

Mailing Date: FEB 17 2012

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	Citation No. 10-0093
LIQUOR CONTROL ENFORCEMENT	:	
	:	Incident No. W03-389064
v.	:	
	:	LID - 39437
MARSPAN, INC.	:	
T/A BOTTOMS' UP HOTEL	:	
696-698 E. PHILADELPHIA ST.	:	
YORK, PA 17403-1648	:	
	:	
	:	
YORK COUNTY	:	
LICENSE NO. H-AP-SS-2652	:	

**BEFORE JUDGE FLAHERTY
BUREAU COUNSEL BALLARON
LICENSEE: ALBERT G. BARNES, ESQUIRE**

ADJUDICATION

BACKGROUND:

This proceeding arises out of a citation that was issued on January 15, 2010, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against MARSPAN, INC., License Number H-AP-SS-2652 (hereinafter "Licensee").

The citation charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Sections 2701, 2702, 2705, 2709 and 5503 of the Crimes Code [18 Pa. C.S. §§2701, 2702, 2705, 2709 and 5503] in that on January 18, 2009, Licensee, by its servants, agents or employees, engaged in disorderly conduct and harassment, committed simple assault and aggravated assault and recklessly endangered another person.

The investigation which gave rise to the citation began on February 10, 2009 and was completed on January 6, 2010; and notice of the violation was sent to Licensee by Certified Mail on January 14, 2010. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on May 11, 2011 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania. The hearing was reopened on November 2, 2011 to allow the Licensee to present testimony which had previously been excluded and to allow the Bureau to present rebuttal testimony.

Upon review of the transcript of this hearing, we make the following Findings of Fact and reach the following Conclusions of Law:

FINDINGS OF FACT:

1. On June 16, 2010, George Marros, who was at that time sole corporate officer of Licensee corporation entered a plea of nolo contendere in the York County Court of Common Pleas to the charge of recklessly endangering another person. He was sentenced to imprisonment in the county jail for six to twenty-three months and to pay restitution to Erik Deshields in the amount of \$170.00 (N.T. 5/11/11, 14, 21 & C-3).

2. The aforementioned plea of nolo contender arose from events occurring on the licensed premises on January 18, 2009 as hereinafter described.

3. On January 18, 2009 Erik DeShields entered the licensed premises. He went to the pool table, put money on the table and waited his turn to shoot pool (N.T. 5/11/11, 23).

4. At approximately 1:45 a.m., DeShields began playing pool with Troy Lentz (N.T. 5/11/11, 49).

5. After Lentz and DeShields had been playing pool, George Marros came from the kitchen area of the licensed premises appearing to be irate. He yelled, "everybody get out of my bar." He came to the pool table and asked Lentz and DeShields to stop playing and get out of the bar. He then turned the light off at the pool table and walked away (N.T. 5/11/11, 49-50).

6. The doorman, Harry Murray, walked over to the pool table. He turned the light at the pool table back on and said "go ahead and finish the game" (N.T. 26, 27, 50 & 67).

7. George Marros came back to the table yelling, "Turn the light off." He then pushed two balls into the pockets (N.T. 27, 50 & 67).

8. At this point Erik DeShields said to George Marros, "Since I can't play the game may I have my money back?" (N.T. 27, 50 & 67).

9. George Marros said to Erik DeShields, "I'm not giving you shit motherfucker." Marros then grabbed DeShields by the shirt. Erik DeShields then grabbed George Marros by the shirt, and they began to struggle (N.T. 50-51).

10. The two struggling men hit the pool table and fell on the floor (N.T. 51).

11. The door man, Harry Murray, quickly came over yelling, "No George, No." He began pulling Erik DeShields off of George Marros (N.T. 51).

12. At this time, George Marros was getting up. He pulled a gun (a .40 caliber Glock) shot one round into the floor and then shot Erik DeShields in the abdominal area about halfway between the shoulder and the waist. The bullet passed through his body and exited from his back (N.T. 28-29 & 51).

13. Erik DeShields wrestled the gun away from George Marros, and at the request of Harry Murray, gave the gun to Murray. Murray removed the clip and ejected the bullet from the chamber (N.T. 29 & 69).

14. Erik DeShields was taken to the hospital by his brother (N.T. 30).

CONCLUSION OF LAW:

The charge of aggravated assault is sustained as are the charges of disorderly conduct and harassment. Simple assault and recklessly endangering are lesser included offenses within aggravated assault and are merged into that offense.

DISCUSSION:

The Bureau has met its burden with respect to the charges of aggravated assault, disorderly conduct and harassment.

The appellate courts of the Commonwealth have long held that a violation of the Criminal Code of Pennsylvania by a liquor licensee on the licensed premises constitutes "other sufficient cause," as that term is used in Section 471 of the Liquor Code [47 P.S. §4-471] subjecting the violating licensee to the penalty provisions of that section. *Commonwealth v. Lyons*, 15 A.2d 851 (Pa. Super 1940); *VJR Bar Corp. v. Pa. Liquor Control Board*, 390 A.2d 163 (Pa. 1978); *In re: Quaker City Development Co.*, 365 A.2d 683 (Pa. Cmwlth. 1976); *Pa. Liquor Control Board v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988). Thus, if Licensee has violated any of the criminal provisions charged, he is subject to the sanctions provided in Section 471 (supra).

FACTUAL DETERMINATIONS

In a liquor license case, the burden is on the Commonwealth to establish a violation by a clear preponderance of the evidence. *In re Omicron Enterprises*, 449 A.2d 857 (Pa.Cmwlth 1982).

The phrase “preponderance of evidence” has been defined as evidence which is of greater weight or more convincing than evidence which is in opposition to it. *Black’s Law Dictionary, Fifth Edition*, West Publishing Company, Copyright 1979, Page 1064.

It is within my province, and is part of my responsibility to determine the credibility of witnesses and the weight to be given to their testimony. *State Correctional Institute v. Robinson*, 561 A.2d 82 (Pa.Cmwlt 1989). I may give testimony such consideration as it may deserve, and accept it or reject it in whole or in part. *McFarland Landscape Service v. Workmen’s Comp. Bd. Of Appeal*, 557 A.2d 816, 817-18 (Pa.Cmwlt 1989); *Hollenbach v. North Wales Foundry Co.*, 136 A.2d 148, 150 (Pa.Super 1957).

In this case I find the testimony given by Erik DeShields, Troy Lentz and Harry Murray to be consistent and believable. This is especially true of Troy Lentz who was a witness with no interest in the matter. I give great weight to the testimony of these witnesses.

Conversely, the witnesses for Licensee did not appear to be credible. I found the claim of George Marros that he felt someone reaching for his gun, thus requiring him to draw it in self-defense to be unbelievable. Further his claim was in direct opposition to the testimony of DeShields, Lentz and Murray.

Because of the foregoing, I give great weight to the testimony presented by the witnesses for the Bureau and no weight to testimony presented on behalf of Licensee.

At this point, we will examine each of the Criminal Code Sections with which Licensee has been charged.

DISORDERLY CONDUCT

The charge of Disorderly Conduct has been sustained. Section 5503(a)(4) of the Crimes Code [18 Pa. C.S. §5503(a)(4)] reads as follows:

§5503 Disorderly Conduct

(a) Offense defined. – A person is guilty of disorderly conduct if with intent to cause public inconvenience, annoyance or alarm or recklessly creating a risk thereof he: ... (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

The record in this case establishes that the president of Licensee corporation, George Marros, instigated the physical confrontation which started this incident by grabbing the shirt of Erik DeShields. When DeShields responded by grabbing his shirt, Marros pulled a .40 caliber Glock pistol and discharged it, wounding Mr. DeShields. I have no trouble concluding that these actions constituted Disorderly Conduct as proscribed by Section 5503(a)(4) (supra).

HARASSMENT

The charge of Harassment has been sustained.

Section 2709 of the Crimes Code [18 Pa. C.S. §2709] as pertinent, reads as follows:

- (a) Offense defined. – A person is guilty of the offense of harassment when with intent to harass, annoy, subjects the other person to physical contact or attempts or threatens to do the same..

As I have already indicated, it is established by the record that Mr. Marros grabbed Mr. DeShields by the shirt and shot him, which were obvious annoyances to him. Since such a reaction was the natural or probable consequence of the actions of Mr. Marros, the law makes it clear that I may infer that he intended such results. *Com. v. Rosado*, 684 A.2d 605 (Pa. Super 1996).

Consequently, I conclude that, with respect to the charge of harassment, the Bureau has met its burden, and the charge is sustained.

AGGRAVATED ASSAULT

Section 2702(a)(4) of the Pennsylvania Crimes Code [18 Pa. C.S. §2702(a)(4)] reads as follows:

- (a) Offense defined. – A person is guilty of aggravated assault if he
- ...(4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon;...

The record establishes that during a confrontation which he instigated, Mr. Marros pulled a .40 caliber Glock pistol and shot Mr. DeShields in the side. There is, therefore, no question that Mr. Marros caused injury to another with a deadly weapon.

With respect to the question of intent, the Superior Court of Pennsylvania has held that I, as a fact finder, am free to conclude that Mr. Marros intended the natural and probable consequences of his actions that result therefrom. *Com. v. Holley*, 945 A.2d 241 (Pa. Super 2008); *Com. v. Rasado*, (supra).

Based upon the foregoing, I conclude that with respect to the charge of Aggravated Assault the Bureau has met its burden, and the charge is sustained.

SIMPLE ASSAULT

I need not consider separately the charge of simple assault since all statutory elements of this offense are included in the charge of aggravated assault and arise from the same criminal act. They are considered to have merged for sentencing purposes. (See 42 Pa. C.S.A. §9765). This charge shall therefore, be dismissed.

RECKLESSLY ENDANGERING

Here again I need not consider separately the charge of recklessly endangering another person since as with simple assault, all of the elements of this offense are included within the charge of aggravated assault and arise from the same criminal act. They are, therefore, considered to have merged for sentencing purposes. (See Section 9765 of the Criminal Code, *supra*).

SCIENTER

In order for a liquor licensee to be held liable for criminal activity on the licensed premises as “other sufficient cause” under Section 471 of the Liquor Code (*supra*), it must be established that the licensee knew or should have known of the illegal activity. *Pa. Liquor Control Board v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988).

In this case, it is plain that Mr. Marros, sole corporate officer of Licensee corporation was aware of his own actions, and the requisite scienter is, therefore present.

PRIOR RECORD:

Licensee has been licensed since December 27, 1996, and has had four prior violations:

Citation No. 98-0829. Fine \$650.00.

1. Sales to a visibly intoxicated person.

Citation No. 99-0954. Fine \$150.00.

1. Used loudspeakers or devices whereby music could be heard outside.

Citation No. 03-1367. Fine \$1,200.00.

1. Sales to a visibly intoxicated person. July 5, 2003.

Citation No. 06-2941. Fine \$150.00.

1. Failed to return the license to the Board after the licensed establishment had not been in operation for a period of 15 consecutive days. Between October 21 and November 28, 2006.

PENALTY:

Section 471 of the Liquor Code [47 P.S. §4-471] prescribes a penalty of license suspension or revocation or a fine of not less than \$50.00 or more than \$1,000.00 or both for violations of the type found in this case.

The actions of Mr. Marros in this case could have easily resulted in the death of Mr. DeShields. It is only through sheer luck that they did not.

Under the circumstances of this case, the penalty imposed shall be revocation of Licensee's liquor license.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Liquor License No. H-AP-SS-2652, issued to MARSPAN, INC., is **REVOKED** effective at 7:00 a.m. on Monday, April 16, 2012. Any Wholesale Liquor Purchase Permit Card or discount card issued in connection with the aforementioned license is hereby CANCELLED.

Since the license has expired there is no license to return; therefore, the Bureau of Licensing is hereby directed to mark their records that this license has been **REVOKED**. The Licensee's right to renew his license is hereby CANCELLED.

Jurisdiction is retained.

Dated this 15TH day of February, 2012.



Daniel T. Flaherty, Jr., J.

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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.

IF YOU WISH TO APPEAL THE DECISION OF THE ADMINISTRATIVE LAW JUDGE'S ORDER, THE APPEAL MUST BE FILED WITHIN 30 DAYS OF THE MAILING DATE OF THE ORDER. PLEASE CONTACT CHIEF COUNSEL'S OFFICE AT 717-783-9454.