[Cite as *Tauring Corp. v. Ohio Liquor Control Comm.*, 2015-Ohio-1967.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Tauring Corp.,	:	
Appellant-Appellant,	:	
		No. 14AP-622
v.	:	(C.P.C. No. 14CV-0839)
Ohio Liquor Control Commission,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on May 21, 2015

Lumpe & Raber, J. Richard Lumpe, and *Steven J. Benyo*, for appellant.

Michael DeWine, Attorney General, and *Vivian P. Tate*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Appellant, Tauring Corp., appeals the July 14, 2014 judgment of the Franklin County Court of Common Pleas affirming the January 23, 2014 order issued by appellee, Ohio Liquor Control Commission ("commission"). For the reasons that follow, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On June 29, 2012, Robert Hastings and Kevin Arnold were patrons of Johnny T's, a bar operated by appellant. Hastings was 20 years old at the time. According to the testimony of Brittany Fillous, the sole bartender working at the bar on the night in question, Hastings arrived at the bar between 9:00 and 10:00 p.m. with a

group of friends. When asked "what shape" Hastings was in when he arrived at the bar, Fillous stated that he seemed fine. (Tr. 40.)

{¶ 3} At "around midnight – 1 am," Fillous observed that Hastings and his friends "were all drinking, but no one appeared to be overly-intoxicated." (July 12, 2012 Fillous Statement, 1.) Before the commission, Fillous confirmed this statement referred specifically to Hastings, agreed this statement meant Hastings was "intoxicated but not overly intoxicated," and recalled that she sold pitchers of vodka-based shots to Hastings and his group. (Tr. 32.)

{¶ 4} Around 2:00 a.m., Fillous saw Hastings walk with a friend to the bar's attached patio, which was fenced in and had no other entrances or exits. No alcohol was sold on the patio. When Hastings and his friend returned from the patio approximately 15 to 20 minutes later, Fillous observed that they appeared "more 'intoxicated.' " (Aug. 25, 2012 Fillous Statement, 2.)

{¶ 5} At 2:20 a.m., just prior to the bar's closing, five of Hastings' group remained, including Hastings, Arnold, "Cory," "Colin," and "Rubbish," who Fillous described to the police as "40's, balding." (July 12, 2012 Fillous Statement, 1, 4.) According to Fillous, "[t]he four younger kids were together finishing up their drinks." (July 12, 2012 Fillous Statement, 2.) Hastings asked Fillous for "more" beer, but she "told him no, because it was time to close." (Tr. 32.) Fillous then heard Arnold pressing Hastings to "stand up to [Fillous] and say something * * * about why [she] wouldn't continue serving." (Tr. 33.) Fillous told Arnold to calm down and told them, "I cannot serve you guys anymore." (July 12, 2012 Fillous Statement, 2.)

{¶ 6} At approximately 2:30 a.m., Fillous walked around the bar shutting off the lights and then pushed Hastings, Arnold, and a friend out of the bar, locking the door behind them. Fillous estimated that between his arrival in the 9:00 to 10:00 p.m. range and his departure at 2:30 a.m., Hastings consumed approximately three drinks.

{¶ 7} At approximately 2:48 a.m., Hastings was critically injured on a road approximately 400 feet from appellant's bar. Franklin County Deputy Sheriff Wes Dobbins determined that Arnold, after leaving the bar, drove his vehicle while intoxicated and hit Hastings, who was walking near the road. Hastings was taken from the scene of

the incident to a hospital, where a lab test conducted at 4:15 a.m. measured his blood alcohol level at 0.268.

{¶ 8} On January 9, 2014, the commission held a hearing, which included testimony from Deputy Dobbins and Fillous, on several charges brought against appellant. On January 23, 2014, the commission entered three interrelated orders finding appellant in violation of several of the charged offenses. First, in case No. 1084-13, the commission found that appellant committed a single violation by "knowingly and/or willfully allow[ing] in and upon the permit premises Improper Conduct, to wit: DISORDERLY ACTIVITY - in violation of 4301:1-1-52(B)(1), a regulation of the Ohio Liquor Control Commission." (Emphasis sic.) (Commission's Order in case No. 1084-13.) Second, in case No. 1083-13, the commission found that appellant committed two violations by both selling and furnishing "beer and/or intoxicating liquor, in and upon the permit premises, to ROBERT HASTINGS AND/OR KEVIN ARNOLD, who were then and there in an intoxicated condition, in violation of Section 4301.22(B) of the Ohio Revised Code." (Emphasis sic.) (Commission's Order in case No. 1083-13.) Finally, in case No. 1082-13, the commission found that appellant committed a single violation by selling beer to a confidential informant who was under 21 years of age in violation of R.C. 4031.69(A). (Commission's Order in case No. 1082-13.) The commission's orders imposed a combined penalty for all three cases, offering appellant the option of either paying a $7,500 fine in forfeiture or having appellant's liquor permit revoked.

{¶ 9} On January 27, 2014, pursuant to R.C. 119.12, appellant appealed the commission's three orders to the Franklin County Court of Common Pleas. In its brief to the trial court, appellant only challenged the order of the commission that found appellant to be in violation of R.C. 4301.22(B) by selling and furnishing beer or an intoxicating liquor to an intoxicated person, identified as Robert Hastings and/or Kevin Arnold. After being fully briefed by the parties, the trial court, on July 14, 2014, issued a judgment entry affirming the challenged order of the commission. The trial court considered "only the evidence pertaining to the sale of alcohol to Mr. Hastings, and not to Kevin Arnold" because "[t]he notice of violation at issue alleges sale to 'Robert Hastings and/or Kevin Arnold' " and, therefore, "evidence of a violation relating to either individual is sufficient." (Trial court's July 14, 2014 Judgment Entry, 4, fn. 1.)

II. ASSIGNMENT OF ERROR

{¶ 10} Appellant appeals assigning a single error for our review:

> THE COMMON PLEAS COURT ABUSED ITS DISCRETION IN AFFIRMING THE ORDERS OF THE LIQUOR CONTROL COMMISSION, IN THAT THE ORDERS ARE NOT SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE AND ARE NOT INACCORDANCE [sic] WITH LAW.

{¶ 11} Pursuant to R.C. 119.12, a common pleas court reviewing an order of an administrative agency must affirm the order if, upon consideration of the entire record, the order is in accordance with law and is supported by reliable, probative, and substantial evidence. *Our Place, Inc. v. Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992); *Colon v. Liquor Control Comm.*, 10th Dist. No. 09AP-325, 2009-Ohio-5550, ¶ 8. To be reliable, the evidence must be dependable, i.e., that there is a reasonable probability that the evidence is true. *Our Place* at 571. To be probative, the evidence must tend to prove the issue in question. *Id.* To be substantial, the evidence must have some weight, i.e., it must have importance and value. *Id.*

{¶ 12} "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." ' " *Colon* at ¶ 8, quoting *Lies v. Ohio Veterinary Med. Bd.*, 2 Ohio App.3d 204, 207 (1st Dist.1981), quoting *Andrews v. Bd. of Liquor Control*, 164 Ohio St. 275, 280 (1955). "In doing so, the court of common pleas must give due deference to the administrative resolution of evidentiary conflicts because the agency, as the fact finder, is in the best position to observe the manner and demeanor of the witnesses." *Lorenzo's Drive Thru, Inc. v. Liquor Control Comm.*, 10th Dist. No. 10AP-460, 2011-Ohio-4249, ¶ 7.

{¶ 13} On appeal to an appellate court, the standard of review is even more limited. "Unlike the court of common pleas, a court of appeals does not determine the weight of the evidence." *Gaydeski v. Liquor Control Comm.*, 155 Ohio App.3d 349, 2003-Ohio-6190, ¶ 12 (10th Dist.). Instead, "[a]n appellate court is limited to determining whether the trial court abused its discretion." *Lorenzo's Drive Thru* at ¶ 8. " 'The term "abuse of

discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), quoting *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). "Absent such an abuse of discretion, an appellate court must affirm the trial court's judgment, even if the appellate court would have arrived at a different conclusion than the trial court." *Lorenzo's Drive Thru* at ¶ 8. Nonetheless, an appellate court does have plenary review of purely legal questions in an administrative appeal. *Colon* at ¶ 9, citing *Big Bob's, Inc. v. Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶ 15 (10th Dist.).

{¶ 14} R.C. 4301.22(B) provides that "[n]o permit holder and no agent or employee of a permit holder shall sell or furnish beer or intoxicating liquor to an intoxicated person." "One of the purposes of R.C. 4301.22(B) is to place a duty on a person selling alcoholic beverages to observe and know when a patron is intoxicated." *Gressman v. McClain*, 40 Ohio St.3d 359, 363 (1988). "[A]ctual knowledge of intoxication is a prerequisite under R.C. 4301.22(B)." *Lluberes, Inc. v. Liquor Control Comm.*, 10th Dist. No. 02AP-1326, 2003-Ohio-5943, ¶ 14, citing *Gressman* at 363.

{¶ 15} Either direct or circumstantial evidence may be used to prove a violation of R.C. 4301.22. *See Lluberes*; *Enitnel, Inc. v. Liquor Control Comm.*, 10th Dist. No. 02AP-583, 2002-Ohio-7034, ¶ 26; *VFW Post 8586 v. Liquor Control Comm.*, 83 Ohio St.3d 79, 82 (1998). In addition, "[t]he commission may draw reasonable inferences based on the evidence before it." *Valentino v. Liquor Control Comm.*, 10th Dist. No. 02AP-586, 2003-Ohio-1937, ¶ 20. *See also B.P.O. of Elks, Cincinnati Lodge No. 5 v. Bd. of Liquor Control*, 105 Ohio App. 181, 184 (10th Dist.1957) (concluding that "the inference that intoxicating liquor was sold on Sunday [in violation of a former statute] was a reasonable one and is supported by the evidence" where liquor was found on the permit holder's premises on Sunday evening on the table at which four persons were seated and permit holder was open for business); *Abdoney v. Bd. of Liquor Control*, 101 Ohio App. 57 (10th Dist.1955) (finding reasonable inferences supported finding of a "sale" of alcohol to an intoxicated person).

{¶ 16} Here, the record provides direct evidence of Fillous's actual knowledge of Hastings' intoxication at midnight – 1:00 a.m., the point in time when Fillous

acknowledged Hastings was drinking and intoxicated, but not "overly intoxicated." (Tr. 32.) The record also supplies direct and circumstantial evidence that supports a reasonable inference that, despite her knowledge of Hastings' intoxication, Fillous continued to sell or furnish alcohol to the group of patrons, including Hastings, until the bar closed.

{¶ 17} Specifically, Fillous confirmed she sold shots to Hastings' group, which she described to the commission as being intoxicated. Fillous also repeatedly used terms that represented the bar's closing time as the cut-off of otherwise continuous beer service to Hastings' group. For example, Fillous stated that at 2:20 a.m., "[t]he four younger kids[1] [out of the remaining group of five] were together finishing up their drinks." (July 12, 2012 Fillous Statement, 2.) Hastings asked Fillous for "more" beer. (Tr. 32.) According to Fillous, she told Hastings "no" in order to close the bar for the night, but Arnold wanted Hastings to confront her "about why I wouldn't *continue* serving." (Emphasis added.) (Tr. 33.) After trying to calm Arnold down, she said, "I cannot serve you guys anymore." (July 12, 2012 Fillous Statement, 2.)

{¶ 18} Fillous's statements are supplemented by temporal evidence and evidence of Hastings' blood alcohol level. As previously indicated, Fillous stated Hastings appeared to be fine when he arrived at the bar around 9:00 to 10:00 p.m., but by midnight - 1 a.m. appeared to be intoxicated. After that point, Hastings remained at the bar another one and one-half to two and one-half hours, until departing at 2:30 a.m. Separated from the bar by just a few minutes and a few hundred feet, Hastings was struck by a truck driven by Arnold. At 4:15 a.m., over three to four hours after Fillous identified Hastings as intoxicated, Hastings' blood alcohol level measured 0.268.

{¶ 19} Fillous's statements confirming she sold shots to an intoxicated group which included Hastings and describing continuous alcohol service up until the bar's closing, coupled with Hastings' ultimate 0.268 blood alcohol level, support a reasonable inference that Fillous sold or furnished Hastings beer or intoxicating liquor after she knew he was intoxicated. In light of the evidence on record and considering the commission's prerogative to assess credibility and weight of evidence as well as the common pleas

[1] This "younger kids" group reasonably included Hastings due to Hastings' age and Fillous's description of "Rubbish" as in his forties and balding. (July 12, 2012 Fillous Statement, 1-2, 4.)

court's duty to respect that prerogative, we cannot say the common pleas court decision was unreasonable, arbitrary or unconscionable. Therefore, we find that the common pleas court did not abuse its discretion in affirming the commission's order.

{¶ 20} Finally, because we have determined that the trial court did not abuse its discretion in determining the commission's order was supported by reliable, probative, and substantial evidence, we decline appellant's request to modify the penalty imposed by the commission.

{¶ 21} Accordingly, we overrule appellant's single assignment of error.

III. CONCLUSION

{¶ 22} Having overruled appellant's single assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

T. BRYANT, J., concurs.
DORRIAN, J., dissents.

DORRIAN, J., dissenting.

{¶ 23} I respectfully dissent from the majority's holding that the trial court did not abuse its discretion in affirming the commission's order. In so doing, I note that, while the commission could certainly consider circumstantial evidence, it is impermissible for the trier of fact to stack inference upon inference. "The rule prohibiting the stacking of one inference upon another prohibits the drawing of one inference solely and entirely from another inference, where that inference is unsupported by any additional facts or inferences drawn from other facts." (Citations omitted.) *State v. Ingram*, 10th Dist. No. 11AP-1124 , 2012-Ohio-4075, ¶ 23. "Although inferences cannot be built upon inferences, several conclusions may be drawn from the same set of facts." (Citations omitted.) *Id.* at ¶ 23. "Because reasonable inferences drawn from the evidence are an essential element of the deductive reasoning process by which most successful claims are proven, the rule against stacking inferences must be strictly limited to inferences drawn exclusively from other inferences." (Citations omitted.) *Id.*

{¶ 24} Here, I agree with the majority that several pieces of both direct and circumstantial evidence demonstrate that Hastings was intoxicated. However, I believe

the commission fails to point to, and my independent review fails to uncover, any portion of the record indicating that Fillous continued to sell or furnish drinks to Hastings or to other members of his party following her determination that he was intoxicated. The record additionally fails to reflect any follow-up questions from the state seeking to establish a temporal relationship between when Fillous furnished drinks to the group and when Fillous became aware that Hastings was intoxicated when he returned from the patio.

{¶ 25} The commission points to Fillous's testimony that patrons were "finishing up their drinks" just prior to closing when Hastings asked her for additional beer. However, the record does not reflect (1) whether Hastings himself was finishing a drink, or (2) when those drinks were sold or furnished to the group. Further, the Commission admits that Fillous specifically denied Hastings' request for additional beer. Although Hastings' blood alcohol content obtained after the bar closed supports an inference of intoxication, this evidence alone does not demonstrate that appellant sold or furnished beer or intoxicating liquor to Hastings when he was intoxicated. *Compare Llubere*s*, Inc. v. Liquor Control Commission*, 10th Dist. No. 02AP-1326, 2003-Ohio-5943, ¶ 15 (affirming commission's finding of a violation of R.C. 4301.22(B) where "there was sufficient evidence presented to support a reasonable inference that the customer was noticeably intoxicated *at the time of sale*, and that the employee who made the sale had actual knowledge of the customer's intoxication" (emphasis added)).

{¶ 26} Thus, although the record reflects (1) that Fillous sold or furnished Hastings with alcohol and (2) that she knew at some point he was intoxicated, it does not reveal that Fillous served or furnished alcoholic beverages to Hastings specifically, or other patrons with whom he was associated, *at the time when* she became aware of Hastings' intoxication. Because the state did not establish a timeline of knowledge of intoxication and sale or furnishing, the evidence was not sufficient to prove a violation of R.C. 4301.22(B). Therefore, I would find that the trial court abused its discretion in affirming the commission's order. For these reasons, I respectfully dissent.

T. BRYANT, J., retired, of the Third Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).