

STATE OF NEW YORK
OFFICE OF CANNABIS MANAGEMENT
OFFICE OF ADMINISTRATIVE HEARINGS

OFFICE OF CANNABIS MANAGEMENT,

Petitioner,

-against-

DECISION

Complaint No. 115 2023 0802 0084

ALCHEMY GIFT SHOP

Respondent.

The above noted matter was held as a Webex hearing before Thomas Kidera, on October 13, 2023.

The Respondent was represented by William D. Berard III, Esq.

The Office of Cannabis Management (hereinafter “OCM”) was represented by Assistant Counsel Jasmine Norman, Esq.

Investigative Specialist James Lawson testified on behalf of OCM.

ISSUE

The allegations set forth in the Notice of Violation and Order to Cease Unlicensed Activity and Notice of Hearing (hereinafter “NOV”) indicate that the Respondent was offering cannabis products, as defined by Cannabis Law § 3, for sale without an appropriate registration, license, or permit. This allegation was based upon observations made during a regulatory inspection which was conducted at 6910 Buffalo Ave. Niagara, New York, on August 2, 2023 (State’s Exhibit 1).

FINDINGS OF FACT

1. On August 2, 2023, Investigator Lawson, in addition to members of the Enforcement Division of OCM, as well as members of the Enforcement Unit of the New York State Department of Tax and Finance (hereinafter “DTF”) conducted a regulatory inspection of Alchemy Gift Shop, located at 6910 Buffalo Ave. Niagara, New York.

2. Investigator Lawson testified that he has training and experience in identifying cannabis and cannabis containing products. He explained that when completing inspections, he looks to see whether a business has a price list, whether products are in glass jars, or if there are other indications that products are being offered for sale. Some of the factors he considers in determining whether a product is being offered for sale is whether it is in public view and its proximity to the cash register.
3. According to the testimony of Investigator Lawson, he entered the location for his inspection and had a pleasant conversation with an individual who identified herself as the owner of Alchemy Gift Shop. He testified that the owner of the premises was very cooperative with the inspection.
4. Investigator Lawson testified that during his search of the premises OCM, along with investigators from the Department of Tax and Finance, recovered a quantity of cannabis flower along with cannabis pre-rolls. He explained that he recognized the labels on the jars containing cannabis flower to be common names for various strains of cannabis.
5. Both items are listed on the Department of Tax and Finance's Voucher/Receipt for Evidence/Property form with weights that fail to list a unit of measurement. (State's Ex. 3) Additionally, Investigator Lawson testified that he was not in fact present when the recovered cannabis was weighed and the stated weight was excluded from evidence.
6. During Investigator Lawson's inspection, he explained that he observed both cannabis flower and pre-rolls in plain view on the counter of the store. (State's Ex. 5) He explained that the quantity of THC flower present in the store was more than the personal use amount per person, daily.
7. Investigator Lawson testified that prior to beginning the regulatory inspection of Alchemy Gift shop, he engaged in a diligent search of the OCM records and determined that the Respondent was not in possession of any registration, license or permit issued by OCM which would permit her to sell cannabis. (State's Ex. 2)
8. The NOV was personally served on and signed by the owner/ operator of the premises, Gretchen Haseley. A copy of the NOV was also affixed to the front door of the premises. The NOV indicated that a hearing was scheduled for August 30, 2023, at 2:00 p.m. A pre-hearing conference was held on September 18, 2023, at 12:30 p.m. During the pre-hearing conference, a hearing date of October 13, 2023, at 2:00 p.m. was selected.

CONCLUSIONS OF LAW

Cannabis Law Article 6 § 125(1) provides that: “No person shall cultivate, process, distribute for sale or sell at wholesale or retail or deliver to consumers any cannabis, cannabis product, medical cannabis or cannabinoid hemp or hemp extract product within the state without obtaining the appropriate registration, license, or permit therefor required by this chapter unless otherwise authorized by law.”

Cannabis Law Article 6 § 138(a) provides that “The board or the Office of Cannabis Management shall, in accordance with the authority otherwise conferred in this chapter, have the authority to: 1. order any person who is unlawfully cultivating, processing, distributing or selling cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such in this state without obtaining the appropriate registration, license, or permit therefor, or engaging in an indirect retail sale to cease such prohibited conduct. 2. seize any cannabis, cannabis product, cannabinoid hemp or hemp extract product, or any product marketed or labeled as such, found in the possession of a person engaged in the conduct described in subdivision one of this section;”

Cannabis Law Article 6 § 132(1) (a) provides that any person who sells cannabis, or cannabis products, or any product marketed or labeled as such, without having an appropriate registration, license or permit therefor, may be subject to a civil penalty of not more than ten thousand dollars for each day during which such violation continues.

Cannabis Law Article 6 § 132(1)(c) provides that: “In assessing the civil penalties under this subdivision, the board or office shall take into consideration the nature of such violation and shall assess a penalty that is proportionate to the violation.”

Cannabis Law Article 1 § 3(46) Retail sale" means to solicit or receive an order for, to keep or expose for sale, and to keep with intent to sell, made by any licensed person, whether principal, proprietor, agent, or employee, of any cannabis, cannabis product, cannabinoid hemp or hemp extract product to a cannabis consumer for any purpose other than resale.

SUMMARY

Investigator Lawson testified credibly regarding the regulatory inspection of Alchemy Gift Shop on August 2, 2023. He explained that on the day of the inspection investigators from OCM as well as DTF entered the store during regular business hours. This was evidenced by the time on the notice of violation, which was approximately 1:32 in the afternoon. (State’s Ex. 1) He stated that the owner of Alchemy Gift Shop was very cooperative with the inspection. No evidence was entered during the hearing that suggested that the owner objected to the inspection that day.

Respondent's counsel argued that investigators could not legally enter Alchemy Gift Shop without a warrant. Counsel also asserted that even if the store was open to the public, officers would need a warrant to enter. This position is in opposition to well-established case law regarding "plain view" doctrine. This doctrine dictates that officers can seize unlawful and incriminating evidence which is readily visible. It "rests on the premise that police should be able to seize incriminating evidence in plain view if they had the right to be where they were when they saw it. [L]aw enforcement officers may properly seize an item in 'plain view' without a warrant if; (i) they are lawfully in a position to observe the item; (ii) they have lawful access to the item itself when they seize it; and (iii) the incriminating character of the item is immediately apparent." (*People v. Brown*, 96 N.Y.2d 80, 88–89, 725 N.Y.S.2d 601, 749 N.E.2d 170; see *People v. Diaz*, 81 N.Y.2d 106, 110, 595 N.Y.S.2d 940, 612 N.E.2d 298; see also *Horton v. California*, 496 U.S. 128, 136–137, 110 S.Ct. 2301, 110 L.Ed.2d 112).'" *People v. Velasquez*, 110 A.D.3d 835, 972 N.Y.S.2d 678 (2013)

In this case, the investigators were free to enter Alchemy Gift Shop during regular business hours, like any other member of the public. The investigators were lawfully able to observe the cannabis on the store counter. They did not need to search or access any area in the store restricted to the public to observe the cannabis flower present in the store on August 2, 2023. Therefore, they had lawful access to the item itself when they seized it.

Prior to entering the premises, Investigator Lawson was aware that the location did not have a license to sell cannabis. As such, any quantity of product, marketed or labeled as cannabis, above the personal use limit and exposed for sale would be considered in violation of Cannabis Law Article 6 § 125(1) and § 132 (1)(a). Investigator Lawson explained that the cannabis flower observed on the counter at the location and seen in State's Exhibit 4-6 was more than the personal use limit. He also testified that it was marketed for sale, as it was contained in glass cannisters and labeled with specific strains of cannabis. Therefore, Investigator Lawson and the investigators from DTF were immediately aware of the incriminating character of the cannabis at the location, particularly given the quantity and the way it was displayed.

The burden in this case is on OCM to prove by a preponderance of the evidence that Respondent has violated the Cannabis Law. In this matter, the element in question is whether Respondent delivered cannabis to consumers or sold to consumers product which contained cannabis or was marketed or labeled as such. There is nothing in evidence to show that the product in this case was tested and found to be cannabis. However, Investigator Lawson testified that he has training and experience in identifying cannabis, and that the product he observed that day resembled cannabis in smell and appearance. He also testified that the product he observed was marketed or labeled as cannabis, as the cannisters the flower was contained in were labeled with common strains of cannabis. What is notable, is that the cannister containing pre-rolls was unlabeled and there was no testimony that it conclusively contained greater than the personal limit of cannabis. For purposes of this decision, the cannister containing pre-rolls was consistent with personal use and will not be considered.

It is evident from the labeling and positioning of the cannisters, as well as their proximity to the ATM machine and various grinders, empty jars, and other cannabis paraphernalia, that the cannabis in Alchemy Gift Shop was exposed, kept, and marketed for sale. For those reasons I

find that Alchemy Gift Shop violated Cannabis Law Article 6 § 125(1), §138(a), and § 132(1) (a) by selling cannabis or product marketed and label as cannabis, namely cannabis flower.

It is also evident from the record that this cannabis marketing operation at Alchemy Gift Shop was a relative minor one. In fact, at the conclusion of the hearing, OCM counsel Jasmine Norman acknowledged that the loose cannabis flower found at Alchemy Gift Shop amounted to “not much cannabis . . . product was in the store. There was still more than the allotted personal use amount in the location.” (Tr. 1:14:50). The record also failed to show the presence of any scales, price lists, baggies, processing materials or any pre-packaged cannabis products at the premises. While it is clear the loose flower cannabis on display was being offered for sale, it is equally clear that this operation was proportionately a minor one.

DECISION

The evidence presented during this hearing showed by a preponderance of the evidence that the Respondent engaged in the sale of illicit cannabis and cannabis products without a license, registration, or permit to do so, at the location of 6910 Buffalo Ave. Niagara, New York, on August 2, 2023. In so doing, Respondent violated Cannabis Law Article 6 § 125(1), §138(a), and §132(1)(a). The Order to Cease Unlicensed Activity is hereby **Affirmed**.

WHEREFORE, THE RESPONDENT IS HEREBY ORDERED:

To pay a **\$2,500.00** fine, as a proportionate penalty, for the limited unlicensed sale of loose cannabis flower on August 2, 2023.

Dated: November 9, 2023

Thomas Kidera

Administrative Law Judge

This decision was sent via email on November 9, 2023, to the following:

Nickolas Perry

Sheila Wagner

Jasmine Norman, Esq.

William D. Berard III, Esq.

PLEASE BE ADVISED: Either party may appeal this decision within 30 calendar days of receipt, according to the specific manner described at 9 NYCRR 133.23(g)(5).