

IN THE SUPREME COURT OF OHIO

08-1966

Richard A. Duncan,  
Appellant-Appellant )

v. )

Liquor Control Commission,  
Appellee-Appellee )

On Appeal from the  
Franklin County Court  
of Appeals, 10th  
Appellate District,  
Case No. 08AP-242

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF RICHARD DUNCAN

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RICHARD A. DUNCAN  
1100 East Blvd  
Aurora, Ohio 44202

Pro Se Appellant

ATTORNEY GENERAL OFFICE  
DAVID DOKKO  
30 East Broad St.  
Columbus, Ohio 43215

Appellee's Counsel

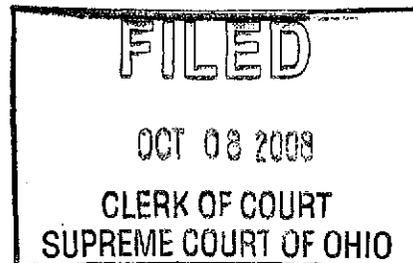


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT  
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL  
QUESTION

It is improper (and of great public interest) for the  
Division of Liquor Control to advance to the next applicant  
on the D-5 quota waiting list while the prior  
applicant is having his permit decided in the Appeals courts  
as such;

1. Could disrupt the orderly administration of quota openings;
2. Could allow multiple permits to be granted resulting in  
overages in the jurisdiction if the prior applicant wins his  
appeal;
3. Could result in bribery schemes to obtain liquor permits.

STATEMENT OF THE CASE AND FACTS

To the dismay of the Department of Liquor Control (hereinafter division) Richard Duncan (hereinafter Duncan) properly and legally has had many D-5 applications on the waiting list in line in Middlefield Village for many years. In about the year 2002 the dept. started processing one at the address of 15570 West High Street and such was denied by the division. Such denial was affirmed by the Liquor Control Commission, the Court of Common Pleas, Court of Appeals and is presently appealed to the Ohio Supreme Court (Memorandum of Jurisdiction filed).

On 5/14/03 Bonner Ohio Properties filed a D-5 application behind Duncan's last filing and ever since the Division has put pressure on Duncan to bypass his 15570 West High application. Rather than to await that appeal in Court, the Division skipped to his next in line D-5 application at 15561 West High Street and started processing that.

On 6/27/06 Duncan submitted his fees but pleaded with the Division to await the outcome of his appeal. He made this request on 10/2/06 and in his Affidavit submitted before the Commission. Nevertheless, the Division on 12/7/06 by order denied and rejected Duncan's D-5 at this location for various reasons. On appeal to the Liquor Control Commission, Duncan argued that his 15561 application cannot be processed until a final appeal is settled on his 15570 West High application. The Common Pleas Court and the 10th District Court of Appeals disagreed with Duncan and so now he appeals to this Court.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law The Division of Liquor Control must await a final determination on processing liquor permit quota openings before proceeding to the next applicant, which includes reviews by the commission and the reviewing courts.

The Division is clearly in error in proceeding on Duncan's 15561 West High application until a judicial ruling is made on the earlier application, for the following reasons;

First of all, such a practice is illogical and results in bad consequences. If the Division was able to arbitrarily bypass pending legal appeals of applications, the Courts review would be meaningless and the application system would turn into chaos.. If the Division disliked an applicant they

were processing or was illegally influenced by an applicant further down the list, they could eventually (through improper means) reach their desired applicant and award him a liquor permit. Then if the Court later on ruled in favor of the first applicant, an overage of permits would result in the city. In the case sub judice, it is possible, if Bonner gets his D-5 permit, Duncan could eventually get 2 more permits in Middlefield, resulting in 4 D-5 permits where the population is just over 2000.

Secondly, such a practice is adverse, as Duncan argued in his affidavit at pg. 5; that if he signed a lease at 15561 West High and later won his appeal at 15570 West High, he would legally be committed to a signed lease to which he didn't want.

Note; the reason Duncan did not supply information to the Division was simply because he felt it was proper to await the 15570 West High decision in the Courts.

Thirdly, the Liquor Laws of Ohio state that, though a Courts review does take time, it must be respected and not bypassed.

RC 4303.29 states "Not more than one D-3, D-4, or D-5 permit shall be issued for each two thousand population, or part thereof,....."

Also, in accordance with RC 119.12 Duncan hereby requests a suspension of any order or action of the Division of Liquor Control to prevent them from processing any future D-5 permits pending a determination of the appeal in case 07CVF 10-13250; due to the unusual hardship to Duncan if they go to Bonners application (also a hardship to Middlefield of an overage of permits).(see OAG 70-095).

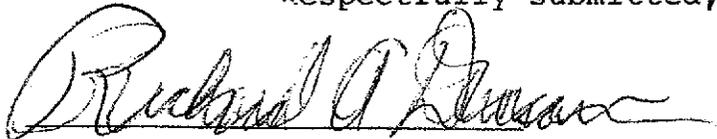
## CONCLUSION

This application at 15561 West High Street cannot be processed yet due to that there are no openings because of the 15570 West High appeal in Court. If the Division has free reigns to hop ahead to Bonner's application, this Courts review process is trampled on, and may result in chaos and corruption.

If the Division doesn't like Duncan having many D-5 applications on file, they must amend the legislation; and not disrespect our honorable court system.

The Commission and Divisions orders must be reversed until the appeals are completed. Also, the lower courts opinion is respectfully requested to be reversed.

Respectfully submitted,



Richard Duncan

-1100 East Blvd.  
Aurora, Ohio 44202

330-995-5377 Appellant

## SERVICE

A copy of this Brief has been served on the attorney for the Commission by first class mail this 8<sup>th</sup> day of October 2008

His address is David Dokko  
30 East Broad Street, 26th Floor  
Columbus, Ohio 43215



Richard Duncan

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN COUNTY, OHIO  
2008 AUG 26 PM 2:42  
CLERK OF COURTS

Richard A. Duncan, :  
Appellant-Appellant, :  
v. : No. 08AP-242  
Liquor Control Commission, : (C.P.C. No. 07CVF10-14127)  
Appellee-Appellee. : (ACCELERATED CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on August 26, 2008, appellant's assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

FRENCH, BRYANT, and GREY, JJ.

By Judith L. French  
Judge Judith L. French

GREY, retired of the Fourth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FRANKLIN CO. OHIO  
2008 AUG 26 PM 12:03  
CLERK OF COURTS

Richard A. Duncan, :  
Appellant-Appellant, :  
v. : No. 08AP-242  
Liquor Control Commission, : (C.P.C. No. 07CVF10-14127)  
Appellee-Appellee. : (ACCELERATED CALENDAR)

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O P I N I O N

Rendered on August 26, 2008

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*Richard A. Duncan, pro se.*

*Nancy H. Rogers, Attorney General, and David H. Dokko, for appellee.*

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APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Appellant, Richard A. Duncan ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas, which affirmed the decision of appellee, Ohio Liquor Control Commission ("Commission"), in denying appellant's application for a liquor permit. For the following reasons, we affirm.

{¶2} On October 18, 2002, appellant applied for a D-5 liquor permit at a strip mall in Middlefield, Ohio. According to a July 14, 2006 report, an investigative officer for

the Ohio Department of Commerce, Division of Liquor Control ("Division"), went to inspect the property, which is located at 15561 West High Street. The officer asked appellant to give a specific location within the strip mall where he would be using the license, and appellant refused. Appellant even went so far as to call the Division and notify them that he would not be answering the officer's questions. Later, after meeting with the strip mall's owner, the officer learned that, while appellant previously had the right of first refusal on one of the units, it had expired three years prior to the inspection, and appellant was not currently a tenant.

{¶3} Appellant did allow inspection at 15570 West High Street, which is another location for which he has applied for a permit. The permit for that property had been denied and was awaiting appeal at the time of the inspection for the permit at issue here.

{¶4} The Division sent letters to appellant on three separate dates, July 20, 2006, August 31, 2006, and October 11, 2006, requesting that he provide a \$100 processing fee, a financial verification worksheet with supporting documents, and proof of tenancy at the mall. On December 7, 2006, the Division rejected appellant's application.

{¶5} Appellant appealed the Division's order, and the Commission held a hearing. During the hearing, the officer testified about his visit with appellant and appellant's lack of cooperation. He also testified to appellant's failure to respond to the Division's document requests, which were necessary to process the license. At this hearing, appellant never denied that he failed to cooperate, nor did he deny ignoring the Division's document requests.

{¶6} On October 5, 2007, the Commission issued an order affirming the Division's order and denying appellant's application. Appellant filed an appeal to the trial court, which affirmed the denial.

{¶7} Appellant filed this appeal and asserts the following assignment of error:

THE COMMISSIONS ORDER IS CONTRARY TO LAW, UNREASONABLE, ARBITRARY AND UNLAWFUL, AND NOT SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIVE EVDIENCE. (ALSO DISCRIMINATORY). ALSO, THE COURT OF COMMON PLEAS AFFIRMING SUCH IS ERROR.

(Sic.)

{¶8} In an administrative appeal, pursuant to R.C. 119.12, the trial court reviews an order to determine whether it is supported by reliable, probative, and substantial evidence and is in accordance with the law. In applying this standard, the court must "give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶9} The Ohio Supreme Court has defined reliable, probative, and substantial evidence as follows:

\* \* \* (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

*Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571.

(Footnotes omitted.)

{¶10} On appeal to this court, the standard of review is more limited. Unlike the court of common pleas, a court of appeals does not determine the weight of the

evidence. *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. In reviewing the court of common pleas' determination that the Commission's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the court of common pleas abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. 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* (1983), 5 Ohio St.3d 217, 219. However, on the question whether the Commission's order was in accordance with the law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

{¶11} After considering the testimony of the investigative officer, as well as the communication between appellant and the Commission, the trial court concluded that reliable, probative, and substantial evidence supported the Commission's order and that the order was in accordance with the law. The court stated:

After review, the court finds no statutory or case law precedent which would prohibit the Commission's actions in this matter. Appellant has willfully \*\*\* failed to provide information and the processing fee for his application for the permit application. Appellant has also purposely filed the multiple applications for permits. There is nothing that would require the Commission to delay action on his permit. \*\*\*

This court is limited to determining whether the trial court abused its discretion in affirming the Commission's order. We find that the trial court did not abuse its discretion, and we affirm its decision.

{¶12} Appellant's arguments are unclear, but he appears to be asserting the notion that to allow the Commission to consider the application at issue here would be adverse to him because it could potentially render him liable on more than one lease. Additionally, he believes there is a possibility that R.C. 4303.09 could be violated due to its limitations on the number of permits allowed for the population. We fail to see, however, how either of these concerns could be problematic because appellant has been unable to show that he has a tenancy or the right to tenancy required for eligibility under R.C. 4303.18.

{¶13} R.C. 4303.18 provides the specific requirements for issuance of a D-5 liquor permit, as follows:

Permit D-5 may be issued to the owner or operator of a retail food establishment or a food service operation \*\*\* that operates as a restaurant or night club \*\*\* to sell beer and any intoxicating liquor at retail \*\*\* and to sell the same products in the same manner and \*\*\* as may be sold by holders of D-1 and D-2 permits. \*\*\*

R.C. 4301.01(B)(14) defines a "nightclub" as "a place operated for profit, where food is served for consumption on the premises." R.C. 4301.01(B)(12) defines a "restaurant" as "a place located in a permanent building provided with space and accommodations wherein, in consideration of the payment of money, hot meals are habitually prepared, sold, and served at noon and evening, as the principal business \*\*\* [excluding] pharmacies, confectionery stores, lunch stands, night clubs, and filling stations." This court has recently held, in *Café Napoli Partnership v. Ohio State Liquor Control Comm.*, Franklin App. No 06AP-1055, 2007-Ohio-3210, ¶18, that the ownership or operation of a restaurant or nightclub is a requirement that must be fulfilled before the issuance of a permit:

\*\*\* Pursuant to R.C. 4303.18, a D-5 permit "may be issued to the owner or operator" of a licensed retail food establishment or food service operation "that operates as a restaurant or night club for purposes of this chapter" to allow the sale of beer and intoxicating liquor under the conditions set forth in R.C. 4303.18. \*\*\* [A]ppellant was required to be the owner or operator of a licensed retail food establishment or a food service operation licensed under R.C. Chapter 3717. \*\*\*

(Emphasis added.) Here, appellant has failed to show that he is either the owner or operator of a night club or restaurant at the 15561 property at issue. He has failed and refused to show either that he is a current tenant or that he has a valid exclusive right of tenancy to a night club or restaurant.

{¶14} Under R.C. 4303.292(A)(1)(c), "[t]he division of liquor control may refuse to issue \*\*\* any retail permit issued under this chapter if it finds \*\*\* [t]hat the applicant \*\*\* [h]as misrepresented a material fact in applying to the division for a permit." On his application, appellant represented that he either owned or was operating a nightclub or restaurant at 15561 West High Street. Since making this representation, however, appellant has not been able to show that he owns or operates either of the required establishments at that location.

{¶15} In addition to not owning or operating a night club or restaurant, appellant was uncooperative with the investigation. Ohio Adm.Code 4301:1-1-12(A) states: "No class \*\*\* D permit \*\*\* shall be issued by the division until the division has conducted a complete examination, including inspection of the premises, and the division finds that the applicant and the location meet all of the requirements imposed by law and rules." (Emphasis added.) By refusing to allow the officer to inspect the property, appellant disqualified that location from consideration for a D-5 permit. The officer could not

adequately inspect the property to ensure that it met the standards established in R.C. 4303.292 because appellant refused to show the officer the specific restaurant or nightclub where the permit was to be used. After the initial refusal to allow inspection, appellant continued to refuse written requests for a financial verification worksheet with supporting documents, proof of tenancy at the mall, and the payment of a \$100 processing fee.

{¶16} There is no need for us to address the issue of potentially awarding appellant multiple permits. The trial court found reliable, probative, and substantial evidence supporting the Commission's denial of the permit application at issue here under R.C. 4303.292(A)(1)(c) and Ohio Adm.Code 4301:1-1-12(A) and that the denial was in accordance with the law. The trial court did not abuse its discretion in upholding the Commission's order.

{¶17} For the foregoing reasons, we overrule appellant's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BRYANT and GREY, JJ., concur.

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

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