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12-4-2007

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BEFORE THE TENNESSEE ALCOHOLIC BEVERAGE COMMISSION

IN THE MATTER OF:)
)
TERENCE CARPENTER) **DOCKET NO. 33.07-094348J**
)
)

INITIAL ORDER

This matter came to be heard on December 4, 2007, before Marion P. Wall, Administrative Judge, Office of the Secretary of State, sitting for the Tennessee Alcoholic Beverage Commission. The Tennessee Alcoholic Beverage was represented by Ms. Carolyn Smith. The Claimant, Terence Carpenter, was represented by Mr. Handel Durham of the Memphis. Both counsel are commended for their zealous and able representation of their respective clients.

This contested case arises from the seizure of certain property of the Claimant on September 13, 2006. After consideration of the entire record, and the arguments of counsel, it is DETERMINED that the seized property should be returned to the Claimant. This determination is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Claimant is a promoter of entertainment events. He promoted an event in conjunction with a friend's birthday party. This event was open to the public. A cover charge was charged to the public for admission. Claimant provided a disc jockey, food, and alcoholic beverages. A caterer was to provide food and drinks, including alcoholic beverages. This event occurred on October 13, 2006.

2. Aware of the event because of flyers distributed in the community, agents of the Tennessee Alcoholic Beverage Commission (TABC), gained entrance to the club hosting the event in Memphis. While there, they observed alcoholic beverages being dispensed without a license.¹

3. The agents thereafter seized the liquor involved, some 327 bottles of liquor.² There was no form given the Claimant comprising a Notice of Seizure. There was no forfeiture warrant sought, or obtained, by the TABC. There is, however, no question of any bad faith on the part of the officers. The seizure was made, and all further actions taken in good faith on the part of TABC. *See*, TCA 40-33-215.

4. Claimant filed a timely request for a hearing and the return of the seized items.

CONCLUSIONS OF LAW

1. TCA 40-33-201, *et seq.*, governs all actions for forfeiture of items seized by the TABC. TABC forfeiture provisions may be found at TCA 57-9-201, and TCA 40-

¹ These beverages were being dispensed by a catering service which had a license to serve, but not sell, such beverages. The Claimant contends that he did not know that the caterer did not have a license to sell, and that he thought that a proper license was in place. These facts are immaterial to the resolution of this matter.

33-201 specifically provides that “all personal property ... subject to forfeiture under the provisions of ... §57-9-201... shall be seized and forfeited in accordance with the procedure set out in this part.” It is noted that this statute was enacted after the forfeiture statute found at §57-9-201, so clearly forfeitures under this section are governed by the procedures found in §40-33-201, *et seq.*, it being the later enacted statute.

2. TCA 40-33-203 requires that upon effecting a seizure, the seizing officer shall prepare a Notice of Seizure form. This seizure is to contain a general description of the property seized, the date it was seized, the date of the notice of seizure, the reason for seizure, and the procedure to seek recovery of the seized items, and the consequences of failing to seek recovery. Here, no notice of any sort was given.

3. Upon seizure of property, the seizing agency is then required to obtain a forfeiture warrant. It must go before a neutral magistrate and establish facts which, in the opinion of the magistrate, establish a legal basis for the seizure and forfeiture of the seized property. TCA 40-33-204. There must be an affidavit from the seizing officer setting forth the legal and factual basis for the seizure. Here, that was not done, either.

4. Forfeitures are not favored in the law, and statutes governing them are to be strictly construed. Here, the statute specifically provides that all forfeitures of personal property “shall be seized and forfeited in accordance with the procedure set out in this part.” Further, the statute provides that “no forfeiture action shall proceed unless a forfeiture warrant is issued in accordance with this section...” TCA 40-33-204(a). Here

² It appears that when the seizure began, certain items belonging to the Claimant went wandering. They were not seized by the TABC, but apparently were taken by opportunistic attendees of the event. At any rate, all items seized

the property was not seized in accordance with the procedure set forth in the statute, and no forfeiture warrant was sought. Therefore, this action for forfeiture cannot be successfully maintained, as the agency did not comply with the requirements set by the Legislature.

5. TABC argues that specific statutes, such as its forfeiture statute found in Title 57, control over general ones, such as the general forfeiture procedures set forth in TCA 40-33-201. While this may be true as a general proposition, in this case the Legislature specifically provided that the forfeiture procedures in Title 40 govern forfeiture actions under the TABC forfeiture statute. The language of the Legislature is clear, and must be followed.

6. TABC next argues that the forfeiture provisions of TCA 40-33-201 do not require the return of contraband, as it alleges the seized liquor to be. The short answer to this contention is the words of the Legislature. TCA 40-33-201 governs seizure and forfeiture of “all personal property.” It further provides that no forfeiture action can proceed unless it is in compliance with the procedures set forth. The Legislature made no exceptions, and the undersigned can do no less.

7. Finding that this forfeiture action may not be maintained because of the failure of the TABC agents, who acted in good faith and who were unaware of the applicability of the provisions of TCA 40-33-201, to properly effectuate the seizure in

compliance with the procedures set forth by the Legislature, it follows that the seized property should be returned.

It is therefore ORDERED that the seized property be returned to the Claimant.

This Initial Order entered and effective this 2nd day of February, 2009.

Marion P. Wall
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State,
this 2nd day of February, 2009.

Thomas G. Stovall, Director
Administrative Procedures Division