

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Chong Hadaway, Inc.,	:	
Appellant-Appellant,	:	
v.	:	No. 03AP-414 (C.P.C. No. 02CVF-05-5085)
Ohio Liquor Control Commission,	:	(ACCELERATED CALENDAR)
Appellee-Appellee.	:	

O P I N I O N

Rendered on February 3, 2004

Blaugrund, Herbert & Martin, Inc., and *Marc E. Myers*, for
appellant.

Jim Petro, Attorney General, and *Kate Oklok*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

WATSON, J.

{¶1} This is an appeal from the judgment of the Franklin County Court of Common Pleas affirming the order of the Ohio Liquor Control Commission ("commission") to revoke Chong Hadaway, Inc.'s ("Hadaway") liquor permit. For the reasons that follow, we affirm.

{¶2} On November 23, 2001, Hadaway's employee sold beer on two occasions to the same underage confidential informant in violation of R.C. 4301.69. Hadaway was

issued a notice for two separate violations. At the hearing held on April 9, 2002, Hadaway entered a plea of denial with a stipulation of the investigator's report as to the first violation. The other violation was ultimately dismissed. On April 23, 2002, the commission issued its order finding a violation under R.C. 4301.69 and, pursuant to R.C. 4301.25(A), the commission revoked Hadaway's permit. Hadaway appealed to the trial court. Hadaway argued that it was subjected to disparate treatment because of its ethnicity in violation of equal protection and that the Ohio Department of Public Safety's ("department"), use of confidential informants demonstrates bad faith. The trial court rejected both arguments and affirmed the commission's order. The court found Hadaway did not establish an equal protection violation as there was no evidence in the certified record regarding the ethnicity of appellant's shareholders and no evidence the commission imposed harsher penalties on appellant than other permit holders. The court further found no evidence of bad faith on the part of the department. Hadaway ("appellant") filed the instant appeal.

{¶3} Appellant asserts the following assignment of error:

The court of common pleas erred when it found that the order of the liquor control commission revoking appellant's liquor permit was supported by reliable, probative, and substantial evidence and in accordance with law.

{¶4} The trial court's standard of review is hybrid in nature. The trial court must review the agency's order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111-112; *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 471. Reliable evidence is dependable; that is, it can be confidently

trusted. *Triplett Grille, Inc. v. Ohio Liquor Control Com'n* (Dec. 12, 1996), Franklin App. No. 95APE06-712, citing *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571. In order to be reliable, there must be a reasonable probability that the evidence is true. *Id.* Probative evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. *Id.* Substantial evidence is evidence with some weight; it must have importance and value. *Id.* *Conrad* sets forth the following guidelines for the trial court:

In undertaking this hybrid form of review, the Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight the court should defer to the determination of the administrative body, which, as the factfinder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility.

Id. at 111.

{¶5} When reviewing the trial court's resolution of this issue, an appellate court's standard of review is more limited. *Goldfinger Ent., Inc. v. Ohio Liquor Control Com'n*, Franklin App. No. 01AP-1172, 2002-Ohio-2770. The only issue this court must decide is whether the trial court abused its discretion. *Id.* "While it is incumbent on the common pleas court to examine the evidence, this is not the function of the court of appeals." *Id.*, at ¶11, citing *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. An abuse of discretion is not merely an error of judgment, but perversity of will, passion, prejudice, partiality or moral delinquency. *Id.* Absent an abuse of discretion, the court of appeals may not substitute its judgment for that of the commission or the trial court. *Id.* As to questions of law, this court's review is de novo. *Goldfinger*, *supra*.

{¶6} Appellant argues the trial court erred in finding the commission's order to revoke its license supported by reliable, probative and substantial evidence. The thrust of appellant's argument is that the department acted in bad faith by its use of confidential informants and trapping appellant to violate the law.¹ We disagree and find the trial court did not abuse its discretion. The trial court correctly found that appellant offered no evidence in the certified record to demonstrate bad faith. R.C. 119.12.

{¶7} Appellant did not raise the specific defense of entrapment at the hearing before the commission. Appellant merely objected to the use of a confidential informant and now asserts that this is against public policy. Therefore, appellant has arguably waived any such defense. Further, appellant appears to use the terms "bad faith" instead of entrapment specifically. In any event, assuming the defense was properly raised, appellant's argument must fail. Entrapment is available as a defense to one who is *induced or lured* by law enforcement or other persons for the purpose of prosecution into the commission of a crime, which the individual otherwise had no intention of committing. *Smith v. State Med. Bd.* (July 19, 2001), Franklin App. No. 00AP-1301, quoting *Lakis v. Bd. of Liquor Control* (1963), 120 Ohio App. 163, 168. "[T]he acts of a law enforcement entity in sending underage persons to purchase alcoholic beverages does not rise to the level of **entrapment** because the police officer 'merely provides an opportunity for another to commit a crime.' " *Enitnel, Inc. v. Ohio Liquor Control Comm.*, Franklin App. No. 02AP-583, 2002-Ohio 7034, at ¶14. (Emphasis sic; citation omitted.)

¹ Appellant raised an equal protection argument at the trial court level but does not make the argument on appeal. Even if it did, we agree with the trial court that there is no evidence to support this claim. There is no evidence in the certified record demonstrating that appellant received disparate treatment because of its membership in a protected class.

{¶8} Here, appellant has set forth no evidence to establish it was induced into committing an act it would not otherwise have committed. The evidence shows to the contrary. Appellant has had previous violations for underage sales in 1994, 1999, 2000 and 2001. The informant merely provided appellant the opportunity to commit a crime. Likewise, there is no evidence to support appellant's argument that the department acted in bad faith or that this act is against public policy. Ohio Adm.Code 4301-1-79 authorizes the division of liquor control ("division") to conduct warrantless administrative inspections by authorized agents or employees of the division and the department or peace officers, to determine compliance with the provisions of the Liquor Control Act. Ohio Adm.Code 4301-1-79(A). Accordingly, we find the department's use of underage confidential informants was not in bad faith nor was it against public policy. See *State v. Stackhouse*, Portage App. No. 2002-P-0057, 2003-Ohio-1980.

{¶9} In summary, appellant stipulated that its employee sold beer to an underage individual in violation of R.C. 4301.69(A).² There was evidence to demonstrate that such underage sale occurred. The violation gave the commission authority to suspend or revoke appellant's permit under R.C. 4301.25(A).³ At the hearing, appellant did not provide a defense but merely argued facts in support of mitigation, namely that it had held its permit for 13 years and terminated the employee who sold the alcohol. It did not dispute the fact that the sales occurred. Further, the commission noted appellant's prior violations for underage sales occurring in 1994, 1999, 2000 and 2001. The most

² R.C. 4301.69(A) provides that "no person shall sell beer or intoxicating liquor to an underage person."

³ R.C. 4301.25(A) provides that the "liquor control commission may suspend or revoke any permit issued pursuant to Chapter 4301. and 4303. of the Revised Code for the violation of any of the applicable restrictions of such chapters or of any lawful rule of the commission or for other sufficient cause * * *."

recent underage sale occurred in September 2001, a little over two months prior to the current violation.

{¶10} We find the evidence supported the factual findings of the commission. Therefore, the court may not modify the commission's sanction. *Henry's Café, Inc. v. Bd. of Liquor Control* (1959), 170 Ohio St. 233; *McCartney Food Market, Inc. v. Liquor Control Comm.* (June 22, 1995), Franklin App. No. 94APE10-1576. "The cases * * * unequivocally hold that once there is a proper determination of a violation of law by the commission, it has within its discretion the authority to impose various penalties, including revocation, and this aspect of the commission's decision cannot be altered on appeal." *Id.*

{¶11} For the foregoing reasons, we find the trial court did not abuse its discretion in finding the commission's order to be supported by substantial, reliable and probative evidence. Accordingly, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

LAZARUS, P.J., and BRYANT, J., concur.
