

TABC DOCKET NO. 586954

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE TEXAS
COMMISSION, Petitioner	§	
	§	
VS.	§	
	§	
JAILHOUSE SALOON LLC	§	
D/B/A JAILHOUSE SALOON LLC	§	ALCOHOLIC
PERMIT/LICENSE NO(s). BG682602, BL	§	
Respondent	§	
	§	
HARRIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-10-2460)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this the 23rd day of September, 2010, the above-styled and numbered cause.

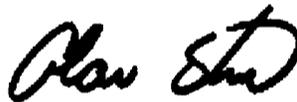
After proper notice was given, the hearing in the above matter was conducted by the State Office of Administrative Hearings, with Administrative Law Judge Stephen J. Burger presiding. The hearing convened on March 19, 2010 and the record was closed on the same day. The Administrative Law Judge made and filed a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law on May 17, 2010. The Proposal for Decision was properly served on all parties, who were given an opportunity to file Exceptions and Replies as part of the record herein. No Exceptions or Replies were filed.

The Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporates those Findings of Fact and Conclusions of Law into this Order as if such were fully set out and separately stated herein. All other motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party that are not specifically adopted herein are denied.

IT IS THEREFORE ORDERED that **No Action** be taken by the Texas Alcoholic Beverage Commission against your Wine and Beer Retailer’s Permit and your Retailer Dealer’s On-Premise Late Hours License.

This Order will become final and enforceable on the 19th day of October, 2010, unless a Motion for Rehearing is filed **before** that date.

SIGNED on September 24th, 2010, at Austin, Texas.



Alan Steen, Administrator
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that service shall be made upon all parties in the manner indicated below on this the 24th day of September, 2010.



Martin Wilson
Assistant General Counsel
Texas Alcoholic Beverage Commission

STEPHEN BURGER
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
2020 North Loop West, Suite 111
Houston, Texas 77018
VIA FACSIMILE: (713) 812-1001

Richard S. Browne
ATTORNEY FOR RESPONDENT
307 N. San Jacinto
Conroe, TX 77301
VIA FACSIMILE: (936) 760-2305

Jailhouse Saloon LLC
d/b/a Jailhouse Saloon LLC
RESPONDENT
1406 N. Plum Creek
Spring, Texas 77386
VIA U.S. REGULAR MAIL

Ramona M. Perry
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Houston District Office

State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

RECEIVED

MAY 19 2010

**TABC HOUSTON
LEGAL**

May 17, 2010

Alan Steen
Administrator
Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

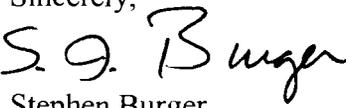
VIA REGULAR MAIL

RE: Docket No. 458-10-2460; Texas Alcoholic Beverage Commission v. Jailhouse Saloon LLC d/b/a Jailhouse Saloon LLC

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507, a SOAH rule which may be found at www.soah.state.tx.us.

Sincerely,

Stephen Burger
Administrative Law Judge

SB/rlm
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**
Ramona Perry Texas Alcoholic Beverage Commission, 427 W 20th Street, Suite 600, Houston, TX 77008- **VIA REGULAR MAIL** (with exhibits and cd)
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**
Jailhouse Saloon LLC, 1406 N. Plum Creek, Spring, TX 77386- **VIA REGULAR MAIL**

2020 North Loop West, Suite 111 ♦ Houston, Texas 77018
(713) 957-0010 Fax (713) 812-1001
<http://www.soah.state.tx.us>

Houston, Harris County, Texas, and the hearing was concluded and the record closed on the same day. Petitioner's attorney was Ramona Perry. Respondent was represented by attorney Richard Browne.

II. LEGAL STANDARDS AND APPLICABLE LAW

The Commission or Administrator may suspend a permit if a permit holder's agent, servant, or employee sold, served, or delivered an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(1) and 61.71(a)(6).

"Intoxicated" is defined as (A) not having the normal use of mental or physical faculties by the introduction of alcohol, or (B) having an alcohol concentration of 0.08 or more. TEX. PENAL CODE § 49.01(a)(2).

III. DISCUSSION OF EVIDENCE AND ANALYSIS

A. Petitioner's Case

Petitioner alleges that Respondent's employee served alcohol to an intoxicated person and requests a 12-day suspension of Respondent's permit. Petitioner's witnesses' testimony is briefly summarized below.

Wendy Shields is an agent with the TABC. In January of 2009, she was assigned to investigate the circumstances of the death of Larry Odell, who died as a result of a motorcycle accident on June 28, 2008. Her investigation revealed that Mr. Odell had been at John's Place and Jailhouse Saloon prior to his accident. Mr. Odell signed a receipt for five beers at John's Place at 2:24 p.m., and signed a receipt for \$32 at Jailhouse Saloon at 6:47 p.m. The latter receipt did not note what was purchased. The fatal accident occurred about 7:02 p.m. Agent Shields also discovered that Mr. Odell called his wife from Jailhouse Saloon at about 3:00 p.m.

Angela Travis testified that she was the bartender at Jailhouse Saloon on June 28, 2008. She recalls serving Mr. Odell four 12-ounce beers beginning about noon, when Mr. Odell arrived along with another motorcyclist, Kelvin Eakin, with whom she was acquainted. She noticed that Mr. Odell was rubbing his left arm constantly, and because of that she did not feel comfortable serving him anymore drinks. She discussed the matter with the owner of the bar, Tom McBride, who left the decision up to her. She did not notice any indication that Mr. Odell was intoxicated, and was only concerned about him rubbing his left arm, which she suspected may have indicated Mr. Odell was having a stroke. Mr. Odell paid for both his beers and Mr. Eakin's, and they left on their motorcycles.

Kelvin Eakin testified that he had known Mr. Odell about 20 years. Mr. Odell was about 60 years old. On June 28, 2008, he and Mr. Odell rode their motorcycles to John's Place arriving between 2:00 p.m. and 3:00 p.m. While at John's Place, he believes Mr. Odell had about two or three beers. They then rode to Jailhouse Saloon and arrived about 4:00 p.m., where they had more beers. He does not know how many beers Mr. Odell consumed. Mr. Odell may also have had a screwdriver at Jailhouse Saloon. He does not recall any signs that Mr. Odell was intoxicated. Mr. Eakin knew that Mr. Odell was an alcoholic, and stated that Mr. Odell could handle his liquor "very well." He had no concerns whatsoever that Mr. Odell could handle his motorcycle when they left Jailhouse Saloon about 7:00 p.m. He observed the accident, and said Mr. Odell was distracted just before a sharp curve in the road where the accident occurred.

Terry Danielson is a medical doctor with the Harris County Medical Examiner's Office. He testified that a blood sample was taken from Mr. Odell on June 30, 2008, and the analysis performed on July 2, 2008, showed a 0.17 blood alcohol level. He believes that it would take about 8-15 drinks to get to this level, and that at such a level, a person should have slurred speech, unsteady balance, and trouble driving. He also testified that someone accustomed to drinking can hide the effects of alcohol better than people less accustomed to drinking.

B. Respondent's Case

Respondent contends that neither Mr. McBride, owner of the bar, nor the bartender, Ms. Travis, had any reason to suspect Mr. Odell was intoxicated when he was served alcohol on June 28, 2008. Respondent's witnesses' testimony is briefly summarized below.

Bonnie Fischer had known Mr. Odell for about three years. She testified that Mr. Odell was a Harley-Davidson motorcycle rider. She met Mr. Odell at Jailhouse Saloon on June 28, 2008, where she was also acquainted with Ms. Travis, the bartender. She arrived at Jailhouse Saloon sometime in the early afternoon, and Mr. Odell was already there. She visited with Mr. Odell, who was drinking beer, but did not see any signs that Mr. Odell was intoxicated. He "seemed fine." She has never seen anyone over-served alcohol at Jailhouse Saloon.

Mr. McBride is the owner of Jailhouse Saloon. He arrived at the bar about 3:15 p.m. on June 28, 2008. He corroborated Ms. Travis's testimony that there was something "not right" about Mr. Odell, and that she was cutting him off. He also noticed that Mr. Eakin had "grabbed two beers" and requested they be put on Mr. Odell's tab. There was another couple seated with Mr. Eakin and Mr. Odell. He spoke with Mr. Odell, who said he was alright. He saw Mr. Odell go to his motorcycle, and noticed that he looked both ways before entering the highway. He saw him take the nearest sharp curve without any problem. He also saw Mr. Odell looking over to his left just before he missed another curve and crashed.

The parties presented exhibits, which will be addressed in the ALJ's analysis.

C. Analysis

Petitioner argues that because Mr. Odell's blood alcohol content was over 0.08, Respondent is in violation of TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(1) and 61.71(a)(6). Respondent argues that it is not in violation of the previously cited statute because Mr. Odell did not show any signs that he did not have the normal use of his mental and physical faculties due

to having been served alcohol.

Applying the 0.08 definition in the manner proposed by Petitioner would be unreasonable. Sellers of alcoholic beverages do not have breathalyzer machines, nor do they require patrons to submit to giving blood samples before being served. How else would any seller know whether or not prospective drinkers are over the 0.08 limit? The only reasonable interpretation of TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(1) and 61.71(a)(6) is one that subjects a seller of alcohol to sanctions when it is shown that the seller served alcohol to an individual who does not have the normal use of his mental and physical faculties.

The evidence shows that Mr. Odell left Jailhouse Saloon only minutes before the accident, and his blood alcohol level was above 0.17 at the time of his death. Ms. Travis or Mr. McBride had no way of knowing what his blood alcohol content was when he was being served alcohol at Jailhouse Saloon. Ms. Travis, Mr. McBride, Mr. Eakin and Ms. Fisher, all eye-witnesses, unanimously and credibly testified that Mr. Odell showed no signs of intoxication, such as slurred speech or impaired balance, while he was at Jailhouse Saloon on June 28, 2008.

Additionally, Dr. Danielson testified that someone accustomed to drinking can hide the effects of alcohol better than someone who is not so accustomed. Mr. Eakin, who knew Mr. Odell for 20 years, attested that Mr. Odell was an alcoholic.

Petitioner has not met its burden of proof and has not proven that Mr. Odell did not have the normal use of his mental or physical faculties when Respondent's employee served Mr. Odell alcoholic beverages on June 28, 2008.

IV. RECOMMENDATION

The ALJ recommends that Petitioner not be allowed to suspend Respondent's permit.

V. FINDINGS OF FACT

1. Jailhouse Saloon LLC d/b/a Jailhouse Saloon LLC (Respondent), is the holder of a Wine and Beer Retailer's On Premise Permit and a Retail Dealer's On Premise Late Hours License, No. BG 682602, BL, for the premises located at 310 Preston, Spring, Harris County, Texas.
2. A Notice of Hearing dated February 17, 2010, was issued by the Texas Alcoholic Beverage Commission (Petitioner) notifying Respondent that a hearing would be held on whether Respondent's permit should be suspended because Respondent's agent, servant, or employee sold, served, or delivered an alcoholic beverage to an intoxicated person, Mr. Odell, on June 28, 2008. The February 17, 2010 Notice of Hearing informed Respondent of the time, place, and nature of the hearing.
3. On March 19, 2010, a public hearing was held before Administrative Law Judge (ALJ) Stephen J. Burger in Houston, Texas. The Petitioner appeared at the hearing, and was represented by Ramona Perry, attorney. Respondent was represented by Richard Browne, attorney.
4. On June 28, 2008, Larry Odell, age 60, was served approximately four beers by Angela Travis, a bartender at Jailhouse Saloon, Spring, Texas.
5. On June 28, 2008, Angela Travis was an employee of Jailhouse Saloon, Spring, Texas.
6. On June 28, 2008, while at Jailhouse Saloon, Spring, Texas, Larry Odell did not exhibit signs that he did not have the normal use of his physical or mental faculties by reason of the introduction of alcohol.
7. On June 28, 2008, at approximately 7:00 p.m. and after leaving Jailhouse Saloon on his motorcycle, Larry Odell had a fatal accident.
8. On June 28, 2008, at about 7:00 p.m., Larry Odell had a blood alcohol level of 0.17.

VI. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5.
2. The State Office of Administrative Hearings has jurisdiction to conduct the hearing in this matter and to issue a Proposal for Decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. ch. 2003.

3. Proper and timely notice of the hearing was given to Respondent pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001.051 and 2001.052; and 1 TEX. ADMIN. CODE § 155.501
4. On June 28, 2008, Respondent or Respondent's agent, servant, or employee, did not sell, serve, or deliver an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. §§ 61.71(a)(1) and 61.71(a)(6).
5. Petitioner is not authorized to suspend Respondent's permit for a Wine and Beer Retailer's On Premise Permit and a Retail Dealer's On Premise Late Hours License for the premises known as Jailhouse Saloon LLC d/b/a Jailhouse Saloon LLC, located at 310 Preston, Spring, Harris County, Texas.

SIGNED May 17, 2010.



STEPHEN J. BURGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE