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Div. of Alcoholic Bev. Control v. Bill & Betty's Tavern  
Cite as 2 *N.J.A.R.* 380

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**DIVISION OF ALCOHOLIC  
BEVERAGE CONTROL,**

Petitioner,

v.

**BILL & BETTY'S TAVERN,**

Respondent.

Decided January 4, 1980

**Initial Decision**

**SYNOPSIS**

The Division of Alcoholic Beverage Control charged the tavern with the sale of an alcoholic beverage to an actually or apparently intoxicated person in violation of *N.J.A.C.* 13:23.1. In order to establish a violation, the Division is required to prove the elements of the charge by a preponderance of the evidence. Although there was no dispute as to the sale or content of the alcoholic beverage, testimony was offered which attempted to show that the mumbling, slow speech and unusual mannerisms of the individual served were due, not to intoxication, but to a speech impediment and the fact that he was "kind of slow."

The administrative law judge determined that the applicable standard for review was whether a reasonable mind might view these external characteristics as indications of intoxication. Applying this standard, the judge determined that substantial evidence supported a conclusion that the individual appeared to be apparently intoxicated. The argument that the individual's conduct was not a deviation from his normal behavior was found to be without merit, for to accept such an argument would require an investigating agent to know the individual idiosyncrasies of each drinker. It was also noted that the failure to call the served individual to testify created an adverse inference against the interests of the tavern.

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**Charles J. Mysak**, Deputy Attorney General, for Petitioner (John J. Degnan, Attorney General of New Jersey, Attorney)

**George F. Hendrickson, Esq.**, for Respondent

**ROSA, ALJ:**

Pursuant to *N.J.S.A.* 33:1-31, the Division of Alcoholic Beverage Control, preferred charges against Bill & Betty's Tavern, Inc. t/a Bill &

Betty's Tavern, having its licensed premises at 155 North Main Street, Milltown, New Jersey, by notice dated October 15, 1979. The charges are that:

On Saturday, September 15, 1979, you sold, served and delivered, allowed, permitted and suffered the sale, service and delivery of alcoholic beverages, directly or indirectly, to a person actually or apparently intoxicated and allowed, permitted and suffered the consumption of alcoholic beverages by such person in and upon your licensed premises; in violation of *N.J.A.C. 13:2-23.1(b)*.

By letter dated October 24, 1979, of R. Joseph Ferenczi, *Esq.*, respondent entered a plea of not guilty to the charges and requested that the matter be set down for a hearing. On November 1, 1979, the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A. 52:14F-1 et seq.* A hearing was scheduled to be held on December 7, 1979 before Administrative Law Judge Joseph Rosa, Jr.

At the time of the offense, the sole shareholder of Bill & Betty's Tavern, Inc., (a New Jersey corporation), was a Thomas Robert Heroy. On November 29, 1979, a sale and transfer of real property and plenary retail consumption license No. 1212-33-001-002, was effectuated, between Bill & Betty's Tavern, Inc., and J. T. of Milltown, Inc., (a New Jersey corporation), t/a Joe and Pauline's Country Tavern, Inc. The present shareholders of J. T. of Milltown, Inc., are: Joseph Spak and Pauline Spak and Pauline Gallo and Steven Ronald Gallo. The transfer of the plenary retail consumption license was approved by the Mayor and Council of the Borough of Milltown on November 12, 1979. Subsequent to the transfer of the real property and the plenary retail consumption license, George F. Hendricks, *Esq.*, was substituted as attorney for the respondent. After proper notice to the parties, a hearing was held on December 7, 1979, at the Office of Administrative Law, Newark, New Jersey.

Relevant testimony was as follows.

Testifying on behalf of the Division was Agent S, a member of the New Jersey State Police, Alcoholic Beverage Control Inspector. He testified that he has been employed as an inspector for the last 22 years, the last ten of which he has been employed as a Senior Inspector. On September 15, 1979, he was part of a survey group investigating various taverns in Middlesex County. The squad, numbering six people, was part of a task force investigating taverns as part of an enforcement project concerning the sale of alcoholic beverages to intoxicated persons. At approximately 11:30 p.m. he entered Bill & Betty's Tavern, located at 155 North Main Street, Milltown, New Jersey, along with Agent D. He and Agent D took seats at the bar. At the time they entered, there were approximately 10 male patrons

present in the tavern. Behind the bar was a bartender later identified as a Joseph Metts. D and S ordered drinks. After a short period of time, a patron entered the tavern and sat two or three stools to the right of S. (D was seated on the stool to S's left.) This patron, who was later identified to be William Cottrell, ordered a glass of beer. The beer was served to Cottrell by Metts and was paid for by Cottrell. At this time S noticed that Cottrell was talking to himself while sitting at the bar. Shortly thereafter, Cottrell went to the men's room. S noticed that Cottrell had difficulty in walking and maintaining his balance while en route to the men's room. He stumbled and had his hand on the wall to assist him in maintaining his balance. S immediately followed Cottrell into the men's room, and after entering the men's room, engaged in a conversation with Cottrell. Cottrell's speech was unclear and garbled. Cottrell told S that he was an Alcoholic Beverage Control agent and had been working since early that evening investigating various bars. Cottrell and S returned to the bar and S told Metts that Cottrell had told him he was an A.B.C. agent. In response, Metts told him that Cottrell was a pick-up man, i.e., he picked up junk. S in response thereto told the bartender "I hope he's not driving home because he's too drunk to walk." Metts laughed and told S that he had heard that one before. S then noticed Cottrell's hands fumbling as he went to produce change for another drink. During this period of time, he also noticed Cottrell's eyes partially closed as he leaned his head on the bar supported by his elbows. Cottrell appeared to S to be intoxicated. S then asked the bartender if he had read in the local papers about the task force that was inspecting various taverns for serving intoxicating persons, and Metts replied that he had noticed the article. At approximately 11:40 p.m., Cottrell ordered another beer and paid thirty-five cents for it. He drank a portion of this beer, and at this time S went outside and signalled the waiting State Troopers to arrest Cottrell when he left the premises. S re-entered the tavern and identified himself and D as Alcoholic Beverage Control agents. The beer which Cottrell had been drinking was seized and placed in a container. The beer was then transmitted to the Division of Alcoholic Beverage Control for chemical analysis, which analysis was performed by Penelope A. Moore. The analysis indicated that the liquid was an alcoholic beverage. This finding was certified by Joseph H. Lerner, Director of Alcoholic Beverage Control. The analysis and certification were introduced into evidence at the hearing.

After Cottrell was taken into custody, S and D went into the kitchen area with Metts and questioned him as part of their routine investigation. S asked Metts if he would drive with Cottrell in his present condition, and Metts answered, "no."

On cross-examination, when asked what symptoms led S to believe that

Cottrell was intoxicated, he listed Cottrell's difficulty with his balance, swaying, mumbling, speaking to himself, incoherent speech, appearance of his eyes as half-closed, bloodshot eyes, the fumbling of his hands, and the strong odor of alcoholic beverage emanating from Cottrell when S had engaged him in a conversation in the men's room. S acknowledged he was not sure if Metts saw Cottrell walking to the men's room. He was sure, however, that Metts saw Cottrell consume the first glass of beer that had been served to him by Metts.

The next witness on behalf of the Division was Agent D, a member of the New Jersey State Police Alcoholic Beverage Control Division for the past 18 years. On the evening in question, he was also an investigator serving as part of the special task force previously referred to. At approximately 11:30 p.m. on the date in question, he entered Bill & Betty's Tavern with S and sat down on a bar stool to the left of S. He testified that Metts was behind the bar when he entered, and that the patron seated somewhat to the right of S immediately appeared to him to be intoxicated. He based his opinion that the patron was intoxicated on the mannerisms exhibited by the patron at the bar and the conversation that the patron appeared to be having with himself. He saw Metts serve the patron, Mr. Cottrell, two beers. He further testified that he overheard the conversation between Metts and S when Metts told S that Cottrell was a "pick-up man." D felt that the bartender was fully aware of Cottrell's condition. D noted that Cottrell had difficulty walking to the men's room, had difficulty standing and was swaying on his way to the men's room. He described Cottrell's speech as slurred and "thick-tongued." Upon a close look at his face, Cottrell's eyes appeared glassy. D also noted the slow movement of Cottrell's hands when he was producing the money to pay for the drinks that he had been served. D recalled that after D and S identified themselves to Metts as Alcoholic Beverage Control agents, and engaged Metts in the conversation in the kitchen, that Metts admitted to S and D that Cottrell appeared intoxicated and that Metts further acknowledged that he would not drive with him.

Under cross-examination, D admitted that Cottrell did not appear to be an "alert" person to him. He also acknowledged that he had no direct conversation with Cottrell. He did recall, however, a conversation wherein Metts told D and S that Cottrell was a regular customer at Bill & Betty's Tavern. He estimated the distance that Cottrell walked between the bar stools and the men's room as 12 to 14 feet and said that it was "tight quarters," that is, one had to negotiate between the pool table and the wall to get to the men's room.

Testifying on behalf of the licensee was the bartender at the time in

question, Joseph Metts. He had been a bartender in the premises for the past 4 years and had known Mr. Cottrell prior to the evening in question. Mr. Metts stated that he had been a bartender for a total of six years and he was well aware of the prohibition regarding the serving of alcoholic beverages to intoxicated persons. He claimed he made it his policy not to serve "drunks." On the date in question, he began work at 5:00 p.m. He recalls the agents' entering the premises at approximately 11:30 p.m. At that time there were approximately 5 patrons in the premises, four males and one female. The agents ordered drinks from Mr. Metts. Metts stated that Cottrell had entered the premises five minutes prior to the entry of the agents and not after the agents as testified by the agents. Cottrell did sit next to the agents. Metts, however, recalls that during the period of time that the agents were in the premises a female patron had engaged Cottrell in a conversation, which neither of the agents recalls. Metts stated that Cottrell had no difficulty walking. He acknowledged that Cottrell often speaks with no continuity and in a slurred fashion because he has a speech impediment. He admitted jesting with the agents in regards to the joke about Cottrell's ability to walk and drive, but regarded it as nothing more than a bar-room joke. He characterized Cottrell as "loosely wound" and stated that unless one knew him one would ordinarily think that Cottrell was under the influence of intoxicating liquor from his speech and mannerisms. He knew about the "crackdown" on the service to intoxicated patrons and stated that this made him doubly careful about whom he served. He also stated that after the agents identified themselves to him, he told them that the mannerisms that Cottrell exhibited that evening were normal for him.

Under cross-examination, Metts denied telling the agents that he thought Cottrell was intoxicated when he served him. He regarded the jokes that were passed back and forth between he and Agent S as nothing more than normal tavern jokes. He testified that Cottrell always exhibited a "closed-eyed look" and that his eyes were always on the droppy side. He stated, in direct response to a question, that if he felt he had violated the law and served Cottrell while intoxicated he would readily admit it.

The next witness on behalf of the licensee was a Roy J. Cull, a patron of the tavern who was present on the evening in question. He stated that he has known Mr. Metts, the bartender, for approximately five to six years and also has known Mr. Cottrell for a period of time. He was present at the time the agents were in the premises. He stated that Cottrell always speaks with a slur and felt that the first time that you saw him you would think that he was intoxicated even if he were not, in fact, intoxicated. He recalls seeing Cottrell pass the pool table on his way to the men's room and in his opinion he didn't feel that he staggered or swayed anything more than his normal gait.

He also recalls there being a female present in the premises when the agents were present.

Under cross-examination, he admitted that while he was in the tavern, he wasn't paying any particular attention to Cottrell. He further admitted that he has seen Cottrell intoxicated and stated that when Cottrell is intoxicated there is not a marked change in his speech or conversation. On the night in question, he only saw Cottrell have one drink and doesn't know if he had anything to drink prior to his entry into Bill & Betty's Tavern.

Under questioning by the court, Cull stated that he last saw Mr. Cottrell in September, and from conversation with Mr. Cottrell's brother, knows that he is still "around and in the area."

After carefully reviewing all of the evidence and testimony and having observed the demeanor of the witnesses, I **FIND**:

1. Respondent Bill & Betty's Tavern, Inc., was the holder of plenary retail consumption license No. 1212-33-001-001 issued by the Borough of Milltown, on September 15, 1979.

2. On November 29, 1979, the plenary retail consumption license was sold from Bill & Betty's Tavern, Inc. to J. T. Milltown, Inc. The sale and transfer was approved by the Mayor and Council of the Borough of Milltown.

3. On Saturday, September 15, 1979, as part of a special investigation, Agent S and Agent D entered Bill & Betty's Tavern at approximately 11:30 p.m.

4. The bartender at the time when premises were entered, by Agent S and Agent D, was a Joseph Metts.

5. Shortly after the entry of Agent S and Agent D into the premises, a patron by the name of William Cottrell also entered the premises and took a seat to the right of Agent S and Agent D.

6. Mr. Cottrell ordered a glass of beer from Mr. Metts, which he was served by Mr. Metts and which Mr. Cottrell paid for.

7. While sitting at the bar, Mr. Cottrell at various times talked to himself.

8. While walking around inside the tavern, Mr. Cottrell had difficulty in walking and maintaining his balance.

9. During the course of his investigation Agent S engaged in a conversation with Mr. Cottrell.

10. Cottrell's speech was unclear and garbled.

11. Cottrell's eyes appeared glassy.

12. Cottrell's hand fumbled as he attempted to produce money to pay for the drinks which he had ordered from Mr. Metts.

13. Agent S in a joking fashion made the bartender aware of Mr. Cottrell's condition subsequent to the service of the first drink to Cottrell

but prior to the service of the second drink to Mr. Cottrell.

14. While seated at the bar, Cottrell's eyes were partially closed.

15. Cottrell consumed all of the first drink which was served to him and part of the second drink.

16. Supporting his head by his elbows, Cottrell leaned on the bar.

17. Cottrell exhibited various manifestations of intoxication and appeared to be intoxicated.

18. Metts was aware of the prohibition of service of alcoholic beverages to apparently intoxicated persons.

19. The substance which had been served to Cottrell by Metts was analyzed and proved to be an intoxicating beverage.

20. Agent S and Agent D, after identifying themselves, conferred with Mr. Metts regarding Cottrell's condition.

21. Metts acknowledged to Agent S and Agent D during conversation that he would not drive in a motor vehicle with Cottrell.

I **CONCLUDE** that the Division has proven the charges by a preponderance of the believable and competent evidence. In evaluating the testimony and deciding its legal impact, the firmly established norm regarding disciplinary proceedings against liquor licenses, is that the proceedings, although they may be criminally prosecuted, are civil in nature. The charges, therefore, need only be proven by a preponderance of the believable evidence. *Butler Oak Tavern v. Division of Alcoholic Beverage Control*, 20 *N.J.* 373 (1956); *Freud v. Davis*, 64 *N.J. Super.* 242 (App. Div. 1960).

In the present matter, the respondent is charged with having sold, served and delivered and with allowing, permitting and suffering the sale, service and delivery of alcoholic beverages to a person actually or *apparently* (emphasis added) intoxicated persons and with having allowed, permitted and suffered the consumption of alcoholic beverages by such persons in violation of *N.J.A.C.* 13:2-23.1. This rule was promulgated in furtherance of the objectives of *N.J.S.A.* 33:1-73, *et seq.*, i.e., "to be remedial of abuses inherent in liquor traffic." Cf. *Butler Oak Tavern, supra* at 385. The rule in question, *N.J.A.C.* 13:2-23.1 a & b was not promulgated solely for the benefit of minors and intoxicated persons but for the protection of the members of the general public as well. Cf., *Essex Holding Corp. v. Hock*, 136 *N.J.L.* 28 (Sup. Ct. 1947).

When alcoholic beverages are sold by a tavern keeper to a minor or to an intoxicated person, the unreasonable risk of harm not only to the minor or intoxicated person but also to members of the traveling public may readily be recognized and foreseen; this is particularly evident in current times when traveling by car to and from the tavern is so

commonplace and accidents resulting from drinking are so frequent.

*Rapport v. Nicholas*, 31 *N.J.* 188 (1950) (at 202).

See also, *National Safety Council, Accidents Facts*, p. 49 (1959 ed.); "Resume of Annual Reports of the Chief Medical Examiner of the County of Middlesex, State of New Jersey" (1933-1958), p. 9; Study No. 885.A13, Minnesota Department of Highways, "The Relationship of Drinking and Speeding to Accident Severity" (1959). The Division has recognized the inherent dangers to society in the sale or service of liquor to intoxicated persons and has created the so-called "Task Force" in an attempt to curb such sales. The agents in the present case were part of this Task Force. The existence of such a Task Force and its objectives were widely publicized through Middlesex County and the State at large. The bartender in the present case acknowledged that he had read about the Task Force's existence a short time prior to the night of the incident. He was well-aware of its existence and its objectives.

In order to establish a violation of *N.J.A.C.* 12:2-23.1, the Division must show a sale, delivery or allowance of an alcoholic beverage to a person who is actually or apparently intoxicated. I **CONCLUDE** that the Division has by a preponderance of the evidence proved all these elements.

There is no question as to the sale. It was testified to by both Agent S and Agent D and it was admitted by the bartender Metts.

I similarly **CONCLUDE** there is no question that the liquid served was an alcoholic beverage. This was verified by the chemical analysis performed by the New Jersey State Police.

I further **CONCLUDE** that Mr. Cottrell was, or was apparently, intoxicated at the time and place in question. There was conflicting testimony as to whether Cottrell was "apparently" intoxicated. The two agents who investigated the premises said he was. The bartender and the other patron said he was not, but indicated that the appearance of intoxication was normal for Mr. Cottrell, due to his unusual mannerisms, such as his mumbling (due allegedly to a speech impediment) and his habit of talking to himself. Metts referred to Cottrell as being "loosely wound" and Cull said he was "kind of slow." We must, however, only be concerned with the person's objective external manifestations. There is not, nor should there be a requirement of a previous knowledge of a person's habits or conduct when judging apparent intoxication. As the courts have said:

The average witness of ordinary intelligence, although lacking in special skill, knowledge and experience, but who has had the opportunity of observation, may testify whether a person was sober or intoxicated.

*Castner v. Sliker*, 33 *N.J.L.* 95 (Sup. Ct. 1868) (at 97)

*See also, Freud v. Davis*, 64 *N.J. Super.* (App. Div. 1960) at 242; *State v. Guerrido*, 60 *N.J. Super.* 505, 511 (App. Div. 1960); *State v. Pickadou*, 34 *N.J. Super.* 177, 180-1 (App. Div. 1955). The inquiry as to apparent intoxication is habitually and properly inquired into of witnesses who have had occasion to see the person. This opinion is used not only in matters as in the present, but is constantly utilized in alleged motor vehicle offenses. In both instances, it has been uniformly held that the measure of judgment of the witnesses must be submitted to the trier of the facts. *State v. Damoorgian*, 53 *N.J. Super.* 108, 114 (Cty. Ct. 1958). The decision in this matter will, therefore, rest on the acceptance or rejection of the testimony of the witnesses for either the Division or the respondent.

The question is whether a reasonable mind might accept the condition of Cottrell as apparently intoxicated, and whether this decision would be was supported by substantial factual evidence. I **CONCLUDE** it would be. The detailed observations of Cottrell's condition as observed by the agents established the observable manifestations of apparent intoxication.

The term 'apparently' refers to the observable manifestations or symptoms of excessive indulgence in alcoholic beverages. It portrays a person so far under the influence of alcoholic beverages that his conduct and demeanor have departed from the normal pattern of behavior. *Division of Alcoholic Beverage Control v. Zane*, 99 *N.J. Super.* 196, 201 (App. Div. 1968).

I **FIND** no merit in the respondent's contention that Cottrell's manifestations were not a departure from his normal behavior. To accept this would place the impossible burden on investigating agencies of knowing what each suspected drunkard's individual idiosyncrasies were. To do so would defeat the legislative intent of *N.J.S.A.* 33:1-77 and the administrative purpose of *N.J.A.C.* 13:2-23.1.

The testimony of the agents included some of the well recognized indicia of observable manifestations of intoxication, including Cottrell's speech, mannerisms and inability to walk properly. Additionally, Cottrell admitted to Agent S that he had been frequenting taverns on the day in question for a number of hours. "Experience has revealed that defendants in these cases do not exaggerate their estimates." *State v. Pichadou*, *supra* at 178.

I therefore **CONCLUDE** Cottrell was apparently intoxicated. In view of the standard of conduct prescribed by the statute and the regulations, I **CONCLUDE** that at the time of the sale, the bartender Metts, knew or should have known that Cottrell was intoxicated.

It should be noted that the best witness as to whether or not Cottrell was, in fact, intoxicated would have been Cottrell himself. The licensee, however, never called Cottrell to the stand to testify as to the incident and

his condition at the time of the incident. The failure to call witnesses who may have relevant testimony and who are available to testify creates an adverse inference; that is, if they had been called they could not have truthfully contradicted the testimony of the opposing party's witnesses, and their testimony would have been unfavorable to the licensee. *Yacker v. Weiner*, 109 N.J. Super. 351, aff'd. 114 N.J. Super. 526 (App. Div.) (1979); *Hickman v. Pace*, 82 N.J. Super. 43 (App. Div. 1966); and *O'Neil v. Bilotta*, 18 N.J. Super. 82, (App. Div. 1951) aff'd. 10 N.J. 308 (1952).

Since the respondent-licensee did not produce Cottrell, nor reasons for his non-appearance, an inference is drawn that the licensee fears the exposure of such facts as would be testified to by Cottrell. *Cf.*, *State v. Clawans*, 38 N.J. 162, 170-171 (1962).

Having, therefore found the licensee in violation of N.J.A.C. 13:2-23.1, it is hereby **ORDERED** that the plenary retail consumption license No. 1212-33-001-001, heretofore issued to Bill & Betty's Tavern, Inc. by the Mayor and Council of the Borough of Milltown and presently held by J. T. of Milltown, Inc., be and same hereby is **SUSPENDED** for a period of twenty-five days commencing at a date to be fixed by the Director or in lieu thereof that the licensee be permitted to pay a fine in an amount fixed by the Director.

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After reviewing the Initial Decision, the  
Director of the Division of Alcoholic  
Beverage Control, on February 13, 1980,  
issued the following Final Decision:

Having carefully considered the entire record herein, including the transcript of the testimony, the exhibit, the initial decision and the licensee's exceptions to the initial decision, I concur with the findings and conclusion herein and adopt them as my own.