[Cite as *Colon v. Ohio Liquor Control Comm.*, 2009-Ohio-5550.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Heriberto Colon,	:	
Appellant-Appellant,	:	
v.	:	No. 09AP-325 (C.P.C. No. 08CVF-07-10297)
Ohio Liquor Control Commission,	:	(REGULAR CALENDAR)
Appellee-Appellee,	:	
City of Cleveland,	:	
Intervenor-Appellee.	:	

D E C I S I O N

Rendered on October 20, 2009

Lumpe & Raber, *J. Richard Lumpe*, and *David A. Raber*, for appellant.

Richard Cordray, Attorney General, and *Scott A. Longo*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} Heriberto Colon, appellant, appeals from a judgment of the Franklin County Court of Common Pleas, in which the court affirmed the order of the Ohio Liquor Control Commission ("commission"), appellee. The commission's order affirmed the order of the Superintendent of the Division of Liquor Control ("division") that denied the 2007-2008 renewal application of appellant's D-5 liquor permit.

{¶2} Appellant owns a bar, known as El Tropical Lounge, in Cleveland, Ohio, and possesses a class D-5 liquor permit. Appellant's brother, Carmelo Colon, is also involved in the business. On July 11, 2007, the city of Cleveland ("city") objected to appellant's 2007-2008 renewal application, claiming that the bar was responsible for fights, gunshots, violence, noise, drug usage, thefts, and other disturbances on the premises and in the area; the bar was a strain on the police force, and neighbors in the area had voiced numerous complaints about the business. The division held hearings on the renewal and objection in January and March 2008. On April 14, 2008, the division issued a rejection order, in which it sustained the city's objection to the renewal application, finding: (1) substantial interference with public decency, sobriety, peace or good order would result from the issuance of the permit and operation thereunder by the application pursuant to R.C. 4303.292(A)(2)(c); (2) the applicant showed a disregard for the laws, regulations or local ordinances of the state, and would operate the permit business in a manner that demonstrates a disregard for the laws, regulations or local ordinances of the state pursuant to R.C. 4303.292(A)(1)(b); (3) the applicant did not disclose all persons having a legal or beneficial ownership interest in the business pursuant to R.C. 4303.293(a), 4303.27, and R.C. 4303.18; (4) the applicant, any partner, member, officer, director or manager thereof, or any shareholder owning more than ten percent of the capital stock has been convicted of a crime that relates to fitness to operate a liquor permit business in the state pursuant to R.C. 4303.292(A)(1)(a); (5) the owner or operator or manager or applicant has been convicted of a felony that is reasonably related to the person's fitness to operate a liquor permit business pursuant to R.C. 4303.29(A), 4301.25(A)(1), and R.C. 4303.292(A)(1)(a); and (6) the applicant has

misrepresented material facts on the application pending with the division pursuant to R.C. 4303.292(A)(1)(c).

{¶3} On May 7, 2008, appellant appealed the division's rejection order to the commission, and the commission granted a stay on May 15, 2008. An evidentiary hearing was held July 9, 2008. On July 11, 2008, the commission issued an order sustaining the city's objection and affirming the division's rejection order. Appellant filed an appeal to the common pleas court.

{¶4} On July 24, 2008, the trial court stayed the commission's order. On September 5, 2008, the trial court granted the city's motion to intervene. On March 3, 2009, the trial court issued a judgment in which it affirmed the order of the commission. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> [I.] THE COMMON PLEAS COURT ABUSED ITS DISCRETION IN AFFIRMING THE ORDER OF THE COMMISSION, WHEN IT FAILED TO CONFINE ITS REVIEW TO THE SUBSTANTIVE EVIDENCE AS PRESENTED TO THE COMMISSION AT THE JULY 9, 2008 EVIDENTIARY HEARING[.]
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> [II.] THE EVIDENCE SUBMITTED AT THE JULY 9, 2008, EVIDENTIARY HEARING BEFORE THE COMMISSION IS INSUFFICIENT TO MEET THE STATE'S BURDEN AND THEREFORE THE STATE HAS FAILED TO MEET ITS BURDEN OF PROOF AS REQUIRED TO SUPPORT THE REJECTION OF A LIQUOR PERMIT RENEWAL UNDER RC 4303.292(A)(2)(c) OR 4303.292(A)(1)(b).

{¶5} We will address appellant's assignments of error together. Appellant argues in his first assignment of error that the common pleas court erred when it affirmed the commission's order by relying upon the contents of the April 14, 2008 rejection order

attached to appellant's notice of appeal to the commission. In his second assignment of error, appellant argues that the evidence was insufficient to support the commission's rejections of his liquor permit renewal under R.C. 4303.292(A)(2)(c) or 4303.292(A)(1)(b).

{¶6} With regard to appellant's first assignment of error, appellant argues that he attached the April 14, 2008 rejection order to his notice of appeal to comply with Ohio Adm.Code 4301:1-1-65(B), which requires such attachment, and the trial court could not use the disputed findings therein to appellant's detriment. Appellant maintains that the April 14, 2008 order was based on a hearing held before the division, at which the rules of evidence do not apply and an objecting party may submit any evidence it desires. Appellant cites several instances in which the common pleas court generally referred to evidence submitted at the division hearing. For instance, in its decision, the trial court stated, "[i]n addition to this evidence, there is also evidence that was presented at the Division level hearing which was held on January 4, 2008 and March 14, 2008[,]" which referred to evidence about neighborhood complaints. The trial court also stated, "[a]ccording to the testimony at the Division level, this was typical of the type of activity that was going on at or near the premises on a regular basis[,]" which referred to the variety of infractions for which police cited violators near the premises. In addition, the trial court cited testimony and evidence from the division hearing in order to support a finding that the permit holder's brother, Carmelo Colon, was a partner or manager of the premises and had been convicted of crimes of which the permit holder had failed to notify the commission.

{¶7} However, we need not address appellant's first assignment of error because we find that, even without the evidence from the division level hearing, the trial

court did not abuse its discretion when it found the commission's order was supported by reliable, probative, and substantial evidence and was in accordance with the law, with regard to appellant's violation of R.C. 4303.292(A)(2)(c). Under R.C. 119.12, when a common pleas court reviews an order of an administrative agency, it must consider the entire record and determine whether the agency's order is "supported by reliable, probative, and substantial evidence and is in accordance with the law." "Reliable" evidence is evidence that is dependable and may be confidently trusted. *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.

{¶8} The common pleas court's "review of the administrative record is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Ohio Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. Even though the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, the findings of the agency are not conclusive. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶9} An appellate court's standard of review in an administrative appeal is more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122. It is not the function of the appellate court to examine the

evidence. Id. The appellate court is to determine only if the trial court has abused its discretion. Id. 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 on the part of the trial court, an appellate court may not substitute its judgment for that of an administrative agency or a trial court. Id. Nonetheless, an appellate court does have plenary review of purely legal questions in an administrative appeal. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶15. Accordingly, we must also determine whether the common pleas court's decision is in accordance with law.

{¶10} R.C. 4303.292(A)(2)(c) provides, in pertinent part:

> (A) The division of liquor control may refuse to issue, transfer the ownership of, or renew, and shall refuse to transfer the location of, any retail permit issued under this chapter if it finds * * *:
>
> * * *
>
> (2) That the place for which the permit is sought:
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> * * *
>
> (c) Is so located with respect to the neighborhood that substantial interference with public decency, sobriety, peace, or good order would result from the issuance, renewal, transfer of location, or transfer of ownership of the permit and operation under it by the applicant[.]

{¶11} The testimony related to this ground for denial was as follows. Joseph Santiago, a Cleveland city councilman, testified he had been a councilman for two and one-half years. He stated that when he became a councilman, the residents were fearful for their lives because of the permit premises. There were a lot of fights at that location,

police were being called to the premises on numerous occasions, there were several shootings at or near the establishment, and there was drug activity. He personally viewed fights on video that were recorded by residents. From February 2008 to July 2008, Santiago also personally viewed fights at the premises after parking his car and watching the premises. He had no knowledge whether this activity was being conducted with the knowledge of the permit holder, and he had never been inside the premises.

{¶12} Matthew Stepic, a Cleveland police detective, testified that the permit premises became a source of numerous and constant complaints on the weekends, including large crowds, fights, gunshots, and robberies. From February 2006 to July 2008, there were 54 calls for service to the address of the permit premises, primarily for large crowds fighting in the street. There were several 911 calls made from the pay phone next to the bar, some for loud music in the bar, public disturbances, fights, cars revving engines and peeling tires, shots fired by the back door of the premises, and broken car windows. The Cleveland police department assigned six to 12 police officers to address the problems on the weekends with the permit premises and another nearby bar, Latin Touch. There were 181 citations issued at or around the permit premises over eight separate weekend days from Friday, September 7, 2007, until Friday, November 30, 2007. These included three misdemeanor arrests, 40 moving violations, 108 parking tickets, five loud music citations, two drug abuse citations, seven open container citations, 19 misdemeanor citations, and five towed vehicles due to license suspension. Detective Stepic said the permit premises were a strain on police resources. He could not say how many of the citations were "directly" related to the permit premises. He had no knowledge whether the infractions were committed with knowledge of the permit holder.

{¶13} Alex Brazynetz, the executive director of a community development organization in the area, testified that the organization held a meeting on the bar in September 2004, which was attended by 60 residents, two television stations, and the district police. The issues discussed were four shootings within a month, fights, loud noise, citizens being approached by patrons, open alcohol containers, and activities in parked cars. Brazynetz said the bar had deteriorated the quality of life in the neighborhood significantly. The organization reached an agreement with the premises owner, but things were only better for a few months. Another community meeting was held in April 2007, because problems at the bar had escalated again around the permit premises, including loud noise, guns, trash and debris in yards from bar patrons, and parking issues. Carmelo Colon agreed to try to resolve the problems. A follow-up meeting was held on June 19, 2007, because things had not improved, including a shooting by people coming from the premises witnessed by a nearby resident, beer bottles being thrown, debris, and drag racing after the bar closed. He had no knowledge whether the permit holder knew of any of these activities or condoned them.

{¶14} Rowena Ventura, who lives 30 to 40 feet directly across from the back door of the permit premises, testified she has witnessed people purchasing drugs from security guards at the permit premises, females being beaten up by males, huge fights with 30 to 40 people being beaten with bottles, and people jumping on cars. She makes her grandchildren sleep in a safe room away from the bar. She is afraid for her life because of the permit premises. After exhausting her options with talking to people associated with the permit premises and speaking to police, she called the Cleveland Plain Dealer and started videotaping the premises. A reporter and photographer came to her house in May

2007, and the reporter witnessed drugs at the premises. The reporter and photographer returned to her house in June 2007, and a fight broke out at the permit premises involving people who had left the bar. Five or six men were beating another man on the premises, and the group traveled up her driveway and onto her yard, at which time someone pulled out a gun and shot the victim five times. Ventura, the reporter, and the photographer dove to the floor, and Ventura crawled into her house to check her grandchildren. After seeing all of her grandchildren were safe, she fell to the floor and vomited with fear. The Friday before the commission hearing, July 4, 2008, a car pulled out of the driveway of the permit premises, stopped in front of her house, fired a shot in the air, and then drove off.

{¶15} Stephanie Gale, who had lived seven houses from the permit premises for about four months, testified that two males going to the bar were trying to find a parking spot, and turned their car around in her yard. When Gale told them that they could not turn around there, they drove their car into her legs. Her husband came to her aid, and the two males got out of the car and attacked her. Men from another car then got out and attacked her husband. In another incident, in the middle of the afternoon, she was with her infant son when several men standing outside the back door of the bar yelled sexual comments at her and later offered to sell her drugs.

{¶16} Ruben Tores, who was in charge of security at the bar for three years, testified that the bar was in a "rough" neighborhood. He stated there are several security guards that watch the premises, some inside and some outside. He had never witnessed anyone being robbed on the premises, and he has heard gunshots from other parts of the

neighborhood. He said fights usually do not occur. He agreed that the bar has more patrons than parking spots, of which there are about 30.

{¶17} Dora Talavera, a patron at the permit premises, testified she had never seen anyone fight at the bar besides a husband and wife, and she had never seen drugs. However, she said she usually leaves by 10:00 p.m.

{¶18} Darling Bermudez lives directly across the street from the bar and is a patron. She said a lot of the activities, about which there had been testimony, happen during times the bar is closed. She said she has never seen a fight at the bar in the three years she has been going there. She said there are a lot of gunshots in the neighborhood, even when the bar is not open. She once observed a huge "riot" in the street involving 30 drug dealers and "crack kids" at four in the morning. She once witnessed a small argument at the bar. She also observed two men get kicked out of another nearby bar, Latin Touch, and they ended up in front of the permit premises fighting and shooting at each other. She said fights at the permit premises do not occur on a regular basis. She said Ventura, who is her next door neighbor, has parked in her parking spot and has also threatened her when asked to move her car.

{¶19} Hilda Perez, a patron of the permit premises, testified the bar is a good place to go. She feels comfortable and safe there, and she has never seen anything unusual transpire there. Perez said that people on the porch of Ventura's house once called one of her African-American friends the "N" word as they were leaving the permit premises.

{¶20} Appellant's argument that the commission erred when it determined that the permit premises caused a substantial interference with public decency, sobriety, peace or

good order is two-fold: (1) there was no evidence that the permit holder or employees thereof condoned, were aware of or initiated any of the activities occurring outside the permit premises; and (2) Santiago, Detective Stepic, and Braynetz were unable to testify as to what activities occurred inside the premises, as they had never been inside the premises or had not been inside the premises for many years. To support his arguments, appellant cites portions of our decision in *2216 SA, Inc. v. Liquor Control Comm.*, 10th Dist. No. 07AP-600, 2007-Ohio-7014, in which this court reversed the lower court and commission's renewal rejection based upon R.C. 4303.292(A)(2)(c) with regard to an adult entertainment establishment.

{¶21} With respect to appellant's first contention, appellant relies upon a portion of *2216 SA*, in which we stated:

> The only clear evidence about recent activities was from Eggleston, [a state witness and neighbor of the permit premises] who lives across the street from the premises and testified that he had been solicited for oral sex as he drove past the place "this summer." However, assuming that the woman who solicited him was an employee, which is difficult to assume given the other testimony about the rampant criminal activity that occurs in the area and on the same street as the permit premises, there is no evidence that such activity was conducted with the knowledge of the permit holder. Further, Eggelston failed to link the area's problems with regard to public sex, urination, and fights specifically with the permit holder. Although some of the offenders in this regard might have patronized the permit holder's premises, there is, again, no evidence that the permit holder condoned or initiated the activities or whether any employees of the permit holder were involved in the activities. Additionally, it is clear that there was no evidence the permit holder or any of the holder's employees were or are aware of these activities occurring outside of its premises and in the general public areas not under its control.

Id. at ¶21.

{¶22} However, appellant's argument is unavailing. In the present case, unlike in *2216 SA*, there was, in fact, evidence that the permit holder and/or his employees knew or should have known about the activities occurring on the premises under his control or activities occurring in surrounding areas that originated from the permit premises. Brazynetz, the executive director of a community development organization in the area, testified that the organization held community meetings regarding the bar in September 2004, April 2007, and June 2007, at which many residents, television stations, newspapers, and district police attended. After each meeting, the premises owner and/or Carmelo Colon agreed to resolve the problems by providing more security, encouraging patrons to leave the premises when it closed, encouraging patrons to keep car radios turned down, and doing a "last call" for alcohol. However, the problems would always return, raising the need for another community meeting. Braynetz stated that appellant was present at some of the meetings. Ventura also spoke with people associated with the permit premises about the problems. Thus, clearly the permit holder was fully aware of problems on the premises.

{¶23} Furthermore, unlike *2216 SA*, in the present case, there was abundant testimony that many of the problems were occurring directly on the permit premises or were originating from the permit premises and spilling out into the surrounding area. Ventura testified she saw people buying drugs from security guards at the permit premises and fights on the permit premises. Santiago testified that, from February 2008 to July 2008, he personally viewed fights at the premises after parking his car and watching the premises. Ventura also said a reporter and photographer from the Cleveland Plain Dealer witnessed drugs at the premises in May 2007, and, in June 2007, a fight broke out

at the permit premises involving people who had left the bar, and five or six men were beating another man on the premises resulting in the man being shot five times in her yard. She also witnessed a car pull out of the driveway of the permit premises, stop in front of her house, fired a shot in the air, and then drive off. Gale testified that two males going to the bar in their car hit her with their car and then attacked her and her husband. If appellant had the number of security guards in place that his head of security, Tores, claimed in his testimony, then there could be no doubt that appellant was aware of what was happening on his premises and/or originating from his premises. Given the community meetings, the extensive media coverage by both television and newspaper outlets, and a large number of police calls, it would be difficult to believe that the permit holder was unaware of the problems on the premises or unaware that his patrons were causing problems in the immediate area around the premises. This argument is without merit.

{¶24} With regard to appellant's second argument, appellant points out that Santiago, Detective Stepic, and Braynetz were unable to testify as to what activities occurred inside the premises, as they had never been in the premises or had not been inside the premises for many years. Appellant cites the following passage from our decision in *2216 SA* to support the contention that, because these witnesses had not been in the permit premises, the commission's determination that the permit premises caused a substantial interference with public decency, sobriety, peace or good order was in error:

> Eggelston could not testify as to what activities occurred inside the premises, as he had never been inside the premises. Given [the] testimony that the whole neighborhood,

> avenue, and area experiences substantial criminal activity, including prostitution and drug activity, we are reluctant to attach appellant's management of the permit premises to the general ills of the surrounding neighborhood. Much of the evidence, in this regard, was general and speculative, which is insufficient to establish substantial interference with public decency, sobriety, peace, or good order.

{¶25} However, we first point out that, with respect to this argument, appellant excessively focuses on what happened inside the permit premises, which is not necessarily relevant to the question of whether the permit premises are so located with respect to the neighborhood that substantial interference with public decency, sobriety, peace, or good order would result from the renewal of the permit. Indeed, in the present case, the whole focus of the commission's findings was upon the activities occurring outside of the permit premises and the effect on the surrounding neighborhood, while the testimony in *2216 SA* focused mainly upon illegal activities occurring inside the adult entertainment premises. It was because the main issue in *2216 SA* regarded activities inside the permit premises that it was relevant that several of the state's witnesses had not been inside the permit premises or had not been inside for a long time.

{¶26} Notwithstanding, the present case is also different from the circumstances in *2216 SA* because the evidence here regarding the illegal and/or disruptive activities occurring outside the permit premises, as testified to by the state's witnesses, was not "general and speculative," and the activities in the current case could be directly attached to the permit premises. Although there was evidence in the present case that the permit premises was located in a "rough" neighborhood that sometimes experienced gunshots, drug activity, and street violence, there was substantial testimony, as already outlined above, that many problems in the area occurred directly on the property of the permit

premises itself and/or originated at the permit premises and then spilled out into the surrounding area.

{¶27} For these reasons, after reviewing the record, we find the trial court did not abuse its discretion. The trial court properly found the commission's determination was supported by reliable, probative, and substantial evidence and is in accordance with the law. There was reliable, probative, and substantial evidence to demonstrate the permit premises was so located with respect to the neighborhood that substantial interference with public decency, sobriety, peace, or good order would result from the renewal of the permit and operation under it by the permit holder pursuant to R.C. 4303.292(A)(2)(c). Because only one ground listed under R.C. 4303.292(A) must be demonstrated in order to refuse a permit, see *Our Place* at 572, and because we have found there was reliable, probative, and substantial evidence under R.C. 4303.292(A)(2)(c), we need not address the other reasons for non-renewal found by the commission. Therefore, appellant's first and second assignments of error are overruled.

{¶28} Accordingly, appellant's two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BRYANT and McGRATH, JJ., concur.

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