

2018 IL App (1st) 162865-U
No. 1-16-2865
February 6, 2018

SECOND DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

KEVIN SMITH,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellant,)	
)	No. 15 CH 18077
v.)	
)	The Honorable
THE POLICE BOARD OF THE CITY OF)	Ann Demacopoulos,
CHICAGO and EDDIE JOHNSON,)	Judge Presiding.
Superintendent,)	
)	
Defendants-Appellees.)	

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* The testimony of store security personnel and a police officer sufficiently supported the Board's findings that a police officer aided an unidentified person in an attempted retail theft, and the officer subsequently lied to investigators. The Board's findings justified the Board's decision to discharge the officer from the police force.

¶ 2 The Police Board of the City of Chicago discharged Officer Kevin Smith from the Police Department because the Board found that Officer Smith helped a thief try to steal items from a store, and Officer Smith lied to a police investigator about the incident. Officer Smith filed

a complaint for administrative review of the Board's decision. The circuit court upheld the Board's decision, and Officer Smith now appeals. We find that the Board did not abuse its discretion in its evidentiary rulings, and the evidence sufficiently supports the Board's findings of fact. We also find that because Officer Smith lied to the investigator, his conduct warrants discharge. Accordingly, we affirm the circuit court's judgment that affirmed the Board's order.

¶ 3

BACKGROUND

¶ 4

Around 1:30 p.m. on October 29, 2013, Officer Smith, while off-duty, went to a Walmart store in Hammond, Indiana. He pushed an empty shopping cart into the store. In the store he encountered a man dressed as an employee of Walmart, who also pushed a shopping cart. Officer Smith put a 32" television into his cart. The other man put two smaller televisions into Officer Smith's cart, along with a fourth box. Officer Smith and the other man pushed their carts into the garden department, separated from the rest of the store by sliding glass doors. A few minutes later they took a cart filled with four large boxes to the front of the store, past the cashiers. As they reached the exit, Benjamin Davis and Kent Bailey, who worked for Walmart as asset protection associates, walked up to them. The other man, the one dressed as a Walmart employee, ran off, pursued by Bailey. Bailey did not catch the man, who remains unidentified. Davis asked Officer Smith some questions, then escorted him to an office in the store. Sergeant Sean Garrison of the Hammond Police Department came to the office and asked Officer Smith more questions. Officer Smith spoke to Sergeant Wilfredo Torres of the Chicago Police Department about the incident on two separate occasions, once in February 2014 and again in May 2014.

¶ 5 The Chicago Police Department charged Officer Smith with violating four departmental rules. First, the Department alleged that Officer Smith violated a law in that Officer Smith "was in a public place *** in a state of intoxication caused by his use of alcohol, and he breached the peace or was in imminent danger of breaching the peace *** in violation of Indiana Code, IC 7.1-5-1-3." Second, the Department alleged that Officer Smith's conduct brought discredit on the Department in that he "accompanied and/or aided an unknown individual by pulling a shopping cart containing approximately three televisions and/or a car stereo to the garden section of the Walmart retail store, where the unknown individual removed the alarm sensors from the merchandise in Police Officer Kevin D. Smith's presence, and/or accompanied and/or aided an unknown individual who appeared to be attempting to commit retail theft." Third, the Department alleged that Officer Smith made false reports in that "Kevin D. Smith made *** the following false statements to *** Torres ***: I would have arrested the individual myself had I known what he was up to, or words to that effect; and/or no actions led me to believe that I should arrest him, or words to that effect; and/or I was not aware of what he was ultimately doing, or words to that effect, which contradict the statements Smith made to Mr. Benjamin Davis *** on or about October 29, 2013 ***, and/or the statements Smith made to *** Garrison *** on or about October 29, 2013." Finally, the Department alleged that Officer Smith violated the rule prohibiting intoxication on or off duty.

¶ 6 Hearing

¶ 7 At the Board's hearing on the charges, Davis testified that he followed Officer Smith to the garden center because taking three televisions to the garden center seemed odd. As he

approached, he heard an alarm sounding. Davis explained that Walmart put spider wire security devices on all televisions available for sale. When the wire breaks or passes the sensors by the store's exits, the wire sets off an alarm. He clearly heard a loud spider wire alarm before he reached the garden center, and he heard the alarm more clearly when he entered the garden center. The Board accepted sample spider wire into evidence.

¶ 8 Davis saw the man with Officer Smith, dressed as a Walmart employee, and Davis realized that the man did not work at the Hammond Walmart. The Department's attorney referred to that man as "the impersonator," and we will adopt that designation. Davis contacted Bailey, and both Davis and Bailey met up with Officer Smith and the impersonator by the exit, where the impersonator ran with Bailey in pursuit. Davis introduced himself to Officer Smith and said he needed to speak with Officer Smith in the office. Davis testified that Officer Smith told Davis he "got the wrong guy and that he was a police officer and he was going to apprehend the other individual." Davis noticed that Officer Smith "smelled very strongly of alcohol." Davis testified that the four items in Officer Smith's cart had a total retail price of \$876.33. After the discussion with Officer Smith, Davis went back to the garden center, where he found cut spider wire wrapped in a place mat inside a grill.

¶ 9 Garrison testified that he arrived at the Walmart in response to a report of attempted theft. Garrison confirmed that Officer Smith smelled of alcohol. Officer Smith told Garrison "he was about to arrest the subject but he didn't get a chance to." According to Garrison, Officer Smith "kept saying, I couldn't find anyone to tell."

¶ 10 Officer Smith testified that he had drunk three glasses of wine before he drove to the Walmart. He intended to purchase a Wii system and an inexpensive television. The

impersonator asked him whether he wanted a television. Officer Smith said yes. The impersonator put two small televisions into Officer Smith's cart. He said he needed to bring the televisions to another customer. Officer Smith did not realize that the impersonator was not a Walmart employee until he ran from the security personnel who met them at the exit.

¶ 11 The Department's attorney showed Officer Smith two documents, and Officer Smith identified the documents as transcripts of his interviews with Sergeant Torres, from February 2014 and May 2014. The Department sought to introduce the substance of the statements into evidence by asking, question by question, whether Sergeant Torres asked each question shown on the transcript and whether Officer Smith gave the answer shown on the transcript. After Officer Smith admitted that the transcript accurately recorded one question and answer, Officer Smith's attorney said, "[W]e'll stipulate he was asked the questions. The questions as worded are correct and his answers as worded are correct." The Board accepted the stipulation and allowed the transcripts of both interviews into evidence.

¶ 12 The transcript of the February interview shows that Officer Smith said the impersonator told Officer Smith to follow him after placing the televisions into Officer Smith's cart. Officer Smith followed the impersonator to the garden center and waited for him. Officer Smith said he paid no attention to the impersonator's actions in the garden center. Officer Smith went to the front of the store with the impersonator, where Officer Smith thought they would look at other televisions.

¶ 13 In the May interview, Officer Smith said that he had three televisions in his cart, when he intended to purchase only one, because the impersonator told Officer Smith the impersonator needed to take two televisions to another customer at the front of the store. Sergeant Torres

showed Officer Smith Garrison's report, pointing to Garrison's assertion that Officer Smith said he intended to arrest the impersonator, but he could not find anyone to tell. Sergeant Torres asked, "What actions did this individual do that lead you to believing you should arrest him?" The transcript shows the following:

"SMITH: Let me explain. I never made that statement. *** I stated, from what I recall, that had I known that is what he was up to I would have arrested him myself. *** No actions led me to believe that I should arrest him. I was not aware of what he ultimately was doing.

SGT. TORRES: *** [W]hy follow him past the final register?

SMITH: I was under the assumption he was a Walmart employee and he was assisting another customer. He told me to follow him and that is what I was doing. I had no knowledge where the other customers were. *** I had no reason to believe he was stealing."

¶ 14 Sergeant Torres then showed Officer Smith Davis's report, where Davis wrote that Officer Smith said, "You've got the wrong guy. I'm here to stop him but you didn't give me a chance." Sergeant Torres asked, "If, as you stated earlier, you did not know this individual was attempting to leave the Walmart store without paying for the merchandise, why would you need to stop him?" Officer Smith answered, "I do not recall making those statements and to my knowledge I did not make those statements. What I remember the conversation being, he asked me who was the guy that ran out, how did I know him, and where did I know him from."

¶ 19 By aiding the attempted retail theft, Officer Smith also brought discredit upon the Department, as alleged in the second charge. The Board rejected Officer Smith's account of the incident, as the Board explained:

"First, Officer Smith permitted the thief to place three televisions in Smith's shopping cart. Officer Smith testified that the thief told him the televisions were for another customer, but if that is the case, there is no reason for him to place the televisions in Officer Smith's cart, as opposed to the shopping cart the thief was already controlling. *** [T]he video shows him going with the thief to the store's garden center, which at the time was a relatively secluded area without other customers, where the store's video system did not capture every area. Almost nine minutes passed since Officer Smith first met the thief. The Board finds it very unlikely that Officer Smith was still merely following the thief to the televisions on sale. Indeed, the conduct of Officer Smith and the thief was suspicious enough to alert a Walmart supervisor, who contacted Walmart asset protection employee Ben Davis. Fourth, and most importantly, it is undisputed that each of the pieces of electronics in Officer Smith's cart was protected with 'spider wire,' which includes an electronic alarm that sounds when cut. When the spider wire is cut, the alarm emits a loud chirping noise for several minutes. It is also undisputed that spider wire was later recovered by Walmart staff in a grill in the garden center. ***

*** The Board heard a spider wire alarm as part of the Superintendent's case. The sound is loud and unmistakably an alarm. *** Davis credibly testified that he

heard a similar alarm from outside the garden center. Notably, while in the garden center, the thief can be seen on the video going to a machine that looks like a grill, opening and then closing the lid. Davis also testified that spider alarms were later found inside a grill in the garden center. *** The Board finds that Officer Smith was in close enough proximity to the thief that he saw the thief cut the spider wire off the electronics at issue, and certainly heard the alarm go off. Nonetheless, Officer Smith did not report what was going on to anyone, took no action with respect to the thief, but instead thereafter accompanied the thief with the electronic equipment to the front of the store, in an effort to walk it out of the store. At this juncture, the thief and Officer Smith were using only Officer Smith's shopping cart, and any suggestion that the thief had a purpose in mind other than to steal the equipment was then long gone. Officer Smith accompanied the thief through the Walmart store for more than thirteen minutes in total. Few legitimate customers would have had such patience with the long delay to get service assistance on a specific item."

¶ 20 The Board found that Davis and Garrison testified credibly on the issue of what Officer Smith said to them on October 29, 2013. Because Officer Smith, in his statements to Sergeant Torres, denied that he told Davis and Garrison he intended to arrest the impersonator, the Board found that "Officer Smith, during his formal interview with the Bureau of Internal Affairs, made intentional false statements when recounting what he said to Mr. Davis or Sergeant Garrison." Thus, the Board found that Officer Smith intentionally made a false report.

¶ 21 The Board then considered the appropriate sanction.

"Separate and apart from the rule violations relating to being intoxicated, the Board finds that the Respondent's assistance in the attempted shoplifting of three televisions and a car stereo and in making multiple intentional false statements warrants his discharge. The Respondent knowingly accompanied and aided an individual in attempting to commit an act of retail theft, and then Respondent intentionally made several false official statements in an effort to cover up Respondent's role in the misconduct. The Respondent thereby exhibited a significant lack of integrity, honesty, and trustworthiness, and this misconduct, by itself, is incompatible with continued service as a police officer. Permitting the Respondent to remain on the job would undermine public confidence in the honesty and integrity of the police force."

¶ 22 The Board discharged Officer Smith from the police force.

¶ 23 Officer Smith filed a complaint for administrative review of the Board's decision. The circuit court affirmed the Board's decision. Officer Smith now appeals.

¶ 24 ANALYSIS

¶ 25 Officer Smith phrases several of his objections to the Board's ruling as matters of his right to due process. Officer Smith's right to due process does not affect our review of the Board's findings. See *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007) (While the due process clause forbids convictions unless the prosecution proves guilt beyond a reasonable doubt, reviewing courts defer to the trial court's finding of guilt, and will not reverse the conviction for insufficient evidence unless no rational trier of fact could have found that the prosecution

proved all the elements of the crime beyond a reasonable doubt). We review the decision of the Board, not the circuit court's decision. *Hanks v. Illinois Department of Healthcare & Family Services*, 2015 IL App (1st) 132847, ¶ 19. "[S]trict rules of evidence that apply in a judicial proceeding do not apply in proceedings before an administrative agency." *Ivy v. Illinois State Police*, 263 Ill. App. 3d 12, 19 (1994). We will not disturb the Board's ruling on the admissibility of evidence unless the Board abused its discretion. *MJ Ontario, Inc. v. Daley*, 371 Ill. App. 3d 140, 149 (2007). The Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2012)) directs us to consider the Board's fact findings *prima facie* true and correct. 735 ILCS 5/3-110 (West 2012). We review the Board's factual findings only to determine whether the findings are contrary to the manifest weight of the evidence. *Walsh v. Board of Fire & Police Comm'rs of Village of Orland Park*, 96 Ill. 2d 101, 105 (1983).

¶ 26

Evidentiary Objections

¶ 27

Officer Smith argues that the Board abused its discretion when it accepted the transcript of Sergeant Torres's interviews into evidence. Officer Smith stipulated that the transcript accurately recorded Sergeant Torres's questions and Officer Smith's answers. Even in criminal trials, if the defendant fails to object to hearsay evidence, the hearsay "is to be considered and given its natural probative effect." *People v. Akis*, 63 Ill. 2d 296, 299 (1976). Here, the Department presented a witness to the interviews, Officer Smith, who could testify as to the accuracy of the transcripts, and began the process of verifying the transcripts through that witness when Smith stipulated to the accuracy of both transcripts. We find that the Board did not abuse its discretion when it admitted the transcripts into evidence.

¶ 28 Next, Officer Smith claims the Department violated his right to due process because the Department failed to present the unidentified impersonator as a witness. But a defendant may lose not merely his job but his liberty if a criminal court finds him guilty of aiding an unidentified criminal in the commission of a crime. See *People v. Bleimehl*, 9 Ill. App. 3d 273, 278 (1972). The due process clause requires only sufficient evidence to support the Board's findings. See *Walsh*, 96 Ill. 2d at 105. Just as due process does not require the prosecutor in a criminal trial to present an unidentified principal offender as a witness for the conviction of an accomplice, the due process clause here does not require the Department to present the unidentified impersonator as a witness.

¶ 29 Officer Smith also objects to the admission into evidence of the breathalyzer test results. The Board based the finding of intoxication largely on the testimony of Davis and Garrison, and Officer Smith conceded in his brief on appeal that he "was intoxicated, no doubt. *** [He] behaved as would a person under the influence of, or impaired, by alcohol." Because the admission of the breathalyzer results into evidence had no prejudicial effect, it provides no grounds for reversal of the Board's decision. *Illinois Department of Human Services v. Porter*, 396 Ill. App. 3d 701, 724 (2009).

¶ 30 Factual Findings

¶ 31 Officer Smith challenges several of the Board's factual findings. First, he contends that the evidence does not support the finding that he aided the impersonator in an attempted theft. The Board found Officer Smith's testimony not credible, and we have no sufficient grounds for rejecting that finding. See *City of Elgin v. Illinois Commerce Comm'n*, 2016 IL App (2d) 150047, ¶ 26. The Board heard the alarm spider wire emits when broken. Davis's

credible testimony supports the inference that the impersonator cut the spider wire in the garden center while Officer Smith stood nearby, close enough to hear the loud alarm. The evidence supports the Board's finding that Officer Smith should have suspected that the impersonator did not intend to help a customer purchase the televisions, especially when Officer Smith and the impersonator took the televisions past the registers without paying for them. Officer Smith's acts of pulling the cart past the register to the front of the store supports the conclusion that he intended to aid the impersonator in his effort to steal the items from the store. The manifest weight of the evidence supports the Board's finding that Officer Smith aided the impersonator's attempted retail theft.

¶ 32 Next, Officer Smith argues that the Board lacked authority to find him guilty of violating the Indiana Code, when no Indiana court tried him for violating that code. But an acquittal on the charge would not preclude the Board from finding that Officer Smith violated the statute. "[A] finding of not guilty in a criminal proceeding does not preclude a civil proceeding based on the same charges since there is a different standard of proof in each proceeding." *Everly v. Chicago Police Board*, 119 Ill. App. 3d 631, 640 (1983). We review the finding that Officer Smith breached the Indiana Code under the same standards applicable to all of the Board's findings of fact. We will not disturb the finding unless it is contrary to the manifest weight of the evidence. See *Walsh*, 96 Ill. 2d at 105.

¶ 33 Section 7.1-5-1-3 of the Indiana Code establishes that a person violates the code if, while intoxicated, the person "breaches the peace or is in imminent danger of breaching the peace." (Ind. Code § 7.1-5-1-3 (eff. 2012)). Officer Smith admits intoxication. The Board found that Officer Smith's acts created a danger of a breach of the peace because Officer Smith, by

assisting the impersonator's attempt to steal from Walmart, caused a chase that threatened to breach the peace. See *State v. Davis*, 27 S.E. 905, 910 (S.C. 1897) (store owner chased defendant when he saw defendant stealing from owner's store, and owner scuffled with defendant in public). We cannot say that the finding that Officer Smith violated section 7.1-5-1-3 of the Indiana Code is against the manifest weight of the evidence.

¶ 34 The evidence also supports the finding that Officer Smith lied to Sergeant Torres. The Board found that Davis credibly testified that Officer Smith said, "You've got the wrong guy. I'm here to stop him but you didn't give me a chance." The transcript of Sergeant Torres's interview shows that Officer Smith denied that he told Davis he intended to arrest the impersonator. Similarly, Garrison testified that Officer Smith told him he would have reported the attempted theft, but he could not find anyone to tell. The transcript of Sergeant Torres's interview shows that Officer Smith denied making that statement to Garrison. The evidence amply supports the finding that Officer Smith lied to Sergeant Torres. We find no grounds for disturbing any of the Board's findings of fact.

¶ 35 **Sanction**

¶ 36 Finally, Officer Smith argues that the infractions the Board found do not justify the decision to discharge him from the police force. We will not reverse the Board's finding of cause for discharge unless the decision is "arbitrary, unreasonable, or unrelated to the requirements of service." *Sutton v. Civil Service Comm'n*, 91 Ill. 2d 404, 410 (1982). The Board noted the findings of intoxication, but relied on the findings of aiding attempted retail theft and lying to Torres as cause for discharge. The court in *Jones v. Civil Service Comm'n of Alton*, 80 Ill. App. 3d 74, 76 (1979), held that the commission could properly discharge a

police officer who committed retail theft. See also *Rispoli v. Police Board of City of Chicago*, 188 Ill. App. 3d 622, 638 (1989). Lying to investigators also warrants discharge. *Valio v. Board of Fire & Police Comm'rs of Village of Itasca*, 311 Ill. App. 3d 321, 331 (2000). "The failure of an officer to provide truthful statements during a department investigation could impair the department's ability to properly and fully investigate violations of departmental regulations. Such a failure could impugn the integrity of the investigation and the department and adversely affect the department's ability to provide efficient service to the community. A police department must be able to conduct accurate investigations of its officers engaged in questionable police conduct." *Valio*, 311 Ill. App. 3d at 331. See also *Remus v. Sheahan*, 387 Ill. App. 3d 899, 905 (2009). We cannot say that the decision to discharge Officer Smith is arbitrary, unreasonable, or unrelated to the requirements of service. Accordingly, we affirm the decision to dismiss Officer Smith from the police force.

¶ 37

CONCLUSION

¶ 38

The Board did not abuse its discretion when it accepted Officer Smith's stipulation concerning the accuracy of interview transcripts and when it admitted the transcripts into evidence. Officer Smith, who admitted that intoxication affected his actions on October 29, 2013, has not shown any prejudice from the Board's decision to admit into evidence the results of a breathalyzer test. The evidence supports the findings that Officer Smith violated several departmental rules. The findings that Officer Smith lied to Sergeant Torres about the incident and about what Officer Smith said to Davis and Garrison, especially when considered in conjunction with the finding that Officer Smith aided the impersonator's

No. 1-16-2865

attempt to steal from Walmart, justify the decision to discharge Officer Smith from the police force. Accordingly, we affirm the circuit court judgment affirming the Board's order.

¶ 39 Affirmed.