

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

ASTRAL LIQUORS, INC., and)
R. J. MANDELL CORPORATION,)

Petitioners,)

vs.)

STATE OF FLORIDA, DEPARTMENT)
OF BUSINESS, DIVISION OF)
ALCOHOLIC BEVERAGES AND TOBACCO,)

Respondent.)

CASE NO. 63,904

FILED

SID J. WHITE

FEB 28 1984

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk



INITIAL BRIEF OF RESPONDENT

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INTRODUCTION

This case is the consolidation of two cases at the district court level. There were two records prepared which were not consolidated. To avoid confusion, any record citation is a reference to the record in the R. J. Mandell Corp. v. DABT record unless the citation specifically states otherwise such as (R. Astral page) in which case it is the Astral Liquors v. DABT record to which reference is being made.

STATEMENT OF THE CASE AND
OF THE FACTS

Respondent, Division of Alcoholic Beverages and Tobacco, hereby adopts those facts set forth in Petitioners brief as being a correct statement of the underlying facts of each case regarding the issues of each case and development of each case to the point of appeal.

POINT I (Restated)

FLORIDA STATUTE 561.32(2) IS NOT
VIOLATIVE OF THE DOCTRINE OF NON-
DELEGATION OF STATUTORY AUTHORITY

Petitioners have questioned the validity of Section 561.32(2), Florida Statutes under the doctrine of non-delegation of legislative power. The complained of statute provides as follows:

(2) No one shall be entitled as a matter of right to a transfer of a license or interest in a license or to a change of executive officers or directors when the division has notified the licensee in writing that revocation or suspension proceedings have been or will be brought against the license; and the transfer of such license or the change of executive officers or directors in such case shall be within the discretion of the division.

It is clearly evident that Florida still adheres to the doctrine of non-delegation of legislative power. Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978). Under this doctrine the courts have held that fundamental and primary policy decisions are to be made by members of the legislature and the administration of the legislative program must be pursuant to some minimum standards and guidelines ascertainable by reference to the enacting legislation. While there is a requirement that certain minimum standards be established this Court has also recognized that it is essential that administrative agencies be allowed flexibility to administer a legislative policy in light of our complex, modern society. Askew, supra. p. 924.

Under the provisions of Section 561.32(2), Florida Statutes,

the legislature has made it abundantly clear than no one is entitled as a matter of right to the transfer of an alcoholic beverage license when there are charges pending against such license.

In the case of State ex rel. Hoffman v. Vocelle, 159 Fla. 88, 31 So.52 (Fla. 1947) this Court held that it is well settled that a sovereign government in the exercise of its police power. may regulate the sale of intoxicants and may regulate the conditions on which such a business may be conducted or permitted. It has also been repeatedly held that there is no field in which the courts have recognized a wider latitude for the exercise of the police power, nor one where there is greater need therefor, than in the sale or possession of intoxicating liquors. Holloway v. Schott, 64 So.2d 680 (Fla. 1953). Under the United States Constitution the individual states are given complete control of regulating the sale of alcoholic beverages within their respective geographic limits, thus making the such business a strict privilege rather than a rights.

Florida's Beverage law is repleat with sections that reflect the Legislature's intent as to how licensees who violate the law and regulations are to be dealt with. Under Section 561.02, Florida Statutes, the Division is empowered to supervise all aspects of the industry and is mandated to enforce the provisions of the beverage law. Pursuant to Section 561.11, Florida Statutes, the Division is given the power and authority to carry out all purposes of the beverage law. Section 561.14, Florida Statutes, provides that where a licensee would not qualify for a new license the Division is empowered to revoke the existing license. The Division's general disciplinary statutory section, Florida Statute 561.29, provides that the Division has the full power and authority

to revoke the license of anyone who violates any law of this state or the United States. From these sections it is clear that the legislature has provided specific guidelines for the issuance and disciplining of beverage licenses.

The Petitioners argue that since there are no appreciable guidelines for determining how the legislature intended the discretion within Florida Statutes 561.32(2) was to be exercised, any action under this statute is unreviewable and therefore an unlawful delegation of statutory authority.

As noted by the Petitioners there are two recognized exceptions to the setting of specific standards or guidelines by the legislature. The first exception is where the business engaged in is a privilege rather than a right and requires a license from the state. Permenter v. Youman, 159 Fla. 226, 31 So.2d 387 (Fla. 1947). There can be little argument that the sale of alcoholic beverages is a privilege rather than a right.

Under the holding of Permenter, supra, this court held that there is no inherent right in a citizen to sell intoxicating liquors and due to the injurious character of the business it was an exception to the lawful business rule. As such an exception, it is not necessary to prescribe specific rules of action where discretion relates to matters within police regulation and it is necessary to protect the general welfare of the public. Permenter, supra. p. 389.

In such instances, where personal fitness of the individual comes into question some discretion is permissible. In Permenter this Court held that in such instances the discretion provided by law or ordinance is deemed to rest "reasonable, and not arbitrary,

discretion." The Court held further that such situations call for the exercise of a discretion of a judicial nature, for which no definite rule of action is necessary." Supra, p. 390..

Petitioners have also cited this Court's ruling North Broward Hospital District v. Mizell, 148 So.2d (Fla. 1962) as holding that the only applicable exception to specific legislative standards or guidelines is in the question of personal fitness for licensing.

A closer review of Mizell, supra., reveals that in addition to the area of personal fitness there is also an exception where it is impractical to lay down a comprehensive and definite rule in an area of police regulation necessary to protect the general welfare. It is clear that while the personal fitness of the Petitioner to whom the transfer was requested is not being questioned, the transfer still falls within the aforementioned second exception. In such exceptions this Court has ruled that it is to be inferred that the standard of reasonableness is to be applied. Mizell, supra. ✓

In the instant case we are asked to examine the discretionary authority of the Division in light of Petitioner's request to allow the transfer of an alcoholic beverage license from a convicted felon to a purchaser without allowing the Division to exercise its legislative mandate to enforce the Beverage Law. The license holder qualified to hold such a beverage license. Administrative charges had been filed and both Petitioners were aware of this. The parties themselves acknowledge this situation in paragraph 4 of their sales agreement. (R-59). Petitioners also argue that had the Division allowed the transfer there would have been no need ✓

to proceed with the administrative case against the prior owner.

The above position of the Petitioners strikes to the essence of Respondent's argument. The legislature has enacted the Beverage Law to delineate the requirements of obtaining an alcoholic beverage license and under what situations a licensee stands in jeopardy of losing such a license. The reason behind these regulations to protect the general welfare of the public in an industry that is historically ripe for misuse. By allowing the unbridled transfer of beverage licenses before the Division could be allowed to take disciplinary action would create a situation where the licensee would be aware that no matter how flagrant his violation of the Beverage Law was, he could escape answering for such violation as long as he could sell or transfer his license before final agency action took place.

In the present situation, the provisions of Florida Statute 561.32(2) lend themselves to the allowance of discretion in that the subject matter of the statute permits only a general scheme or policy. Such a policy is seen to be allowed under the holding of State, Dept. of Citrus v. Griffin, 239 So.2d 577 (Fla. 1970). This Court further held in Griffin, supra., that when such a general approach is required, judicial scrutiny ought to be accompanied by recognition and appreciation of the need for flexibility. Supra p. 581. See also Bailey v. Van Pelt, 78 Fla. 337, 82 So. 789 (Fla. 1919).

Where there is a legitimate state interest which the legis-

lation aims to effect and if the legislation is a reasonably related means to achieve the intended end, it will be upheld. Patch Enterprises, Inc. v. McCall, 447 F.Supp. 1075 (M.D. Fla. 1978). The statute herein should be seen as a means of regulation and protecting the state's ability to discipline its beverage licensees and is reasonably related to this end. Since this statute can be seen as an exercise of police power in the State's purpose of protecting the general welfare of the public the absence of specific guidelines should not be considered fatal. Solimena v. State, 402 So.2d 1240 (Fla. 3rd DCA 1981).

Petitioners have cited the case of Carbo v. Meiklejohn, 217 So.2d 159 (Fla. 1st DCA 1968) as controlling the instant situation. A review of Carbo, supra., shows that the statute examined therein was a pure licensing exception concerning an applicants personal fitness. The statute addressed not only the "best interest" of the state but also of the applicant in regards to their financial soundness. Since the instant situation addresses a situation not calling for "personal fitness" the ruling in Carbo should not be applied to the instant matter.

In Carbo, supra., the court's primary concern was the lack of connection between the financial success of an alcoholic beverage distributor and the public interest. In the instant case there is a clear connection with the legislature's concern of a transfer of a license when charges are pending and the Division's ability to discipline the license before the transfer. In the absence of a showing that, as applied to a particular case, a statute is an arbitrary or unreasonable regulation, the courts must assume that it is reasonable and a valid regulation.

In the instant case, it is abundantly clear that the licensee, a convicted felon, had no right under the beverage law to retain its beverage license. The Division had a clear right to revoke the license and deny its transfer until such authority could be exercised. In this instant matter the denial of Petitioner's transfer can only be viewed as reasonable.

As a final argument under this point Respondent would refute Petitioner's allegation that a prima facie case had been made for the transfer. Under the ruling of Adult World, Inc. v. State, 408 So.2d 605 (Fla. 5th DCA 1981) the court therein held that under the provisions of Florida Statutes 561.32(2) the applicant for the transfer of a beverage license must establish there was a bona fide sale, secure approval of its application and show an absence of agency proceedings. Supra. p. 607. In this case Petitioners failed to establish the required requisites and show not be granted the transfer. Florida Department of Transportation v. JWC Co., 396 So.2d 778 (Fla. 1st DCA 1981).

POINT II (Restated)

THE AGENCY DID NOT DEVIATE
FROM EXISTING POLICY IN
DENYING PETITIONERS TRANSFER

Petitioners argue that the Final Order entered by the Division is defective in light of the alleged absence of an explanation of the exercise of discretion in denying the transfer of the beverage license.

It is well settled that an applicant for a license or permit carries the ultimate burden of persuasion of entitlement through all proceedings until such time as final action has been taken by the agency. Florida Department of Transportation v. JWC Co., 396 So.778 (Fla. 1st DCA 1981). Petitioners argue that since the Final Order was void of an explanation for the action taken there is a question as to the validity of the order.

A review of the transcript herein shows at no time during the cause of the hearing was it ever demonstrated by the Petitioners that the agency's policy in similar situations was to grant such requests. What was shown was a licensee who was no longer qualified to hold a beverage license under the Beverage Law and was attempting to sell such license before the Division could take appropriate disciplinary action.

As argued under the first argument, it is clear that the Division is operating under strict legislative guidelines as to who can qualify for a beverage license and what will subject a licensee to harsh penalty of revocation. Under its legislative directive the Division is required to enforce the provisions of the beverage law. Allowing a licensee to evade disciplinary action by way of selling a beverage license before the culmination of agency proceedings would be contradictory to the legislative directives, and defeat

the Division's jurisdiction over a licensee.

The failure of Petitioners to show entitlement to the license in question is grounds for disapproval in itself and would not require explanation. JWC Co., supra 778. This failure included both a lack of showing a permissive policy and a lack of showing no outstanding charges. Adult World, Inc. supra.

Assuming arguendo that the Final Order is defective pursuant to Petitioners second point. Under the provisions of Section 120.68(12)(b), Florida Statutes, what would then be required would be that the matter be remanded to the Division for an explanation of its exercise of discretion. In such a situation the Division would have to cite the facts again showing the licensee's lack of qualifications and its duty to enforce the beverage law. Having been given the discretion to act on outstanding charges before any transfer is concerned, the nature of the disqualification would allow for a revocation of the license. The statutory guidelines do not allow convicted felons to hold liquor licenses and revocation has not been shown to be contrary to agency policy. So while no specific rule existed at the time the instant matter arose, a factual basis for the Final Order was shown and the Beverage Law stands for the agency's policy against such transfers.

The hearing in the instant matter neither formulated new agency policy by adjudication at the hearing level or by unbridled discretion. The appropriate policy is contained within the statutory directives of the beverage law and remained unchanged as it existed prior to the hearing.

In the case of McDonald, v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977) the court held that the agency's

Final Order in 120.57 proceedings must describe its "policy within the agency's exercise of delegated discretion" sufficiently for review. Supra p. 582. In the instant case the Division has met the above guidelines. The facts set forth that a licensee was disqualified by having been convicted of a felony, a violation requiring revocation of the licensee's alcoholic beverage license. The Division brought charges against the license prior to any attempt by the Petitioners to sell and transfer the license. In the final order the transfer was denied by the reasoning that the pending charges were outstanding. This is the Division's policy statement and has since been stated in rule form by rule that provides that no license will be transferred while there are charges pending.

In the instant matter the statutes provide the general policy of the Division as given by the Legislature. The Division denied the transfer herein until disposition of the administrative charges. Upon hearing the charges the license was revoked thereby leaving nothing to be transferred. Accepting the Petitioners argument would take away the Division's jurisdiction to discipline any such licensees if not done before a transfer was effected.


CONCLUSION

Florida Statute 561.32(2) is a permissible exception to the doctrine of non-delegation of legislative authority. While there are no explicit guidelines, the police power exercised by the agency and the legislative intent of the Beverage Law enable the discretion given by Section 561.32(2) to be exercised in a permissible manner.

The Final Order give a factual basis for the agency's finding and the transfer denial was not a deviation from normal agency policy. Petitioners failed to meet their burden of proof to entitlement to the transfer by not showing an absence of pending charges and that existing agency policy would allow for such transfer.

Based on Respondent's argument the lower court opinion should be affirmed and the Final Order be allowed to stand.

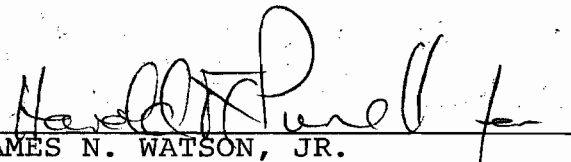
Respectfully submitted



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Lane Abraham, Esquire, 200 S. E. 1st Street, #1191, Miami, Florida 33131 this 28 day of February, 1984.



JAMES N. WATSON, JR.