

Mailing Date: AUG 16 2016

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

PENNSYLVANIA STATE	:	In re Citation No. 15-2058
POLICE, BUREAU OF	:	
LIQUOR CONTROL ENFORCEMENT	:	BLCE Incident No. W01-501719
	:	
v.	:	PLCB LID No. 52886
	:	
3153 TAING, INC.	:	PLCB License No. R-SS-3903
3153 N. 22 nd ST.	:	
PHILADELPHIA, PA 19132-1550	:	Philadelphia County

JUDGE SHENKLE
BLCE COUNSEL: Erik S. Shmukler, Esq.
LICENSEE: Leng Taing, president

ADJUDICATION

BACKGROUND:

The Bureau of Liquor Control Enforcement of the Pennsylvania State Police issued this citation on November 24, 2015. The citation alleges that Licensee violated the Liquor Code, 47 P.S. §§4-401(a) and 4-406(a)(1), on October 24, 2015, by selling, furnishing or giving liquor for consumption off premises.

A hearing was held on May 17, 2016, in Plymouth Meeting, Pennsylvania.

FINDINGS OF FACT:

1. The Bureau investigated Licensee during the period September 16 through October 24, 2015, and sent it written notice of the results on October 30, 2015. The notice alleges that Licensee violated the law on October 24, 2015, when it “sold, furnished or gave liquor for consumption off premises” (N.T. 8-9, Exhibit B-1).
2. The Bureau issued this citation on November 25, 2015, and a copy of it was mailed to the licensed premises on that date. The citation repeats the allegation made in the notice letter, and adds the statutory citations to 47 P.S. §§4-401(a) and 4-406(a)(1). (N.T. 9-10, Exhibit B-2).
3. On October 24, 2015, a liquor enforcement officer entered the licensed premises at about 3:00 p.m. There may have been a patron or two, but it wasn’t crowded. The officer approached the counter area, which was attended by the only employee in the premises. He asked for a shot of

Bacardi. The clerk asked if he wanted the lemon flavor; she said it was better. He said, “sure, whichever one. I’ll get an orange juice as well.” (N.T. 6-7, 14).

4. Customers first entering the premises find themselves in a serving area eight feet wide and fifty-four feet long. Most of the right-hand side of that serving area is separated from the kitchen and storage areas by floor-to-ceiling Plexiglas. Customers place their orders at a serving window. The officer did not see any seating (N.T. 14, PLCB approval letter with sketch plan).

5. The rum was given to the officer in a small Styrofoam cup, which is how Licensee serves all liquor purchased in the premises. He paid for his order and walked over to the door to exit. He waited a minute or two to see if he “would be stopped or anything.” He then walked out of the premises and disposed of the liquor in a trash can on the corner of 22nd Street (N.T. 6-7, 17).

6. At the time of this transaction Licensee maintained two signs, one at the entrance to the premises and one on the Plexiglas divider inside, reproduced below (N.T. 16, Exhibits L-1, 2, 3):



CONCLUSIONS OF LAW:

The weight of the evidence does not support the proposition that Licensee violated the Liquor Code, 47 P.S. §§4-401(a) and 4-406(a)(1), on October 24, 2015, by selling, furnishing or giving liquor for consumption off premises.

DISCUSSION:

The officer testified that he did not recall seeing the signs reproduced above, but he allowed that they “may have been there, yeah” (N.T. 11). During later examination on this point, he tried to back away from this statement, insisting that he did not recall, but still allowing that they could “possibly” have been there (N.T. 12).

I find that the signs in question were posted prominently in the licensed premises at the time of this transaction. Licensee’s evidence is unequivocal on this point and the Bureau’s evidence did nothing to diminish its weight. Given this finding and the unmistakable nature of the signs themselves, I find that a person in the officer’s position should have seen and remembered them.

While it is certainly true that the mere posting of a sign is not a defense, the existence of these signs is a circumstance which cannot be ignored. There have been many cases in which signs found to exist in licensed premises turn out not to mean what they say. For example, a sign reading “For Amusement Only” provides no defense when a customer nevertheless asks for and receives a payoff from playing a video poker machine.

By the same token, a sign requiring all liquor to be consumed on the licensed premises cannot operate as a defense if a licensee nevertheless ignores the rule.

If the officer saw the signs and then determined to forget or ignore them, it may be that he thought they were irrelevant. After all, the statutes cited by the Bureau provide in no uncertain terms that retail liquor licensees are authorized to sell liquor only for on-premises consumption. It may be that the posting of signs in this case does not relieve Licensee of the duty to supervise its premises to see that no liquor leaves the establishment except in the stomachs of the patrons.

If that was the Bureau’s theory, it is strange that they chose to frame the charge in a way that necessarily involves a mental element. The Bureau alleges that the sale was made “for consumption off premises” and that clearly includes the idea that the customer is entitled to take the drink away.

If the Bureau believed that intent had no place, why did it charge the violation the way it did? If the mere removal of liquor from a licensee’s premises were a sufficient basis for liability, the citation should have read, “Licensee violated the Liquor Code, 47 P.S. §§4-401(a) and 4-406(a)(1), on October 24, 2015, by permitting liquor to be removed from its licensed premises.”

I have reviewed a large number of cases decided by this tribunal and by the PLCB, and I did not find any which involved the mere removal of liquor from a premise, without a preceding agreement – whether explicit or implicit – that this was permissible.

One of the most interesting cases I found was *Carpenter License, No. 355*, decided by the Court of Common Pleas of Lebanon County, Pennsylvania, and reported at 41 Pa. D. & C.2d 24 (1966). In that case a distillery salesman entertained bar managers and potential customers at a licensed premise, which he patronized frequently. At the end of the evening he was presented with a check for \$104.05.¹ After examining it, he took issue with the cost of some of the drinks, but since it was late he told the innkeeper that he would be back to adjust the bill and left without paying.

¹ This was evidently a substantial sum of money, and the court speculated that the salesman may have raised a question because the check was larger than his immediate ability to pay. Credit card use was less prevalent then.

An agent for the Board² found the tab in the cash register and charged the licensee for selling alcoholic beverages on credit. The court found that there was no prearrangement for a credit sale, and that neither the salesman nor the innkeeper intended or contemplated that there would be a sale on credit; therefore, there could be no liability on the licensee.

The same concept applies in this case. The act of selling requires an intention on the part of both the buyer and the seller, what has been called a “meeting of the minds.”

If there has been no “meeting of the minds” the law has not been violated. Proof that the liquor was removed from the premises is not even essential, so long as there has been a transaction in which the parties intended that the purchaser remove the liquor from the premises. See *Bally Hotel, Inc.*, In re Citation No. 97-0917; *Fassano Bar Corp.*, In re Citation No. 14-1259.

PLCB v. TLK, Inc., 518 Pa. 500, 544 A.2d 931 (1988), does not require a different result.

In that case the Pennsylvania Supreme Court held that when a licensee is charged under §471 of the Liquor Code for the unlawful acts of its employees or patrons, “some element of scienter on the part of the licensee is required to endanger the license,” if the underlying conduct violates the Crimes Code rather than the liquor laws.

Probably the clearest example of absolute liability in the liquor law context is the case of a minor obtaining alcoholic beverages in a licensed establishment. If it happens, the licensee is liable (unless an affirmative defense is available) even if the only sin or omission involved was that it “failed to prevent” the minor from obtaining an alcoholic beverage.

But in such cases, the Bureau alleges that licensees, by their servants, agents or employees, “sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages...”

Such a charge incorporates all of the possible ways a minor might have obtained a drink; the charge in this case does not similarly include all possibilities. Of all the possible ways that open containers of liquor might leave a licensed premise, this citation charges only one: the case where the parties intended the sale to be for off-premises consumption.

The element of intent assumed in the allegation is not the same thing as *scienter*. *TLK* was concerned with a matter of criminal law (sales of illegal drugs by an employee) and does not require that the words “for consumption off premises” be ignored.

An intention to sell liquor for off-premises consumption might be inferred from the fact that the drink is delivered in a disposable container, but this piece of circumstantial evidence loses its weight when it appears that a licensee uses disposable containers exclusively, as in this case.

There was no testimony in this case that the officer ordered the drink “to go” or in any other way communicated his intention to remove the liquor from the premises. As Licensee aptly pointed out, most of his customers can read.

² Prior to Act 14 of 1987, the prosecutorial function now performed by the Pennsylvania State Police was performed by agents of the Pennsylvania Liquor Control Board.

When a licensee posts written notice on the premises that it will not sell liquor “to go” – which is what Licensee’s notice in this case accomplishes – there must be some affirmative evidence that the parties to a transaction intended nevertheless to violate this rule.

There was no evidence of an illegal sale in this case.

ORDER

THEREFORE, it is hereby ORDERED that Citation No. 15-2058 is DISMISSED.

Dated this 10TH day of August, 2016.



David L. Shenkle, 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.

WHETHER OR NOT RECONSIDERATION HAS BEEN REQUESTED, AGGRIEVED PERSONS MAY APPEAL TO THE PLCB, NORTHWEST OFFICE BUILDING, HARRISBURG, PA 17124 WITHIN 30 DAYS AFTER THE MAILING DATE OF THIS ORDER.

THE PLCB CHIEF COUNSEL'S TELEPHONE NUMBER IS 717-783-9454.