

Mailing Date: OCT 12 2012

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

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	IN RE: CITATION NO. 11-1858
LIQUOR CONTROL ENFORCEMENT	:	
	:	BLCE INCIDENT NO. W06-435295
	:	
	:	
v.	:	
	:	
	:	PLCB LID - 59421
RUSSELLS & KRISTYS, LLC	:	
117-119-125 W. MAIN ST.	:	PLCB LICENSE NO. R-AP-SS-7341
BLOOMSBURG, PA 17815-1704	:	

ADJUDICATION

BEFORE JUDGE THAU
BUREAU COUNSEL PIETRZAK
LICENSEE: SCOTT T. WILLIAMS, ESQUIRE

BACKGROUND:

This proceeding arises out of a citation that was issued on November 3, 2011, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against RUSSELLS & KRISTYS, LLC, License Number R-AP-SS-7341 (hereinafter "Licensee").

The citation contains three counts.

The first count charges Licensee with violation of Section 471 of the Liquor Code [47 P.S. §4-471] and Section 5503 of the Crimes Code [18 Pa. C.S. §5503] in that Licensee, by its servants, agents or employees, engaged in disorderly conduct on August 20, 2011.

The second count charges Licensee with violation of Section 499(a) of the Liquor Code [47 P.S. §4-499(a)] in that on August 20, 2011, Licensee, by its servants, agents or employees, failed to require patrons to vacate that part of the premises habitually used for the service of alcoholic beverages not later than one-half hour after the required time for the cessation of the service of alcoholic beverages.

The third count charges Licensee with violation of Section 499(a) of the Liquor Code [47 P.S. §4-499(a)] in that on August 20, 2011, Licensee, by its servants, agents or employes, permitted patrons to possess and/or remove alcoholic beverages from that part of the premises habitually used for the service of alcoholic beverages after 2:30 a.m.

The investigation which gave rise to the citation began on August 22, 2011 and was completed on September 18, 2011; and notice of the violation was sent to Licensee by Certified Mail on September 23, 2011. The notice of violation was received by Licensee.

An evidentiary hearing was held on this matter on July 25, 2011 at 524 County Farm Road, Montoursville, 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:

Counts No. 1, 2 and 3

1. A municipal police officer (PO) was on duty, in full uniform, and in a marked patrol vehicle on August 20, 2011. The PO stationed his vehicle directly across a four-lane highway which separates the PO's vehicle from the licensed premises. The PO could see people inside the premises from that location (N.T. 23-27).

2. The PO called County Dispatch to determine the time. County Dispatch provided a time just thirteen seconds short of 2:30 a.m. The PO advised County Dispatch that he intended to enter the premises (N.T. 28-31).

3. After entering the premises, the PO noticed patrons were drinking alcoholic beverages and conversing. One employe, Ms. F., noticed the PO. She remarked that her cash register indicated it was only 2:29 a.m. (N.T. 33-36; 40; 44).

4. Ms. F. cursed and yelled at the P.O. calling him a "big fucking dickhead." She exited the premises. The PO followed her outside. There was a group of people immediately outside the premises conversing. While outside, Ms. F yelled, "You better get going, all these Bloom cops are pigs." Ms. F. also shoved outdoor furniture maintained by Licensee (N.T. 51-52, 53, lines 3 and 4; N.T. 54).

5. One individual in the crowd, known to the PO, remarked, "Come on, ..., don't you guys have anything better to do,... I mean who cares. Bloomsburg is better than this" (N.T. 55).

6. Licensee had no indication that Ms. F. would be likely to behave in the manner she did. She never behaved that way at work before (N.T. 162-165).

CONCLUSIONS OF LAW:

Count No. 1. The Bureau has failed to meet its burden of proof.

Count No. 2. The Bureau has failed to meet its burden of proof.

Count No. 3. The Bureau has failed to meet its burden of proof.

DISCUSSION:

Count No. 1 – Disorderly Conduct

A. Elements

One may be found to have violated 18 Pa. C.S. §5503, relating to noisy and disorderly conduct, in four ways. They are: engaging in fighting or threatening, or in violent, tumultuous behavior; making unreasonable noise; using obscene language, or making an obscene gesture; creating a hazardous or physically offensive condition by an act which serves no legitimate purpose.¹

Proof of intent is also required. Intent may be established by showing a reckless disregard of risk of public inconvenience or alarm. *Commonwealth v. Hughes*, 410 A.2d 1272 (Pa.Super., 1979). Loud talking is not disorderly conduct where there is an absence of evidence demonstrating nearby residents were disturbed or those on public thoroughfares were annoyed. *Commonwealth v. Bertz*, 30 Pa. D. & C. 2nd 703 (1963).

Our Superior Court has held that calling police officers, “god damn fucking pigs,” as a large crowd gathers constitutes a violation of the relevant statute. *Commonwealth v. Pringle*, 450 A.2d 103 (Pa.Super., 1982). More recently however, the Pennsylvania Supreme Court resolved a similar case quite differently. *Commonwealth v. Hock*, 728 A.2d 943 (Pa. 1999).²

Writing for the majority, Justice Saylor noted that the disorderly conduct statute cannot be used as a method of protecting police from all verbal indignities. The offense of disorderly conduct is not intended as a catchall for every act which annoys or disturbs people. The law has a limited periphery beyond which prosecuting authorities may not trespass. The ruling suggested speech must contain “fighting words” to be actionable.

¹ The Bureau has not specified which or how many of these four are implicated. Based upon the Bureau’s presentation, I infer the allegation relates to all except making unreasonable noise. Nonetheless, I address all four conditions.

² The defendant’s remark, “fuck you asshole,” uttered in a normal tone of voice while walking away from the police was not criminal conduct. Also see *Tate v. West Norriton Township*, 545 F. Supp. 2nd 480 (United States District Court, Eastern District of Pennsylvania 2008).

B. Application to Facts

Without question, the bartender's speech and subsequent behavior was uncivil and inappropriate, but not unlawful. To some degree, I readily understand why someone might respond as the bartender did. She believed the PO arrived prior to 2:30 a.m. In the PO's mind, he entered the premises somewhere between 2:31 and 2:32 a.m. to alert the bartender that Licensee violated the law. I dare say, most of us would be shocked by such a strict enforcement approach because slight differences in time calibration are everyday occurrences.

As to the remainder of the Bureau's case, which relies entirely upon the PO's testimony, I find the evidence all too vague. I first note the PO's inability to provide a consistent estimate of the number of patrons in the licensed premises. The first was somewhere between eight to twenty customers (N.T. 36). When I heard that, I was taken aback. I thought the PO's estimate was surprisingly imprecise. Surely, I further thought, a police officer is accustomed to providing estimates with significantly more accuracy. Later, the PO's estimate changed to fifteen (N.T. 45). Several questions later, the PO offered an estimate of twenty (N.T. 46).

As the hearing progressed, I repeatedly challenged the PO to describe the precise behavior the bartender demonstrated while outside the licensed premises. I heard her behavior was "provocative," that she threw chairs around, but not at the PO or in the street. I then heard the bartender just "shoved things around" (N.T. 53).

The PO also suggested the bartender's behavior "prompted" the crowd on the sidewalk to become threatening. When asked how the crowd manifested that threat, the PO referred to the comments of just one person, which the PO described as heckling (N.T. 54-55; Finding of Fact No. 5). The PO found the person's comments to be "condescending." (N.T. 56). No other crowd member caused the PO any difficulty (N.T. 84).

I asked the PO to describe what else happened. His initial response was that he, "wouldn't venture a guess," which was followed by, "became (sic) almost us against them and it became a mob mentality." (N.T. 56).

When the witness was asked whether there was anything particularly disturbing about the crowd's behavior outside the licensed premises, the response was, "I mean nothing extraordinary." (N.T. 70). That comment was followed by, "I mean, I don't know if I could put it into words." As the point was pressed, the PO's only difficulty with the crowd was loitering. His goal was to disperse the crowd (N.T. 73-74). Based upon the PO's estimate, the scene was cleared of people at approximately 2:45 a.m. (N.T. 78-79).

The PO then asserted the bartender engaged in noisy and disorderly conduct when she showed the PO her cell phone which indicated it was 2:30 a.m., rather than the PO's estimate of 2:40 a.m. (N.T. 78-79).

I find nothing in this record to support the charge.

C. Scienter

Had I concluded the bartender violated the law, the Bureau still must establish *scienter* as required by *Pa. Liquor Control Board v. TLK, Inc.*, 544 A.2d 931 (Pa. 1988). Of course, *TLK* tells us that violations of the Crimes Code by employees or patrons may be applied to a licensee in this administrative process upon a showing that the licensee knew or should have known of the unlawful conduct.

Every legal principle enunciated in a judicial decision must be read in context; a rule loses vitality when extracted from the environment in which it was conceived, *Six L's Packing Company v. W.C.A.B. (Williamson)*, 44 A.3d 1148 (Pa. 2012). As applied to the newly minted *scienter* standard enunciated in *TLK*, one must remember it arose in relationship to a pattern of unlawful conduct.

It is therefore stretching *TLK's* holding to apply it to an isolated, unexpected act. Moreover, there was nothing in the bartender's employment history that would have suggested she would likely behave in the manner she did. That an employe advised the PO that she was in charge, a declaration that may suffer from inadmissible hearsay issues, does not clothe the employe with the mantle of Licensee.³

Counts No. 2 and 3 – Permitting Patrons to Remain After 2:30 a.m. with Alcoholic Beverages

A. When is 2:30 a.m. actually 2:30 a.m.?

At first glance, the question sounds absurd, but in this factual environment, it is entirely relevant. The Liquor Code imposes the duty upon Licensee to clear the establishment of patrons and alcoholic beverages by no later than 2:30 a.m. What the law does not state is the standard by which time is measured.

By way of example, I asked those at the hearing to provide me with the time indicated by each person's watch. In this small, unscientific sample, the responses varied by as much as five minutes (N.T. 150-151). In terms of liability, in every case but this, a five minute variation has been inconsequential. Perhaps that is no more the case.

³ Bureau counsel requested permission to file a brief specifically related to *scienter*. The transcript was available on August 17, 2012. Counsel had thirty days from that date to file a brief but did not do so (N.T. 177-178).

Instantly and assuming I accord the Bureau's evidence substantial weight, the violations occurred within less than one minute after 2:30 a.m. This fact elevates the significance of a statutory standard to a critical level. Am I to apply an Officer's source for determining time, or the reading on a licensee's computer, or some other standard? ⁴

At the hearing, I drew the analogy of measuring an automobile's speed for the purpose of proving a speed limit violation. Because speed, when measured over a relatively short distance, is highly susceptible to gross inaccuracies if the measuring device is the slightest bit off, the law requires regular instrument calibration. This matter provides strong argument for the same approach for time assessment.

This case has channeled my penalty assessment thinking in a new direction. Just as the amount a driver exceeds the speed limit impacts on penalty, ought not the degree to which a licensee remains open after 2:30 a.m. have a significant penalty impact? Consequently, time measurement accuracy becomes all the more important.

Some devices we rely upon to determine time do not measure time. A cell phone is not a time measuring device. The time a cell phone registers is provided by another source. Nonetheless, without calibration, how are we to know that a cell phone accurately received and recorded the time?

I engaged Bureau counsel in a colloquy concerning the very application of law down to seconds after 2:30 a.m. I inquired whether the Bureau has a policy of allowing a cushion of time, five minutes for example before a citation would issue. I was advised that there is no standard policy and that officers have discretion to determine whether a citation is to issue for these violations (N.T. 125-132). I believe, the lack of a fixed policy places licensees in an unfair position if one is given a grace period while another is not.

B. Burden of Proof

Putting aside the above inquiry, I find this record is devoid of any admissible evidence regarding the time the PO entered the licensed premises. The PO's testimony regarding time was based on documentation from which the PO read (N.T. 33). He had before him the County Dispatch Record which listed the time of his call as 2:29:47 a.m. The PO's repetition of that entry constitutes inadmissible hearsay. The Legal Residuum Rule provides, even if un-objected to, inadmissible hearsay cannot support a finding of fact absent other corroboration. Without any admissible proof of time, the Bureau's case must fail.

⁴ In addition to the lack of a statutory standard, this matter calls into question whether the Bureau must prove the measuring device it employed to determine time was calibrated, such proof taking the form of an official certification.

ORDER

IT IS HEREBY ORDERED that Citation No. 11-1858 be **DISMISSED**.

Jurisdiction is retained.

Dated this 10TH day of October, 2012.



Felix Thau, ALJ

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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.