*

The second count alleges that Licensee violated Section 491(2) of the Liquor Code, 47 P.S. §4-491(2), on July 12, 2009, by unlawfully possessing liquor obtained from a source other than a Pennsylvania State Store.

The third count alleges that Licensee violated Section 493(12) of the Liquor Code, 47 P.S. §4-493(12), on July 12, 2009, because it failed to keep records on the licensed premises.

A hearing was held on February 9, 2010, in Plymouth Meeting, Pennsylvania. The parties stipulated to the timely service of the notice letter and citation.

FINDINGS OF FACT:

1. On July 12, 2009, liquor enforcement officers seized from the licensed premises three 200 milliliter bottles of Sangsters Rum, four 340 milliliter bottles of Wray and Nephew Red Label Wine, and ten 200 milliliter bottles of Magnum Tonic Wine. These brands are not sold through the Pennsylvania State Store system (by stipulation, Exhibits B-3 and B-4, N.T. 5-6).

2. A team of law enforcement personnel entered the licensed premises at about 12:05 a.m. on Sunday, July 12, 2009. There were about 75 patrons and three people behind the bar. A man seated at the bar identified himself to the officers as the person in charge. Officers inspected the premises, walking behind the bar and looking for anything illegal (N.T. 7-9).

3. A liquor enforcement officer noticed a bartender standing in position, leaning against the bar. There were two bags behind his legs on the bottom shelf of the bar. The officer asked the bartender to stand aside, and he complied. One of the bags was a PlayStation 3 video game console bag, and the other was a backpack. The officer asked if these were his bags, and he said they were. The officer asked what was inside the bags. The bartender said that a PlayStation 3 and a couple of games were in one. He helped the officer open the zipper on this bag, and the officer saw that the contents were as the bartender stated (N.T. 9-11).

4. The officer picked up the second bag and asked what was in it. The bartender turned away and mumbled that he didn't know. The officer picked up the bag and opened it. He immediately smelled an odor which he recognized as marijuana (N.T. 11).

5. During five years of service, the officer had participated in about 30 investigations involving alleged controlled substances. He had received training in the identification of narcotics at the Southeast Training Center, from a corporal in the Compliance, Auditing and Gambling Enforcement Unit. As a result of his training, he knows what marijuana smells like in its unburned state (N.T. 12).

6. On the basis of his training and perception, the officer believed that the bag contained two large freezer bags of marijuana, weighing about a pound each. Citywide Vice police officers took possession of the bag and its contents. The liquor enforcement officer did not do any type of testing on the alleged marijuana (N.T. 13-14).

7. Another liquor enforcement officer took photographs of the alleged marijuana on her cell phone camera. The first of these photographs shows, among other things, the two approximately one-pound bags of alleged marijuana found in the main compartment of the bag the officer had searched. The second shows the same two bags with an additional, smaller bag which was found in the front compartment of the bag from behind the bar. The third picture is the same thing from a different angle. The last picture shows the bag which had contained these items, as well as the PlayStation bag (N.T. 14-15, Exhibit B-5).

8. Based on the information the liquor enforcement officer received, the contents of the bags was tested, and based on the results of the test, the officer charged the violation set forth in the first count of this citation (N.T. 16).

9. The inspection by liquor enforcement officers of records maintained in the licensed premises on July 12, 2009, resulted in the finding that there were beer and liquor invoices for the year 2008, but none for the year 2009 (N.T. 16).

10. The officers' search behind the bar did not disclose anything else alleged to be illegal, apart from the bags described above and the liquor and wine not sold in state stores (N.T. 17).

11. A police officer who was present on July 12, 2009, took possession of the alleged marijuana, and also smelled the odor of marijuana from the bags. The individual who claimed ownership was searched, and additional alleged marijuana was taken from his person. The seized items were recorded on a property record by the officer who testified, and the substances were fieldtested by another officer in his presence. Licensee's objection to the result of that test was sustained as hearsay (N.T. 18-23).

12. The alleged marijuana was then taken to the City's chemical lab at 8th and Poplar, for further testing. The individual who claimed ownership was arrested and charged with possession of a controlled substance with the intent to deliver it. The vice officer who testified believed, based on his observations and experience, that the substance seized was marijuana. The property receipt documenting the seizure was received in evidence, but objection was maintained as to the truth of the matters stated therein (N.T. 24-26, Exhibit B-6).

13. The police officer who signed the property receipt and conducted the field test on the alleged marijuana was unable to come to the hearing because of a medical emergency at home (N.T. 29-30).

14. Licensee's management did not know, prior to July 12, 2009, that the bartender who was arrested had any involvement with controlled substances (N.T. 34).

15. Licensee's business records for 2009 were not on the premises on July 12, 2009, because they were in the possession of an accountant, who had been newly employed by Licensee. The records have been returned to the premises (N.T. 35).

16. The seventeen bottles of alcoholic beverages listed in the first finding of fact above did not belong to Licensee, and were not intended to be held for resale as a part of Licensee's business. They were the property of Licensee's assistant manager, who had bought them during a visit to Jamaica. He intended to consume them with friends during a birthday party for himself which he intended to hold in the licensed premises (N.T. 35-36, 43-44).

CONCLUSIONS OF LAW:

Licensee's employee possessed a controlled substance on the licensed premises on July 12, 2009. This was a violation by the employee of §780-113 of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, 35 P.S. §780-113. However, it was not a violation by Licensee of that statute, nor was it a violation of §§471 and 493(31) of the Liquor Code, 47 P.S. §§4-471 and 4493(31), because Licensee did not have actual or constructive knowledge of the employee's crime.

Licensee violated Section 491(2) of the Liquor Code, 47 P.S. §4-491(2), on July 12, 2009, by unlawfully possessing liquor obtained from a source other than a Pennsylvania State Store.

Licensee violated Section 493(12) of the Liquor Code, 47 P.S. §4-493(12), on July 12, 2009, because it failed to keep records on the licensed premises.

DISCUSSION:

I am satisfied that the testimony of experienced police officers in an administrative proceeding is sufficient to prove, by a clear preponderance of the evidence, that a substance is marijuana without evidence of the result of a scientific test. *Com. v. Leskovic*, 307 A.2d 357 (Pa. Super., 1973) and *Com. v. Williams*, 428 A.2d 165 (Pa. Super., 1981).

Since it is not lawful for any person to possess marijuana in Pennsylvania, the act of Licensee's bartender in bringing more than two pounds of it to work in a backpack was, obviously, an illegal act. I am not persuaded that liability for this act can be imputed to Licensee, however.

The controlling precedent is *PLCB v. TLK, Inc.*, 544 A.2d 931 (Pa., 1988). The essence of the holding is contained in the first paragraph of Justice Flaherty's opinion:

This appeal from the revocation of a restaurant liquor license presents a question never before addressed by this Court: the extent to which a licensee may be liable for illicit drug transactions by an employee. We hold that a strict liability standard is inappropriate and that at least some degree of scienter is required. When violations of the Liquor Code and its attendant laws and regulations are not the conduct under review, a licensee is liable only if he knew or should have known of the illegal activity and if he fails to prove substantial affirmative measures taken to eliminate a known pattern of illegal activity.

-- 544 A.2d at 932

In *TLK* the evidence established a pattern of drug trafficking in the licensed establishment; there was no such evidence in this case. Licensee's owner in this case testified that he did not know, prior to July 12, 2009, that the bartender who was arrested had any involvement with controlled substances. There is no evidence on which a contrary finding could be based.

There is also no evidence that Licensee should have known what was in the bartender's backpack. There were no sales, no solicitations, no transfers of illegal drugs. In short, there is no evidence to support the proposition that Licensee had constructive knowledge of the bartender's criminal possession of a controlled substance on its premises.

By the same token, Licensee has no defense to the second count of the citation. This count involves a provision of the Liquor Code; therefore, no proof of *scienter* is required. 47 P.S. §4491(2) makes it unlawful for any person to possess more than one gallon of any liquor or alcohol not purchased in a state store or through a limited winery. In this case, 3.96 liters of alcoholic beverages not sold through the Pennsylvania State Store system were possessed in the licensed premises by

Licensee's assistant manager. One gallon equals 3.785 liters. I impute the assistant manager's knowledge of this fact to Licensee, because of his management responsibilities.

PRIOR RECORD:

Licensee has been licensed since August 20, 2003, and has had two prior violations:

Citation No. 07-1046C. \$1,250.00 fine and R.A.M.P. – certification mandated.

1. Sales to a minor. April 5, 2007.

Citation No. 08-1692. \$400.00 fine.

1. Obtained liquor from a source other than a state store. March 22, 2008.
2. Possessed liquor unlawfully. March 22, 2008.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. §4-471, prescribes a penalty of license suspension or revocation or a fine in the \$50 to \$1,000 range, or both, for violations of this type. Penalties are assessed as follows:

Count 1 – DISMISSED.

Count 2 – a fine of \$500.00.

Count 3 – a fine of \$100.00.

ORDER

THEREFORE, it is hereby ORDERED that Licensee, 275 Banhan, Inc., License No. R-SSEHF-8061, shall pay a fine of six hundred dollars (\$600.00) within 20 days of the mailing date of this order. In the event the fine is not paid within 20 days, Licensee's license will be suspended or revoked. Jurisdiction is retained.

Dated this 5TH day of MAY, 2010.



David L. Shenle, J.

jb

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.

Detach Here and Return Stub with Payment

The fine must be paid by cashier's check, certified check or money order. Personal and business checks are not acceptable unless bank certified. Please make your guaranteed check payable to the Commonwealth of Pennsylvania and mail to:

PLCB-Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg PA 17110-9661

Citation No. 09-1876 275 Banhan, Inc.