

STATE OF INDIANA

BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION

THE PERMIT OF)
MITCH Z, INC.) PERMIT NO. RR71-30791
d/b/a SECOND BASE) EX22-012502
4407 S. IRONWOOD DRIVE)
SOUTH BEND, INDANA 46614)
Permittee.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mitch Z, Inc, d/b/a Second Base (Permittee) is the holder of an alcohol permit Issued by the Indiana Alcohol and Tobacco Commission (ATC) under permit number RR71-30791 doing business at 4407 S. Ironwood Dr., South Bend, IN. Law enforcement received a report of a fatality accident at US 20 and approximately East St., Road 19 on November 18, 2022. The investigation resulted in the issuance of EX22-012502 alleging a violation of IC 7.1-5-10-15 against the Permittee.

After attempts to resolve the matter failed, the matter was set for hearing on the violation on August 17, 2023.

Participating in the hearing for the ATC were Andrew Wignall, Esq., Prosecutor for the ATC; Detective Brandon Denesuk of the Elkhart Sherriff's Department; and Kaycee Sullivan of the Indiana Excise Police.

Participating for Permittee were Mitchell Heppenheimer, Esq.; James Korpal, Esq.; Mitch Zultanski; Bobbie Brobeck; Greg Eller and Scott Bedwell.

The following exhibits were submitted and admitted into evidence:

1. Exhibit 1- Medical Record Certification and Affidavit
2. Exhibit 2 –Affidavit for Search Warrant, 11-19-22
3. Exhibit 3- Toxicology Report- alcohol analysis
4. Exhibit 4- Toxicology Report- drug analysis
5. Exhibit 5 - Affidavit for Search Warrant, 11-21-22
6. Exhibit 6- Surveillance tape from Permittee of 11-19-22

Having heard the testimony and evidence and considering the Exhibits admitted into evidence, the Hearing Judge issues the following:

FINDINGS OF FACTS

1. The Permittee is the holder of an alcohol permit under RR71-30791, authorizing the sale of alcohol in South Bend, Indiana.
2. On November 18, 2022, the Permittee was open for business at the Permittee's address of 4407 South Ironwood Drive, South Bend, Indiana.
3. On November 18, 2022, the Elkhart County Sheriff received a report of a fatality accident car crash at approximately US 20 and East St., Road 19, and Elkhart County Indiana.
4. Detective Brandon Denesuk (Denesuk) of the Elkhart County Sheriff's Department was assigned to the case and arrived on the scene at approximately 12:40 AM on November 19, 2022, and discovered a deceased individual who had been driving a Nissan Altima with the accident of such a nature that the roof had to be cut off to remove the driver of the other vehicle.
5. The other vehicle was a 2013 Chevy Malibu, and the driver was identified as Koral Lynn Jordan (Jordan) who was transferred to the hospital with non-life-threatening injuries.
6. The investigation revealed that the vehicle driven by Koral Lynn Jordan (Jordan) was traveling the wrong way on US 20- she was traveling eastbound in the westbound lanes.
7. The detective noticed a purple Royal Crown bag in the 2013 Chevy Malibu but saw no alcohol containers in the vehicle.
8. The detective obtained a search warrant (Exhibit 2), to obtain a blood sample for the purpose of determining the presence of intoxicating chemicals.
9. The medical records (Exhibit 1) resulting from the issuance of the search warrant revealed that Jordan tested positive for alcohol with a level of 339.0 mg/dl or .339 BAC from a test at 00.34 EST on November 19, 2022.
10. In addition, the medical records show that she tested positive for U THC Metabolite Screen for marijuana and had a YHC metabolite in her system.
11. Finally, medical records stated that Interpreted Alcohol Level Results:
 - 20-100 mg/dl May exhibit slight influence of alcohol.
 - 100-200 mg/dl Incoordination, decreased response to stimuli.
 - 200-300 mg/dl staggering gait, slurred speech, delirium.
 - 250-400 mg/d Severe incoordination, unconsciousness.

350-500 mg/dl May be comatose.

12. A later test on November 19, 2022 (Exhibit 3), indicated a BAC level .259.
13. On November 21, 2022, the detective spoke with Jordan who indicated that on that evening she worked a nine (9) hour shift at Peddler's Pub, had at least one (1) drink and lives in Edwardsburg, Michigan which meant that she was traveling the wrong way to go home to Michigan that night.
14. Pursuant to the search warrant issued as Exhibit 5, the detective observed that the front tire was worn down to the rim of the tire and that there was red and yellow paint on the rim of the tire and that there were no alcohol containers in the vehicle.
15. The detective further testified that the Crown Royal bag contained a grinder and paper often used to make a marijuana cigarette.
16. Indiana State Excise Police Officer Kaycee Sullivan (Sullivan) stated she has been an officer for 11 years and has had extensive training and experience in alcohol use and abuse and with investigations after incidents involving alcohol use.
17. The surveillance tape of Permittee (exhibit 6) from November 18, 2022, was played in a redacted version which was admitted into evidence by agreement of both parties.
18. Sullivan indicated that she watched the tape in its entirety three (3) times – the first time for general observation, the second time for specific situations, and the third time to assess motor skills, facial expressions, stumbling, and walking of Jordan.
19. A previous video surveillance from Jordan's place of employment- Peddler's Pub- showed that she worked from 1 PM to 7 PM on the date of the accident, that she consumed alcohol while working and between 5:26 PM and 8:30 PM, she was served approximately nine (9) drinks and twice smoked marijuana.
20. Jordan's shift was over at 7:00 PM on November 18, 2022, and she arrived at the Permittee with other staff from Peddler's Pub as a patron at approximately 8:45 PM- although the two (2) bars are five (5) minutes apart.
21. While watching the surveillance tape (Exhibit 6), Sullivan described some behaviors exhibited by Jordan which indicated she was under the influence of alcohol and/or marijuana becoming more animated and dramatic, grasping the whole glass of alcohol with two hands, was quiet, was heavy footed, isolated, contemplative, walked to the exit the wrong way twice, chugged a drink, was unsteady, sat on the sidewalk, animated while talking at the bar, leaning on an individual, bobbing up and down by herself, unsteady on her feet, and diminution of fine motor skills.

22. Mitchell Zultanski (Zultanski) testified that he is the owner of Permittee and has two (2) other establishments with liquor permits, visits the establishments regularly, and has had three (3) violations in the past ten (10) years, and none of which occurred at the permit premises.
23. Bobbie Brobeck (Brobeck) has worked at the Permittee for two years, has been a bartender for 21 years and knows Jordan having worked with her at Peddler's Pub for three (3) years.
24. Due to her past employment, Brobeck knows that the signs of someone who is intoxicated include slurred speech, stumbling, repeating things, and spilled drinks and stated that she has "cut off people" for excessive alcohol use.
25. Brobeck testified that she knew Jordan was a heavy drinker and was with a group from Peddler's Pub.
26. Brobeck stated that she served Jordan four (4) alcoholic drinks that night- Captain Morgan and Sprite- but believes she only drank two (2) of them and that Jordan was emotional because Brobeck knew that Jordan was having boyfriend issues.
27. Brobeck and Jordan worked together for three (3) years at Peddler's Pub, she knew that Jordan was a heavy drinker and smoked marijuana, that Jordan is of short stature---5'2" 115 lbs.---and was emotional because of boyfriend problems, and she served Jordan alcoholic beverages.
28. Brobeck testified that she did not suspect Jordan was drunk (intoxicated) and that Jordan did not seem intoxicated.
29. Brobeck testified that Jordan was not loud, did not stagger when she walked, and did not spill her drinks.
30. The ATC records showed that Brobeck went through the ATC Certified Server Training Course as recently as January 2020, which has a section of training entitled "Sale to Intoxicated".
31. That training lists signs of intoxication as:
 - Odor of alcohol on breath; red, glossy eyes; stumbling, staggering; loud, boisterous; mood swings; inability to count money; slurred speech; loss of coordination; and loss of inhibitions.
32. Gregory Eller (Eller) testified that he was a bartender at Peddler's Pub but did not work there the day of the accident.
33. He also testified that he saw Jordan at Permittee on November 18, 2022, that she was there with others, that she was upset because her boyfriend broke up with her, that she was there for approximately two hours and that someone who has been drinking some three hours could be intoxicated.

34. Scott Bedwell (Bedwell) is an alcohol consultant having served for 26 years as an ATC Excise police officer.
35. He stated that he observed the videotape (Exhibit 6) and did not see identifiers of intoxication indicating that the video was black and white, grainy, contained no audio, and he therefore could not identify signs of intoxication such as slurred speech, being loud, being obnoxious, and other openly visible signs, both oral and visual. He did not see any signs of falling down, tripping or having an unusual gait.
36. While the evidence could be viewed as conflicting between exhibits 3 and 4, (one shows alcohol content of .339 and the other later one shows an alcohol content of .259) it is accepted that as time goes on, the alcohol content in the human body goes down.
37. Given the Interpreted Alcohol Level Results stated in Exhibit 1, Jordan should have exhibited signs of at least a staggering gait, slurred speech, delirium and, in the most severe circumstances, incoordination and unconsciousness.
38. It is generally accepted that individuals who have extended, excessive use of alcohol will not show signs generally accepted for the BAC test level because they develop a tolerance for a higher testing level.
39. A visual review of Exhibit 6, the surveillance tape, does not indicate that Jordan displayed signs of intoxication listed in the Training for Servers and Brobeck could not know and cannot be responsible for the consumption, if any, by Jordan before her arrival at Permittee's location if there were not visible or audible signs of intoxication.
40. Any finding of fact that should more appropriately be a conclusion of law is hereby so delineated.

CONCLUSIONS OF LAW

1. The Indiana Alcohol and Tobacco Commission has jurisdiction over this matter pursuant to Ind. Code Sec 7.1-1-2-2 and Ind. Code Sec 7.1-2-3-7
2. The Indiana Alcohol and Tobacco Commission has jurisdiction to hear matters of enforcement of its rules and regulations. (Ind. Code Sec 7.1-2-3-7 (4).
3. The Hearing Judge complied with the requirements for a hearing on a permit violation by giving at least five days' notice of the hearing (905 IAC 1-37-7).
4. The Hearing Judge conducted the hearing consistent with 905 IAC 1-37-10 and heard evidence consistent with 905 IAC 1-37-11.

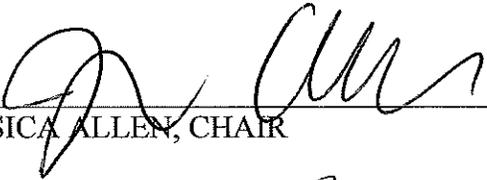
5. IC 7.1-1-1-1 states that among the general purposes of IC 7.1 are to “(1) ... protect the ... health, peace, and morals of the people of the state...” and (2) to regulate and limit the ... sale, possession and use of alcohol and alcoholic beverages.”
6. IC 7.1-5-10-15 states that an alcohol beverage may not be sold, bartered, delivered, or given away to an individual who is known to be intoxicated.
7. A violation under IC 7.1-5-10-15 above was issued to Permittee, Mitch Z Inc., because an employee of Mitch Z Inc., Bobbie Brobeck, sold an alcohol beverage to an individual, Jordan, who was known to be intoxicated.
8. IC 35-41-2-2(b) states that a person engages in conduct if, when the person engages in the conduct, the person is aware of a high probability that the person is doing so.
9. There is inconclusive evidence to conclude by a preponderance of the evidence that Brobeck knew on November 18, 2022, that she was serving an alcoholic beverage to Jordan while she was intoxicated.
10. These Findings and Conclusions are fact sensitive to the specific circumstances in this case and require as a matter of law sufficient evidence to show that Brobeck served alcohol to Jordan knowing that Jordan was intoxicated. Such evidence must be gleaned from the evidence presented as viewed by Brobeck, without the knowledge of prior alcohol consumption at another location, and/or visual or audible signs of intoxication such as those mentioned in the Certified Server Training Program, and without the knowledge of Jordan’s subsequent BAC level hours after she left the Permittee’s premises.
11. Any conclusion of law that should more appropriately be designated a finding of fact is hereby delineated.

IT IS THEREFORE ORDERED AND ADJUDGED that Mitch Z Inc., based on the facts and evidence presented at the hearing has not violated IC 7.1-5-10-15 and that this matter is hereby found not true, and it is dismissed.

All of which is ordered this 7th day of September 2023.


James W Payne, Hearing Judge
Indiana Alcohol and Tobacco Commission

Approved this 19th day of September, 2023.



JESSICA ALLEN, CHAIR



JAMES PAYNE, VICE CHAIRMAN



DALE GRUBB, COMMISSIONER



MARJORIE MAGINN, COMMISSIONER