D9955 - T19

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

LORENZO'S DRIVE THRU, INC.,	]	
	]	CASE NO. 09CVF-12-18405
Appellant,	]	
vs.	]	JUDGE MCINTOSH
	]	
LIQUOR CONTROL COMMISSION,	]	
	]	
Appellee		

TERMINATION NO: 18
BY: [illegible] 4-21-10
FINAL APPEALABLE ORDER

DECISION AND JUDGMENT ENTRY
AFFIRMING, IN PART, AND REVERSING, IN PART, THE ORDER OF
THE OHIO LIQUOR CONTROL COMMISSION
AND
NOTICE OF FINAL APPEALABLE ORDER

Rendered this 20th day of April, 2010

MCINTOSH, J.

This case is before the Court on an appeal pursuant to R.C. 119.12 from an Order of the Ohio Liquor Control Commission (the "Commission"). The relevant facts and procedural history are as follows.

Facts

Appellant Lorenzo's Drive Thru, Inc. is the permit holder for a permit premises in Akron, Ohio. Appellant was cited for an alleged violation of R.C. 4301.22(B) (furnishing beer to an intoxicated person) and an alleged violation of R.C. 4301.66 (hindering and/or obstructing an officer from making an inspection or search). On November 18, 2009, the Commission conducted a hearing on the claimed violations.

At the hearing, the State presented the testimony of Lieutenant Cynthia Christman, an Akron Police Officer. The Officer testified that on May 1, 2009, she observed a male, later identified as Clarence Williams, staggering on the sidewalk up to

and into the front door of Lorenzo's Drive Thru. (T. 6). The Officer testified that as she approached, "I could see someone inside the drive-thru—only an arm because the cash register sits back—handing the subject I saw staggering, handing something small. It appeared to be change." (T. 6). She then saw Mr. Williams come back out to the sidewalk. (T. 6). She went up to Mr. Williams, saw that he had a beer in a bag, and asked him where he got it. (T. 7). The Officer testified that he stated that he bought the beer at Lorenzo's. (T. 7, 20). She testified that the beer was a very cold, unopened can of Camo Black Ice. (9, 20-21). She testified that Mr. Williams was obviously intoxicated, as he had a hard time standing still, he was weaving and staggering, and his speech was slurred. (T. 11-12).

The Officer testified that Daniel Ringer came out of Lorenzo's and identified himself as the manager. (T. 8). The Officer told Mr. Ringer that someone inside had just sold a beer to Mr. Williams, and Mr. Ringer said that he did not know which employee might have done that, as a couple of the employees had just left work. (T. 8). Mr. Williams then began complaining of chest pain, and the Officer called for EMS. (T. 10). The owner of the drive-thru, Jeff Lorenzo, then came out and asked the Officer what was going on. (T. 11). The Officer stated that after she told him that one of his employees had just sold alcohol to Mr. Williams,

> He started rapid firing questions at me, who sold it, how do I know he got—he could have gotten it anywhere. And he went on and on with a lot of questions. And as soon as I started to answer them he would continue on bantering to the point I told him wait to the side and I'll talk to you when I'm done here. He took a couple steps back and came forward again and the same kind of—just asking questions, talking over and over again that the guy couldn't have bought the beer there and that he could have bought it—he pointed to two other establishments nearby. (T. 12-13).

The Officer stated that Mr. Lorenzo obstructed her in handling this arrest and "really created a problem." (T. 13). She described Mr. Lorenzo as "very agitated" and "verbally aggressive" and stated that he "was just verbally interfering and he tried to talk to the drunk subject. I had him step back repeatedly, told him to step back, get back out of the way and that I would talk to him when I was done." (T. 13-14). On cross-examination, the Officer agreed that Mr. Lorenzo never put his hands on her or Mr. Williams. (T. 21). She also agreed that she did not conduct an investigation or inspection inside the permit premises. (T. 22).

Appellant called three witnesses: Mr. Ringer, Joshua Duncan, and Mr. Lorenzo. Mr. Ringer testified that he arrived at work at Lorenzo's after the incident and went outside to find out what had happened. (T. 29-31). He then went to get Mr. Lorenzo, who was in his office upstairs, and they went outside. (T. 31). He testified that Mr. Williams told them that he did not buy the beer at Lorenzo's. (T. 31). They then went to tell this to the Officer, who told them to step away. (T. 31). He stated that he asked the Officer several times who sold the beer, but that he and Mr. Lorenzo were not aggressive toward her. (T. 42-44). Mr. Ringer testified that he reviewed the cash register tape for the relevant time and there was no sale of Camo Black Ice beer. (T. 33).

Joshua Duncan testified that he had stopped to get gas during the incident. (T. 44-49). He testified that Mr. Williams did not buy the beer at Lorenzo's, as he was carrying the beer down the street before he got near Lorenzo's. (T. 49-50).

Mr. Lorenzo testified that after the incident he walked up to the Officer and asked who sold the beer. (T. 62). After the Officer said "I'm busy," he walked away. (T. 62). He then talked to Mr. Williams, who said he did not get the beer from Lorenzo's. (T.

63). He testified that he next walked up to the Officer to tell her this, and she said "Get away from me right now, I'm busy." (T. 63). After the ambulance took Mr. Williams, Mr. Lorenzo walked up to the Officer again and asked who sold the beer, and the Officer told him to walk away. (T. 64-65). He then stated "You know what, that's why Akron sucks." (T. 65). He testified that he offered to show the Officer video from the camera in the Drive Thru, but she said she was not interested. (T. 65). Mr. Lorenzo testified that he did not save the video because he did not know of the citation until two weeks later. (T. 66).

On November 27, 2009, the Commission issued an Order finding Appellant in violation as to both charges and giving Appellant the option of either a suspension of Appellant's permit for five days or a forfeiture of $500.00. From that Order, Appellant appealed to this Court.

Standard of Review

This court must affirm the Order of the Commission if it is supported by reliable, probative and substantial evidence and is in accordance with law. R.C. 119.12; *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St. 2d 108, 111.

The Court's Findings and Conclusions

Appellant first argues that the evidence does not establish a violation of R.C. 4301.22(B), which provides that "No permit holder and no agent or employee of a permit holder shall sell or furnish beer or intoxicating liquor to an intoxicated person." Appellant argues that the only impartial evidence is that of Mr. Duncan, who said that Mr. Williams had the beer before he got to Lorenzo's. Appellant asserts that even the Officer did not see Lorenzo's furnish a beer to Mr. Williams.

This Court's scope of review of the agency's decision in an administrative appeal is limited. The Court is to "give due deference to the administrative resolution of evidentiary conflicts" because the fact finder had the opportunity to observe the witnesses and weigh their credibility. *Univ. of Cincinnati v. Conrad, supra,* 63 Ohio St. 2d at 111. The Court "will not substitute its judgment for the Board's where there is some evidence supporting the Board's Order." *Harris v. Lewis* (1982), 69 Ohio St.2d 577, 579.

Officer Christman testified that as she approached Lorenzo's Drive Thru she saw Mr. Williams inside and saw an arm handing him something that appeared to be change. She then saw that he had a very cold unopened can of beer, and he told her he had just purchased it at Lorenzo's. (T. 6-7, 20-21). Mr. Ringer and Mr. Lorenzo were not present until after the incident. While Mr. Duncan's testimony does conflict with that of the Officer, the Commission, as the finder of fact, was entitled to find the testimony of the Officer more credible.

The Court concludes that the finding of a violation of R.C. 4301.22(B) is supported by reliable, probative and substantial evidence and is in accordance with law.

Appellant next argues that the evidence does not establish a violation of R.C. 4301.66, which provides as follows:

> No person shall hinder or obstruct any agent or employee of the division of liquor control, any enforcement agent of the department of public safety, or any officer of the law, from making inspection or search of any place, other than a bona fide private residence, where beer or intoxicating liquor is possessed, kept, sold, or given away.

Violations of R.C. 4301.66 have been found where a permit holder delayed in admitting an investigator to the premises, (*see, e.g., Gaydeski v. Liquor Control Comm.*, 2003-Ohio-6190), and where a permit holder prevented an investigator from obtaining

evidence during an inspection of the premises (*see, e.g., Monkey Joes, Inc. v. Liquor Control Comm.*, 2004-Ohio-1010).

R.C. 4601.66 prohibits hindering or obstructing an officer "from making inspection or search of any place ... where beer or intoxicating liquor is possessed, kept, sold, or given away." Here, as the Officer admitted, there was no investigation or inspection of the permit premises. (T. 22). The alleged violation consists solely of Mr. Lorenzo's persistent questions to the Officer outside the permit premises. Thus, there was no hindering or obstruction of an inspection or search of any place where beer was possessed, kept or sold. R.C. 4301.66 is simply inapplicable to these facts.

For the foregoing reasons, the Court concludes that the record in this case does not contain reliable, probative or substantial evidence establishing the elements of a violation of R.C. 4301.66.

As set forth above, the Court has affirmed the Commission's finding that Appellant committed one charged violation, but has found that the second charged violation was not supported by the evidence or in accordance with law.

"If a reviewing court finds that not all of the violations found by an administrative agency are supported by the evidence or in accordance with the law, the court has discretion to affirm the penalty as reasonable, to modify the penalty to make it appropriate for the remaining violations, or to remand the matter to the agency to fashion a new penalty." *Rossiter v. Ohio State Medical Board* (2002), Tenth Appellate District No. 01AP-1252, 2002 Ohio App. LEXIS 1955, pg. 11. In *Rossiter*, the Court of Appeals reversed the agency's finding as to one violation, but affirmed other violations. Noting that "the duty with respect to the penalty is one peculiarly within the discretion of the

trier of facts", the Court remanded the matter so that the Board could reconsider the appropriate penalty in view of the modified judgment. *Id.*, pg. 12. In accordance with *Rossiter*, this Court declines to exercise its discretion to determine the penalty to be imposed in this matter, and remands to the Commission to reconsider the appropriate penalty in view of the modified judgment.

For the foregoing reasons, the Commission's Order in this matter is affirmed, in part, and reversed, in part, and this matter is remanded to the Commission to reconsider the appropriate penalty in view of the modified judgment. This is a final, appealable Order. Costs to Appellant. Pursuant to Civil Rule 58, the Clerk of Court shall serve upon all parties notice of this judgment and its date of entry.

IT IS SO ORDERED.

STEPHEN L. MCINTOSH, JUDGE

Copies to:
Kurt O. Gearhiser, Counsel for Appellant
Paul Kulwinski, Counsel for Appellee