

[Cite as *Lorenzo's Drive Thru, Inc. v. Liquor Control Comm.*, 2011-Ohio-4249.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lorenzo's Drive Thru, Inc.,	:	
Appellant-Appellant,	:	
v.	:	No. 10AP-460
Liquor Control Commission,	:	(C.P.C. No. 09CVF-12-18405)
Appellee-Appellee.	:	(REGULAR CALENDAR)

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D E C I S I O N

Rendered on August 25, 2011

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*The Gearhiser Law Firm, Inc.*, and *Kurt O. Gearhiser*, for appellant.

*Michael DeWine*, Attorney General, and *Paul Kulwinski*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Appellant, Lorenzo's Drive Thru, Inc. ("Lorenzo's"), appeals from a judgment of the Franklin County Court of Common Pleas affirming the order of appellee, Liquor Control Commission ("Commission"), finding that Lorenzo's violated R.C. 4301.22(B). For the reasons that follow, we affirm the judgment of the trial court.

{¶2} Of relevance to this appeal, the alleged violation before the Commission provided:

On or about May 1, 2009, you and/or your agent(s) and/or employee(s) DANIEL RINGER, and/or your unidentified agent(s) and/or employee(s) did furnish beer in and upon the permit premises, to CLARENCE WILLIAMS, who was then and there in an intoxicated condition, in violation of Section 4301.22(B) of the Ohio Revised Code.

(Oct. 16, 2009 Notice of Hearing.)

{¶3} The Commission heard testimony from Lieutenant Cynthia Christman ("Lt. Christman"), an Akron police officer for the state, and three witnesses for Lorenzo's: Daniel Ringer, Jeff Lorenzo, and Joshua Duncan. Mr. Lorenzo owned the permit premises where the alleged violation occurred; Mr. Ringer was employed as a manager there; and, Mr. Duncan witnessed some of the events in question.

{¶4} After hearing the testimony of the witnesses, the Commission found that the alleged violation of R.C. 4301.22(B), in fact, occurred. Nevertheless, the penalty imposed as a result of this violation was "I.V.N.P.," or "in violation, no penalty." (Nov. 27, 2009 Commission's Order.) In response, Lorenzo's timely appealed to the common pleas court. On April 20, 2010, the court concluded that the Commission's finding of a violation of R.C. 4301.22(B) was supported by reliable, probative, and substantial evidence and was in accordance with law.<sup>1</sup> (Trial court's decision, at 5.)

{¶5} Lorenzo's has timely appealed to this court and presents the following assignment of error for our consideration:

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<sup>1</sup> With respect to a second alleged violation, hindering an inspection in violation of R.C. 4301.66, the court concluded that there was not reliable, probative, and substantial evidence supporting the Commission's conclusion that a violation occurred. As a result, the court reversed the Commission's finding on that charge. Because the Commission has not appealed the court's determination in this regard, it is not a subject of this appeal.

## ASSIGNMENT OF ERROR

I. THE COURT BELOW ERRED WHEN IT FOUND THAT THE TESTIMONY AND EVIDENCE BEFORE THE LIQUOR CONTROL COMMISSION PROVIDED RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE THAT DaNIEL RINGER OR AN UNIDENTIFIED AGENT OR EMPLOYEE FURNISHED BEER TO CLARENCE WILLIAMS IN VIOLATION OF R. C. 4301.22(B).

{¶6} Pursuant to R.C. 119.12, when a common pleas court reviews an order of an administrative agency, the court must consider the entire record to determine if the agency's order is supported by reliable, probative, and substantial evidence and is accordance with law. To be "reliable," evidence must be dependable and true within a reasonable probability. *Our Place, Inc. v. Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571. To be "probative," evidence must be relevant, or, in other words, it must tend to prove the issue in question. *Id.* To be "substantial," evidence must have some weight; it must have importance and value. *Id.*

{¶7} In reviewing the record for reliable, probative, and substantial evidence, the court of common pleas " 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *AmCare, Inc. v. Ohio Dept. of Job & Family Servs.*, 161 Ohio App.3d 350, 2005-Ohio-2714, ¶9 (quoting *Lies v. Ohio Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207). In doing so, the court of common pleas must give due deference to the administrative resolution of evidentiary conflicts because the agency, as the fact finder, is in the best position to observe the manner and demeanor of the witnesses. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111.

{¶8} Unlike a trial court, an appellate court may not review the evidence. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 1993-Ohio-122. An appellate court is limited to determining whether the trial court abused its discretion. *Id.* Absent such an abuse of discretion, an appellate court must affirm the trial court's judgment, even if the appellate court would have arrived at a different conclusion than the trial court. *Lorain City School Dist. Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 261. When reviewing the trial court's judgment as to whether an agency's decision is in accordance with law, an appellate court's review is plenary. *Spitznagel v. State Bd. of Edn.*, 126 Ohio St.3d 174, 2010-Ohio-2715, ¶14.

{¶9} During the hearing before the Commission, Lt. Christman testified on behalf of the state. According to her testimony, on May 1, 2009, she observed a male, who was later identified as Clarence Williams, staggering on the sidewalk towards Lorenzo's. (Tr. 6.) She saw him enter the permit premises, at which point she exited her vehicle and approached the premises. (Tr. 6.) She testified that she saw someone inside handing what "appeared to be change" to Mr. Williams. (Tr. 6.) When Mr. Williams exited the permit premises, Lt. Christman questioned him. Lt. Christman then testified about the ensuing exchange:

I stopped him and I asked him, I said, "How much have you had to drink? You're drunk, you're staggering here." And he said, "Yeah, I've been drinking[,] but I'm old enough." He was 50 years old, of course.

He said - - he commented that he was allowed to drink[,] and I didn't have a right to ask him because I'm not his mother. And at that point[,] I saw that he had a bag tucked up underneath his sleeve, his left sleeve. And I said, "Is that a beer?" And he pulled it out and said, "Yes, it is, but it's not open."

And he continued to try to walk on. And I said, "Where did you get that? Did you just buy that there?" And he says, "Yeah, I bought it there. I'm allowed[;] I'm old enough." This man was highly intoxicated. He was staggering badly[,] and he had just gone into Lorenzo's Drive-Thru and bought more alcohol.

(Tr. 6-7.)

{¶10} Lt. Christman testified about the extent of Mr. Williams intoxication when she said, "his speech was highly slurred, his eyes were bloodshot," and "[h]e had all the signs" of "somebody who is very drunk." (Tr. 11-12.) She made these observations and reached these conclusions based upon her 18 years of experience in law enforcement and her involvement on the Summit County OVI Task Force. (Tr. 12.)

{¶11} Lt. Christman testified that the beer that had been tucked in Mr. Williams sleeve was an unopened 24-ounce can of Camo Black Ice beer that was inside a brown bag and was very cold. (Tr. 9, 21.) When she asked Mr. Williams where he purchased it, he told her that he bought it at Lorenzo's. (Tr. 75.) The manager of a nearby drive-thru told Lt. Christman that Mr. Williams attempted to purchase alcohol on his premises, but Mr. Williams was turned away. (Tr. 24.) Further, according to Lt. Christman, the only other place nearby did not carry Camo Black Ice beer. (Tr. 24.)

{¶12} As the manager of Lorenzo's, Daniel Ringer testified on its behalf during the hearing before the Commission. According to his testimony, he arrived at the permit premises after the incident had occurred. (Tr. 29.) He accordingly said that he could not have been the individual who furnished the beer to Mr. Williams. (Tr. 29.) He also indicated that he had questioned both sales clerks who worked on May 1, 2009, and they too denied having furnished the beer to Mr. Williams. (Tr. 30.) He then recited an exchange that occurred between Mr. Williams and Jeff Lorenzo, the owner of the permit

premises. According to Mr. Ringer, Mr. Williams told Mr. Lorenzo that he had purchased the beer "down the street." (Tr. 30.) Mr. Ringer testified that when he and Mr. Lorenzo attempted to convey this information to Lt. Christman, she ignored them. (Tr. 30.)

{¶13} Mr. Ringer also testified that he retrieved the tape from the cash register, which demonstrated the sales that occurred at the premises on May 1, 2009. (Tr. 32.) According to Mr. Ringer, the cash register tape showed that no sale of Camo Black Ice beer occurred at the relevant time. (Tr. 32-33.)

{¶14} Also called as a witness on behalf of Lorenzo's was Joshua Duncan, an employee of Time Warner Cable who was in the vicinity at the time. (Tr. 46.) He testified that Mr. Williams appeared to be very drunk as he approached the premises. (Tr. 47.) However, according to Mr. Duncan, Mr. Williams already had a can of beer before reaching Lorenzo's. (Tr. 47.) He testified that Mr. Williams showed a brown paper bag to the police officer, as if to acknowledge that he indeed had beer, but it was unopened. (Tr. 47.) Further, Mr. Duncan testified:

I finished filling my van [with gasoline]. As I was pulling out of Super America I notice the gestures was like pointing at Lorenzo's Drive-Thru. I'm like, well, what did they do wrong? I saw this guy carrying that same alcohol that was sitting on top of the cop car, saw him carrying that down the whole road, all the way down Exchange.

So after I went, did my work for the rest of the day, I got off work at nine p.m. that night, I drove to Lorenzo's Drive-Thru and asked them, are you guys getting in trouble for this whole ordeal \* \* \* [b]ecause you really shouldn't be because I witnessed that gentleman carrying that beer all the way down Exchange.

(Tr. 49-50.)

{¶15} Mr. Lorenzo also testified on Lorenzo's behalf. According to his testimony, he confronted the two sales clerks who were working at the time and instructed them that anything they had done would show up on Lorenzo's security tapes. (Tr. 62.) He then asked whether either of them had sold Mr. Williams beer. (Tr. 62.) According to Mr. Lorenzo, they told him that they did not. (Tr. 62.) Mr. Lorenzo then explained that he destroyed the security tapes because he assumed that he was not going to be cited when he did not receive a citation on the actual day of the incident. (Tr. 62.)

{¶16} As is clear, portions of Mr. Duncan's testimony conflicted with that of Lt. Christman. Additionally, Mr. Ringer and Mr. Lorenzo denied that any furnishing or sale ever took place. However, as the court of common pleas aptly noted, neither Mr. Lorenzo nor Mr. Ringer were present at the time of the incident. Further, the court of common pleas was required to give deference to the Commission's resolution of evidentiary conflicts because it was the fact finder and was in the best position to observe the witnesses. See *Conrad* at 111.

{¶17} Based upon the arguments presented, the gravamen of Lorenzo's position is that the evidence weighed more heavily in its favor during the Commission hearing. However, in administrative appeals, "a court of appeals does not determine the weight of the evidence." *Byrd v. Auditor of State*, 10th Dist. No. 10AP-560, 2011-Ohio-3306, ¶12, citing *Rossford Exempted Village School Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707. So long as some evidence supports the common pleas court's finding, we may not substitute our judgment for that of the common pleas court. See *Pushay v. Walter* (1985), 18 Ohio St.3d 315. As a result, just as the court of common

pleas was unable to substitute its judgment for that of the Commission, we are similarly bound.

{¶18} Based upon the foregoing, we find no abuse of discretion on the part of the common pleas court in affirming the Commission's order. We therefore overrule appellant's single assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

BROWN and RINGLAND, JJ., concur.

RINGLAND, J., of the Twelfth Appellate District, sitting by assignment in the Tenth Appellate District.

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