In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-11-00058-CV

TRI-CON, INC. D/B/A EXXPRESS MART #14, Appellant

V.

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Appellee

On Appeal from the 356th District Court
Hardin County, Texas
Trial Cause No. 51750

MEMORANDUM OPINION

Tri-Con, Inc., d/b/a Exxpress Mart No. 14, appeals from the denial of Tri-Con's renewal application for a wine and beer retailer's off-premise permit. *See* Tex. Alco. Bev. Code Ann. § 26.01 (West Supp. 2010). The City Secretary of Lumberton, Texas, and the Hardin County Clerk certified in December 2008 and January 2009, respectively, that Exxpress Mart No. 14 was located in a wet area. The Texas Alcoholic Beverage Commission (TABC) issued a permit to Tri-Con in February 2009 with an expiration date one year later. In January 2010, Tri-Con filed an application to renew its permit with the TABC. A protest was filed. The county judge, acting in his administrative capacity as

a hearing officer for the TABC, denied Tri-Con's application. *See* Tex. Alco. Bev. Code Ann. §§ 61.31, 61.32 (West 2007); *Garza v. Tex. Alcoholic Beverage Comm'n*, 138 S.W.3d 609, 613 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (county judge as administrative hearing officer for TABC). Tri-Con appealed to the district court. Tex. Alco. Bev. Code Ann. § 1167(a) (West 2007). That court affirmed the denial of Tri-Con's application. *See* Tex. Alco. Bev. Code Ann. § 61.34 (West 2007). Tri-Con then appealed to this Court.

Administrative decisions are reviewed under the substantial evidence rule. *See* Tex. Alco. Bev. Code Ann. § 11.67(b) (West 2007); *see also* Tex. Gov't Code Ann. § 2001.174 (West 2008). Under the substantial evidence standard, the test is "whether the evidence as a whole is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action." *Tex. Alcoholic Beverage Comm'n v. Sierra*, 784 S.W.2d 359, 360 (Tex. 1990) (quoting *Tex. State Bd. of Dental Exam'rs v. Sizemore*, 759 S.W.2d 114, 116 (Tex. 1988)); *Morgan v. Tex Alcoholic Beverage Comm'n*, 519 S.W.2d 250, 254 (Tex. Civ. App.—Texarkana 1975, no writ). An appellate court presumes an administrative decision to be reasonable; the party seeking to set aside the decision must show the decision was not reasonably supported by substantial evidence. *See Four Stars Food Mart, Inc. v. Tex. Alcoholic Beverage Comm'n*, 923 S.W.2d 266, 269 (Tex. App.—Fort Worth 1996, no writ).

The protesting party testified he had personal knowledge that the gas station is in a dry area because he had seen the survey, used a tape measure to measure 200 feet from the highway, and determined the gas station is within that 200 feet. Acknowledging that he is not a surveyor, he stated that "[t]he letter from the County Attorney and the work they did with surveyors is definitive proof that this gas station is within the dry area . . . . It's clearly stated 200 feet from the highway, and it doesn't take [a] surveyor to know that it's within 200 feet."

James Skinner, a licensed, professional surveyor, testified the TABC asked him to review a specific precinct boundary. Skinner determined that Exxpress Mart. No. 14 is located in the City of Lumberton and that the precinct boundary is located on the northwest side of Exxpress Mart. No. 14. Skinner testified as follows:

> The line is actually 200 feet parallel to the highway, and the highway would be the west right-of-way line of U.S. Highway 69 and 287, and the building is located in the area between the 200 foot line and the west lateral line of US Highway 69 and 287.

He also testified he did not determine whether the store is located in a wet or dry area; he "was not hired to determine- [that.]"

Rebecca Walton, County Attorney for Hardin County, indicated she had advised Glenda Alston, the County Clerk of Hardin County, to write TABC a letter (a) informing TABC that Hardin County had discovered that Exxpress Mart No. 14 was located in a dry area, and (b) asking that its license to sell alcohol be revoked. *See* Tex. Alco. Bev. Code

Ann. § 61.32. Walton testified she did not have personal knowledge as to whether the store was in a wet or dry area. She explained she relied on information from others.

Elias Sarkis signed the renewal application for Tri-Con. He indicated Tri-Con obtained a permit to sell beer and wine on the premises and began selling alcohol when it became legal to do so in 2007 or 2008. At the time of the hearing before the county judge, the store was operating under a permit that had been issued in February 2009. Sarkis testified he owns the property directly behind the store and that there is approximately 200 feet from the center of the road to the next judicial precinct. Sarkis indicated that if the County or the City had informed him the first time that he was not in the right area, he would not have rebuilt the store in its present location, but would have pushed the building further back on the property. Sarkis testified that if he moved his front door approximately fifty feet to the northwest, he would be in a different judicial precinct. He also indicated that he received certifications that the store was located in a wet area, that he relied on those certifications, and that he invested $1.8 million to construct a new building at that location.

WET OR DRY?

In issue one, Tri-Con, essentially, argues that the county judge's determination to deny the permit is not supported by substantial evidence, because there is no evidence Exxpress Mart. No. 14 is located in a dry area. The protesting party's testimony regarding his measurements showing the store to be within 200 feet from the highway, Rebecca

Walton's testimony that, after her investigation, she concluded Exxpress Mart No. 14 was in a dry location, the surveyor's testimony that the boundary line of the precinct was 200 feet from the highway, and Sarkis's acknowledgement that he could have constructed the building further back on the property if he had known the building was not in the right location, support the judge's conclusion that Exxpress Mart. No. 14 is located in a dry area. The fact that the protestant, surveyor, and the county attorney did not present a map, a survey, or other documentation goes to the weight of the evidence. The fact-finder determines the weight and credibility to give the witnesses' testimony. *Akers v. Stevenson*, 54 S.W.3d 880, 884 (Tex. App.—Beaumont 2001, pet. denied) (As trier of fact, the court is free to believe one witness, disbelieve others, resolve inconsistencies in a witness's testimony, and accept lay testimony over that of experts.). Issue one is overruled.[1]

SECTION 11.37(C) AND 61.37(C)

In issue three, Tri-Con argues that, assuming Exxpress Mart No. 14 is located in a dry area, the district court erred in affirming the denial of the permit application. Tri-Con argues the certification that Exxpress Mart No. 14 is located in a wet area serves to "grandfather" Tri-Con into a wet status until a subsequent local election is held to change that status to dry as provided in section 11.37. *See* Tex. Alco. Bev. Code Ann. § 11.37(c) (West 2007). The TABC references an identical provision in section 61.37(c). *See* Tex.

[1]Since we conclude the trial court did not err in finding the location is within a dry area, we need not consider issue two regarding denial of the permit on the ground of "unusual condition or situation."

Alco. Bev. Code Ann. § 61.37(c) (West 2007). The statutes provide that once a license or permit is issued, the certification that the location or address is in a "wet" area may not be changed until after a subsequent local option election to prohibit the sale of alcoholic beverages. *Id*. §§ 11.37(c), 61.37(c). Both parties reference the statutory provision, along with this Court's opinion in *Texas Alcoholic Beverage Commission v. Hancock*, 269 S.W.3d 685, 688 (Tex. App.—Beaumont 2008, no pet.). In *Hancock*, we stated that the Commission correctly denied Hancock's application, and we held that an "erroneous issuance of a mixed beverage permit does not effectively convert a dry area to a wet area without a local option election." *Hancock*, 269 S.W.3d at 686. Similarly, a mistake here by a city secretary or a county clerk or a mistake in the issuance of the permit does not negate the fact that an area is dry.

When we construe a statute, we presume that compliance with the state constitution is intended. Tex. Gov't Code Ann. § 311.021(1) (West 2005). "[T]he constitution grants the power of regulation and grants the Legislature the power to pass laws allowing the sale of mixed beverages; however, that power is subject to the power of the people to authorize the sale of mixed beverages in the affected voting unit . . . ." *Hancock*, 269 S.W.3d at 687. The Alcoholic Beverage Code provides that, subject to certain exceptions, "an authorized voting unit that has exercised or may exercise the right of local option retains the status adopted, whether [that be] absolute prohibition or legalization of the sale of alcoholic beverages of one or more of the various types and

alcoholic contents on which an issue may be submitted under the terms of Section 501.035, Election Code, until that status is changed by a subsequent local option election in the same authorized voting unit." Tex. Alco. Bev. Code Ann. § 251.72 (West 2007). As this Court stated in *Hancock*, section 11.37(c) does not provide a process for the Alcoholic Beverage Commission to authorize the legal sale of mixed beverages in a dry area, as that would circumvent the power reserved to the electorate by the state constitution. *Hancock*, 269 S.W.3d at 688. The local option election provides the sole mechanism for changing the status from dry to wet for the legal sale of mixed beverages. *See In re Davis*, 269 S.W.3d 581, 582 (Tex. 2008) ("Once voters in a justice precinct have elected wet or dry status, that status remains in effect until voters in that same territory, by another local option election, change it."). We conclude the same principle applies to a permit for a wine and beer retailer's off-premise permit. Issue three is overruled.

We affirm the district court's judgment.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on June 1, 2011
Opinion Delivered June 16, 2011

Before Gaultney, Kreger, and Horton, JJ.