

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Gina, Inc.,	:	
	:	
Appellant-Appellee,	:	
	:	No. 11AP-107
v.	:	(C.P.C. No. 10CVF-11832)
	:	
Ohio Liquor Control Commission,	:	(REGULAR CALENDAR)
	:	
Appellee-Appellant.	:	

D E C I S I O N

Rendered on September 27, 2011

Lumpe & Raber, J. Richard Lumpe and David A. Raber, for appellee.

Michael DeWine, Attorney General, and Scott Longo, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Appellee-appellant, Ohio Liquor Control Commission ("commission"), appeals from a judgment of the Franklin County Court of Common Pleas reversing the commission's order that directed appellant-appellee, Gina, Inc. ("Gina"), to either serve a seven-day suspension of its liquor license or forfeit \$700. The commission assigns a single error:

The Franklin County Common Pleas Court erred and abused its discretion when it held that the Ohio Liquor Control Commission's decision finding Gina, Inc., in violation of R.C. 4301.66 was not supported by reliable, probative and substantial evidence and was not in accordance with law.

Because the common pleas court abused its discretion in reversing the commission's order, we reverse.

I. Facts & Procedural History

{¶2} Gina, doing business as "Gina's Party Store," held class C1, C2 and D6 liquor licenses at all times relevant to this appeal. As a result of a March 16, 2010 warrantless administrative inspection of Gina's premises, the commission on June 11, 2010 mailed Gina a notice of hearing alleging that Gina's employee and permit holder, Maryrose Mbah, violated R.C. 4301.66 when she hindered or obstructed the agents from making an investigation, inspection, or search of the permit premises. Pursuant to the notice, the commission conducted a hearing on July 14, 2010, at which Gina stipulated to the facts underlying the violation as set forth in the commission's narrative report.

{¶3} As the report explains, the agents went to the permit premises on March 16 for three purposes: to inform the permit holder that the commission was terminating its agency contract with the store, to conduct an audit of the spirituous liquor inventory, and to conduct an administrative inspection of the permit premises based upon complaints. The agents arrived during normal business hours, identified themselves to the permit holder Mbah, and advised her that the agents would be conducting an administrative inspection of the premises.

{¶4} The agents initially identified a safe near a desk just inside the door to an open back room or storage area. The agents asked Mbah to open the safe, and she did.

The agents then located another safe further back in the storage area. When the agents inquired about the purpose of the second safe, Mbah informed the agents that money from the sale of the spirituous liquor was dropped into the safe. The agents asked Mbah to open the second safe, but Mbah ignored the agents' request. After the agents asked Mbah a second time to open the safe, "she became agitated and said she did not have to open the safe." At that point, agent-in-charge Brent Devery approached Mbah and asked her if she was going to open the safe. Mbah walked past Agent Devery into the back office area and quickly placed something in a handbag. Mbah returned to the door of the back office area where Agent Devery was standing, and she attempted to close the door on him, stating the agents already had been in the office and would need a warrant to go any further. When Agent Devery stuck his foot in the door, Mbah "continued to attempt to pull the door shut on [Agent] Devery's foot." After Agent Devery read Mbah the fine print on her liquor permit concerning liquor investigations, Mbah opened the second safe.

{¶5} At the July 14 hearing, Gina's counsel explained that on December 31, 2009, someone robbed Gina of about \$30,000, the store's entire New Year's Eve sales. As a result, the permit holder had been short on deposits and was working with the former Superintendent of Liquor Control to pay the commission the money Gina owed to it. When the current Superintendent of Liquor Control assumed office, he conducted some internal audits and discovered Gina not only was short on deposits, but "the number was increasing," a factor that prompted the commission to terminate its agency contract with Gina.

{¶6} As to the alleged violation, Gina contended the agents exceeded the scope of a permissible warrantless administrative inspection when they demanded entry into the

second safe, since they lacked a reasonable suspicion that a violation of the Liquor Control Act or commission rules would be found in the second safe. In response to that contention, Agent Moyer, one of the agents who assisted in the March 16 inspection, testified the commission "was missing over \$50,000 in spirituous liquor or money" from Gina, so he and the other agents were looking for the \$50,000. (Tr. 9-10, 16.) Agent Moyer asserted that when Mbah informed the agents some money from the sale of spirituous liquor was dropped into the second safe, the agents "had a reasonable suspicion that money was in the safe." (Tr. 10.) Agent Moyer further testified Mbah "hindered inspection of Agent Devery's when she shut the door on his foot." (Tr. 22.)

{¶7} On the evidence presented, the commission found Gina hindered or obstructed the agents' investigation in violation of R.C. 4301.66. The commission accordingly imposed a sanction. Gina timely appealed to the common pleas court.

{¶8} The common pleas court reversed the commission's order, finding reliable, probative, and substantial evidence did not support the order, and the order was not in accordance with law. The court rejected the commission's assertion that it had the requisite reasonable suspicion to enter the second safe because of Mbah's agitated, irrational, and uncooperative conduct, stating the commission "in bootstrap fashion" could not properly contend "Mbah's resistance to a warrantless search provided, at least in significant part, the basis to conclude that reasonable suspicion existed." (Tr. 8.) Instead, the court "found as a matter of law that the liquor officials did not have a reasonable suspicion that evidence of illegal conduct was contained in the second safe." (Tr. 10.)

{¶9} The commission asserts the common pleas court erred in reversing the commission's order, as the record contains ample evidence of Mbah's hindering the

agents' inspection of the permit premises apart from her conduct concerning the second safe.

II. Motion to Strike

{¶10} The commission filed a motion to strike Gina's appellate brief based on noncompliance with App.R. 16(A)(6) and (D). App.R. 16(A)(6) provides that an appellate brief shall include a statement of facts relevant to the assignments of error presented for review, with appropriate references to the record. App.R. 16(D) provides that references "to parts of the record shall be to the pages of the parts of the record involved." The appellee need not include a statement of facts unless the appellee is dissatisfied with the statement appellant filed, but if the appellee does so, it must conform to the requirements of App.R. 16(A). App.R. 16(B). Contrary to the commission's contentions, Gina's brief contains numerous citations to the record. Any omissions do not require that Gina's brief be stricken.

{¶11} Moreover, although the commission correctly asserts Gina's brief included facts not in the record, the extraneous facts were limited to three: (1) the former Superintendent of Liquor Control intended to terminate Gina's agency contract for two stores, only one of which is at issue in this appeal; (2) the former Superintendent allowed Gina to reassign the agency contract and transfer the liquor permit to another entity; and (3) the former Superintendent insisted that the commission be the first paid from the transfer money. Gina does not reference these three facts in the remainder of its brief, and they do not factor into our decision in this matter. Because the commission does not demonstrate prejudice arising from Gina's deviation from App.R. 16, we deny the

commission's motion to strike Gina's brief. *Huffer v. Huffer*, 10th Dist. No. 09AP-574, 2010-Ohio-1223, ¶10.

III. Standard of Review

{¶12} Under R.C. 119.12, a common pleas court, in reviewing an order of an administrative agency, must consider the entire record to determine whether reliable, probative, and substantial evidence supports the agency's order and the order is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11. 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.' " *Lies v. Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. of Liquor Control* (1955), 164 Ohio St. 275, 280. The common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts, but "the findings of the agency are by no means conclusive." *Conrad* at 111. The common pleas court conducts a de novo review of questions of law, exercising its independent judgment in determining whether the administrative order is "in accordance with law." *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 471.

{¶13} An appellate court's review of an administrative decision is more limited than that of a common pleas court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. The appellate court is to determine only whether the common pleas court abused its discretion. *Id.* Absent an abuse of discretion, a court of appeals may not substitute its judgment for that of an administrative agency or the common pleas court.

Pons at 621. An appellate court, however, has plenary review of purely legal questions. *Big Bob's, Inc. v. Ohio Liquor Control Comm.*, 151 Ohio App.3d 498, 2003-Ohio-418, ¶15.

IV. Hinder or Obstruct an Investigation

{¶14} The common pleas court reversed the commission's order upon concluding the agents conducted an unconstitutional search of the second safe. The "administrative search" exception is amongst the judicially recognized exceptions to the warrant requirement of the Fourth Amendment to the United States Constitution. *Stone v. Stow* (1992), 64 Ohio St.3d 156, 164 fn.4. The exception being embodied in Ohio Adm.Code 4301:1-1-79, the rule authorizes liquor control agents and peace officers to conduct warrantless administrative inspections of licensee premises subject to the time, place, and scope limitations contained in the rule. A warrantless administrative inspection pursuant to Ohio Adm.Code 4301:1-1-79 includes "the search and seizure of materials in locked closets, filing cabinets, cellars, attics, storage rooms, desks, and safes located on the licensed premises," provided the agents possess "reasonable suspicion that evidence of violation of the liquor control act, the rules of the liquor control commission, or the rules of the division of liquor control will be found therein." Ohio Adm.Code 4301:1-1-79(D). The parties dispute on appeal whether the agents possessed the requisite reasonable suspicion to enter the second safe.

{¶15} The commission, however, contends that, "[r]egardless of any legal analysis as to whether reasonable suspicion was present or not to permit the Agents to search the safe, Maryrose committed a hindering when she refused to cooperate with the Agents." (Appellant's brief, 8.) R.C. 4301.66 provides, in relevant part, that "[n]o person shall hinder or obstruct any agent or employee of the division of liquor control * * * from making

inspection or search of any place, other than a bona fide private residence, where beer or intoxicating liquor is possessed, kept, sold, or given away."

{¶16} The facts recited in the commission's narrative report, to which Mbah stipulated, support the commission's determination that Mbah hindered the agents' investigation of the licensed premises, obstructed it, or both. After the agents asked Mbah to open the second safe, Mbah became uncooperative, ignored the agents, went into the back office area and quickly placed something in a handbag. She then attempted to close the door on Agent Devery. When Agent Devery stuck his foot in the door, Mbah continued trying to close the door on his foot.

{¶17} This court has found a permit holder hindered or obstructed an investigation under R.C. 4301.66, when the permit holder "delay[ed] in opening the door to the liquor agents once they had identified themselves as agents, coupled with the attempt to conceal [the permit holder's] bottle of beer during that delay." *Gaydeski v. Ohio Liquor Control Comm.*, 10th Dist. No. 03AP-329, 2003-Ohio-6190, ¶14, appeal not allowed, 102 Ohio St.3d 1410, 2004-Ohio-1763. "A delay of even two minutes has been held sufficient to constitute a hindrance under R.C. 4301.66." *Id.*, citing *Rodgers v. Ohio Liquor Control Comm.* (Oct. 19, 1998), 5th Dist. No. 98 CA39 2. Thus, where the manager of an establishment pulled "the inner door shut after he had been shown the badges of the liquor investigator," the manager hindered an investigation. *United Ancient Order of Druids, Columbus Grove No. 10 v. Bd. of Liquor Control* (1960), 84 Ohio Law Abs. 461 (concluding that the manager hindered or obstructed investigation where, although the manager possessed keys to unlock the door, he instead, "with the intent of delay, * * *

wrongfully informed the investigator and the police officer that readmittance or admittance into the inner room could only be obtained by pushing the buzzer").

{¶18} Similarly, boisterous conduct, foul language, and a general uncooperative nature on the part of a permit holder also are sufficient to satisfy R.C. 4301.66. *Sermon v. Ohio Liquor Control Comm.* (July 20, 1995), 10th Dist. No. 95APE01-18 (noting that where the permit holder reacted in a boisterous and uncontrolled manner to the liquor agents' presence, cursed, interrupted the agents, and continued to "incite the patrons with his persistent vocal barrage," the evidence supported a violation of R.C. 4301.66); *Planet Earth Entertainment, Inc. v. Ohio Liquor Control Comm.* (1998), 125 Ohio App.3d 619, 625-26 (concluding the refusal of permit holder's employees to cooperate with the liquor agents' demands supported the commission's finding the permit holder violated R.C. 4301.66).

{¶19} Despite evidence supporting the violation the commission found, the common pleas court reversed the commission's order for lack of reasonable suspicion that evidence of a violation would be found in the second safe. Although the agents needed reasonable suspicion to enter the second safe, they did not need reasonable suspicion to inspect the open areas of the licensed premises. See *Loom Lodge 2156 Northfield v. Ohio Liquor Control Comm.*, 10th Dist. No. 05AP-1243, 2006-Ohio-4072, ¶10 (stating " 'reasonable suspicion,' as referred to in Regulation 79(D), applies to the 'search and seizure of materials in locked closets, filing cabinets, cellars, attics, storage rooms, desks, and safes located on the licensed premises,' and does not apply to the mere entry of a permit premises itself"). Moreover, "[w]hen we are presented with alternate interpretations of a tribunal's decision, only one of which delivers internal consistency, we

are compelled to construe the decision in a manner that achieves consistency." *Ohio Dept. of Rehab. & Corr. v. Price*, 10th Dist. No. 10AP-260, 2010-Ohio-5629, ¶17, citing *Macklin v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 01AP-293, 2002-Ohio-5069, ¶20 (stating " '[i]f the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment' "), quoting *Estate of Barbieri v. Evans* (1998), 127 Ohio App.3d 207, 211.

{¶20} Here, the commission did not specify the conduct on which it premised its determination that Mbah violated R.C. 4301.66. In view of the stipulated evidence, the basis could have been either Mbah's actions in closing the door on the agent's foot or deterring the agents from opening the second safe. The evidence supports the first basis, as Mbah hindered the agent's investigation when she shut the door on Agent Devery's foot and precluded his entry into what had been an open door to the room. The second basis, Mbah's refusing to allow the agents to open the second safe, is less clear because unless the agents had reasonable suspicion to open the safe, a requisite the common pleas court concluded was lacking, Mbah could not have hindered the agents' legitimate investigation.

{¶21} Because we are required to interpret the commission's decision in a manner consistent with its order, we reverse the judgment of the common pleas court. The court's determining the agents lacked reasonable suspicion that evidence of a violation would be found in the second safe in effect selects a basis for the commission's order inconsistent with its finding a violation. By contrast, consistency is achieved in acknowledging that, separate and apart from the agents' entry into the safe, Mbah hindered or obstructed the

investigation when she became uncooperative, attempted to conceal something in a handbag, and shut the door on Agent Devery's foot.

{¶22} As a result, the common pleas court abused its discretion in reversing the commission's order, because substantial, reliable, and probative evidence supports the order, and the order is in accordance with law. The commission's single assignment of error is sustained.

V. Disposition

{¶23} Having sustained the commission's single assignment of error, we reverse the judgment of the common pleas court and remand with instructions to affirm the commission's order.

*Motion to strike denied; judgment reversed
and cause remanded with instructions.*

FRENCH, J., concurs.
TYACK, J., dissents.

TYACK, J., dissenting.

{¶1} I respectfully dissent.

{¶2} The trial court did not abuse its discretion in determining that there was a lack of reliable, probative, and substantial evidence to support the Liquor Control Commission's adjudication order. The trial court carefully analyzed what the key question of the case is, whether Liquor Control Commission agents had a reasonable suspicion that a violation of the liquor control act or the division of liquor control would be found in the second safe. It determined that the agents had nothing more than a hunch which would be impermissible to interpret as a reasonable suspicion. The trial court did not

abuse its discretion in arriving at this conclusion. I would therefore affirm the trial court's judgment.

{¶3} The question of this case is limited to the level of suspicion in the second safe. Whether Gina's employee Mbah hindered agents from entering the office area cannot be the basis for the issued violation of R.C. 4301.66. The LCC agents had already conducted their inspection of the office area and the first safe. The only item that remained to be inspected was the second safe.

{¶4} These warrantless searches are governed by Ohio Adm.Code 4301:1-1-79 which states in part:

Warrantless administrative inspections may be conducted by authorized agents or employees of the division of liquor control, the department of public safety, or peace officers * * * subject to the following limitations as to time, place, and scope:

(A) Inspections shall be conducted for the limited purpose of determining compliance with the provisions of the liquor control act and the rules of liquor control commission or the division of liquor control.

* * *

(D) This provision for warrantless administrative inspections includes, but is not limited to, the search and seizure of materials in locked closets, filing cabinets, cellars, attics, storage rooms, desks, and safes located on the licensed premises, so long as there is *reasonable suspicion* that evidence of violation of the liquor control act, the rules of the liquor control commission, or the rules of the division of liquor control will be found therein. * * * It shall be within the discretion of the liquor control commission or any court of competent jurisdiction to determine whether the right to inspect was based on *reasonable suspicion* that evidence of violations of the liquor control act, rules of the liquor control commission, or division of liquor control would be found in said licensed premises.

(Emphasis added.)

{¶5} Thus, the commission's agents' conduct must be limited to determining compliance. If an agent wishes to search a locked safe, they are required to have a reasonable suspicion that a violation of compliance would be found within.

{¶6} The investigative report and hearing testimony are the two sources for the facts in question. Agent Moyers located a safe in the office area. Mbah was asked to and then opened this first safe. Agent Moyers located a second safe further back in the storeroom and asked what that particular safe was used for. Mbah explained that money from the sales of the spirituous liquor was dropped into that safe. "Agent Moyers asked [Mbah] if she would open that [second] safe as well. [Mbah] went about her business. After a few minutes Agent C. Moyers again asked [Mbah] if she could open that safe. [Mbah] ignored Agent Moyers['] request." (Ohio Dept. of Public Safety Investigative Unit Report.) Agent Moyers asked again and Mbah became agitated and said she did not have to open the safe. Agent Moyers advised Agent Devery who asked Mbah if she was going to open the safe. Mbah walked into the office area and tried to block Agent Devery from entering by closing the door on his foot.

{¶7} The record clearly shows that the LCC agents were interested in opening the second safe which required reasonable suspicion to do so. The testimony at the hearing focused on the second safe and why the agents wanted it open and why Mbah would not open it. The report and testimony do not show that the agents wanted to inspect anything other than the second safe. It would be pure speculation to say that the agents were interested in inspecting the office area again.

{¶8} Therefore, without reasonable suspicion of a violation in the second safe, agents would not be permitted in the office area since it was already determined by the agents that the area did not contain a violation. It is logical that the office area had already been searched for violations before Mbah blocked the door. First, the report indicates that at least Agent Moyers was in, and searched, the office area for a few minutes. Second, the investigative unit did not report any violations in the office area. Third, both the investigative report and the hearing testimony focused on getting Mbah to open the second safe— not stating that agents searched the office area, or that they wanted to, after Agent Devery gained entry.

{¶9} The Liquor Control Commission hearing and the trial court focused on the question of whether reasonable suspicion existed and not simply whether Mbah had hindered Agent Devery from entering the office area. Without reasonable suspicion the agents' warrantless search had already reached its limit and Mbah could not have been in violation of R.C. 4301.66 for asserting her constitutional, protected right against unlawful searches and seizures.

{¶10} The trial court found that the agents had no more than a hunch and therefore lacked reasonable suspicion that a violation would be found in the second safe. Having found this, the limited scope of the agents' search did not permit them to enter the office area again since compliance had already been determined. This examination of the evidence by the trial court is not unreasonable or arbitrary and does not rise to the level of an abuse of discretion.

{¶11} As an appellate court, our role is more limited than that of a trial court reviewing the same order. It is incumbent on a trial court to examine the evidence. Such

is not the charge of the appellate court. The appellate court is to determine only if the common pleas court has abused its discretion. *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261. 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. The proper deference must be given to trial courts to make such determinations when examining evidence.

{¶12} The majority cites several cases where a violation of R.C. 4301.66 was found due to a hindrance or obstruction of a Liquor Control Commission agents' searches. These cases are distinguishable from the case at bar in that the hindrance occurred when an agent wanted to *initially* search an area for violations, which they had a right to do under Ohio Adm.Code 4301:1-1-79. In the case at bar, agents had already searched the office area and no evidence indicates they were trying to gain entry to search for violations again. The limited exception to prohibitions against warrantless searches was already completed. All that remained was the inspection of the second safe.

{¶13} Accordingly, I would affirm the judgment of the trial court and find it did not abuse its discretion. Since the majority does not agree, I respectfully dissent.
