No. 12-108788-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MCJS, INC. DBA REED'S RINGSIDE SPORTSBAR AND GRILL,

Appellant

vs.

KANSAS DEPARTMENT OF REVENUE,

Appellee

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BRIEF OF APPELLEE

Appeal from the District Court of Shawnee County
The Honorable Larry D. Hendricks, Judge
District Court Case No. 12-C-01

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NATURE OF THE CASE

This is an appeal brought under the Act for Judicial Review and Civil Enforcement of Agency Actions to contest the imposition by the Director of the Alcoholic Beverage Control ("ABC") of a $500 fine against the appellant for a violation of K.S.A. 41-2615. The Director's Order was affirmed by the Secretary of Revenue and the Shawnee County District Court. The Appellee prays that this Court will find the agency's action was appropriate and affirm the district court's holding.

ISSUES ON APPEAL

Appellant's appeal presents two main issues:

I. **Interpretation of K.S.A. 41-2615**. K.S.A. 41-2615 prohibits a licensee from "knowingly or unknowingly" permitting a minor to possess or consume alcoholic liquor on the licensed premises. The agency found that the statute imposes absolute liability on the licensee when a minor possesses or consumes alcoholic liquor on the licensed premises. Did the agency correctly interpret and apply the law to this action?

II. **Sufficiency of Evidence.** The Agency found that a 17-year-old had possessed and consumed alcoholic liquor on the appellant's licensed premises. Was that finding based on evidence which is substantial when viewed in light of the record as a whole?

STATEMENT OF FACTS

On July 3, 2010, Kipp Shupe consumed alcoholic liquor at Reed's Ringside Sports Bar and Grill ("Reed's"). (R. I at 148). No one at Reed's checked Shupe's identification when he entered Reed's or during the time he was there. (R. I at 145 and 147). Shupe was 17 years of age. (R. I at 146).

Shupe was arrested at approximately 4:00 a.m. on July 3, 2010 after a high-speed chase and one-vehicle accident. (R. I at 104-105). Shupe was intoxicated at the time of his arrest. (R. I at 105). When officers recovered Shupe's vehicle, they found 26 cans remaining from an open 30-pack of Bud Light beer. (R. I at 112). Shupe testified he consumed four cans of Bud Light beer in his vehicle prior to arriving at Reed's. (R. I at 148). A blood test administered later that morning showed that, at the time of the test, Shupe had a blood alcohol content of 0.09. (R. I at 106).

Shupe provided two written statements to police officers concerning the incidents of July 3, 2010. (R. I at 197). In the first statement, Shupe stated Johnny Bourdon had purchased pitchers of beer at Reed's and he had consumed some of the beer. (R. I at 116). In his second written statement, Shupe claimed he had purchased a pitcher of beer at Reed's. (R. I at 151-152). Shupe testified at the hearing that he had purchased two pitchers of beer at Reed's. (R. I. at 146).

Johnny Bourdon is a friend of Shupe's and refers to Shupe as his nephew. (R. I at 131). Bourdon was interviewed on July 5, 2010 by Officer Darrel Chapman of the Potawatomi Police Department concerning the events of July 3, 2010. (R. I at 107). Bourdon initially denied that Shupe was with him at Reed's (R. I at 115). When confronted with Shupe's statement that Shupe was there and drinking Bourdon admitted to "contributing to a minor". (R. I at 117). Bourdon told Chapman during the interview that he had bought all the beer at Reed's. (R. I at 118). During the hearing, Bourdon testified that Shupe had bought a pitcher of beer, although he did not see him do it. (R. I at 133 & 135).

ABC Enforcement Agent Mel Meier issued an administrative citation on July 28, 2010 for an alleged violation of K.S.A. 41-2615. (R. I at 23). On September 9, 2010, ABC served a Notice of Administrative Action and Order of the Director on Reed's. (R. I at 24-27). The Notice gave Reed's the right to request a hearing. (R. I at 25). ABC received Reed's request for a hearing on September 14, 2010. (R. I at 28). An evidentiary hearing was held on March 28, 2011. (R. I at 196).

The ABC Director found that Kipp Shupe was a minor who had consumed alcoholic liquor on Reed's licensed premises. (R. I at 198). The Director further found that K.S.A. 41-2615 creates absolute civil liability on a licensee for a violation of the statute. (R. I at 198). The Director then found the licensee guilty of violating K.S.A. 41-2615 and ordered a $500 fine. (R. I at 198-199).

Reed's appealed the Director's Order to the Secretary of Revenue on August 25, 2011. (R. I at 201). On December 2, 2011, the Secretary confirmed the Director's interpretation of K.S.A. 41-2615 and affirmed the Order of a $500 fine. (R. I at 237-238). Reed's filed a petition for judicial review in Shawnee County District Court on January 3, 2011. (R. II at 3). The District Court found the agency's interpretation of K.S.A. 41-2615 was correct. (R. II at 29). The District Court also found the agency's determination of fact was supported to the appropriate standard of proof by evidence which was substantial when viewed in light of the record as a whole. (R. II at 31).

ARGUMENTS AND AUTHORITIES

I. The Agency correctly interpreted and applied K.S.A. 41-2615 to the facts.

A. Standard of review

The Court's scope of review is defined by K.S.A. 77-621(c). A court reviewing an agency action may grant relief only if it finds, *inter alia*: (4) the agency has erroneously interpreted or applied the law. K.S.A. 77-621, as amended L. 2009 Ch. 109, Sec. 28. An agency action is presumed valid, and the burden for proving it to be invalid falls on the person challenging the agency action. *Brewer v. Schalansky,* 278 Kan. 734, 102 P.3d 1145, 1148 (2004). Statutory interpretation is a question of law, over which the court exercises unlimited review. *State ex rel. Slusher v. City of Leavenworth*, 285 Kan. 438, 443, 172 P.3d 1154 (2007). Deference is no longer given to an administrative agency's interpretation of its authorizing statutes. *Fort Hays State Univ. v. Fort Hays State Univ. Chapter, Am. Assoc. of Univ. Professors*, 290 Kan. 446, 457, 228 P.3d 403 (2010).

B. K.S.A. 41-2615(a) does create absolute civil liability on licensees.

K.S.A. 41-2615(a) provides: "No licensee or permit holder, or any owner, officer, or employee thereof, shall knowingly or unknowingly permit the possession or consumption of alcoholic liquor or cereal malt beverage by a minor on premises where alcoholic beverages are sold by such licensee or permit holder..."

Agency's interpretation has always been that the "knowingly or unknowingly permit" language of the statute creates absolute liability on a licensee when a minor is found in possession of alcohol on its licensed premises. Absolute liability requires no

knowledge or intent on the part of the violator. *State v. JC Sports Bar, Inc.*, 253 Kan. 815, 821, 861 P.2d 1334 (1993). It is enough that the violation occurred.

K.S.A. 41-2615 has been recognized as a hybrid of penal and regulatory provisions. *State v. Sleeth*, 8 Kan. App. 2d 652, 664 P.2d 883 (1983); *Sanctuary, Inc. v. Smith*, 12 Kan.App.2d 38, 733 P.2d 839 (1987). A study of the history of K.S.A. 41-2615 indicates that the legislature intended to impose an absolute liability standard on ***licensees.*** Between 1965 and 1987, K.S.A. 41-2615 read, in pertinent part:

> (a) No club shall knowingly or unknowingly permit the consumption of alcoholic liquor or cereal malt beverage on its premises by a minor...The owner of any club, or any officer or employee thereof, who shall permit the consumption of alcoholic liquor or cereal malt beverage on the premises of the club by a minor shall be deemed guilty of a misdemeanor...

In *State v. Sleeth*, the Kansas Court of Appeals found that the conspicuous absence of the "knowingly or unknowingly" phrase from the sentence applying to criminal prosecution of owners indicated a legislative intent to infuse <u>that</u> provision with a scienter requirement. *State v. Sleeth.* 8 Kan.App.2d 652, 656, 664 P.2d 883 (1983). In other words, the first sentence, applying to the regulatory enforcement of clubs, created an absolute liability standard, while the criminal provision, applying to the individual, did not. The court further found that knowledge of the incident was <u>not</u> a prerequisite to holding the club liable for a violation. *Sleeth*, at 656.

In *Sanctuary, Inc. v. Smith*, the Court reaffirmed that interpretation, finding that K.S.A. 41-2615, through the use of the "knowingly or unknowingly permit" phrase, imposes an absolute liability standard on clubs: "Our legislature has adopted a strict regulatory policy by imposing upon private clubs an **absolute duty** not to

permit minors to consume alcoholic beverages on their premises." *Sanctuary, Inc. v. Smith* 12 Kan.App.2d 38, 39, 733 P.2d 839 (1987).

The statute was amended in 1987 to:

> (a) No licensee or permit holder, or any owner, officer or employee thereof, shall knowingly or unknowingly permit the consumption of alcoholic liquor or cereal malt by a minor on premises where alcoholic beverages are sold by such licensee or permit holder...
> (b) Violation of this section is a misdemeanor punishable by a fine of not less than $100 and not more than $250 or imprisonment not exceeding 30 days, or both..."

In *State v. JC Sports Bar, Inc., Supra*, the Kansas Supreme Court addressed the language "knowingly or unknowingly permit" as it applied to a **criminal** prosecution. The owner of a bar had been charged criminally with a violation of the amended statute. A minor picked up an abandoned cup of beer at an unoccupied table and consumed from it, then sat it back on the table. When the minor consumed the beer, the owner was actually standing outside the bar with the ABC Agent.

The Court found that "it appears to us that the legislature in adopting the language 'knowingly or unknowingly permit intended some action or inaction of a greater magnitude than merely opening for business on the night in question, which allowed the prohibited conduct to occur before **criminal liability** would attach." *JC Sports Bar*, at 823, emphasis added.

In *JC Sports Bar*, the Kansas Supreme Court addressed only a criminal issue...could a bar and its owners be found <u>criminally</u> liable for the illegal actions of a minor on their premises, when all evidence indicated that no one in the bar provided beer to the minor or even knew he had taken a drink from someone else's cup? The

court found that the bar and its owners could not be found **criminally** liable in that instance. The court did not address **civil** application of the statute.

It is logical that a criminal court and an administrative agency may interpret and apply the same statute differently. Penal statutes must be strictly construed in favor of the accused. *Huelsman v. Kansas Department of Revenue,* 267 Kan. 456, 462, 980 P.2d 1022 (1999). That same statute may be construed more liberally by an administrative agency in a civil action.

Nothing in the *JC Sports Bar* opinion reverses or negates the findings by the Court in *Smith* and *Sleeth.* Simply put, *JC Sports Bar* speaks only to criminal liability, **not** civil liability. The court specifically finds that, previous to the 1987 amendment, the statute imposed absolute civil liability on the licensee, but no absolute criminal liability on the individual. After the 1987 amendment, the statute expanded ***criminal*** liability to all violators, whether the violation was knowingly or unknowingly. *JC Sports Bar*, at 821. The Court further found, however, that "the statute does not establish absolute liability under the facts of this case and does not clearly indicate a legislative purpose to do so." *JC Sports Bar*, at 823.

With all due respect to the Court, the statute **does** indicate a legislative purpose for imposing absolute liability on licensees. Since the passage of the liquor control act in 1949 and the club and drinking establishment act in 1965, the express public policy of the State of Kansas has been that minors shall not possess or consume alcoholic liquor. K.S.A. 41-727, K.S.A. 41-2610, K.S.A. 41-2615, and K.S.A. 21-5607.

Since 1965, K.S.A. 41-2615 has been interpreted as applying absolute liability on licensees. In the 20 years since the *JC Sports Bar* opinion was issued, the statute has continued to be interpreted by the agency and District Courts as applying absolute civil liability on licensees. At no time has the legislature, the maker of public policy, taken any action to correct or change that interpretation.

Thousands of licensees have been cited under the agency's interpretation of the statute and paid hundreds of thousands of dollars in fines. Licenses have been suspended and revoked based on that interpretation. If the agency's interpretation was against public policy and the intent of the legislature, surely the legislature would have clarified its position. It has not done so, despite appeals from industry members.

The "knowingly or unknowingly permit" language has remained constant through all amendments to the statute. There is no legislative history concerning the legislature's intent in adopting that language. When the statute was amended in 1987, it was done in a conference committee. Again, there is no legislative history to explain the legislature's intent in amending the statute. However, the lack of any legislative action to change 45 years of agency interpretation and application of the statute implies at least tacet approval.

C. Even absent absolute liability, Reed's did knowingly or unknowingly permit a minor to possess or consume alcoholic liquor on the licensed premises.

Reed's makes much of the Director's failure to make a specific finding that Reed's, in any way, **permitted** Shupe to possess or consume alcohol. That argument is without merit. Evidence presented at the hearing clearly shows that Reed's did "permit" Shupe to possess or consume liquor. "Permit" can be interpreted to imply

"circumstances where one has power or control to authorize an act or to give one's consent to a situation" or it can imply "circumstances where one acquiesces in the doing of a thing or the existence of a circumstance by failing to take action to prevent it or where one allows a thing to happen by not opposing it". *State v. Wilson*, 267 Kan. 550, 560-61, 987 P.2d 1060 (1999).

Shupe purchased at least one pitcher of beer from an employee of Reed's. (R. I at 146 & 151-152). Testimony clearly showed that employees passed by and cleared the table where Shupe was in possession of and consuming alcoholic liquor. (R. I at 146-147). Shupe testified that he was clearly consuming beer at the table and saw several employees pass by or wait on his table during the time he was doing so. (R. I at 147-148). Employees of Reed's knew or should have known that Shupe was consuming alcoholic liquor on the licensed premises and did nothing to stop him.

While there was conflicting testimony concerning how <u>much</u> beer Shupe purchased or drank, evidence clearly shows he did possess and consume alcoholic liquor on the licensed premises. No one ever checked Shupe's identification or asked his age during the time he was at Reed's. (R. I at 145, 147). No one removed the beer from the table or otherwise prevented Shupe from consuming it. Shupe was 17 years old, and looked it. (R. I at 197). Yet no one bothered to check whether he was old enough to be consuming beer.

Reed's acquiesced in Shupe's consumption of alcoholic liquor by taking no action to prevent it. Reed's allowed Shupe to consume alcoholic liquor on its licensed premises by not opposing it. Under the *Wilson* analysis, therefore, Reed's

did "permit" Shupe to possess and consume alcoholic liquor. The mere fact that the Director made no specific finding to that effect does not negate the agency's action.

II. The agency action was based on a determination of fact that was supported to the appropriate standard of proof by evidence which is substantial when viewed in light of the record as a whole.

A. Standard of review

The Court's scope of review is defined by K.S.A. 77-621(c). A court reviewing an agency action may grant relief only if it finds, *inter alia*: (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act. K.S.A. 77-621, as amended L. 2009 Ch. 109, Sec. 28.

The question of whether the agency's action was based on a determination of fact that was supported to the appropriate standard of proof by evidence which is substantial when viewed in light of the record as a whole is a question of fact, over which this court's review is limited. "An appellate court, in reviewing an agency action, is limited to ascertaining from the record whether there is substantial competent evidence to support the agency findings." *Winston v. State Dept of SRS,* 274 Kan. 396, 404, 49 P.3d 1274 (2002) (citing *Sokol v. Kansas Dept. of SRS*, 267 Kan. 740, Syl. ¶ 3, 981 P.2d 1172 (1999). Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact

from which the issue can reasonably be resolved. *Winston,* at 404 (citing *Kansas Dept. of SRS v. Paillet*, 270 Kan. 646, Syl. ¶ 2, 16 P.3d 962 (2001).

In determining whether there is substantial evidence to support an agency action, the reviewing court may not set aside an agency order merely because it would have reached a different conclusion had it been the trier of fact. The evidence must show that the agency's determination "was so wide of the mark as to be outside the realm of fair debate." *Vakas v. Kansas State Bd. Of Healing Arts,* 23 Kan. App. 2d 889, 941 P.2d 381, 384 (1997).

An agency action is presumed valid, and the burden for proving it to be invalid falls on the person challenging the agency action. *Brewer v. Schalansky,* 278 Kan. 734, 102 P.3d 1145, 1148 (2004).

B. Appropriate Standard of Proof.

Civil cases, including administrative actions, involve a "preponderance of the evidence" standard of proof, unless "particularly important individual interests or rights are at stake". *In re B.D.-Y.*, 286 Kan. 686, 691, 187 P.3d 594 (2008), citing *Ortega v. IBP, Inc.,* 255 Kan. 513, 527-528, 874 P.2d 1188 (1994). "Preponderance of the evidence is evidence which shows that the truth of the facts asserted is more probable than not." *B.D.-Y.*, Syll. ¶ 1.

C. The record supports a finding that Shupe did possess and consume alcoholic liquor on Reed's licensed premises.

Substantial evidence is evidence which is both relevant and has substance, and which furnishes a substantial basis of fact from which the issues can easily be resolved. *Kennedy v. Board of Shawnee County Commissioners,* 264 Kan. 776, 783,

958 P.2d 637 (1998). Substantial evidence is "such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion." *Blue Cross and Blue Shield of Kansas, Inc. v. Praeger,* 276 Kan. 232, 263, 75 P.3d 226, 246 (2003).

In this instance, Shupe testified that he had purchased and consumed beer at Reed's on July 3, 2010. Bourdon also testified that he had purchased beer at Reed's and shared that beer with Shupe on July 3, 2010. (R. I at 133). Reed's makes much of the inconsistencies in the statements provided to the police by Shupe and Bourdon and their testimony at the hearing. However, that argument is simply a red herring. Those inconsistencies deal with how long Shupe was at the establishment, the amount of beer consumed and whether or not Shupe bought any of the beer himself (and how much) or whether Bourdon bought the beer for him. The inconsistencies do not contradict any testimony provided on the basic issue. The statements and testimonies are consistent on the fact that Shupe did consume alcoholic liquor while on the licensed premises.

It is unfortunate that Reed's was prevented from providing video surveillance footage of the evening in question. However, based on the testimony provided, it is highly unlikely that such evidence would have resulted in a different outcome. It seems particularly unlikely that someone would voluntarily admit criminal activity to the police when he did not, in fact, participate in such activity. The testimony of Shupe, Bourdon, and the police officer was sufficient to support the conclusion that Shupe had been drinking beer at Reed's on July 3, 2010. No further evidence was necessary, even had it been available.

The testimony provided by Shupe, Bourdon and Officer Chapman was substantial and relevant and would lead a reasonable person to conclude that it is more likely than not that Shupe did possess and consume alcoholic liquor on Reed's licensed premises on July 3, 2010. The agency's action was, therefore, based upon a determination of fact that was supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole.

CONCLUSION

K.S.A. 41-2615(a) imposes absolute civil liability on a licensee when a minor possesses or consumes alcoholic liquor on its premises. It is not necessary to show that Reed's knew Shupe was under-age, or that Reed's had any intent to serve minors alcohol. It is enough that it happened. The statute clearly provides that a licensee may not even "unknowingly" permit it to happen.

It would be poor public policy to construe K.S.A. 41-2615(a) in such a way as to require a showing of intent or knowledge to find a licensee liable in such an instance as this. Such an interpretation would only discourage licensees from taking proactive steps to prevent underage access to liquor. It would also be poor policy to require the licensee to take some overt action to "permit" underage access of liquor before finding them liable for a violation. Licensees could merely serve the people with the minor and look the other way while the minor consumed alcohol. No good would be served by such a position, while great harm could ensue.

Reed's voluntarily entered into a highly regulated business. A liquor license is a privilege that comes with great responsibility. When Reed's accepted its liquor license, it also accepted the responsibility that comes with it. That responsibility

includes an absolute duty to prevent minors from possessing or consuming alcoholic liquor on the licensed premises. Reed's failed that responsibility in this instance.

The best evidence available in this case was witness testimony. Shupe and Bourdon testified, under oath, that Shupe had consumed alcoholic liquor on Reed's licensed premises. That testimony created a basis of fact from which to conclude the licensee had, at least unknowingly, permitted the possession and consumption of alcoholic liquor on the licensed premises by a 17-year-old boy. The Director's finding that a violation had occurred was based on substantial competent evidence.

Reed's has failed to maintain its burden of proof to show the agency action was invalid.

WHEREFORE the State urges the Court to affirm the District Court's findings and uphold the $500 fine.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the above and foregoing Brief was deposited in the United States Mail, postage prepaid and properly addressed, on the 31st day of May, 2013 to:

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