

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

BM Petro, Inc.
8240 Fair Oaks Blvd.
Carmichael, CA 95608-2414

Licensee(s).

File No.: 21-476650

Reg. No.: 18088284

**Precedential Decision
No.: 21-01-E**

**DESIGNATION OF DECISION AS PRECEDENTIAL UNDER
GOVERNMENT CODE SECTION 11425.60**

Pursuant to Government Code Section 11425.60, the Department of Alcoholic Beverage Control hereby designates as precedential its decision, dated November 12, 2019, in the above-referenced action.

This decision is designated precedential effective December 22, 2021.

Sacramento, California

Dated: December 22, 2021



Eric Hirata
Director

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

File No.: 21-476650

Reg. No.: 18086948

BM Petro, Inc.
8240 Fair Oaks Blvd.
Carmichael, CA 95608-2414

Respondent

Off-Sale General License

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department November 12, 2019, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on March 28, 2019, before Administrative Law Judge Alberto Roldan, and the written arguments of the parties, adopts the following decision.

In a two-count accusation, the Department seeks to discipline Respondent's license on the grounds that,

- On or about June 13, 2018, respondent-licensee's agent or employee, Harmit Singh Dhillon, at the licensed premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: distilled spirits, to Kara Mulrooney, an obviously intoxicated person, in violation of California Business and Professions Code¹ section 25602(a).
- On or about June 13, 2018, respondent-licensee's agent or employee, Harmit Singh Dhillon, at the licensed premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to wit: distilled spirits, to Kara Mulrooney, a habitual or

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

common drunkard, in violation of California Business and Professions Code section 25602(a). (Exhibit D-1)

In each of the above two counts alleged in the accusation, the Department further alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b) of the Business and Professions Code. The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b). (Exhibit D-1)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on March 28, 2019.

FINDINGS OF FACT

1. The Department filed the accusation on November 30, 2018.
2. The Department issued a type 21, off-sale general license to the Respondent at the above-described location on September 9, 2009 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. On June 13, 2018, Officer S. Rice (Rice) of the California Highway Patrol (CHP) responded to a traffic collision between a car and a motorcycle at Fair Oaks Boulevard and Hillsgrove Avenue. Rice had 24 years of training and experience with CHP and had investigated thousands of collisions during his career. Rice also had extensive training and experience in the investigation of driving under the influence cases. When Rice arrived, he observed that a motorcycle was damaged from a collision with a car. Based on the time of the call, witness statements and physical evidence, Rice determined that the collision had occurred at approximately 9:30 a.m. Witnesses pointed out to Rice a gold colored Honda Accord as the vehicle that had cut off the motorcyclist by turning into its path. Rice observed significant damage to the right side of the Accord that was consistent with it having been involved in a collision with the motorcycle as described by the witnesses. Based on the witness reports and the physical evidence Rice observed, Rice determined that the Honda Accord was proceeding eastbound on Fair Oaks Boulevard. just prior to turning left into an apartment complex. While making this turn, the driver of the Honda Accord failed to yield to the motorcyclist who was proceeding westbound on Fair Oaks Boulevard.
5. The operator of the Honda Accord left the scene prior to Rice's arrival. Rice ran the registration records of the Honda Accord and determined that the vehicle was associated with Kara Mulrooney (Mulrooney). Rice determined that Mulrooney lived in apartment #10 at 8601

Fair Oaks Boulevard, which was the complex the Honda Accord had been turning into at the time of the collision. Rice went to Mulrooney's apartment, knocked on the door and announced himself as law enforcement. Rice heard movement in the apartment, but no one responded to the door.

6. After getting no response, Rice entered Mulrooney's apartment and contacted her at approximately 10:54 a.m. to determine if she was injured and to continue the investigation of the collision. Rice immediately determined that Mulrooney was exhibiting obvious signs of intoxication. Rice initially had to do a sternum rub with his knuckles to revive Mulrooney so he could speak with her. Mulrooney smelled strongly of alcohol. She had red, watery eyes. Her speech was slurred. Her clothing was unkempt and dirty. At one point when she stood, she staggered, and her shorts fell down. Rice observed her movements to be slow and deliberate.

7. Mulrooney told Rice that she had purchased vodka at the nearby Valero gas station on Fair Oaks Boulevard, which was the Licensed Premises. Mulrooney described herself to Rice as "fucked up" but denied having drunk any alcohol since before the vodka purchase at the Licensed Premises that day. Mulrooney told Rice that she had also taken OxyContin earlier. While she did not clarify when she had taken the OxyContin, she stated that she had taken the OxyContin while drinking vodka. Rice accompanied Mulrooney to the hospital where he observed a phlebotomist draw a blood sample from Mulrooney at 11:32 a.m. on June 13, 2018. Rice booked the sample into evidence and it was later tested by the Sacramento County District Attorney's Office Laboratory of Forensic Services. The sample taken from Mulrooney had a blood alcohol level of .345 percent and showed the presence of Oxycodone². (Exhibit D-2)

8. On June 13, 2018, CHP Officer C. Hertzell (Hertzell) spoke with Harmit Singh Dhillon (Dhillon), the clerk who sold vodka to Mulrooney just prior to the collision. Dhillon told Hertzell that it was obvious that Mulrooney had been drinking prior to the purchase. Dhillon reported that Mulrooney was a regular customer over the course of several years and that she bought alcohol and other items multiple times a week. Dhillon also allowed Hertzell to watch the surveillance monitors. Hertzell, like Rice, was an experienced traffic officer familiar with under the influence investigations. He observed that Mulrooney was moving in a slow, deliberate manner while purchasing the vodka from Dhillon. She was also having trouble using an ATM card and handling her purse as evidenced by her need to grasp both with both hands and her need to have Dhillon complete the transaction for her. Mulrooney was barefoot when she entered the Licensed Premises.

9. Department Agent B. Pender (Pender) spoke with Mulrooney on June 13, 2018, after she returned to her apartment from the hospital. She stated that she bought Smirnoff vodka at the Licensed Premises earlier that day. Mulrooney perceived herself as being intoxicated during the

² OxyContin is an extended release formulation of Oxycodone.

purchase given that she was shaky and had been on a multi-day drinking binge prior to the purchase. She had trouble entering her PIN number to pay for the purchase, so she ultimately had Dhillon complete the purchase transaction as a credit purchase. Mulrooney stated that she was a regular customer at the Licensed Premises and that she knew Dhillon well. Pender obtained the receipt for the purchase which showed the transaction occurring at 9:27 a.m. on June 13, 2018. (Exhibit D-3) Mulrooney left the Licensed Premises by vehicle and the collision with the motorcycle occurred approximately 3 minutes after the purchase.

10. Pender re-interviewed Mulrooney on June 14, 2018. During this interview, Mulrooney stated that she drank half a pint of vodka after waking on June 13, 2018, at approximately 8 a.m. and before going to the Licensed Premises. Mulrooney testified that she bought all her alcoholic beverages from the Licensed Premises because it was close by her home. Mulrooney recalled prior instances where she had made alcohol purchases at the Licensed Premises while she felt intoxicated and she described an incident prior to June 13, 2018, when Dhillon drove her home because she was too intoxicated to get home from the Licensed Premises. Mulrooney did not mention being denied alcohol sales at the Licensed Premises during periods when she was making purchases when intoxicated.

11. Pender went to the Licensed Premises on June 14, 2018, to try to speak with Dhillon. When Pender initially asked for Dhillon, Dhillon told Pender that Dhillon was not there. Once Pender identified himself as a law enforcement officer, Dhillon immediately admitted that he was Dhillon. Dhillon admitted to knowing Mulrooney and that she was a regular customer for about 10 years. Dhillon admitted to knowing that Mulrooney drank regularly and that he had seen her on multiple occasions intoxicated prior to June 13, 2018. Dhillon stated to Pender that he had prevented Mulrooney from making purchases on prior occasions because she was “very drunk” and “really messed up”. On at least one occasion, Dhillon stated that he had driven her home from the Licensed Premises because she was too intoxicated to get home on her own.

12. Pender obtained and preserved video recordings of the surveillance system from the Licensed Premises monitors that showed Mulrooney’s movement through the Licensed Premises and interaction with Dhillon during the transaction on June 13, 2018. Pender did this by using the video function on his smart phone to record the surveillance system while it was run at regular speed. (Exhibits D-4 and L-1) The exhibits show Mulrooney from two separate angles. They show Mulrooney moving in a shuffling fashion. Her movements are markedly slower than the movements of other persons in the Licensed Premises. Mulrooney is unsteady in the handling of her purse and Dhillon ultimately assists Mulrooney in retrieving her ATM card. After Mulrooney is unable to enter her PIN number, Dhillon ultimately takes possession of Mulrooney’s ATM card and rings up the transaction as a credit purchase. During their interviews, both Mulrooney and Dhillon talked about this occurring. In the videos, Mulrooney then slowly reaches forward and uses both hands to take back the card from Dhillon. Mulrooney

appears unsteady in the receipt of the card, the handling of her purse and in walking out of the Licensed Premises to her vehicle.

13. Dhillon testified in this matter. He testified to knowing Mulrooney for multiple years and that she made purchases multiple times a week at the Licensed Premises. He testified to her voice sounding “fine” when she said “morning” to Dhillon and asked to buy vodka upon entering on June 13, 2018. He testified to not noticing any abnormal behavior in Mulrooney that morning. Dhillon testified to not smelling alcohol when he interacted with Mulrooney. Dhillon testified that her eyes were not bloodshot and watery on June 13, 2018. Dhillon testified to knowing what Mulrooney was like when she was intoxicated because he had declined to sell to her on occasions where she appeared to be intoxicated. Both she and her boyfriend have entered the Licensed Premises intoxicated on multiple occasions prior to June 13, 2018, according to Dhillon. Dhillon testified to Mulrooney having trouble with entering the PIN on June 13, 2018, as the result of her not being able to remember her boyfriend’s PIN number. This is what led Dhillon to take Mulrooney’s card and complete the transaction for her as a credit card purchase. Dhillon testified to telling the CHP officer that “I don’t think so” in response to the officer’s question of whether Mulrooney was intoxicated when she made the purchase on June 13, 2018. Dhillon testified to looking at Mulrooney during the transaction and that he would not have sold to her if he thought she was intoxicated. Dhillon saw Mulrooney walk to her car and drive away after the vodka purchase on June 13, 2018.

14. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee’s violation or causing or permitting of a violation of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25602(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.
4. As noted in *Rice v. Alcoholic Bev. etc. Appeals Bd.* 118 Cal.App.3d 30, 35–36 (1981):

“Courts have long recognized that the outward manifestations of intoxication are well known and easily recognized. In *Coulter v. Superior Court* (1978) 21 Cal.3d 144, 155, the court said: “Defendants have argued that the term 'obviously intoxicated' is too broad and subjective to serve as a satisfactory measure for imposition of civil liability. However, the phrase is contained in section 25602, a criminal statute, and the courts have experienced no discernible difficulty in applying it. (See *Samaras v. Dept. Alcoholic Bev. Control* (1960) 180 Cal.App.2d 842, 844; *People v. Smith* (1949) 94 Cal.App.2d Supp. 975; *People v. Johnson* (1947) 81 Cal.App.2d Supp. 973, 975-976). As described in *Johnson*, “The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known outward manifestations which are plain and easily seen or discovered. If such outward manifestations exist and the seller still serves the customer so affected he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.”

5. In regard to opinion testimony of intoxication, the *Rice* court further noted: “Because the manifestations of intoxication are so well known, nonexpert witnesses may offer opinion testimony based upon their observations as to a person's intoxication. (*People v. Conley* (1966) 64 Cal.2d 310, 325)” *Rice v. Alcoholic Bev. etc. Appeals Bd.* (1981) 118 Cal.App.3d 30, 35–36

6. As noted above, “the use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are ‘plain’ and ‘easily seen or discovered.’ If such outward manifestations exist and the seller still serves the customer so affected he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.”³

7. The factors courts have relied upon in establishing whether or not a person is obviously intoxicated include incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, and argumentative behavior.⁴ It is not necessary for all of the signs described to be present in order to find that a person is obviously intoxicated, but there must be sufficient indications “to cause a reasonable person to believe that the one with whom he or she is dealing is intoxicated.”⁵

8. Cause for suspension or revocation of the Respondent’s license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that, on

³ *People v. Johnson*, 81 Cal. App. 2d Supp. 973, 975-76 (1947) (emphasis in original). See also *Schaffield v. Abboud*, 15 Cal. App. 4th 1133, 1141 (1993).

⁴ *Jones v. Toyota Motor Company, Ltd.*, 198 Cal. App. 3d 364, 370 (1988).

⁵ *Schaffield*, 15 Cal. App. 4th at 1140-41.

June 13, 2018, respondent-licensee's agent or employee, Harmit Singh Dhillon, at the Licensed Premises, sold an alcoholic beverage, to wit: vodka, a distilled spirit, to Kara Mulrooney, an obviously intoxicated person, in violation of California Business and Professions Code section 25602(a) as alleged in count one of the accusation. (Findings of Fact ¶¶ 2-13)

9. Despite Dhillon's claims to the contrary, there was substantial evidence that Mulrooney was obviously intoxicated and that this was, or should have been, apparent to Dhillon when he sold her a container of vodka. The video evidence revealed that Mulrooney had difficulty walking and performing the simple task of making an ATM transaction to the point that Dhillon had to intercede to complete the transaction for her. Mulrooney, in the video evidence, appears to be in slow motion compared to the movement of the people around her, including Dhillon. Mulrooney reported that she drank prior to going to the Licensed Premises on June 13, 2018. The credible physical evidence received in this matter was contrary to Dhillon's testimony. Dhillon's testimony in this matter was at odds with a statement he made to Hertzell where he said it was obvious that Mulrooney had been drinking. Given the inconsistencies in Dhillon's statements versus his testimony and the fact that his testimony is at odds with the physical evidence received in this matter, his testimony is given little weight. (Findings of Fact ¶¶ 2-13)

10. The physical symptoms and outward appearance of Mulrooney that Rice saw later were manifest for Dhillon to observe when she came in to make the purchase on June 13, 2018. Rice testified credibly that Mulrooney smelled strongly of alcohol, had red, watery eyes and her speech was slurred when he first contacted her about two hours after the purchase from Dhillon. He noted that Mulrooney's clothing was unkempt and dirty. The video evidence showed that Mulrooney entered the Licensed Premises barefoot. Her blood alcohol level when tested a few hours later was, astonishingly, nearly four times the legal limit. She crashed mere moments after leaving the Licensed Premises despite being on a road with which she was very familiar. Notably, Mulrooney herself perceived that she was intoxicated when she went to the Licensed Premises according to her statement to Pender on June 13, 2018. (Findings of Fact ¶¶ 2-13)

11. The evidence presented at the hearing established that Respondent's agent or employee, Dhillon, knew or should have known that Mulrooney was obviously intoxicated and should not be sold any alcoholic beverages at the time Mulrooney was sold the vodka on June 13, 2018 at the Licensed Premises, as alleged in count one. This count of the accusation is sustained.

12. Respondent argues that the term "habitual or common drunkard" was found to be unconstitutionally vague, uncertain, and incapable of being uniformly enforced under a prior version of Penal Code section 647 in *Ex parte Newbern* 53 Cal.2d 786 (1960).

13. However, the prior version of Penal Code section 647 only used the term "common drunkard," which is different than the language in Section 25602(a) of a "habitual or common drunkard." Even if the language is substantially similar enough to have the same result, this

hearing does not grant the authority to the Department to determine the constitutionality of any statute and refuse to enforce it on that basis.⁶

14. The evidence shows that Dhillon was aware that Mulrooney was a “habitual or common drunkard.” Dhillon stated that he knew Mulrooney well, she was a regular customer at the Licensed Premises for the past ten years, and he knew she drank habitually. Dhillon stated that Mulrooney repeatedly came to the Licensed Premises to purchase alcohol when obviously intoxicated. Mulrooney testified that she purchased all her alcohol at the Licensed premises and developed a friendly relationship with Dhillon due to her frequent patronage of the Licensed Premises. Dhillon claims he previously denied sales on multiple occasions to Mulrooney because she was obviously intoxicated. Dhillon stated that on at least one prior occasion Mulrooney was so intoxicated when entering the Licensed Premises that Dhillon drove her home because she could not get home on her own.

15. Due to Dhillon’s own admissions and testimony, Dhillon was aware that Mulrooney was a “habitual or common drunkard” based on their shared history. Dhillon chose to make a sale to Mulrooney on June 13, 2018, even with this knowledge in violation of Section 25602(a).

16. Cause for suspension or revocation of the Respondent’s license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that, on June 13, 2018, respondent-licensee’s agent or employee, Harmit Singh Dhillon, at the Licensed Premises, sold an alcoholic beverage, to wit: vodka, a distilled spirit, to Kara Mulrooney, a habitual or common drunkard, in violation of California Business and Professions Code section 25602(a) as alleged in count two of the accusation. (Findings of Fact ¶¶ 2-13)

PENALTY

The Department sought an aggravated penalty of 25 days for both counts. The multiple counts were alternative statements of the same transactional violation.

Under rule 144⁷, the standard recommended penalty for a violation of section 25602(a) is a 15-day suspension. The Department argued for a significant upward departure given the serious outcome that flowed, in part, from the Respondent’s sale of alcohol to Mulrooney, regardless of her condition of sobriety, as evidenced by this incident and the prior described history that was developed in this case. There appears to be a pattern of conduct where the Respondent’s agents allowed repeated sales to Mulrooney in circumstances where they knew or should have known that she was intoxicated and a habitual or common drunkard. Because of the Licensed Premises’

⁶ See Article III, section 3.5 of the California Constitution which states that an administrative agency has no power to declare a statute unenforceable or refuse to enforce a statute based on it being unconstitutional unless an appellate court has decided that such statute is unconstitutional.

⁷ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

tolerance of her alcohol purchases, regardless of her condition of sobriety, Mulrooney came to rely on the Licensed Premises as a place to get alcohol without having to worry about getting turned away. The Respondent failed in its duty to turn away obviously intoxicated persons and habitual or common drunkards trying to purchase alcohol. The evidence established that this appeared to be a pattern. Aggravation is warranted.

The only factor in mitigation applicable to this violation is the Respondent's lack of prior discipline over approximately nine years of licensure. The penalty recommended herein complies with rule 144.

ORDER

Counts one and two are sustained. The Respondent's off-sale general license is suspended for 20 days for each count. Respondent's suspensions are to be served concurrently.

Dated: November __, 2019

Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.