

2415 First Avenue
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NEW CAR DEALERS POLICY AND APPEALS BOARD

STATE OF CALIFORNIA

BERKEY LEE GARAGE,)
A California Corporation,)
Appellant,)
v.)
DEPARTMENT OF MOTOR VEHICLES,)
Respondent.)

Case No. A-23-72

Filed: July 6, 1972

Time and Place of Hearing:

June 14, 1972, 11:15 a.m.
Director's Conference Room
Department of Motor Vehicles
2415 First Avenue
Sacramento, California

For Appellant:

T. Roy Hoover
Attorney at Law
1305 Franklin Street
Oakland, CA 94612

For Respondent:

Honorable Evelle J. Younger
Attorney General
By: Victor Sonenberg
Deputy Attorney General

FINAL ORDER

An appeal was taken to this board from a decision of the Director of Motor Vehicles ordering disciplinary action against appellant's license, certificate and special plates. The basic facts are not disputed. Appellant was convicted in the Municipal

Court of the Berkeley-Albany Judicial District, County of Alameda, State of California, on a plea of nolo contendere, of the offense of violating Section 11713(n) Vehicle Code (disconnecting, turning back or resetting the odometer on a motor vehicle in violation of Sections 28050 or 28051^{1/} Vehicle Code), a crime involving moral turpitude.

The underlying relevant and undisputed facts are that appellant, on October 23, 1969, took in on trade a 1966 Volkswagen which, at the time of the trade, had 88,000 miles registered on the odometer. Appellant spent approximately \$350 at its internal shop rates repairing the vehicle. This work was done in appellant's shop over a period of months. During August 1970, the car was sold. The odometer then registered approximately 39,000 miles.

Appellant did not deny that the odometer registered about 49,000 miles less when the vehicle was sold than when it acquired it, but, notwithstanding the conviction on its nolo contendere plea, contends that the mileage was not reduced for any unlawful purpose. Johnny E. Lee, sole owner of appellant corporation, testified, "I don't know what happened. I believe the speedometer had been exchanged with another unit, somehow, is all I can come up with." (A.T. 21:13-15.) Testimony established that the

^{1/} "Section 28051. It is unlawful for any person to disconnect, turn back or reset the odometer on any motor vehicle with the intent to reduce the number of miles indicated on the odometer gauge." Section 28050 has no bearing on the case before us.

car had been damaged extensively prior to its being traded to appellant, and the latter took the position that this damage could have necessitated the replacing of the speedometer unit. However, appellant's records did not show that it had replaced the speedometer unit or done any work on either the odometer or any component thereof, although detailed records were kept on appellant's repair work on the vehicle.

At oral argument before us, appellant moved for a continuance for the purpose of obtaining and presenting "newly discovered evidence" to augment the record. Appellant made an offer of proof that the person from whom it acquired the vehicle had tampered with the odometer prior to the trade-in. We denied the request for continuance and rejected the offer because what the former owner did or did not do prior to surrendering possession of the vehicle to appellant, could not have any significant bearing on the case. It was not disputed that after appellant acquired the automobile, the mileage indicated on the odometer was in fact reduced by about 49,000 miles or that appellant was convicted as a result thereof.

We were not favorably impressed with appellant's attempt to avoid the consequences of its plea of nolo contendere by contending that neither the judge, the district attorney nor appellant's counsel understood the significance of its plea. The pertinent Penal Code and Vehicle Code provisions are plain

and simple. For purposes of this proceedings, appellant pleaded guilty and was convicted of a crime involving moral turpitude.

The only question remaining is the appropriateness of the penalty.

IS THE PENALTY IMPOSED BY THE DIRECTOR OF MOTOR VEHICLES COMMENSURATE WITH THE DIRECTOR'S FINDINGS?

The hearing officer recommended that the appellant's license, certificate and special plates be suspended for a period of 120 days, with the entire suspension stayed for a period of three years. During the three years, appellant was to be on probation and subject to the condition that it obey all laws and all rules and regulations of the Department of Motor Vehicles. This recommendation was not adopted by the Director of Motor Vehicles. The director ordered that only 105 days of the suspension be stayed, and that appellant cease the business of buying and selling vehicles for fifteen days. On appeal, appellant argued that a 15-day suspension was excessive, that this board should rescind the director's order and impose the penalty recommended by the hearing officer.

At the outset, we take note of the well-established principle that an administrative proceedings such as that giving rise to this appeal has as its primary purpose not

the punishment of the wrongdoer but the protection of the public. (Ready v. Grady 243 Cal.App.2d 113; Borrer v. Department of Investments, 15 Cal.App.3d 539.) In a case involving a licensed building contractor, an appellate court had occasion to say that the purpose of the licensing law is primarily to "...keep the contracting business clean and wholesome, to the end that it may merit the respect and confidence of the public in general and in particular those who have recourse to contractors in the construction or improvement of their properties." The court recognized that the public can be protected and the status of the industry enhanced by an administrative sanction short of license revocation.

It further said, "...it [disciplinary proceeding] is not intended for the punishment of the individual contractor but for the protection of the contracting business as well as the public by removing, in proper cases, either permanently or temporarily, from the conduct of a contractor's business a licensee whose method of doing business indicates a lack of integrity upon his part or a tendency to impose upon those who deal with him." (West Coast Home Improvement Company v. Contractors State License Board, 72 Cal.App.2d 287.)

To impose no actual suspension on an automobile dealer who has unlawfully tampered with an odometer would, in our opinion, undermine public confidence in an industry that has made

commendable strides toward achieving the dignity it deserves. Further, no actual suspension, in a case of this kind, would suggest to the wrongdoer, as well as other licensees who may have an inclination towards facilitating the sale of automobiles through wrongful means, that the risks involved do not outweigh the benefits. It follows that we believe the 120-day stayed suspension recommended by the hearing officer is not appropriate.

On the other hand, we do not believe the facts of this case are such that an actual suspension of fifteen days is warranted. The director found that appellant had been an authorized Volkswagen dealer since the mid-1950's. There is nothing in the record to indicate appellant has ever violated a law or regulation governing its licensed business save only the single conviction charged in the accusation. Appellant employs 56 persons. Perhaps only one of them was guilty of the odometer tampering charged. There was no evidence whatsoever tending to show how the offense was committed or who among the corporate officers and employees was the culprit. It is reasonable to expect that a 15-day involuntary vacation would create economic hardships to a substantial number of the innocent bystanders. Furthermore, the evidence failed to show that Mr. Lee, owner of appellant corporation and the person who most bears the burden of a cessation of business activity, was a participant in the odometer tampering or knew of it or

condoned the illegal conduct.

Balancing the gravity of this one wrongful act against the consequences flowing from an actual suspension, we are of the opinion that a five-day period of cessation of licensed business activities will best serve the public interest.

WHEREFORE THE FOLLOWING ORDER IS HEREBY MADE:

1. The dealer's license, certificate and special plates (D-1270) heretofore issued to appellant, Berkey Lee Garage, are hereby suspended for a period of one-hundred-twenty days (120); provided, however, one-hundred-fifteen (115) days of said suspension shall be stayed and appellant placed on probation for a period of three (3) years from the effective date of this decision on the following terms and conditions:

(a) Appellant shall obey all of the laws of the United States, of the State of California and its political subdivisions, and all rules and regulations of the Department of Motor Vehicles pertaining to the exercise of its privileges as a licensee. If appellant, or one of its officers, are convicted of a crime, including a conviction after a plea of not guilty or nolo contendere, such conviction shall be construed as a violation of the terms and conditions of any probationary license issued to appellant.

(b) The license, certificate and special plates (D-1270) heretofore issued to appellant are hereby suspended for a period of five (5) days.

2. Should the Director of Motor Vehicles at any time during the existence of said probationary period determine upon reliable evidence that appellant has violated any of the terms and conditions of probation, he may, in his discretion and after notice and opportunity to be heard, revoke said probation for the remainder of said suspension of the license, certificate and special plates as hereinabove set forth imposed; otherwise, upon full compliance by appellant of all of the terms and conditions of probation set forth and upon expiration of the term of probation, said stay of order of suspension shall become permanent.

This Final Order shall become effective July 24, 1972.

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PASCAL B. DILDAY

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D I S S E N T

I disagree with that portion of the decision of the majority that a five-day cessation of licensed business activities is appropriate in this case. In my opinion, adopting the recommendation of the hearing officer would be the proper decision of this board.

As far as can be determined from the record, appellant is a dealership that has served its community well for going on twenty years and without any prior disciplinary action. To close it down for five days for one isolated instance of odometer tampering under the circumstances of this case is uncalled for.

I am unable to comprehend just how the public interest is served any better by a five-day shutdown than it would be served by a stayed suspension of 120 days with a three-year period of probation. As the majority points out, economic hardship to many people results when a dealership is compelled to suspend business operations. Causing economic hardship is not compatible with public interest. Certainly the penalty recommended by the hearing officer would cogently serve notice on appellant and other dealers that odometer tampering is not something that will be winked at by enforcement authorities and would do so without causing chaos to innocent people.

Mr. Lee, owner of the dealership, made no attempt to conceal the fact that the odometer mileage had been reduced while the vehicle was at his dealership and his testimony that he didn't know how it happened was in no way questioned. He stands to sustain the brunt of the five-day shutdown ordered by the majority, which includes placing the franchise in jeopardy, even though the most the evidence shows concerning his culpability is that there may have been some negligent supervision on his part. If one instance of negligent supervision is to terminate an operation, all enterprises, including governmental agencies, will be closing their doors.

I would adopt the penalty recommended by the hearing officer.

W. H. "HAL" McBRIDE

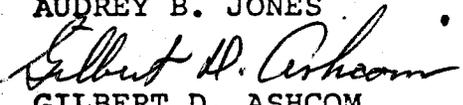
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2. Should the Director of Motor Vehicles at any time during the existence of said probationary period determine upon reliable evidence that appellant has violated any of the terms and conditions of probation, he may, in his discretion and after notice and opportunity to be heard, revoke said probation for the remainder of said suspension of the license, certificate and special plates as hereinabove set forth imposed; otherwise, upon full compliance by appellant of all of the terms and conditions of probation set forth and upon expiration of the term of probation, said stay of order of suspension shall become permanent.

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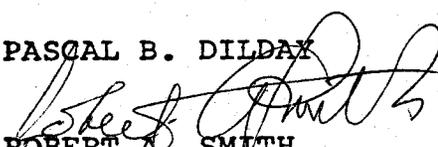
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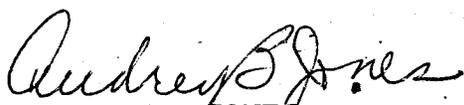
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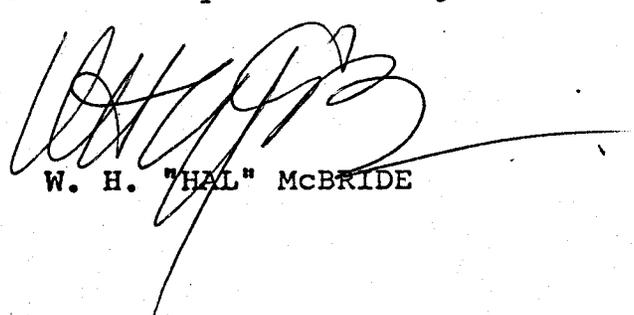
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