STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14ABC07103

N C Alcoholic Beverage Control Commission Petitioner, v. Partnership T/A Poor Boys Respondent.	**FINAL DECISION**

THIS MATTER came on for hearing before Hon. J. Randolph Ward on May 13, 2015, in Fayetteville, North Carolina, upon the Petition of the N.C. Alcoholic Beverage Control Commission, to determine if Respondent has violated the alcoholic beverage control laws, and if so, to impose sanctions pursuant to N.C. Gen. Stat. § 18B-104(a).

APPEARANCES

For Petitioner: Timothy W. Morse, Asst. Counsel
N.C. ABC Commission
Raleigh, N.C.

Respondent: *Pro se*

ISSUE

Whether Permittee's employee sold a malt beverage to a person less than 21 years old, while on licensed premises in violation of N.C. Gen. Stat. §18B-302(a)(1)?

UPON DUE CONSIDERATION of the arguments of counsel; the exhibits admitted; the sworn testimony of each of the witnesses in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests they might have, and whether their testimony is reasonable and consistent with other credible evidence; and upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable law, the undersigned Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent holds Off Premises Malt Beverage and Unfortified Wine permits issued by Petitioner N.C. Alcoholic Beverage Control Commission (hereinafter "Petitioner" or "the Commission"). On May 29, 2014, Cumberland County ABC Officers conducted a series

of sale-to-underage compliance checks in Cumberland County. A compliance check was conducted at Respondent's business premises in Wade, North Carolina.

2. During the compliance check, Patrick Ashley, accompanied by ABC Officer R. Skidmore, entered Respondent's business, Poor Boys, to attempt to purchase a malt beverage.

3. Patrick Ashley was born on March 30, 1995, making him 19 years of age on the date of the compliance check. During the compliance check, Mr. Ashley carried his North Carolina "Full Provisional" Driver's License. (P. Exs. 3 and 3B.) In addition to Mr. Ashley's date of birth, the Driver's License contained, next to his photograph, the following statement: "Turns 21 on 3-30-2016."

4. Upon entry into Poor Boys, Mr. Ashley selected a 25-ounce can of Bud Light malt beverage from the refrigerator and proceeded to the checkout counter to make the purchase. The clerk, Nacy Waskas, asked Mr. Ashley for his identification. After looking at Mr. Ashley's driver's license for a moment, Ms. Waskas asked where his birth date was, and Ashley pointed to it at the bottom of the card. Immediately thereafter, Ms. Waskas sold the malt beverage to Mr. Ashley.

5. Mr. Ashley exited the business and gave the malt beverage to Officer K. Whittenton, who bagged, marked, and later photographed the malt beverage for use as evidence. Officer Skidmore cited Ms. Waskas and informed her that the permittee would be issued an ABC violation as well because she had sold alcohol to a person under 21 years of age. Ms. Waskas stated to Officer Skidmore that she had done so by mistake.

6. Respondent was not represented by counsel, but took actions in its own behalf in the litigation. Mr. Robert Bethea, vice president of the firm, notified the Office of Administrative Hearings ("OAH") that due to health problems they each had, neither he nor Ms. Waskas would appear at the scheduled hearing. However, he declined to ask for an additional continuance on those grounds, argued that Officer Skidmore's testimony would be exculpatory, and asked that OAH proceed to decide the case. He was informed that the case would be decided based on the evidence presented at hearing. No one appeared or produced evidence on behalf of Respondent at the hearing.

7. The uncontradicted evidence shows that on May 29, 2014, Ms. Waskas, Respondent's clerk, sold an alcoholic malt beverage to a person less than 21 years old, and consequently, regardless of her intent or comprehension of Mr. Ashley's age, Respondent is subject to sanction for this violation of the alcoholic beverage control laws.

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of the parties and the controversy in this matter pursuant to N.C. Gen. Stat. § 18B-906(a).

2. N.C. Gen. Stat. § 18B-302(a)(1) "Sale to or purchase by underage persons" states that, "It shall be unlawful for any person to: Sell malt beverages to anyone less than 21 years old."

3. The preponderance of the evidence shows that on May 29, 2014, Respondent's employee sold an alcoholic malt beverage to a person less than 21 years old in violation of N.C. Gen. Stat. § 18B-302(a)(1).

NOW THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

FINAL DECISION

Respondent's ABC permits shall be suspended for 15 days, and Respondent shall pay a monetary penalty of $500.00 on dates to be determined by Petitioner.

MEMORANDUM OF DECISION
(26 NCAC 03 .0127(c)(8))

One plausible inference of the evidence adduced at the hearing is that Respondent's clerk, Ms. Waskas, sold the alcoholic beverage to Petitioner's underage buyer mistakenly, without the intent to sell it to a person under 21 years of age. The fact that she asked him to point out his birthday suggests that she was not merely going through the motions of "carding" the youth, just in case others in the store were watching. If she genuinely did not know where to look for the birthday on a provisional driver's license--on which the information is printed vertically--she may have felt flustered and hurried when calculating Mr. Ashley's age and simply erred.

Can the clerk and her employer be found to have violated the statute if she did not know or intend to be selling alcohol to a person under the age of 21? The statute does not specify that a defendant must "knowingly" carry out the transaction to be convicted. However, a recent Court of Appeals case makes clear that under applicable common law, that omission is not necessarily determinative. This case discusses circumstances under which an intent requirement should be understood to be implied. See, *State v. Huckelba*, ___ N.C. App. ___, 771 S.E.2d 809, 2015 WL 1788725 (No. COA14-916, 21 Apr. 2015). In this case, the Court reversed a jury's guilty verdict for "possessing a weapon on educational property" (i.e., the High Point University campus) rendered under the trial judge's instruction that "Defendant was guilty … even if she did not know she was on educational property." *Id.*, 771 S.E.2d at 812 (internal cites omitted throughout).

When this question is raised, the statute should be analyzed under the "following principles of statutory construction: (1) the common law presumption against criminal liability without a showing of *mens rea*; (2) the General Assembly's intent in enacting and amending the statute; and (3) the rule of lenity," i.e., when there is "more than one plausible reading that comports with the legislative purpose in enacting the statute," a criminal statute should be "strictly construed" to require that the State prove a defendant's wrongful intent. *Id*., 771 S.E.2d at 816 & 823.

It should be acknowledged that the *Huckelba* Court meaningfully observed that, "The first principle of statutory construction articulated by the federal courts is the common law presumption that criminal culpability requires a guilty mind, or some knowledge that the actor is performing a wrongful act" and concluded that the "rule of lenity" was applicable in *Huckelba*. However, the ABC statute involved in this case appears to fit in another part of the Court's analytical framework: "In North Carolina, the 'cardinal principle of statutory interpretation is to ensure that the legislative intent is accomplished.' McLeod v. Nationwide Mutual Ins. Co., 115 N.C. App. 283, 288, 444 S.E.2d 487, 490 (1994)." *Id*., 771 S.E.2d at 816.

> There is, however, an exception to the general presumption favoring a *mens rea* requirement which we must address before we may conclude that the "knowingly" mental state should be read [into the statute] …. The United States Supreme Court has recognized that in certain cases, where the prohibited activity deals with "public welfare" or "regulatory" offenses, Congress may impose a form of strict criminal liability. Typically, these cases "involve statutes that regulate potentially harmful or injurious items."

State v. Huckelba, 771 S.E.2d at 817-18. The leading example in the case law is illegal possession of hand grenades. See *United States v. Freed*, 401 U.S. 601, 91 S.Ct. 1112, 28 L.Ed.2d 356 (1971), wherein the Court reasoned that a defendant "would hardly be surprised to learn that possession of a hand grenade is not an innocent act." This "public welfare exception" has also been applied to crack cocaine—like alcohol, a legally controlled (albeit, legal) consumable substance. *United States v. Cook*, 76 F.3d 596, 601 (4th Cir.1996). Our Court of Appeals has characterized the penalties in §18B-104 imposed in this case as "administrative." See, *Hall v. Toreros, II, Inc*., 626 S.E.2d 861, 868, 176 N.C. App. 309 (2006).

In finding that the "public welfare exception" did not apply in their case, the *Huckelba* Court pointed out that "knowingly possessing or carrying . . . a gun is not, on its own, a criminal act.... In fact, the mere act of possessing or carrying a gun accordance with the law is stringently protected by both the United States and North Carolina Constitutions." *Id*., 771 S.E.2d at 817. While normally less dangerous than hand grenades, mere possession of alcohol by underage drinkers is likewise itself the evil to be avoided, and penalized, given the near certainty that possessors will consume it.

That fact also has implications for another consideration of particular importance in the regulatory scheme for preventing underage drinking. The Legislature will not be presumed to have intended to "saddle[ ] [law enforcement] with an unduly heavy burden of proving a defendant's subjective knowledge." *Huckelba*, at 821. The *Huckelba* Court took note of *United*

States v. Langley, 62 F.3d 602 (4th Cir.1995), wherein the Fourth Circuit considered "a federal statute prohibiting felons from possessing firearms which have been shipped or transported through interstate commerce" and "read a mental state requirement into the 'possession' element, but refused to read a mental state requirement into the other two elements of the crime," status as a felon, and movement of the firearm through interstate commerce. *Id.* at 606. The Court of Appeals contrasted that statute to the one at issue in *Huckelba*, in which a *mens rea* element would require that "the State need only prove a defendant's knowledge of her presence on educational property by reference to the facts and circumstances surrounding the case," such as a "school building … with children," versus "an empty parking lot that is open to the public." *Huckelba*, at 820-21.

There are no comparable external "facts and circumstances" with which to divine the thoughts of a store clerk. The apparent purpose of §18B-302(a) and the penalties for its violation in §18B-104 are to enforce the permittee alcohol vendor's obligation to see that a conscientious and competent effort is made to prevent sales to persons under 21 years of age (and not primarily to punish scofflaw clerks). Rewarding the permittee with higher revenues, without fines, if it employs ignorant, careless or incompetent clerks who unintentionally make illegal sales is not a reasonable outcome. To err is human and that may very well be all that Ms. Waskas was guilty of on May 29, 2014. The Commission can exercise prosecutorial discretion when it thinks leniency is due or serves its mission. However, it appears that the applicable statute creates a "public welfare or regulatory offense[]" enforced by "a form of strict criminal liability," without regard to intent.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 21st day of August, 2015.

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J. Randolph Ward
Administrative Law Judge