

TEXAS ALCOHOLIC BEVERAGE * BEFORE THE STATE OFFICE
COMMISSION *
*
VS. * OF
*
JAMES ANTHONY SCARBOROUGH *
DBA TONY'S 2120 CLUB *
PERMIT NO. BG-233918 *
TARRANT COUNTY, TEXAS *
(T.A.B.C. NO. 578033) * ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

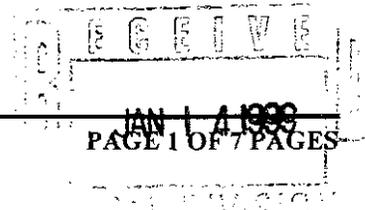
The staff of the Texas Alcoholic Beverage Commission (Staff) brought this action against a licensee of the Commission for possessing marihuana, a narcotic, on the licensed premises and for delivery of a controlled substance (marihuana) on the licensed premises.. The Staff recommended the license be canceled. The Administrative Law Judge agrees with the Staff, and recommends that the license be canceled.

I. Procedural History, Notice & Jurisdiction

On March 19, 1998, Staff notified James Anthony Scarborough, doing business as Toni's 2120 Club (Respondent), 2120 Jacksboro Highway, Fort Worth, Tarrant County, Texas, that it was seeking disciplinary action due to Respondent's possession and delivery of marihuana, a controlled substance, on the licensed premises. Staff asserted that such an act constituted grounds for suspension or cancellation of Respondent's license or permit.

Since there were no contested issues of general notice or jurisdiction in this proceeding, these matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

On September 17, 1998, a hearing was convened before Stuart C. Shelton, Administrative Law Judge (ALJ) in the State Office of Administrative Hearings, Suite 10, of the Vinnedge Building, 2100 N. Main Street, Fort Worth, Texas. Staff was represented by Dewey Brackin, Attorney for the Commission. Respondent appeared and was represented at the hearing by Bradford Shaw, an attorney. The record closed on September 17, 1998, at the conclusion of the arguments. No proposed findings of fact and conclusions of law were filed.



II. Discussion

A. Introduction

Respondent holds a Wine and Beer Retailer's Permit BG-233918 issued by the Commission. Respondent operates the business known as Tony's 2120 Club, located at 2120 Jacksboro Highway, in Fort Worth, Tarrant County, Texas.

B. Statutory Provisions

TEXAS ALCOHOLIC BEVERAGE CODE

Section 11.49: (a) In this code, "premises" means the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.

Section 61.71(a) : The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee:

(17) conducted his business in a place or manner which warrants the cancellation or suspension of the license based on the general welfare, health, peace, morals, safety, and sense of decency of the people;

Section 104.01 LEWD, IMMORAL, INDECENT CONDUCT. No person authorized to sell beer at retail, nor his agent, servant, or employee, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency, including, but not limited to, any of the following acts:

(9) possession of a narcotic or any equipment used or designed for the administering of a narcotic or permitting a person on the licensed premises to do so.

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Section 35.31(b): Any of the following offenses shall be regarded as grounds to suspend, cancel, or deny, permits, licenses, or applications for such, under sections 11.46(a)(8), 11.61(b)(7), 61.42(a)(3), and 61.71(a)(17) of the Texas Alcoholic Beverage Code if civil or criminal citations have been issued or arrests have been made and if the offense is shown to have been committed on a premise by a permittee, licensee, or applicant or by a person permitted to be on the premises if the permittee, licensee, or applicant knew or should have known that such offense was occurring on the premise and shall be considered offensive to the general welfare, health, peace, and safety of the people of the state:

(10) Any other offense included in any law of the United States or the State of Texas that is shown to have occurred on the premise and have a detrimental effect on the general welfare, health, peace, and safety of the people.

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Section 35.41

In the Texas Alcoholic Beverage Code, the following definitions apply:

(b) Narcotic - any substance defined in the Texas Controlled Substances Act, Section 481.002(5), (6), (7), or (26).

TEXAS HEALTH AND SAFETY CODE--Texas Controlled Substances Act

Section 481.002(8): "Deliver" means to transfer, actually or constructively, to another a controlled substance, counterfeit substance, or drug paraphernalia, regardless of whether there is an agency relationship. The term includes offering to sell a controlled substance, counterfeit substance, or drug paraphernalia.

(26) "Marihuana" means the plant *Cannabis sativa* L. whether growing or not, * * *

Section 481.120 (a): Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally delivers marihuana.

Section 481.121 (a): Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.

C. Evidence Received

The Staff presented the testimony of Kendall Novak, Wade Stratton, and Respondent, James Scarborough. The Staff also presented documentary evidence consisting of a certified copy of Respondent's license, a certified copy Respondent's violation history, a sketch made by Kendall Novak, and eight photographs. Respondent offered no evidence.

Kendall Novak testified that on January 16, 1998, he was employed by the Tarrant County Sheriff's Department as a deputy sheriff. His duties as a K-9 officer included the handling of a drug dog trained to find controlled substances, and providing assistance in the arrest of certain violent offenders. He had been assigned to these duties for approximately four years prior to the date in question. Deputy Novak had received training in the recognition of controlled substances and had previously observed the dog successfully discover and point to narcotics. Because Deputy Novak is a K-9 officer, his drug dog is with him constantly while he is on duty.

Deputy Novak stated that he was on a felony stakeout at approximately 2:00 p.m. and in a marked police vehicle parked across the street approximately 40 yards from the licensed premises. Adjacent to Deputy Novak's location was a closed business and a liquor store. Deputy Novak was facing toward the anticipated location of the felon he sought to arrest, which permitted him to view the licensed premises.

Deputy Novak observed a gray pickup truck with two occupants pull into the parking lot of the 2120 Club and park. The driver left the truck, entered the 2120 Club, and came out shortly, accompanied by Respondent. Respondent and the driver approached a car parked in the parking lot. It appeared to Deputy Novak that Respondent obtained some keys from the car. Deputy Novak was observing the two men through binoculars. The two men then went to the rear of a Lincoln automobile, parked nearby in the same parking lot. Respondent opened the trunk of the Lincoln and took out a plastic bag which he handed to the other man. Deputy Novak observed that the bag seemed to contain a green, leafy substance. This man, later identified as Wade Stratton, placed the bag in the front, handwarmer pocket of his sweatshirt and returned to his truck. Stratton drove the truck directly to the adjacent liquor store, parked, and entered the liquor store. When Stratton left the liquor store, he was stopped by Deputy Novak. In the handwarmer pocket of Stratton's sweatshirt, a plastic bag containing a green, leafy substance was found. Deputy Novak identified the contents of the bag as marihuana and arrested Stratton.

Upon the arrival of other law enforcement personnel, Deputy Novak went across the street and entered the 2120 Club seeking Respondent. As he waited for assistance to arrive, Deputy Novak took his drug dog to examine the Lincoln. The dog indicated that some type of narcotic was in the trunk of the Lincoln. Respondent consented to a search of the Lincoln's trunk. In the trunk, Deputy Novak found several plastic bags containing a green leafy substance which, based on his experience, he determined was marihuana. A chemical test was performed on the substance by Deputy Novak which confirmed that the bag's contents was marihuana. Respondent was arrested for delivery of a controlled substance.

Wade Stratton testified that he was the person stopped by Deputy Novak. He testified that he believed the contents of the plastic bag to be marihuana. He testified that he had been convicted of possession of marihuana and had been sentenced to a term in jail as a result of this incident.

James Scarborough testified that he was a licenseholder of the Commission and that he was acquainted with Wade Stratton. He admitted that Petitioner's Exhibit 5 is a photograph of the 2120 Club.

D. Analysis and Recommendation

The Administrative Law Judge recommends that sanctions be taken against Respondent for violating TEX ALCO. BEV. CODE Sections 61.71(a)(17) and 104.01(9), for possession and delivery of a narcotic, to wit: marihuana, on the premises. The parking lot was adjacent to the building premises, was directly or indirectly under Respondent's control, and was used for parking

by customers of the club. Respondent offered no evidence that the parking lot was excluded from the licensed premises.

Since Scarborough took the keys from one automobile and used them to open the trunk of the Lincoln from which he took the marihuana, it is apparent that Scarborough was in possession of the marihuana prior to its transfer to Wade Stratton. The transfer was carried out by actually handing the marihuana to Stratton.

As Stratton was observed taking the marihuana and leaving the premises with it, he also possessed the marihuana on the premises. Since Stratton was on the premises when he was handed the marihuana by Scarborough, he possessed the marihuana on the premises with the consent of Scarborough.

The Commission's penalty matrix, 16 TAC 37.60, suggests a punishment range from a 21-day license suspension to cancellation of a license for possession of a narcotic. The matrix also suggests cancellation of the permit in the event the permittee sells narcotics on the premises.

The possession of the narcotic on the premises and its transfer to Stratton, by the licensee, coupled with the permitting possession of the marijuana on the premises by the buyer, and, in fact abetting or encouraging of such possession by the buyer, is a combination of violations so serious in nature that the requested sanction of cancellation is warranted. Therefore, it is recommended that Respondent's license be canceled.

III. Proposed Findings of Fact

1. On July 13, 1998, the staff of the Texas Alcoholic Beverage Commission (Staff) issued a notice of hearing to James Anthony Scarborough, d/b/a Tony's 2120 Club (Respondent) for a hearing on allegations that Respondent possessed narcotics on the licensed premises and had permitted someone else to possess narcotics on the premises.
2. The notice was sent to Respondent's address of record by certified mail.
3. On January 16, 1998, James Anthony Scarborough was a licensee of the Commission.
3. Respondent holds Permit BG-233918 for the premises located at 2120 Jacksboro Highway, Fort Worth, Tarrant County, Texas.
4. Respondent, while in the parking lot, took from the trunk of a Lincoln automobile a bag containing marihuana and handed it to Wade Stratton.
5. In the trunk of the Lincoln automobile, which was parked in the parking lot, Deputy Novak found bags containing marihuana.

6. Respondent was aware of, and had control of, the contents of the trunk of the Lincoln automobile.
7. The parking lot where Officer Novak observed Respondent and Wade Stratton possessing and delivering the green, leafy substance is adjacent to the licensed premises, and is directly or indirectly controlled by Respondent.
8. The parking lot where Officer Novak observed the marijuana being possessed and delivered is a part of the licensed premises.
9. The substance which Officer Novak observed Respondent possess on the premises was marihuana.
10. The substance which Officer Novak observed Wade Stratton possess on the premises was marihuana.
11. The substance which Officer Novak observed being delivered on the premises by Respondent was marihuana.
12. Respondent allowed Wade Stratton to possess the marihuana on the licensed premises.

IV. Proposed Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Section 106.13 (Vernon 1998)..
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Chapter 2003 (Vernon 1998).
4. Respondent was served with adequate notice of the proceeding as required by the Administrative Procedure Act, TEX. GOV'T. CODE ANN. Section 2001.051 and Section 2001.052.
5. On January 16, 1998, Respondent violated TEX. ALCO. BEV. CODE ANN. Section 104.01.(9) by possessing marihuana on the licensed premises..
6. On January 16, 1998, Respondent violated TEX. ALCO. BEV. CODE ANN. Section 104.01(9) by allowing Wade Stratton to possess marihuana on the licensed premises.

7. On January 16, 1998, Respondent violated TEX. ALCO. BEV. CODE ANN Section 61.71(a)(17) by making a delivery of marihuana on the licensed premises.

Based upon the foregoing, a cancellation of the license for the premises is warranted.

SIGNED this 13th day of January, 1999.


STUART SHELTON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING

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