

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION

JENNY'S TAVERN, INC.,
Appellant

v.

PENNSYLVANIA STATE POLICE
BUREAU OF LIQUOR CONTROL
ENFORCEMENT,
Appellee

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No. 09-1453

Donald G. Karpowich, Esquire
Craig A. Strong, Esquire

Counsel for Appellant
Counsel for Appellee

Civil Law - Liquor License - Appeal of Citation - Notice to
Bar- 40 Pa.Code § 5.32(a)

1. The Court's review of the Liquor Control Board's imposition of a fine for violation of the Board's regulations is *de novo*.
2. A violation of Section 5.32(a) of the Liquor Control Board Regulations pertaining to the sound of music or entertainment emanating from loud speakers heard outside the licensed premises does not require a course of conduct. One instance is sufficient to constitute a violation.
3. Having independently weighed the testimony and credibility of the witnesses, and being convinced that a violation of the Liquor Code occurred, payment of a fine of \$400.00 is appropriate.

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MEMORANDUM OPINION

Nanovic, P.J. - December 28, 2009

Jenny's Tavern, Inc. ("Jenny's Tavern") petitions for allowance of appeal and/or review from an Order of the Pennsylvania Liquor Control Board ("Board") sustaining a citation for its alleged violation of Section 5.32(a) of the Liquor Control Board Regulations, 40 Pa. Code § 5.32(a), and imposing a \$400.00 fine. The primary issue before us is whether the Code was in fact violated, justifying the citation and fine.

FACTUAL AND PROCEDURAL BACKGROUND

Jenny's Tavern is a bar and restaurant business located at 1 West Oak Street, Tresckow, Carbon County, Pennsylvania. It is solely owned by Mary McAloose, and operated by her and her husband, Andrew McAloose. Jenny's Tavern has held Liquor License No. R-13156 since September 9, 2004, and has had three prior violations of the Liquor Code: (1) 40 Pa. Code § 5.32(a) (use of loudspeakers or devices whereby music could be heard outside) in 2005, (2) 40 Pa. Code § 5.32(a) (use of loudspeakers or devices whereby music could be heard outside) in 2007, and (3) 47 P.S. § 4-493(1) (sales to a minor) in 2007.

Officer William Rosenstock of the Pennsylvania State Police, Bureau of Liquor Control Enforcement, was assigned to investigate Jenny's Tavern on January 23, 2008. He conducted an investigation on January 25 and 26, 2008. (N.T. 07/16/2008, pp. 9, 10, 12). The investigation was prompted by an anonymous complaint received on the Harrisburg hotline. (N.T. 07/16/2008, p. 10).

Officer Rosenstock observed no violations on January 25, 2008. (N.T. 07/16/2008, p. 11). He returned to the premises on January 26, 2008, at 9:20 p.m., and testified that he could hear music emanating from inside Jenny's Tavern from across the street and from approximately one hundred to one hundred and twenty feet down Oak Street in either direction. (N.T. 07/16/2008, pp. 12-14). He then entered Jenny's Tavern and determined that the music was coming from a karaoke set up with two speakers on pedestals measuring approximately twenty by thirty-six inches each, as well as a wireless microphone. (N.T. 07/16/2008, p. 14). Officer Rosenstock left Jenny's Tavern at 10:00 p.m. As he left, he continued to hear the music outside the building all the way to his car parked across Oak Street. (N.T. 07/16/2008, pp. 14-15).

Mary McAloose testified that she was present at Jenny's Tavern on the evening of January 26, 2008, to ensure that the karaoke was not too loud. (N.T. 07/16/2008, p. 32).

The karaoke operator showed her that the machine was set on the lowest level. (N.T. 07/16/2008, p. 32). She testified that she noticed Officer Rosenstock was present that evening, and that he left in a hurry. (N.T. 07/16/2008, p. 33). She also testified that she has never received any sound-related complaints from anyone in the community. (N.T. 07/16/2008, p. 33). Further, she opined that the anonymous tip may have been from a patron that she threw out and that people are regularly angry with her for throwing them out of the bar. (N.T. 07/16/2008, p. 58).

Jerry Breck, operator of the karaoke entertainment on the evening of January 26, 2008, testified that he used a gauge to make sure the music could not be heard from outside Jenny's Tavern, that he did not perform the sound check until 9:30, and that the performance did not start until 9:35. (N.T. 07/16/2008, pp. 38-39). He also testified that the patrons complained about the low volume of the music that evening. (N.T. 07/16/2008, p. 39).

Andrew McAloose, Mary McAloose's husband, testified that the patrons that evening knew who Officer Rosenstock was, that they were harassing him, that one man dedicated a karaoke song to him, and that Officer Rosenstock "ran out". (N.T. 07/16/2008, pp. 52-53). He also testified that he checked to see whether music could be heard from outside Jenny's Tavern between 9:30 and 9:45 p.m. on January 26, 2008, and that it

could not. (N.T. 07/16/2008, pp. 53-55). Officer Rosenstock testified that he left the premises "for officer's safety" that evening. (N.T. 07/16/2008, p. 58).

On March 10, 2008, the Pennsylvania State Police Bureau of Liquor Control Enforcement issued a citation to Jenny's Tavern for a violation of the Pennsylvania Liquor Code on January 26, 2008. The citation alleged a violation of 40 Pa. Code § 5.32(a), which reads as follows:

A licensee may not use or permit to be used inside or outside of the licensed premises a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, can be heard on the outside of the licensed premises.

A hearing on the citation was held on July 16, 2008, before the Honorable Felix Thau. Judge Thau issued an Adjudication dated August 27, 2008, sustaining the citation and imposing a \$400.00 fine. Jenny's Tavern appealed the Adjudication on September 23, 2008, which appeal was dismissed by the Board on May 6, 2009, affirming the Adjudication. A supersedeas to delay the submission of the fine was not granted. Jenny's Tavern has now petitioned us for an allowance of appeal and/or review from the Board's Order. A *de novo* hearing was held on August 24, 2009. For the reasons that follow, the Board's Order will be affirmed in full.

DISCUSSION

Our standard of review is clear. "The trial court has the duty of receiving the record of the proceedings below, if introduced in evidence, together with any other evidence that is properly received, and then make its own findings of fact, conclusions of law and assess the appropriate penalty, if any." Pennsylvania State Police, Bureau of Liquor Enforcement v. Kelly's Bar, Inc., 639 A.2d 440, 442 (Pa. 1994). In a case involving this particular Code violation, "[i]t is the court's duty to evaluate the credibility of the witnesses, weigh the testimony and, as this proceeding is civil in nature, determine whether or not the violations charged have been established by a preponderance of the evidence." In re Luvera, 24 Pa. D. & C.3d 149, 151 (Pa.Com.Pl. 1981), *affirmed*, 454 A.2d 236 (Pa.Cmwlth. 1981). We then may "change, alter, modify or amend the findings, conclusions and penalties imposed, of the Administrative Law Judge and the Board." Kelly's Bar, Inc., 639 A.2d at 442.

"[40 Pa. Code § 5.32(a)] is clearly designed to protect neighbors, street pedestrians, and others from being subject to unwanted sounds, commonly known as 'noise pollution.'" Appeal of Two-O-Two Tavern, Inc., 492 A.2d 502, 504 (Pa.Cmwlth. 1985). Although we are mindful of the fact that citations for violation of this particular regulation are often based upon more than one incident (see, e.g., id. at 503;

Pennsylvania State Police, Bureau of Liquor Control Enforcement v. JEK Enterprises, Inc., 621 A.2d 1115, 1116 (Pa.Cmwlth. 1993), *appeal denied*, 646 A.2d 1182 (Pa. 1994); Pennsylvania State Police, Bureau of Liquor Control Enforcement v. R-Lounge, Ltd. t/a Rumors Lounge, 646 A.2d 609, 609 (Pa.Cmwlth. 1994); Smart, Inc. v. Liquor Control Board, 70 Pa. D. & C.2d 535, 539 (Pa.Com.Pl. 1974)), the Code is clear that one instance is sufficient to constitute a violation.

[40 Pa. Code § 5.32(a)] seeks to protect the public outside the premises from the sound of music or entertainment emanating from loudspeakers on the premises. The language of the regulation requires that such sounds be contained within the licensed premises at all times. No course of conduct is addressed. The burden placed upon the licensee is not unreasonable. The regulation is not violated by an unexpected eruption of noise by a suddenly unruly patron with a loud voice. Instead, the licensee is merely required to control the music and entertainment he supplies or permits through loudspeakers for the pleasure of his customers to the extent that the sound of it remains within the premises.

Appeal of Dale E. Sedeshe, 21 Pa. D. & C.3d 115, 119-120 (Pa.Com.Pl. 1981) (interpreting Hude v. Commonwealth, 423 A.2d 15 (Pa.Cmwlth. 1980) to hold as much).

As we did not have the benefit of Officer Rosenstock's testimony at our *de novo* hearing, we rely upon his assertions before Judge Thau that on the evening of January 26, 2008, he heard music outside Jenny's Tavern as far away as one hundred and twenty feet and that its source was karaoke entertainment

which amplified music. Officer Rosenstock's testimony was clear and discriminating, distinguishing between the two dates he was present at Jenny's Tavern. The only direct testimony presented at the *de novo* hearing by Jenny's Tavern as to what could be heard outside was from Andrew McAloose, who testified that the music was low enough so as not to be heard from outside the premises. "The question of [a witness's] credibility, as well as the sufficiency of his testimony, [are] matters for the hearing judge to determine." Las Vegas Supper Club, Inc. v. Pennsylvania Liquor Control Board, 237 A.2d 252, 253 (Pa.Super. 1967). Upon weighing the testimony and credibility of the witnesses, both before us and contained in the administrative record, we conclude that the Pennsylvania State Police Bureau of Liquor Control Enforcement has met its burden of proof and that the Code was indeed violated.

CONCLUSION

Upon careful consideration of the record before us, the decision of the Board affirming the Adjudication and dismissing the appeal of Jenny's Tavern, and ordering Jenny's Tavern to pay a fine of \$400.00 and adhere to all of the conditions set forth in the Adjudication, is affirmed. Jenny's Tavern's appeal is denied.

BY THE COURT:

P.J.

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ORDER OF COURT

AND NOW, this 28th day of December, 2009, upon consideration of the Appellant's Petition for Allowance of Appeal and/or Review from an Order of the Pennsylvania Liquor Control Board, and counsels' argument and submissions thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the appeal is DENIED. The Order of the Pennsylvania Liquor Control Board dated May 6, 2009, is AFFIRMED. If not previously paid, the Licensee is directed to pay a fine of four hundred dollars (\$400.00) within thirty (30) days of the entry date of this Order.

BY THE COURT:

P.J.