

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 10, 2007 Session

**ROLLINS MARKET, INC. d/b/a ROLLINS MARKET v. METROPOLITAN
BEER PERMIT BOARD**

**Appeal from the Circuit Court for Davidson County
No. 04C-3084 Hamilton V. Gayden, Jr., Judge**

No. M2006-00516-COA-R3-CV - Filed September 25, 2007

The Davidson County Metropolitan Beer Board appeals the decision of the Circuit Court, which reversed the Board's revocation of a beer permit. The Board had revoked the beer permit issued to Rollins Market, Inc., based upon a finding the market had received four citations for unlawfully selling beer to minors. The corporation contended it only had one violation and that the previous citations the Board relied upon to revoke its permit were issued to a prior owner of the market, not the corporation. The record shows that the corporation was required by Board policies to obtain a new beer permit when it acquired the market and that only one citation had been issued subsequent to the corporation receiving its beer permit. Thus, the evidence does not preponderate against the trial court's finding that the citation at issue constituted the corporation's first violation for selling beer to minors. We therefore affirm the decision of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., and DONALD P. HARRIS, SR. J., joined.

Margaret O. Darby, Nashville, Tennessee, for the appellant, Metropolitan Beer Permit Board of the Metropolitan Government of Nashville and Davidson County.

James Robin McKinney, Jr., Nashville, Tennessee, for the appellee, Rollins Market, Inc., d/b/a Rollins Market.

OPINION

On August 6, 2004, a citation for selling beer to a minor in violation of the Nashville Metropolitan Code¹ was issued to a business operating under the trade name "Rollins Market"

¹ See Metropolitan Code of Laws Section 7.08.140(B).

located at 1200 Old Hickory Boulevard in Davidson County. It was the fourth citation issued to the Rollins Market in the past three years. A corporation named the Rollins Market, Inc., was the owner of the market when the August 6, 2004, citation was issued.

The ownership of the market, however, had changed just a few months prior to the issuance of the August 6, 2004 citation. The party to whom the beer permit was issued had also changed. The previous owner of “Rollins Market” and person to whom the beer permit had been issued was Richard A. Rollins, a sole proprietor.² During the time Mr. Rollins owned the market and held the beer permit, the market was cited for unlawfully selling beer to minors on three occasions.³ It was after the third citation that Mr. Rollins incorporated the business. The incorporation of the business constituted a change in the ownership of the market. As a consequence of the change in ownership, the new owner, Rollins Market, Inc. (“the corporation”), was required to obtain a permit to sell beer.

The corporation submitted an application for a permit to the Metropolitan Beer Board on July 1, 2004. Mr. Rollins signed the application on behalf of the corporation as president of the corporation and identified himself on the application form provided by the Board as the “person in charge of operations on the premises.”⁴ Upon receipt of the corporation’s application for a beer permit, the Board issued a temporary permit in July of 2004 to “Rollins Market, Inc.”⁵

On August 6, 2004, within days of the issuance of the temporary permit, the market was cited for selling beer to a minor in violation of Metropolitan Code of Laws Section 7.08.104(B). The case was set for hearing before the Metropolitan Beer Board. The corporation pled guilty to the August 6, 2004, citation at the hearing before the Board but contended it constituted a first offense. The Board however disagreed due to the fact it considered the incorporation of the business a mere ploy to avoid the adverse consequences of the Board’s progressive penalty policy. As a consequence, the Board found the August 6, 2004, citation for selling beer to minors constituted the market’s fourth offense. Based upon that finding, and the Board’s progressive penalty policy, whereby the penalty for violations is increased with the number of violations, the Board revoked the beer permit issued to the corporation.

The corporation then filed a Petition for Writ of Certiorari and Supersedas seeking to reverse the Board’s decision and to reinstate the beer permit issued to the corporation. Following a full hearing, the Circuit Court set aside the revocation upon a finding the Board’s decision was arbitrary, determined the August 6, 2004 violation constituted a “first violation” for the corporation, assessed a \$1,500 fine against the corporation, and ordered the Board to issue the beer permit to the corporation.

The Beer Board appeals contending the Circuit Court erred by classifying the August 6, 2004 violation as a “first offense.” The Board also contends the Circuit Court erred in determining the Board’s decision to revoke the permit was arbitrary.

² Richard Rollins owned the market from 2000 to 2004.

³ The previous citations were issued on February 28, 2002, June 4, 2003, and March 19, 2004.

⁴ The new application for a new beer permit and the disclosures made therein were pursuant to Metropolitan Code of Laws Section 7.08.040(C).

⁵ The exact date the temporary beer permit was issued is not to be found in the record. It is evident from the record the temporary permit was issued prior to July 30, 2004, as evidenced by “Old Location Inspection Sheet” dated July 30, 2004.

STANDARD OF REVIEW

The Circuit Court's standard of review of a beer board's decision to revoke a beer permit requires the Circuit Court to conduct a trial *de novo* as a substitute for an appeal. Tenn. Code Ann. § 57-5-108(d) (2006). Therefore, the Circuit Court is to try the case as if it were the Metropolitan Beer Board.

The action of such agency in connection with the issuance of any order of any kind, including the revocation or suspension of a license or permit, imposition of a civil penalty or the refusal to grant a license or permit under §§ 57-5-105, 57-5-106 and this section, may be reviewed by statutory writ of certiorari, with a trial *de novo* as a substitute for an appeal, the petition of certiorari to be addressed to the circuit or chancery court of the county in which any such order was issued.

Tenn. Code Ann. § 57-5-108(d). Additional proof may be presented, and as the statute provides, the case is to be tried as if it originated in circuit or chancery court. *Sigler v. Metropolitan Beer Permit Bd.*, 62 S.W.3d 732, 734 (Tenn. Ct. App. 2001); *see Cooper v. Alcohol Commission of the City of Memphis*, 745 S.W.2d 278, 281 (Tenn. 1988). Moreover, the trial judge is required to make an independent judgment on the merits, substituting his or her judgment for that of the Board." *Sigler*, 62 S.W.3d at 734.

On appeal from the trial court, we review the trial court's findings of fact *de novo* with a presumption of correctness unless the preponderance of the evidence is otherwise. Regarding questions of law, our review is *de novo* with no presumption of correctness. Tenn. R. App. P. 13(d). *Sigler*, 62 S.W.3d at 734; *Tennessee Sports Complex, Inc. v. Lenoir City Beer Bd.*, 106 S.W.3d 33, 35 (Tenn. Ct. App. 2003); *Metropolitan Beer Permit Bd. of Metropolitan Government of Nashville and Davidson County v. Jones*, 625 S.W.2d 267, 268 (Tenn. 1981).

ANALYSIS

The Board first challenges the Circuit Court's classification of the August, 2004, violation as a "first" violation. The Board argues that there exists a progressive penalty structure, which the Board follows. Jackie Eastlake, Executive Director of the Metropolitan Beer Board, testified as to the details of the progressive penalty structure. A first offense of selling beer to a minor brings a fifteen hundred dollar civil penalty in lieu of a hearing. The second offense results in a fourteen-day suspension and ninety days probation. The third offense results in thirty days suspension and one hundred and eighty days probation. The fourth offense is revocation.

The Board contends the corporation and Mr. Rollins, the prior owner of the market, should not be protected from the progressive penalty due to the incorporation of the business; however, the Board failed to cite to a written rule or any authority to support this contention. In fact, the only evidence or authority in the record is contrary to the Board's position.

The corporation provided evidence of other entities which were not cited for multiple violations following a change in ownership. The record indicates that on December 2, 1999, Mapco Express store located at 585 Stewart's Ferry was issued a citation for selling beer to minors, for which it received a "\$1,500 civil penalty option in lieu of a hearing." At the time of the violation this store was owned by "Mapco Petroleum, Inc." Less than two years later on October 11, 2001, the same Mapco store at 585 Stewart's Ferry received another violation for selling beer to minors; however, at this time the corporate ownership of the store changed from "Mapco Petroleum, Inc." to "Mapco Express, Inc." Notwithstanding the violation occurring at the same location, the penalty assessed was a first offense penalty.⁶ The same practice was followed when the Mapco Express store located at 3043 Nolensville Road was cited on two separate occasions.

We also find another Board policy in direct contradiction of the Board's position in this matter. That is the Board's policy which requires the issuance of a new beer permit if there is a change in ownership, as was the case here. This practice evidences the Board's acknowledgment that a change in ownership has occurred. With the change of ownership, the citation issued to the corporation, Rollins Market, Inc., on August 6, 2004, constituted the corporation's first offense for selling beer to a minor.

Finding the weight of the evidence does not preponderate against the trial court's findings and conclusions, we affirm.

The Board also contends the trial court erred in determining the Board's decision was arbitrary in "not considering the Age Detection Machine" which the market had belatedly installed in an effort to mitigate the consequences of its selling beer to minors. Our decision herein renders this issue moot.⁷

⁶ According to Ms. Eastlake, the time period for a classification of subsequent time period is five years, meaning that a violation occurring more than five years prior to the subsequent violation will not be counted against the permittee in violation.

⁷ The Age Detection Machine is an electronic device used by sellers of alcoholic beverages to assure the purchaser is of a lawful age.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the Metropolitan Beer Permit Board.

FRANK G. CLEMENT, JR., JUDGE