

Mailing Date: SEP 28 2012

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	IN RE: CITATION NO. 11-0306
LIQUOR CONTROL ENFORCEMENT	:	
	:	BLCE INCIDENT NO. W03-423800
	:	
v.	:	
	:	
	:	PLCB LID - 55730
PORTABELLAS, INC.	:	
T/A PORTABELLAS	:	PLCB LICENSE NO. R-AP-SS-EHF-15770
2495 E. HARRISBURG PIKE	:	
MIDDLETOWN, PA 17057-39417	:	

**ADJUDICATION**

**BEFORE JUDGE FLAHERTY  
BUREAU COUNSEL PIETRZAK  
LICENSEE: FRANK C. SLUZIS, ESQUIRE**

BACKGROUND:

This proceeding arises out of a citation that was issued on March 10, 2011, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against PORTABELLAS, INC., License Number R-AP-SS-EHF-15770 (hereinafter "Licensee").

The citation charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Sections 2701 and 3304 of the Crimes Code [18 Pa. C.S. §§2701 and 3304] in that Licensee, by its servants, agents or employes, committed simple assault and engaged in criminal mischief on September 26, 2010.

The investigation which gave rise to the citation began on December 15, 2010 and was completed on February 3, 2011; and notice of the violation was sent to Licensee by Certified Mail on February 14, 2011. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on March 7, 2012 in the Office of Administrative Law Judge, Brandywine Plaza, 2221 Paxton Church Road, Harrisburg, Pennsylvania.

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. Jennifer Speck and Roxann Sheetz are sisters (N.T. 34, 61 and 118).
2. As of September 26, 2010, Roxann Sheetz was employed by the Licensee as officer manager (N.T. 60-61, 118-119).
3. Justin Nicholson, as of September 26, 2010 was the president and sole stockholder of Licensee corporation (N.T. 116).
4. As of September 26, 2010 Corey Nasatka was the “boyfriend” of Roxann Sheetz (N.T. 37).
5. As of September 26, 2010 Jennifer Speck and Justin Nicholson had recently separated as a couple after having two children together (N.T. 62, 118-119 and 121).
6. On September 26, 2010, shortly after 12:00 a.m., Corey Nasatka, Jennifer Speck and Roxann Sheetz entered the licensed premises together (N.T. 34).
7. Shortly after the arrival of Nasatka, Speck and Sheetz, Speck became involved in an argument with Justin Nicholson, President of Licensee corporation. During the argument, Nicholson put his hand on Speck’s face and shoved her (N.T. 37-39 and 63-64).
8. Roxann Sheetz became involved in the argument between Speck and Nicholson and shoved Nicholson in the same manner that Nicholson had shoved Speck. As a result someone who was behind Nicholson hit Sheetz on the shoulder and Sheetz fell to the floor (N.T. 38-39 and 64-65).
9. During the argument between Speck and Nicholson inside the licensed premises, Speck slapped and punched Nicholson in the mouth, cutting his lip (N.T. 127).
10. As a result of the physical confrontation in the licensed premises, a general brawl started. During the disturbance, Sheetz was taken out of the bar by Corey Nasatka, and Nicholson was taken out by one of his security people (N.T. 39-40, 64-65 and 128-129).
11. Once outside, an argument began between Nicholson and Sheetz near Sheetz’s automobile. As the argument ensued, Nicholson began hitting Sheetz’s automobile with his fists on the passenger side fender; the door and the hood leaving a hand print in the hood and cracks and dents causing between \$1,000.00 and \$1,500.00 in damage to the automobile.

12. When the incident with Sheetz's automobile was over, Corey Nasatka was hit in the back of his head, and his glasses were knocked off. When he turned he saw Nicholson and two of his friends coming at him. Nasatka ducked and covered his head. He was hit several more times in the head and back, but did not see who hit him. The fight was then broken up by other people who were present (N.T. 42-44).

CONCLUSION OF LAW:

The charge of simple assault is **dismissed**.

The charge of criminal mischief is **sustained**.

DISCUSSION:

The Bureau has met its burden as to the charge of criminal mischief, but has not met its burden as to the charge of criminal assault.

The Supreme Court of Pennsylvania has held that violation of the criminal laws of the Commonwealth, where appropriate scienter is present constitutes "other sufficient cause" as that term is used in Section 471 of the Liquor Code [47 P.S. §4-471]. *Pa. Liquor Control Board v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988).

Thus, violation of a Pennsylvania Criminal Statute by a liquor licensee on the licensed premises will subject the licensee to the penalty provisions of Section 471 (supra).

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.

With these principles in mind I will address each of the criminal sections charged.

Simple Assault

Section 2701 of the Crimes Code [18 Pa. C.S. §2701] in pertinent part, reads as follows:

(a) Offense defined. – A person is guilty of assault if he:

- (1) Attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another;

(2) Negligently causes bodily injury to another with a deadly weapon;

(3) Conceals or attempts to conceal a hypodermic needle on his person and intentionally or knowingly penetrates a law enforcement officer or an officer or an employe of a correctional institution, county jail or prison, detention facility or mental hospital during the course of an arrest or any search of the person...

The record in this case establishes that Mr. Nasatka was initially hit from behind and did not see who hit him. Further, he subsequently ducked and did not see who delivered any of the following blows. In addition, his fleeting glimpse of Mr. Nicholson before he ducked is not in my opinion sufficient evidence to establish that Mr. Nicholson, by physical menace attempted to put Mr. Nasatka “in fear of imminent serious bodily injury.”

In light of the foregoing, I conclude that the Bureau has failed to meet its burden with respect to the charge of Simple Assault and that charge will be dismissed.

#### Criminal Mischief

Section 3304(a)(1) of the Crimes Code [18 Pa. C.S. §3304(a)(1)] reads as follows:

(a) Offense defined.—A person is guilty of criminal mischief if he:

(1) Damages tangible property of another intentionally, recklessly, or by negligence in the employment of fire, explosives or other dangerous means listed in Section 3302(a) of this title (relating to causing or risking catastrophe).

The record clearly establishes that Mr. Nicholson, President and Stockholder of Licensee corporation deliberately did extensive damage to the automobile of Roxann Sheetz with his fist.

#### Scienter

The Supreme Court of Pennsylvania has mandated that when a licensee has been found to have committed a violation which is classified as “other sufficient cause,” some element of scienter must be present before the penalties set forth in Section 471 of the Liquor Code (supra) may be applied. The test set forth by the court is as follows:

1. Whether the licensee knew or should have known of the illegal activities by an employe or patron. If so, the licensee is liable.

2. A licensee may defend his license by demonstrating he took substantial, affirmative steps to guard against a known pattern of illegal activities.

*Pa. Liquor Control Board v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988).

In this case, since Mr. Nicholson is in fact the Licensee, it is clear that scienter requirements have been satisfied.

Based upon the foregoing, I conclude that the charge of criminal mischief has been sustained.

PRIOR RECORD:

Licensee has been licensed since June 20, 2007, and has had one prior violation:

IN RE:

Citation No. 10-1142. Fine \$150.00.

1. Permitted smoking in a public place where smoking was prohibited. December 10, 2009, January 13, 22, 23, February 27, March 8, April 5 and 6, 2010.

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.

Under the circumstances of this case, the penalty imposed shall be a fine of \$1,000.00 and a three days suspension.

ORDER

THEREFORE, it is hereby ordered that Licensee PORTABELLA'S, INC., pay a fine of \$1,000.00 within 20 days of the mailing date of this Order. In the event the aforementioned fine is not paid within 20 days from the mailing date of this Order, Licensee's license shall be suspended or revoked.

IT IS FURTHER ORDERED that Licensee's liquor license (including all permits and Licensee Discount Card) License No. R-AP-SS-EHF-15770 be suspended for a period of three days **BEGINNING** at 7:00 a.m. on Tuesday, December 11, 2012 and **ENDING** at 7:00 a.m. on Friday, December 14, 2012.

Licensee is directed on December 11, 2012 at 7:00 a.m. to place the enclosed placard of notice of suspension (identified as Form No. PLCB-1925 and as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is advised if replacement placards are needed for any reason they are available at all Pennsylvania Liquor Stores/Wine & Spirits Shoppes.

The Bureau is directed to visit and monitor the aforementioned licensed premises for compliance with this Order.

Licensee is authorized on December 14, 2012 at 7:00 a.m. to remove the placard of suspension and return his license to its original wall location.

Jurisdiction is retained.

Dated this 26<sup>TH</sup> day of September, 2012.

A handwritten signature in black ink, reading "Daniel T. Flaherty, Jr.", written over a horizontal line.

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.**

**Detach here and submit stub with payment**

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The fine must be paid by Cashier's Check, Certified Check or Money Order. **Personal and business checks are not acceptable unless bank certified.** Make 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

IN RE: CITATION NO. 11-0306  
PORTABELLA'S, INC.