

NO. 41454-6-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DODGE CITY SALOON, INC.,

Appellant,

vs.

WASHINGTON STATE LIQUOR CONTROL BOARD,

Respondent,

APPEAL FROM THE SUPERIOR COURT

HONORABLE ROBERT A. LEWIS

REPLY BRIEF

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INTRODUCTION

In this Brief, Dodge City Saloon, Inc. (Dodge City) will reply to certain of the arguments made by the Washington State Liquor Control Board (the Board) in the Brief of Respondent. Dodge City will avoid reiterating arguments made in the Brief of Appellant. Failure to address a certain point set out in the Brief of Respondent to restate a certain theory or argument previously discussed means that the issue was sufficiently covered in the Brief of Appellant.

This brief will discuss statutes and regulations. Those not contained in the Appendix to the Brief of Appellant will be set out in the Appendix to this brief.

ARGUMENT

I. All Evidence Must Be Suppressed.

a. A Search Occurred.

The Board argues that Dodge City cannot invoke the protections of Fourth Amendment to the United States Constitution or Article I, Section 7 of the Washington State Constitution because, in its words, “no search occurred.” In support of this contention, it argues that Dodge City had no reasonable expectation of privacy because its premises are open to the public. The Board’s argument cannot be accepted.

A search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. *State v. Young*, 123 Wn.2d 173, 189, 867 P.2d 593 (1994). In this case, and as discussed at Brief of Appellant, pps. 23-24, Dodge City's reasonable expectation of keeping its premises closed to persons under the age of twenty-one years was clearly infringed by Christopher Mangan's attempt to gain entry.

First of all, and as the Board must concede, the fact that a business is open to the public does not mean that the proprietor loses all expectation of privacy. As the Court stated in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979), "there is no basis for the notions that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees."

Secondly, Dodge City does not invite all members of the public onto its premises. Specifically, persons under the age of twenty-one years are not invited in. This is made clear by a sign to that effect on the exterior of Dodge City's premises. Board officers can also not claim to be members of the general public that Dodge City allows to be in its establishment. They claim the right to be on Dodge City's premises pursuant to RCW 66.28.090(1) and WAC 314-11-090(1). If a licensee refuses admission to a Board officer, the Board will impose monetary

sanctions or suspend or revoke the business' license. WAC 314-29-020. Allowing admission in the face of a claim of authority does not amount to a valid consent to entry. *Seymour v. Washington State Department of Health*, 152 Wn.App. 156, 170, 216 P.3d 1039 (2009). The Board's argument must fail because its premise is faulty — Dodge City does not open its premises to members of the general public without exception.

The Board's argument is not supported by the Supreme Court decisions in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), or *Dow Chemical Co. v. United States*, 476 U.S. 227, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986). In the former, the Supreme Court held that a warrant was required for inspections made under the Occupational Safety and Health Act of 1970 (OSHA). The Court noted that the factor critical to its decision was that a government employee sought entry to the premises over the employer's objection. It stated that the employer could have no reasonable expectation of privacy in the observations that an employee might make and later report. 436 U.S. at 314. In the same way, Dodge City has no reasonable expectation of privacy should any of its employees note the presence of an under-aged person on the premises and choose to report their observations to the Board. The Court's statement does not allow the Board *carte blanche* to attempt entry onto the premises. In *Dow Chemical Co. v. United States*,

supra, the Court held that a business had no reasonable expectation of privacy to protect it from the government's taking aerial photographs of the exterior of the premises. That case is obviously distinguishable from what we have here — seeking of entry to Dodge City's premises by a Board agent within the category that Dodge seeks to exclude.

Dodge City maintains a reasonable expectation of privacy in its premises because it seeks to exclude persons under the age of twenty-one years from entry. (Brief of Appellant, pps. 23-24) The Board's arguments to the contrary lack merit.

b. RCW 66.44.010(4) Does Not Allow for "Compliance Checks."

The Board concedes that the legislature did not specifically authorize "compliance checks" in RCW 66.44.010(4). The Board complains, however, that it will be hamstrung if every investigative technique that it is allowed to use must be spelled out in a statute. The Board's argument must be rejected.

First of all, the Board's argument is factually incorrect. The statute in question, RCW 66.44.010(4), does set out methods by which the Board could conduct its "compliance checks." It allows Board agents to obtain and execute search warrants to enforce the provisions of RCW 66. Board officers could use this provision to obtain a warrant

before doing a “compliance check.” Doing so would clearly pass the requirements of the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington Constitution if the warrant was properly supported.

There is nothing in RCW 66.44.010(4) that allows warrantless administrative inspections. Such inspections are allowed, however, if there is a regulatory scheme that authorizes the inspection and contains limitations on the scope of the inspection and the discretion of the investigating officers. *Washington Massage Foundation v. Nelson*, 87 Wn.2d 948, 558 P.2d 231 (1976); *Alverado v. Washington Public Power System*, 111 Wn.2d 424, 439, 759 P.2d 427 (1988); *Seymour v. Washington State Department of Health*, *supra*; Brief of Appellant, pps. 13-16. In the absence of any mention of “compliance checks” in RCW 66.44.010, there can be no regulatory scheme authorizing the compliance checks and containing the necessary restrictions on time and scope as the Court indicated was necessary in *Washington Massage Foundation v. Nelson*, *supra*. Therefore, there can be no valid authorization for warrantless administrative inspections such as “compliance checks.”

In summary, RCW 66.44.010(4) does contain provisions that justify “compliance checks” — when they are conducted pursuant to a

warrant. Warrantless “compliance checks” find no support, however, in RCW 66.44.010(4).

c. If the Statutory Scheme Allows for “Compliance Checks,” It Necessarily and Improperly Sanctions Random Searches.

As Dodge City pointed out in Brief of Appellant, pps. 21-23, if RCW 66.44.010(4) allows for “compliance checks,” it essentially allows for random searches because the statutory scheme contains no limitations on the frequency, time, and scope of any “compliance check.” This, of course, would violate the constitutional restriction on random searches.

The Board counters first by stating that this argument was not raised at the trial court level. However, it relates to a manifest constitutional right and may therefore be considered on appeal. RAP 2.5(a)(3). The Board does not to dispute whether the “compliance check” was “random.” As Board officers stated, the Board was not drawn to do its “compliance check” because of any specific complaint on the date of the “compliance check,” May 16, 2008. (AR 68-69) The Board refers to a previous violation some months before May 16, 2008. The violation at that time, however, would not support a search because the information was necessarily stale. See, e.g., *State v. Higby*, 26 Wn.App. 457, 613 P.2d 1192 (1980).

In a larger sense, whether or not Board officers had some suspicion that Dodge City might be allowing minors onto its premises misses the entire point. The Board officers should have obtained a warrant if they had sufficient information to suggest that violations were occurring. They did not do so. Rather, they chose to conduct the “compliance check” without any statutory authority to do so. And if the statute on which the Board relies does sanction “compliance checks,” it allows them to be random since there is nothing in the statute restricting “compliance checks” by any time and scope.

d. The Board Cannot Rely on RCW 66.28.090(1).

The Board has chosen to rely on RCW 66.28.090(1) to give it standing to enter Dodge City’s premises without a warrant — a position it did not take in the course of the administrative proceeding or before the trial court. As Dodge City pointed out in Brief of Appellant, pps. 20-21, RCW 66.28.090(1) is insufficient to authorize the presence of Board officers in the absence of a warrant. Since the Board has chosen to rely extensively on this statute, Dodge City will give a more detailed discussion of the case that refutes the Board’s argument, *Washington Massage Foundation v. Nelson, supra*. In that case, the Court considered former RCW 18.108.180 and RCW 18.108.190 which provided as follows:

The director or any of his authorized representatives may at any time visit and inspect the premises of each massage business establishment in order to ascertain whether it is conducted in compliance with the law, including the provisions of this chapter, and the rules and regulations of the director. The operator of such massage business shall furnish such reports and information as may be required.

The latter statute read:

State and local law enforcement personnel shall have the authority to inspect the premises at any time including business hours.

The Court first gave a history of the various decisions governing warrantless administrative inspections. It noted that the Supreme Court of the United States had found a requisite governmental interest where municipal housing codes were concerned in *Camara v. Municipal Court*, 387 U.S. 523, 534, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). It noted that such a governmental interest had also been found for inspections of businesses involved in the sales of alcoholic beverage and firearms in *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 80 S.Ct. 774, 25 L.Ed.2d 60 (1970), and *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), respectively. The Court then announced the critical test for the constitutionality of any statute allowing warrantless intrusion for administrative searches. It stated:

Though a statute authorizing warrantless inspections is proven to be justifiable under the above criteria, the regulatory inspection must be carefully limited in time, place, and scope. To allow otherwise would jeopardize the singular protection available against inspection unrelated to the lawful objectives of the regulatory scheme.

87 Wn.2d at 952. It went on to distinguish inspections related to the characteristics of a building — as might be related to housing code violations — and a business contained within a building. It stated that:

. . . (W)hen an industry or business is subject to extensive governmental regulation and frequent unannounced inspections are necessary to insure compliance, warrantless inspections are valid if authorized by a statute which sufficiently delineates the scope, time and place of inspection. And the authorized inspection must be relevant to the purposes of the statute, i.e., in furtherance of the public interest in regulating particular conduct or conditions. Again this balances the competing interests and gives notice of the proper extent and nature of the inspection.

87 Wn.2d at 953. The Court then stated that former RCW 18.108.180 was constitutionally infirm because it authorized inspections “at any time” and allowed search or investigation for any law violation of any kind. On that basis, it stated that the statute “fails to give reasonable notice of the permissible scope of the inspection” and offered “no guidelines concerning what physical items and areas of the business may be inspected.” It found RCW 18.108.190 “even less instructive as to the

authorized time, place, and scope of inspection” because it prescribed no standards by which a person inspected or a court could determine whether the particular inspection was authorized by statute. 87 Wn.2d at 954. It then concluded:

. . . (W)e find (the statutes) to be too imprecise to convey sufficient notice of the proper time, place and scope of the inspection. The statutory scheme must give some indication of these factors. To allow otherwise would leave the inspectee subject to the unfettered discretion of the inspecting agency and individual inspector.

The statute at issue, RCW 66.28.090(1), is even less precise than former RCW 18.108.180 and RCW 18.108.190. It allows for inspection of “any premises or parts of premises used or in any way connected physically or otherwise with the licensed business.” In other words, there are absolutely no limitations as to where Board officers may go. Secondly, it states that the premises “shall at all times be open to inspection” thereby placing absolutely no limits of when an inspection can occur. Finally, the statute contains no limits as to the terms of the inspection. Where former RCW 18.108.180 stated that the purpose of the inspection was to see whether the establishment was complying with laws, RCW 66.28.090(1) contains no such limitation. In short, if former RCW 18.108.180 was not sufficiently precise to be constitutional, there can be no question but that RCW 66.28.090(1) does not measure up to the

requirements of the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington State Constitution.

The Board's discussion of the necessity of regulation of retail liquor licensees misses the point. As the Board has conceded, inspections of retail liquor licensees — as well as all other business — must meet the requirements of the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington State Constitution. The Supreme Court of the United States made this clear in *Colonnade Catering Corp v. United States, supra*. The issue is whether the regulatory scheme passes constitutional muster.

The Board seeks to limit the holding of *Washington Massage Foundation v. Nelson, supra*, to the massage industry on the basis that retail liquor licenses are pervasively regulated. (Brief of Respondent, pps. 23-24, *fn. 12*) The opinion in *Washington Massage Foundation v. Nelson, supra*, does not allow for such distinction. The Court noted the absence of any historical basis for the regulation of massage parlors similar to that for regulation of the business of providing alcoholic beverage. It made clear, however, that its analysis did not depend on the presence or absence of a recognized governmental interest in regulating massage. Rather, it assumed that the State could establish the necessity and justification for a warrantless inspection of massage parlors.

Nonetheless, it held that the two statutes at issue authorize “unreasonable searches because they fail to delineate adequate limitations on purpose, time, place, or scope of inspection.” 87 Wn.2d at 953-54.

To summarize, RCW 66.28.090(1) is constitutionally infirm. It cannot provide the authorization for the Board’s “compliance check.”

e. Law Enforcement’s Ability to Use “Decoys” Has No Applicability to Issues Related to the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington State Constitution.

The Board contends that warrantless compliance checks are justified because other court decisions have sanctioned the use of “decoys.” This argument misses the mark because the opinions the Board cites do not, in fact, hold that or even intimate that warrantless “compliance checks” can be sanctioned under the Fourth Amendment to the United States Constitution or Article I, Section 7 of the Washington State Constitution.

The Board has cited a number of cases that relate to the use of decoys where a defendant claims entrapment. *City of Seattle v. Gleiser*, 29 Wn.2d 869, 189 P.2d 967 (1948); *State v. Gray*, 69 Wn.2d 432, 418 P.2d 725 (1966); *State v. Smith*, 101 Wn.2d 36, 677 P.2d 100 (1984); *State v. Enriquez*, 45 Wn.App. 580, 725 P.2d 1384 (1986); *State v. Trujillo*, 73

Wn.App. 913, 883 P.2d 320 (1994). It also relies on two cases that deal with both the entrapment defense and claims that the police conduct violated due process because it was outrageous. *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996); *State v. Emerson*, 10 Wn.App. 235, 517 P.2d 245 (1973). In *Playhouse Corp. v. Washington State Liquor Control Board*, 35 Wn.App. 539, 667 P.2d 1136 (1983), a case involving Board officers and on which the Board places heavy reliance, the question presented, among others, was whether the officers' conduct was outrageous. In none of these cases, did the Court discuss whether the acts of the "decoys" offended the Fourth Amendment to the United States Constitution or Article I, Section 7 of the Washington State Constitution. The same can be said of the case involving the actions of Board officers and on which the Board places heavy reliance. An opinion is not controlling on a theory or issue not raised or discussed in that opinion. *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). These cases are therefore not helpful in deciding whether the constitutional provisions at issue here are offended by warrantless "compliance checks."

The Board has also cited *State v. Athan*, 160 Wn.2d 354, 158 P.3d 27 (2007). In that case, the defendant was held to have no reasonable expectation of privacy in his DNA contained on an envelope

that he had licked. Officers had used a ruse to get him to mail the envelope to them. The Court concluded that he had no reasonable expectation of privacy in an envelope that he had licked and voluntarily placed in the mail addressed to a police detective. That case is a far cry from ours. Dodge City does not invite persons under the age of twenty-one years onto its premises in the same way that Mr. Athan voluntarily mailed the envelope to the detective. To the contrary, it attempts to keep under-aged individuals out of its establishment by checking for identification at the door and having a sign on the exterior indicating that the premises are off limits to persons under the age of twenty-one.

The Board's argument is not supported by the authority it cites. Warrantless "compliance checks" have never been held to comport with the requirements of the Fourth Amendment to the United States Constitution or Article I, Section 7 of the Washington State Constitution.

f. The Board Will Still Be Able to Enforce the Provisions of RCW 66.

The Board complains that it cannot enforce the provisions of RCW 66 if it is not allowed to conduct "compliance checks." The Board forgets it must function like any other law enforcement agency — its investigative techniques must pass constitutional muster. If the Board suspects that an establishment is allowing under-aged persons on restricted

premises, it is free to get a warrant that would allow it to send an under-
aged person to attempt to gain entry to the premises. The legislature has
authorized the Board to obtain warrants in RCW 66.32.020 and in RCW
66.44.010(4). Nothing prevented the Board from obtaining a warrant from
embarking on the “compliance check” here.

Furthermore, nothing in the statutory scheme prevents
Board officers from enforcing the provisions of RCW 66 by resort to old-
fashioned police work — making a case by interviewing witnesses.

One other statement must be made here. The Board’s
utilization of “compliance checks” does nothing more than create
violations which the Board then prosecutes. One would hope that the
Board would spend its time enforcing violations that occur without any
Board involvement rather than creating violations.

The Board seeks to cut constitutional corners by not
obtaining warrants that authorize its investigative efforts and by relying on
statutes that simply do not authorize the actions that Board officers take.
This cannot be allowed.

g. Conclusion.

The Board’s “compliance check” amounted to an unlawful
search since it was done without a warrant and without constitutionally
sufficient support in the statutory and regulatory scheme. Since

constitutionally infirm evidence cannot be offered in an administrative proceeding pursuant to RCW 34.05.452(1), all evidence from Mr. Mangan and Board officers should have been suppressed and the complaint then dismissed for lack of evidence.

II. Dodge City Was Entrapped.

a. The Defense of Entrapment Is Available.

The Board claims that Dodge City cannot rely on the defense of entrapment because that defense is limited to criminal prosecutions. (Brief of Respondent, pps. 31-32) The Board's argument is not supported by the language of the statute that discusses the defense of entrapment, RCW 9A.16.070(1), which reads as follows:

(1) In any prosecution for a crime, it is a defense that:

(a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and

(b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.

The two critical terms within the statute that bear on the question, "prosecution" and "crime," do not limit the thrust of the statute to criminal proceedings.

The term “prosecution” is not limited to criminal proceedings. It is not defined in RCW 9A and specifically not in RCW 9A.04.110, the general definitional statute for RCW 9A. A term that is not specifically defined in a statute must be given its plain meaning, and that meaning can generally be derived from a standard dictionary definition. *American Continental Insurance v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004); *Albice v. Premier Mortgage Services of Washington, Inc.*, 157 Wn.App. 912, 923, 239 P.3d 1148 (2010). The term “prosecute” means to institute legal proceedings against another person. *Collins English Dictionary* (2009). That definition includes but is clearly not limited to criminal proceedings. In that regard, the word “prosecute” is expressly utilized in the civil context. For example, and as CR 17(a) provides in pertinent part:

Every action shall be prosecuted in the name of the real party in interest. . . .

The definition of the term “crime” is also has no limitation to criminal proceedings. The term is defined in RCW 9A.04.040(1) as follows:

An offense defined by this title or by any other statute of this state, for which a sentence of imprisonment is authorized, constitutes a crime. . . Crimes are classified as felonies, gross misdemeanors or misdemeanors.

In other words, the term refers to the offense, not the proceeding in which a violation is claimed.

The Board's proceedings to suspend Dodge City's license clearly amounted to a prosecution for a crime as those terms are defined. The Board commenced a legal proceeding — a “prosecution” — for violation of RCW 66.44.310(1)(a). By its terms, that statute is a crime because it has been classified as a misdemeanor. It reads in pertinent part:

... (I)t shall be a misdemeanor to:

(a) to serve or allow to remain in any area classified by the board as off-limits to any person under the age of twenty-one years. . .

The Board instituted proceedings to revoke Dodge City's license for violation of RCW 66.44.310. As such, it amounted to prosecution of a crime. Therefore, the defense of entrapment must apply.

b. The Substantial Evidence in the Record Demonstrates That Dodge City and Mr. Hilker Were Entrapped.

The Board does not attempt to refute either of the two elements of the defense of entrapment. It makes no argument that the offense did not originate in the minds of law enforcement and that Mr. Hilker and Dodge City did in fact have a predisposition to commit the offense. Rather, it focuses on RCW 9A.16.070(2), which states that “the defense of entrapment is not established by a showing only that law

enforcement officials merely afforded the actor the opportunity to commit a crime.” Concentrating on RCW 9A.16.070(2) ignores the focus of the entrapment defense — the intent or predisposition of the defendant to commit the crime. Comment to WPIIC 18.205.

As discussed in the Brief of Appellant, pps. 27-29, the substantial evidence in this case leads to only one conclusion — that neither Mr. Hilker nor Dodge City was predisposed to admit minors to the premises. This conclusion stems from the presence of a sign on the outside of the establishment indicating that persons under the age of twenty-one years are not welcome; the fact that Mr. Hilker checked the seventeen year old, mature looking Mr. Mangan to enter Dodge City’s establishment; the absence of any report to Board officers that Mr. Hilker had ever allowed an under-aged person onto Dodge City’s premises prior to May 16, 2008 (AR 232); the absence of any prior citations to Mr. Hilker for permitting under-aged persons onto restricted premises; the lack of evidence that Mr. Hilker had ever permitted under-aged persons to be on restricted premises; and Mr. Hilker’s experience in the industry.

c. Conclusion.

Entrapment is available as a defense in these proceedings. In this case, the substantial evidence supports the defense. On that basis, the complaint should have been dismissed.

III. The Wrong Burden of Proof Was Utilized.

In the Brief of Appellant, Dodge City argued that the Board was required to prove its case by clear and convincing evidence. (Brief of Appellant, pps. 29-37) The Board responded in its brief. Both sides noted the pendency of *Hardee v. Department of Social and Health Services*, 152 Wn.App. 48, 215 P.3d 214 (2009), review granted, *Hardee v. Department of Social and Health Services*, 168 Wn.2d 1006, 226 P.3d 781 (2010). As Dodge City has indicated, the Supreme Court's decision in that case will likely inform the decision on the issue presented here. On that basis, Dodge City will therefore not address this issue further until and unless the Supreme Court renders its decision and the Court requests further briefing on the Supreme Court's opinion.

IV. The Board Engaged in Outrageous Conduct.

The Board directed Christopher Mangan to attempt entry to Dodge City's premises when he was seventeen years of age. It apparently sees nothing wrong with enlisting a person under the age of eighteen years to go into Dodge City's establishment to attempt to purchase alcoholic beverage and when that person was not specifically immunized from criminal prosecution for doing so under the terms of RCW 66.44.290(1). That statute criminalizes attempting to purchase alcoholic beverage by persons under the age of twenty-one years except for persons "between the

ages of eighteen and twenty-one years who are participating in a controlled purchase program authorized by the liquor control board under rules adopted by the board.” It shows clear legislative direction that persons under the age of eighteen years should not be allowed to participate in “controlled purchase” programs. The Board’s disrespect for this clear legislative simply cannot be countenanced. The Board must, like everyone else, follow law. Its disrespect for what the legislature has directed requires dismissal.

Dismissal is also required by Mr. Mangan’s attempt to buy his way into the premises. The Board denies the presence of evidence to that effect. According to Tony Kutch, however, Mr. Mangan offered money before he was asked to pay a cover charge. (AR 172-73) Mr. Hilker confirmed that Mr. Mangan offered him money before Mr. Hilker asked to show his identification. (CP 450)

V. Proceedings Should Have Been Continued to Allow Mr. Hilker’s Testimony.

As pointed out in the Brief of Appellate, pps. 37-39, the Board deprived Dodge City of the testimony of Jeffry Hilker, its most critical witness on the issue of entrapment, by charging him criminally. Dodge City has amply addressed in the Brief of Appellant but must to respond to two arguments the Board has made.

First of all, the Board contends that Mr. Hilker could have been forced to answer questions that would not incriminate him. However, he could refuse to answer virtually every relevant question, including whether Dodge City employed him. A witness may refuse to answer any question on the grounds of self-incrimination if the answer would merely furnish a link in the chain of evidence necessary to prosecute a witness for a crime. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951); *State v. Hobble*, 126 Wn.2d 283, 290, 892 P.2d 85 (1995). Mr. Hilker being asked whether he was a Dodge City employee or whether he was on duty on May 16, 2008 — seemingly innocuous questions — would form a link in the chain in the prosecution for allowing Mr. Mangan to be on Dodge City’s premises in violation of RCW 66.44.310(1)(a). In short, no question could be asked of Mr. Hilker that he would not claim his right against self-incrimination.

Contrary to what the Board asserts, Dodge City was not seeking any sort of “permanent continuance,” only a continuance until Mr. Hilker’s criminal matter was concluded. The Board could have taken steps to eliminate the problem by requesting the Clark County prosecuting attorney to dismiss the pending charges. Furthermore, the Board forgets that it created the problem by charging Mr. Hilker in the first instance when it certainly was not required to do so.

Under the circumstances, a claim of privilege by a critical witness, hearing should have been continued to allow Mr. Hilker to testify.

VI. Dodge City Is Entitled to an Award of Attorney's Fees.

Dodge City seeks attorney's fees both at the trial court and on appeal based on RCW 4.84.350(1). (Brief of Appellant, pps. 42-46) Dodge City stands on the sufficiency of the argument in the Brief of Appellant but will address certain other issues the Board has raised.

The parties agree that an administrative agency can avoid an award of attorney's fees by demonstrating that the agency action was substantially justified. RCW 4.84.350(1); *Aponte v. Department of Social and Health Services*, 92 Wn.App. 604, 623, 965 P.2d 626 (1998). The Board claims that its actions were substantially justified because Board officers had "utilized investigative methods, which had long been held as constitutionally valid." (Brief of Respondent, p. 49) That statement is simply incorrect. In support of its argument, the Board refers to RCW 66.44.290. This is the first case that has tested the constitutionality of that statute. And it is submitted that anyone associated with the Board should have concluded that it was constitutionally infirm after the Court's decision in *Washington Massage Foundation v. Nelson, supra*. The Board also refers to *Playhouse Corp. v. Washington State Liquor Control Board, supra*. In that case, however, the Court did not address the substantive

issues presented here — the propriety of “compliance checks” as administrative inspections under the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington Constitution; “compliance checks” using persons not immune from engaging in the practice in violation of a clear legislative direction; and the defense of entrapment. It would be more accurate to say that the Board has engaged in practices of very questionable constitutional propriety only because no one has questioned its activities before. That state of affairs, of course, does not justify—substantially or otherwise—what it did in this case.

The Board cannot sustain its burden of proving substantial justification for its actions. Dodge City is entitled to an award of attorney’s fees under the terms of RCW 4.84.350.

CONCLUSION

As stated here and in the Brief of Appellant, the trial court erred by not ruling that the administrative complaint against Dodge City should be dismissed and by not awarding Dodge City its attorney’s fees. Its decision

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should be reversed with directions to dismiss the administrative action and to grant Dodge City's request for attorney's fees. Dodge City should also be awarded attorney's fees on appeal.

DATED this 20 day of April, 2011.



BEN SHAFTON, WSB #6280
Of Attorneys for Dodge City

APPENDIX

RCW 66.32.020 27

WAC 314-11-090(1)(as pertinent) 28

WAC 314-29-020(as pertinent)..... 28

RCW 66.32.020:

If, upon the sworn complaint of any person, it is made to appear to any judge of the superior court or district court, that there is probable cause to believe that intoxicating liquor is being manufactured, sold, bartered, exchanged, given away, furnished, or otherwise disposed of or kept in violation of the provisions of this title, such judge shall, with or without the approval of the prosecuting attorney, issue a warrant directed to a civil officer of the state duly authorized to enforce or assist in enforcing any law thereof, or to an inspector of the board, commanding the civil officer or inspector to search the premises, room, house, building, boat, vehicle, structure or place designated and described in the complaint and warrant, and to seize all intoxicating liquor there found, together with the vessels in which it is contained, and all implements, furniture, and fixtures used or kept for the illegal manufacture, sale, barter, exchange, giving away, furnishing, or otherwise disposing of the liquor, and to safely keep the same, and to make a return of the warrant within ten days, showing all acts and things done thereunder, with a particular statement of all articles seized and the name of the person or persons in whose possession they were found, if any, and if no person is found in the possession of the articles, the return shall so state.

WAC 314-11-090:

Per RCW 66.28.090, the following must be available to inspection at all times by the board and any law enforcement officer:

- (1) The licensed premises and any premises connected physically or otherwise to the licensed business. . .

WAC 314-29-020:

Group 1 violations are considered the most serious because they present a direct threat to public safety. Violations beyond the first violation do not have a monetary option upon issuance of a violation notice. The liquor control board may offer a monetary option in lieu of suspension days based on mitigating circumstances as outlined in WAC 314-29-015(4).

Violation Type	1 st Violation	2 nd Violation in a two-year window	3 rd Violation in a two-year window	4 th Violation in a two-year window
Refusal to allow an inspection and/or obstructing a law enforcement officer from performing their official duties. RCW 66.28.090; RCW 66.44.370; WAC 314-11-090	5 day suspension or \$500 monetary option	7 day suspension	30 day suspension	Cancellation of license

**NO. 414554-6-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

DODGE CITY SALOON,

Appellant,

vs.

WASHINGTON STATE LIQUOR CONTROL BOARD,

Respondent,

APPEAL FROM THE SUPERIOR COURT

HONORABLE ROBERT A. LEWIS

AFFIDAVIT OF MAILING

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STATE OF WASHINGTON
BY _____
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