

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Mines, Inc., :
Appellant :
v. :
Pennsylvania State Police, :
Bureau of Liquor Control : No. 107 C.D. 2012
Enforcement : Submitted: June 22, 2012

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: August 17, 2012

The Mines, Inc. (Licensee) appeals from the Order of the Court of Common Pleas of Luzerne County (trial court) which affirmed the Pennsylvania Liquor Control Board's (Board) decision to impose a \$1,000.00 fine¹ for violation of Section 493(1) of the Liquor Code (Code), 47 P.S. § 4-493(1),² and that Licensee comply with the requirements set forth in Section 471.1 of the Code³, pertaining to Responsible Alcohol Management.

¹ The Administrative Law Judge (ALJ) imposed a fine of \$1,250.00 against Licensee, which was affirmed by the Board. However, as the matter stands before this Court, the trial court's Order affirms the imposition of a fine in the amount of \$1,000.

² Act of April 12, 1951, P.L. 90, *as amended*, 47 P.S. § 4-493(1). Section 493(1) of the Code provides that “[i]t shall be unlawful...[f]or any licensee...or any employe, servant or agent of such licensee...to sell, furnish or give any liquor or malt or brewed beverages, or to permit any liquor or malt or brewed beverages to be sold, furnished or given, to any person visibly intoxicated....”

³ This section was added by the Act of December 20, 2000, P.L. 530.

The facts, as found by the trial court, are as follows:

1. The Pennsylvania State Police Bureau of Liquor Control Enforcement [Bureau]...began its investigation of [Licensee's premises] on March 30, 2009 and completed it on August 11, 2009....
2. [On April 26, 2009, at approximately 12:00 a.m., Bureau Enforcement Officer Michael Rutkowski (Officer Rutkowski) entered Licensee's premises in an undercover capacity]....^[4]
3. While sitting at the bar, [Officer Rutkowski] noticed a patron who[m] he believed was visibly intoxicated....
4. [Officer Rutkowski] testified that he witnessed the patron consume two drinks, [speak in a loud, excited, and slurred fashion, use profanity continuously, and nearly fall down once or twice]....
5. In response to someone calling him a drunk, the patron hoisted his glass, saying "that's fucking right...I'm gonna [sic] get bombed tonight."...
6. [Officer Rutkowski] overheard someone tell the patron that he had better slow down because when he leaves he is going to get arrested because he is drunk....
7. Thereafter, friends of the patron encouraged him to leave. He stated that he wanted another drink before he left. The bartender then served the patron a rum and coke and did not charge him for it....

⁴ Both the ALJ and the trial court made the finding that Officer Rutkowski entered Licensee's premises at approximately 11:45 p.m. on April 25, 2009. However, this Court's review of the certified record reveals that Officer Rutkowski testified that while he arrived at Licensee's establishment at approximately 11:45 p.m. on April 25, 2009, he did not actually enter the premises until approximately 12:00 a.m. on April 26, 2009. Notes of Testimony (N.T.), February 18, 2010, at 16-17; Reproduced Record (R.R.) at 56a-57a. Nevertheless, this discrepancy is of no consequence to the issues before this Court.

8. The owner of the premises, Mr. Thomas Greco [Mr. Greco], testified that he was present at the premises on the night in question....

9. Mr. Greco stated that he believed the patron involved to be Chad Williams [Mr. Williams], and that Mr. Williams was not intoxicated on that evening....

10. [Mr. Williams] testified that he was indeed at the premises on the night in question, but that he was not drunk....

11. A citation was issued to [Licensee] by the Bureau on August 28, 2009. The citation charges a violation of Section 493(1) of the [Code]....

Trial Court Decision, December 29, 2011, Findings of Fact (F.F.) Nos. 1-11 at 1-2.

On February 18, 2010, an evidentiary hearing was conducted before the ALJ. At the hearing, Officer Rutkowski testified that, at approximately 12:00 a.m. on April 26, 2009, he entered Licensee's establishment and seated himself at the upper-level bar in order to observe its patrons. N.T., February 18, 2010, at 17-18; R.R. at 57a-58a. He testified that while sitting at the bar he noticed a male patron, seated about four or five feet away, whom he believed was visibly intoxicated. *Id.* at 19-20; R.R. at 59a-60a. Officer Rutkowski testified that his attention was immediately drawn to the patron, who was seated with two other male patrons and watching a hockey game between the Pittsburgh Penguins and the Philadelphia Flyers on television. He overheard someone tell the patron, "shut up, you drunk," to which the patron responded by hoisting his mixed drink in the air, as if to celebrate a toast, and saying, "that's fucking right; I'm gonna [sic] get bombed tonight." *Id.* at 20-21; R.R. at 60a-61a. Officer Rutkowski further testified:

[The patron] was continuously talking. He basically never shut up. His speech was loud, excited,...[and] extremely slurred....As he [watched] the hockey game, he [jumped] up and down....[a]nd as he jumped up and down, he almost fell once or twice....He screamed continuous profanity. His speech was very fast and very slurred and he [kept] saying, [^c“that’s motherfucking right^b”]; [that was] his phrase that he continued to use throughout the night. He made several off-the-cuff statements...that [he was] going to get bombed in celebration of Pittsburgh winning.

His friends encouraged him to slow down probably three or four times because in the first ten minutes I was there, he drank two mixed drinks....

Q. Did you ever have an occasion to hear the bar staff speak to him?

A. ...The bar staff or [someone] who[m] I believed to be an employee there...came up to him at one point and said[,] [^c“you better calm down, especially when you leave[,] because you’re going to get arrested for being drunk because the Wilkes-Barre Police [are] standing outside.”^b]

...After all this,...[h]e told the bartender he wanted another rum and coke. She poured him a rum and coke and gave it to him...and she [did not] charge him for it....[He drank the rum and coke and then left, and I followed him off the premises to make sure that he was not driving].

Id. at 21-23; R.R. at 61a-63a.

The ALJ found Officer Rutkowski’s testimony to be more credible than that of Licensee’s two witnesses and, on April 12, 2010, issued an Order that sustained the citation, imposed a fine of \$1,250.00 against Licensee, and ordered Licensee to comply with Responsible Alcohol Management Program (RAMP) requirements within ninety days of the mailing date of the Order. ALJ Adjudication and ALJ Order, April 12, 2010, at 1-4; R.R. at 8a-11a.

Licensee appealed the ALJ's Order to the Board. On July 22, 2010, the Board, finding substantial evidence to support the ALJ's findings, issued an Opinion and Order that affirmed the decision of the ALJ and dismissed the appeal. Board Opinion, July 22, 2010, at 1-10; R.R. at 15a-24a.

On August 23, 2010, Licensee appealed the Board's Order to the trial court, which convened a hearing *de novo* on April 11, 2011. At the hearing, the Bureau moved to have the certified record of the proceedings below admitted into evidence, which the trial court granted without objection from Licensee. N.T., April 11, 2011, at 8; R.R. at 159a. Licensee, on the other hand, presented the testimony of three witnesses, in addition to numerous exhibits, to rebut the testimony of Officer Rutkowski. Mr. Greco, Licensee's owner, testified that, on the night in question, over twenty police officers assembled in front of his establishment as part of an alleged campaign initiated by the President of King's College to force Licensee out of business because it attracted "the wrong crowd" and "[was not] a good mix for the college." *Id.* at 18-22; R.R. at 169a-173a. Mr. Greco further testified that because of the police presence outside the establishment, he impressed upon his employees the importance of "mak[ing] sure everything gets done properly," and, consequently, did not believe it possible that a visibly intoxicated patron was served on the night in question. *Id.* at 30-31; R.R. at 181a-182a. In addition, on direct examination, Mr. Greco testified:

Q. ...[T]he description of this [visibly intoxicated] person is someone who's [sic] approximately [5'10"], 200 pounds, balding, with cargo shorts. Do you know who that individual is?

A. Yes. After we learned, especially the cargo shorts, there's [sic] only one person who would come to the club

in cargo shorts, because we don't [sic] allow shorts, and that one person is Chad Williams.

Id. at 31; R.R. at 182a.

Mr. Greco's testimony that Chad Williams fit Officer Rutkowski's description of the visibly intoxicated patron that he observed on the night in question was corroborated by the testimony of Chad Williams, himself, who further testified to his presence at Licensee around midnight on April 26, 2009, but unequivocally denied being intoxicated while on the premises. *Id.* at 55-62; R.R. at 206a-213a.

On December 29, 2011, the trial court affirmed.

On January 23, 2012, Licensee filed an appeal with this Court.⁵

⁵ This Court's scope of review in citation/enforcement appeals is limited to determining whether the trial court abused its discretion, committed an error of law, or made findings of fact unsupported by substantial evidence. *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Cantina Gloria's Lounge, Inc.*, 536 Pa. 254, 639 A.2d 14 (1994). "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused." *Commonwealth v. Levanduski*, 907 A.2d 3, 14 (Pa. Super. 2006) (*en banc*) (citation omitted); *see also Tucker v. Bensalem Township School District*, 987 A.2d 198 (Pa. Cmwlth. 2009). Further, this Court has defined "substantial evidence" to be "such relevant evidence as a reasonable person might accept as adequate to support a conclusion." *Joy Global, Inc. v. Workers' Compensation Appeal Board (Hogue)*, 876 A.2d 1098, 1103 (Pa. Cmwlth. 2005) (citation omitted).

On appeal, Licensee contends that the trial court committed an error of law or abused its discretion in concluding that Officer Rutkowski was credible and that his testimony was sufficient to sustain the violation of serving a visibly intoxicated patron. Licensee's Brief at 10. Specifically, Licensee contends that the trial court erred when it credited Officer Rutkowski's testimony before the ALJ over the contravening testimony and evidence proffered by Licensee at the *de novo* hearing conducted by the trial court.⁶ *Id.* at 11-15. Licensee alleges that Officer Rutkowski's testimony was a fabrication, instigated on behalf of "the conspiracy initiated by King's College to shut down [Licensee]." *Id.* at 14-15. Consequently, Licensee contends that Officer Rutkowski's testimony was inherently untrustworthy and that the trial court erred by not accepting Licensee's version of events over that of Officer Rutkowski.

The burden of proof in a citation/enforcement proceeding involving a violation of the Code is upon the Bureau to prove its case by a clear preponderance of the evidence. *In re Omicron Enterprises*, 449 A.2d 857 (Pa. Cmwlth. 1982).

⁶ To the extent Licensee suggests that Officer Rutkowski's testimony before the ALJ contained in the certified record is less reliable than the live testimony of its witnesses by virtue of the fact that the trial court did not have the opportunity to observe Officer Rutkowski's demeanor while testifying, this Court dismisses such suggestion as contrary to existing law. It is well-settled that in citation/enforcement cases, the trial court "has the duty of receiving the record of the proceedings below, if introduced in evidence, together with any other evidence that is properly received, and then make its own findings of fact, conclusions of law and assess the appropriate penalty, if any." *Pennsylvania State Police, Bureau of Liquor Enforcement v. Kelly's Bar, Inc.*, 536 Pa. 310, 314, 639 A.2d 440, 442 (1994). Further, this Court's review of the certified record indicates that Licensee, represented by counsel, had a full and fair opportunity to explore any potential defect or inconsistency in Officer Rutkowski's testimony during his cross-examination at the evidentiary hearing before the ALJ. N.T., February 18, 2010, at 24-69; R.R. at 64a-113a.

The sale of alcohol to a visibly intoxicated patron is a strict liability offense under the Code. *Pennsylvania Liquor Control Board v. TLK, Inc.*, 518 Pa. 500, 544 A.2d 931 (1988). Intoxication is a matter of common knowledge, and opinions given by lay people are permissible on the issue. *Commonwealth v. Reynolds*, 389 A.2d 1113 (Pa. Super. 1978). A witness may express an opinion regarding another's intoxication so long as sufficient facts exist on which to base an opinion. *Commonwealth v. Hughes*, 480 Pa. 311, 389 A.2d 1081 (1978); *see also Commonwealth v. Summers*, 410 A.2d 336 (Pa. Super. 1979) (concluding that witnesses' observations of the way the person looked and the way he was walking provided sufficient factual basis for witness to conclude a person was intoxicated). The court also looks to the witness' personal knowledge and observation. *Commonwealth v. Davenport*, 386 A.2d 543 (Pa. Super. 1978).

Pursuant to Section 471 of the Code, a trial court's scope of review in citation/enforcement appeals is *de novo* on questions of law, fact, administrative discretion, and such other matters as may be involved, and in the exercise of its statutory discretion it is free to make its own findings of fact and conclusions of law or to adopt those of the Board. *Cantina Gloria's Lounge*. Further, based upon its *de novo* review, a trial court may sustain, alter, change, modify, or amend the Board's determination whether or not it makes findings that are materially different from those found by the Board. *Id.*

Here, the trial court, in its *de novo* capacity, opted to make its own findings of fact, on the basis of which it concluded that Officer Rutkowski's testimony was credible and sufficient to establish by a clear preponderance of the

evidence that the patron he observed on the night in question was visibly intoxicated when served by Licensee. Trial Court Decision, F.F. Nos. 3-7 at 1-2. Accordingly, because this Court is satisfied that no abuse of discretion has occurred and that the trial court's factual determinations were supported by substantial evidence Licensee's argument, which is simply an invitation to invade the province of the trial court as fact-finder, must fail. *See Bobotas v. Pennsylvania Liquor Control Board*, 408 A.2d 164, 165 (Pa. Cmwlth. 1979) (holding that, in citation/enforcement appeals to this Court, "questions of evidentiary weight and of the credibility of witnesses are matters to be determined by the lower court") (citation omitted).

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

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ORDER

AND NOW, this 17th day of August, 2012, the Order of the Court of Common Pleas of Luzerne County in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge