

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF ST. PAUL

In the Matter of the
City of St. Paul vs.
J.K. Corporation of
St. Paul, d/b/a
Depot Bar
241 East Kellogg Blvd.,
St. Paul, Minnesota

FINDINGS_OF_FACT,
CONCLUSIONS_OF_LAW
AND_RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Bruce D. Campbell, acting as a Hearing Officer for the City of St. Paul, on August 31, 1993, in the Landmark Towers, St. Paul, Minnesota.

Appearances: Philip B. Byrne, Assistant City Attorney, 800 Landmark Towers, 345 St. Peter Street, St. Paul, Minnesota 55102, appeared on behalf of the City of St. Paul; and Thomas Hughes, Attorney at Law, 1230 Landmark Towers, 345 St. Peter Street, St. Paul, Minnesota 55102, appeared on behalf of the Licensee, J.K. Corporation (Depot Bar, Licensee or Respondent).

The record of this proceeding closed on August 31, 1993, at the conclusion of the hearing.

This report is a recommendation, not a final decision. The St. Paul City Council will make the final decision after review of the record which may accept, reject or modify the Findings, Conclusions and Recommendations contained herein. Pursuant to P 310.05(c-1) of the St. Paul Legislative Code, after receipt of this report, the City Council must provide an opportunity to present oral or written arguments alleging error in this Report and to present argument related to any recommended adverse action.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are whether the J.K. Corporation, through its owner, John J. Kelly, violated P 409.08(6) of the St. Paul Legislative Code by permitting gambling on the licensed premises or in any room adjoining the licensed premises, and if so, what sanction is appropriate for the violation or violations established?

Based upon the record herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The J.K. Corporation of St. Paul holds an on-sale liquor license from the City of St. Paul represented by License I.D. No. 96489. That license is currently applicable to the Depot Bar, located at 241 Kellogg Boulevard East, St. Paul, Minnesota 55101. City Ex. 3. The same corporation holds a restaurant license, a Sunday on-sale liquor license and a charitable gambling license for the same location. The stock of J.K. Corporation of St. Paul is owned by John J. Kelly. Mr. Kelly has been a bartender and on-sale liquor establishment owner since approximately 1969. He has owned seven or eight bars, serially, over the last 24 years in and around the City of St. Paul. Mr. Kelly and his family currently operate the Depot Bar in Saint Paul.

2. In April of 1993, the Vice Division of the St. Paul Police Department received civilian complaints about unlawful gambling occurring at the Depot Bar. The St. Paul police requested that the Gambling Enforcement Division of the Minnesota Department of Public Safety conduct an undercover surveillance investigation at the Depot Bar. Between April 13, 1993, and April 27, 1993, Special Agent John Overland posed as a patron of the bar to observe whether any illegal gambling activities were occurring on the licensed premises.

3. On April 13, 1993, Special Agent Overland was working in an undercover capacity. He entered the Depot Bar at approximately 5:30 p.m. Mr. John Kelly, the owner of the bar, was tending bar. Mr. Kelly was upset because the bartender who should have been working that shift had not appeared for work. Another employee of the establishment, the fry cook, was talking with a male who used the name, "Doug". Doug was the man la

4. On April 14, 1993, Special Agent Overland, working in an undercover capacity, again entered the Depot Bar at approximately 11:40 a.m. Mr. Sabby was not in the Depot Bar when Special Agent Overland arrived. After Special Agent Overland had left the bar and was sitting in his vehicle in the bar's parking lot, he saw Mr. Sabby park in the bar lot and exit his maroon or wine colored two-door Buick Riviera, carrying a cellular phone. Mr. Sabby entered the bar at approximately 11:55 a.m. on April 14, 1993. Special Agent Overland did not reenter the bar for fear of appearing suspicious.

5. On April 15, 1993, Special Agent Overland, working in an undercover capacity, entered the Depot Bar at approximately 6:00 p.m. Special Agent Overland observed Mr. Sabby talking with Mr. Kelly, the bar owner, and a bar patron. Mr. Sabby was carrying his cellular phone as he usually did while he was in the bar. On a number of occasions, Mr. Sabby received cellular telephone calls. When that occurred, he would walk past the bar and out the back door of the establishment. After a short period of time, he would come back into the bar and continue conversing with the bar owner and bar patrons. During the evening, Mr. Sabby also received calls on the hard-wired telephone

at the bar. A number of bar patrons, however, other than Mr. Sabby, did use the hard-wired phone and received and placed calls over that telephone. On one occasion, Mr. Sabby took a call on the house phone, talked momentarily and then hung up. After hanging up, he walked towards the back door of the bar. While he was walking out the back door, his cellular phone rang. Several times when Mr. Sabby answered his cellular phone that evening he would remove from his inside breast pocket a folded 8 1/2" x 11" sheet of paper folded in half and a smaller paper book or pamphlet. After taking the call, Mr. Sabby would write something on the 8 1/2" x 11" paper and return the two documents to his pocket. Special Agent Overland could not see what Mr. Sabby was writing.

6. During the evening, Mr. Sabby, Mr. Kelly and bar patrons had a number of conversations that included Mr. Sabby talking about bets and bets he had placed. Specific mention was made of a \$1,000 bet, a \$200 bet and at least one smaller bet. These conversations were not, however, in the context of a bet that Mr. Sabby had placed that evening. After one phone call, Mr. Sabby hung up the phone and stated, "I have it booked." There is no evidence in the record as to whether Mr. Sabby was referring to a bet that had been placed with him or whether the reference was to booking a trip that he had been planning. At approximately 9:00 p.m., Mr. Sabby and the people with whom he had been speaking left the bar.

7. On April 20, 1993, Special Agent Overland was working in an undercover capacity and entered the Depot Bar at approximately 6:15 p.m. Richard Kelly, the owner's brother, was bartending. Mr. Kelly, the owner, was not in the establishment. Several persons that Special Agent Overland recognized were present and speaking to the bartender, including the female employee named Renea. While Special Agent Overland was in the bar, the house phone would ring. Most of the incoming callers asked to speak to Mr. Sabby. Mr. Sabby's whereabouts were unknown to the person answering the phone. The bar patrons around the bar, several of whom Special Agent Overland could identify, talked about Mr. Sabby's bookmaking operation and how at least one individual owed him a significant amount of money. Several of the bar patrons talked about bookmaking activities and placing bets, including trips to Las Vegas to place bets on National Football League games prior to the pre-season. Special Agent Overland left. He did not see Mr. Sabby at the bar on April 20, 1993.

8. On April 21, 1993, Special Agent Overland, working in an undercover capacity, entered the Depot Bar at approximately 5:45 p.m. The bar employee named Renea was bartending. Special Agent Overland observed Mr. Sabby leaving the bar after his cellular phone had rung carrying a yellow writing pad and the folded 8 1/2" x 11" sheet and small pamphlet book that Special Agent Overland had observed previously. After a

period of time, Mr. Sabby reentered the Depot Bar through the back door. After

he came back in, the telephone rang several times. Mr. Sabby had apparently left the bar and entered his vehicle in the parking lot. At least the bar patrons who were friends of Mr. Sabby believed that he had passed out in his car because one patron had knocked on the car window without receiving a response. Special Agent Overland left the bar.

9. On April 22, 1993, Special Agent Overland was working in an undercover capacity. At approximately 6:05 p.m., he entered the Depot Bar. The bar employee named Renea was bartending. On at least one occasion, a caller, using the house phone, requested to know the whereabouts of Mr. Sabby.

The owner's brother, Richard, asked Renea where Mr. Sabby was. Renea replied that Mr. Sabby was not in the bar and that his phone was turned off. Special Agent Overland left the bar.

10. On April 27, 1993, Special Agent Overland entered the Depot Bar at approximately 6:45 p.m. He was working in an undercover capacity. Mr. Sabby and the owner of the bar, John Kelly, were in the bar talking. Mr. Kelly's brother, Richard, was bartending. While Mr. Sabby was talking to Mr. Kelly, he was holding his cellular phone. During a conversation with a bar patron overheard by Mr. Kelly, Mr. Sabby and the bar patron discussed "over" and "under" in the context of sporting events. After a period of time, Mr. Sabby told the bartender that he was expecting a call and that if it came before 9:00, he would be across the street. Mr. Sabby took his writing pad and cellular phone and left the bar.

11. On April 29, 1993, the St. Paul Police Department executed a valid search warrant on the person and vehicle of Douglas Sabby. The search warrant was executed on Mr. Sabby's person shortly after he left the Depot Bar by vehicle and entered the Gopher Bar. When Mr. Sabby was searched at the Gopher Bar, the police recovered from his person a cellular telephone, \$2,000 in cash, betting slips, a sports line sheet book and a sheet of paper with betting balances noted on the sheet. In Mr. Sabby's vehicle, the officers found betting slips on pads of paper with the Depot Bar name, baseball line sheets, betting slips, a packet of water soluble paper, and pieces of paper with betting balances written on them. Mr. Sabby was arrested for felony sports bookmaking and subsequently pleaded guilty to at least one felony sports bookmaking charge.

12. At approximately 8:30 p.m. on April 29, 1993, the St. Paul police executed a second sports gambling warrant and searched the Depot Bar. During the search of the bar and the back bar area, the police recovered a ten-number gambling card, a homemade ten-number gambling card, an envelope addressed to Doug Sabby, c/o the Depot Bar, 241 East Kellogg Boulevard, St. Paul, Minnesota, a notation of an apparent indebtedness, and the bar's address directory which included the name of Mr. Sabby.

13. At the hearing herein, Mr. Sabby admitted to having been a sports bookmaker and a good customer and friend of Mr. John Kelly, the owner of the

bar. He admitted to being in the bar four to five times a week. Mr. Sabby denied ever accepting a bet in the bar. He admitted to receiving calls on both the house telephone and on his cellular phone. When he received a call on his cellular phone in which a bet was to be placed, he testified that he always left the bar, generally going to the parking lot to complete the telephone bookmaking transaction. He would then, typically, reenter the bar. Mr. Sabby denied ever accepting a bet in the bar itself, because he did not wish to cause trouble for his friend Mr. Kelly. Mr. Sabby always took his bets on 8" x 10" water soluble paper, not on

14. Mr. John Kelly considered Mr. Sabby to be a friend and a good customer. Mr. Kelly had known for a significant period of time that Mr. Sabby was a sports bookmaker. Mr. Kelly never saw Mr. Sabby take a bet on either the house phone or his cellular phone in the bar itself. Mr. Kelly never placed a bet with Mr. Sabby. Mr. Kelly knew that Mr. Sabby was accepting illegal sports bets when he would receive a telephone call on his cellular phone, leave the bar for a short period of time and then return. Mr. Kelly took the position that he had no responsibility for what occurred outside of the bar room itself, in his parking lot or other grounds associated with the bar.

15. Mr. Kelly had some ten-number gambling boards in the bar in the past, but when the City announced that they were unacceptable and illegal, Mr. Kelly stopped allowing the distribution of such cards within the bar.

16. The notation on the piece of paper referring to John Coria owing \$250, attached to City's Ex. 6 and recovered during the search of the bar by the police, refers to a wage situation with a former employee. Mr. Kelly is not interested in gambling or sports bookmaking and is not familiar with the terms of the trade, like "over" and "under".

17. On August 4, 1993, an Amended Notice of Hearing was properly served on the Licensee's attorney, Mr. Hughes.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the St. Paul City council have jurisdiction in this matter pursuant to Minn. Stat. § 14.55 and § 310.05(c-1) of the St. Paul Legislative Code.

2. The Amended Notice of Hearing was proper in form and was validly served.

3. There is insufficient evidence to conclude that Mr. Sabby actually

accepted illegal sports wagers in the bar room itself, or in rooms physically attached to the bar room.

4. The owner of the bar, Mr. Kelly, and other bar employees knew that Mr. Sabby was in the business of accepting illegal sports bets.

5. Mr. Sabby, on numerous occasions with the knowledge of the bar owner, Mr. Kelly, and other bar employees, received telephone calls soliciting the acceptance of an illegal sports bet in the bar room or in rooms attached to the bar room, left the bar room and actually accepted the illegal wager outside of the bar, typically in the bar's parking lot.

6. Mr. Kelly, the owner of the bar, knew that Mr. Sabby received calls on the bar's house phone soliciting the acceptance of illegal sports bets which were later received by Mr. Sabby on his cellular phone, with the consummation of the transaction outside of the bar room and adjoining rooms, typically in the bar's parking lot.

7. Mr. Kelly was not aware of illegal ten-number sports cards being sold or circulated in the bar after the City of St. Paul had warned that such activity was illegal.

8. There is no evidence in the record that the handmade illegal ten-number card seized as a result of the executed search warrant was prepared by Mr. Kelly or any employee of the bar or was in the bar with the knowledge of Mr. Kelly or any of the bar's employees.

9. As a consequence of Conclusions 4 - 6, supra, the Licensee violated St. Paul Legislative Code P 409.08(6) on numerous occasions by allowing a significant portion of an integrated gambling transaction to occur on his licensed premises.

10. As a consequence of Conclusion 9, supra, it is appropriate to suspend all of the licenses of the Depot Bar for a period of two days. St. Paul Legislative Code P 409.2(6)(b) and P 409.26(c).

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the City Council suspend all of the St. Paul City licenses applicable to the Depot Bar held by the J.K.

Dated this 6th_ day of October, 1993.

_____/s/_____

BRUCE D. CAMPBELL
Administrative Law Judge

NOTICE

The City Council is respectfully requested to provide a copy of its final decision to the Administrative Law Judge by first class mail.

Reported: Tape recorded; no transcript prepared.

MEMORANDUM

Section 409.08(6) of the St. Paul City Legislative Code provides as follows:

No licensee shall keep, possess or operate, or permit the keeping, possession or operation of, on any licensed premises or any room adjoining the licensed premises any slot machine, dice or any gambling device or apparatus, nor permit any gambling therein (whether or not licensed by the state)

After a determination that there has been a violation of section 409.08(6), the City Council may take adverse action with respect to the licenses held by the licensee. Section 310.01 of the Saint Paul Legislative Code defines adverse action as:

Adverse action means a revocation or suspension of a license, the imposition of conditions upon a license, the denial of an application for the grant, issuance, renewal or transfer of a license, and any other disciplinary or unfavorable action taken with respect to a license, licensee or applicant for a license. Adverse action includes any of the foregoing directed at one or more licenses held by a licensee at any location in the City of St. Paul.

Section 310.05 and Section 310.06 of the St. Paul Legislative Code discuss the ability of the City Council to take adverse action with respect to a license, as the term adverse action is defined in Section 310.01 of the Legislative Code, previously quoted. Section 310.06(c) of the Legislative Code allows the imposition of reasonable conditions and/or restrictions upon a license issued or held under the Legislative Code. Further, Minn. Stat. §348.415 (1992), in relevant part, provides:

The authority issuing or approving any retail license or permit under this chapter shall either suspend for up to 60 days or revoke the license or permit or impose a civil

fine not to exceed \$2,000 for each violation on a finding that the license or permit holder has failed to comply with an applicable statute, rule, or ordinance relating to alcoholic beverages. . . . The issuing authority or

the commissioner may impose the penalties provided in this section on a retail licensee who knowingly . . . (3) conducts or permits the conduct of gambling on the licensed premises in violation of the law. . . .

Section 409.26 of the Saint Paul Legislative Code sets presumptive penalties for violations of the intoxicating liquor laws and regulations. Section 409.26(b). The presumptive penalty for the first appearances before the City Council for an illegal gambling violation is a one day suspension. Pursuant to P 409.26(c), multiple violations are to be considered in a single appearance, multiplying the presumptive period of suspension by the number of offenses. The Council also has the discretion on a first offense for a gambling violation to impose a fine in lieu of license suspension. St. Paul City Legislative Code P 409.26(b).

As noted in the findings, there is not sufficient evidence for the Administrative Law Judge to conclude that Mr. Sabby, with the knowledge of Mr. Kelly, the bar owner, or bar employees, actually accepted an illegal sports wager in the bar room or in the back room of the bar. There is some admitt

The Administrative Law Judge does find, however, that Mr. Kelly and, through him the corporation, violated St. Paul City Legislative Code P«409.08(6), by allowing Mr. Sabby to receive telephone calls both on the bar telephone and on Mr.«Sabby's cellular telephone in the bar that which, with the knowledge of the owner, resulted in Mr. Sabby accepting illegal gambling bets as part of an integrated gambling transaction on other portions of the property of the bar.

Apparently, Mr. Kelly takes the position that what is prohibited by P 409.08(6), is the actual acceptance of the wager on the licensed premises. The Administrative Law Judge, however, finds that the wagering that occurred in this case was part of a continuing transaction that began in the licensed premises with the actual knowledge of the bar owner and continued for completion onto other property, outside of the licensed premises, within the direction and control of the corporation and its owner, the parking lot.

Logically, there are two separate elements to placing an illegal sports wager. The solicitation of the person to accept the bet; and the actual acceptance of the bet by the bookmaker. The Respondent apparently argues that only the second element constitutes a violation of P«409.08(6) of the St. Paul Legislative Code. In this case, however, Mr. Sabby routinely received on the licensed premises a solicitation to accept an illegal wager with the intention

that it be accepted virtually immediately in a continuous transaction, once he had left the licensed premises and proceeded to other portions of the property owned by the bar. On a number of occasions a bar telephone was also used to solicit the acceptance of the illegal wager. The Administrative Law Judge finds that the repeated occurrence of the first element of an illegal sports wagering transaction on the licensed premises with the actual knowledge of the bar owner and employees is sufficient to constitute a violation of P 409.08(6) of the St. Paul Legislative Code under the facts of this case. All of the same evils are occasioned by Mr. Sabby's conduct in this case as would result if he had physically accepted the bets on the licensed premises.

In a number of cases, the courts have uniformly held that the location where the bet is finally placed is not determinative of whether illegal gambling has occurred. *People v. Haughey*, 120 P.2d 121 (Dist. Ct. App. 1941); *Herden v. State*, 188 So. 849 (Fla. 1937); *Ex. Parte Walker*, 80 P.2d 990 (Cal. 1938). In *People v. Terpenning*, 40 Cal. Rptr. 214 (Dist. Ct. App. 1964), the court imposed liability for a gambling offense on a woman who only maintained a location to accept calls and to forward the callers' telephone numbers to another location where the bets were actually placed and the gambling records kept. The court focused on the fact that an integrated, continuous illegal wagering activity was occurring and that this was a necessary link in that process. 40 Cal. Rptr. at 216. It is also clear that Mr. Kelly's conduct violated Minn. Stat. P 609.755 (1992), a misdemeanor gambling offense. The word "place" used in the statute does not only mean a room. It includes an open space like the parking lot. *Commonwealth v. Carlson*, 120 N.E.2d 384 (Mass. 1954).

The Administrative Law Judge notes that when the search warrant was executed on the Depot Bar, several gaming cards were found behind the bar. The Administrative Law Judge credits the testimony of the owner of the bar, Mr. Kelly, that he had no knowledge of the presence of those cards in the bar and had discouraged their use since the illegality of such wagering devices was brought to his attention by the City.

Having found violations of P 409.08(6) of the St. Paul Legislative Code, it is necessary to recommend a penalty to the City Council. The Administrative Law Judge is primarily guided by P 409.26 of the St. Paul Legislative Code which sets presumptive penalties for liquor violations. It should

Section 409.26(b)(8) of the St. Paul Legislative Code makes the presumptive penalty for a first appearance before the council for illegal gambling on licensed on-sale premises to be a one-day suspension of the license or, in lieu of the suspension, a fine appropriate to the seating capacity of the establishment. The record in this case shows that the seating capacity of

the Depot Bar does not exceed 99 persons. City Ex. 3. Hence, the presumptive alternative fine is \$500.

The Administrative Law Judge does not believe that a fine of \$500 is appropriate in this case. It is clear that a number of repeated violations occurred, as noted in the Findings. Mr. Kelly also acknowledged that he knew that Mr. Sabby was illegally accepting sports wagers, but felt no responsibility for that conduct because the consummation of the transaction did not occur in the bar room. The Administrative Law Judge believes it appropriate to consider P 409.26(c) relating to multiple violations. Under that provision, the Council can consider each individual violation to be a separate "first appearance" under the presumptive penalty guidelines. The Administrative Law Judge believes that, given the knowledge of Mr. Kelly and the number of violations, it would be appropriate to suspend all of the licenses of the Depot Bar for two full days, rather than imposing a \$500 fine, or any other action the City might take under the Legislative Code or governing Minnesota statutes.

BDC