

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

| | | |
|---------------------------------|---|--------------------------|
| ALVIN KLEIN, ROBERT LIPPMAN and |) | AB-7184 |
| STEVEN LIPPMAN |) | |
| dba Village Expressmart |) | File: 20-141764 |
| 10974 Le Conte Avenue |) | Reg: 97041857 |
| Los Angeles, CA 90024, |) | |
| Appellants/Licensees, |) | Administrative Law Judge |
| |) | at the Dept. Hearing: |
| v. |) | Jeffrey Fine |
| |) | |
| DEPARTMENT OF ALCOHOLIC |) | Date and Place of the |
| BEVERAGE CONTROL, |) | Appeals Board Hearing: |
| Respondent. |) | May 6, 1999 |
| |) | Los Angeles, CA |

Alvin Klein, Robert Lippman, and Steven Lippman, doing business as Village Expressmart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale beer and wine license for their clerk, Jose Ballesteros, having sold an alcoholic beverage (a twelve-pack of beer) to Aaronmichael Younessi, who was then 19 years of age, such sale being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a), the third such violation within a 36-month period.

Appearances on appeal include appellant Alvin Klein, Robert Lippman, and Steven Lippman, appearing through their counsel, Ralph Barat Saltsman, and the

¹The decision of the Department, dated July 2, 1998, is set forth in the appendix.

Department of Alcoholic Beverage Control, appearing through its counsel,
Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 16, 1984. Thereafter, the Department instituted an accusation against appellant charging the sale of beer to Younessi. An administrative hearing was held on April 16, 1998,² at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained.

The transaction in question involved the purchase by Aaronmichael Younessi, a minor, of a 12-pack of Coors beer. The transaction was witnessed by two Department investigators, Edward Yee and Eric Hirata, who were in the store.

Younessi testified that he went to the rear of the store, grabbed the 12-pack of Coors, and stood in line at the register. He placed the beer on the counter, and pulled out his identification and money. Younessi testified he was asked for identification, and produced his California driver's license. When the clerk rang up the sale, Younessi, according to his testimony, did not have enough money, so went to his friend, who was waiting in the car, to get additional funds. He then returned to the store, paid for the beer, left the store, and encountered the investigator. Younessi said he was asked if he had identification, and answered that he did. The identification he had was his California driver's license. He denied having any other identification.

On cross-examination, Younessi said he was accompanied to the store by a

² *That the administrative hearing occurred on an anniversary of the issuance of appellants' license appears to be nothing more than a coincidence.*

male friend who was also not 21. The friend remained in the car while Younessi went into the store. The two had been at a friend's house before going to get the beer. Younessi was not positive how much money he had with him, but believed he had \$10.00. He could not remember the denomination of the bill or bills he had, but he knew it was paper currency. The money he had was collected from his friend and the other two people at the friend's house. He had no money of his own when he went in the store. He insisted the identification he carried was his own, and denied having someone else's driver's license, or having false identification. Younessi acknowledged his awareness that it was unlawful to be in possession of false identification, or to use another person's identification. Younessi believed he had paid somewhere between \$12.00 and \$15.00 for the beer.³ Younessi confirmed he had not been searched by the investigator when he was stopped after leaving the store, nor had his friend or the car his friend was in been searched.

According to the testimony of investigator Yee, his attention was drawn to Younessi by his youthful appearance. Yee testified that he observed Younessi in line at the cash register, holding Coors beer. He saw Younessi place the beer on the counter, produce identification for the clerk, engage in conversation with him, leave the store without the beer, and then return momentarily, hand the clerk some money, and complete the transaction. At this point, Yee left the store, waited for Younessi to come outside, and apprehended him when he did so. Yee identified himself as an investigator, and asked Younessi his age, and for identification. Younessi told Yee he was 19, and produced a valid California driver's license which confirmed that he was, in

³ *The transaction was recorded on a security camera, and the cash register tape, which was visible on the recording, indicated a transaction total of \$8.97. Appellant Alvin Klein testified that the price of the beer for the past three years was \$7.99, and, with tax and err, the total would have been \$8.97.*

fact, 19. Yee testified that he informed Hirata of the situation, and then reentered the store with Younessi and confronted the clerk. According to Yee, when the clerk was shown Younessi's driver's license, he said "something to the effect 'It was busy. I must have misread the birth date.'" Yee then left Younessi in the custody of Hirata and Los Angeles police officer Anthony Posada, a member of the task force Yee was working with on the night in question, and who, with other officers, had been summoned to the scene, while he reentered the store to cite the clerk. He did not search Younessi.

On cross-examination, Yee estimated the length of time Younessi remained outside the store before returning to complete the transaction as approximately 30 seconds to one minute. He said that when Younessi handed him his driver's license, it was not in Younessi's wallet. He testified that he asked Younessi if he had any false identification with him, and was told no.

Officer Posada testified that he also asked Younessi if he had any fake identification, and was told no. Officer Posada also testified he gave Younessi a pat-down search, and found keys, a wallet, and a pill box. He had Younessi open his wallet and display it, but did not himself take the wallet in his hands. Posada explained to the Administrative Law Judge (ALJ) that when he conducted his pat-down search, investigator Yee was inside the store and investigator Hirata was outside. Posada said he saw cards in Younessi's wallet with his name on them, and also saw several bills in the money section of the wallet, but did not see any false identification.

Investigator Hirata testified that he saw Officer Posada conduct the pat-down search, but he himself did not search Younessi.

Jose Ballesteros, the clerk, testified that he has been a cashier at the premises for eight years. He was aware that a minor's driver's license has a red

stripe, and the minor's photo would be on the right, whereas an adult's photo is on the left. Ballesteros did not recall whether he was shown a driver's license or an identification, but insisted it showed an age over 21, and denied that it had a red stripe. He specifically denied having been shown the driver's license exhibited to him by the investigator immediately after the sale. Ballesteros claimed that the identification he was shown contained a birth date of 1970 [RT 153-154].

Appellant Klein testified that he was called to the store after the sale. He thought it difficult to believe Ballesteros would have sold to a minor. He said Ballesteros was the most trustworthy clerk appellants employed, and the most vigilant in checking for proper proof of age.

Following the conclusion of the hearing, the ALJ issued a proposed decision which rejected appellants' reliance upon the defense set forth in Business and Professions Code §25660, i.e., good faith reliance upon false identification.

Appellants have filed a timely notice of appeal, and raise the following issues: (1) the Department's failure to comply with lawfully issued subpoenas prejudiced appellants' ability to defend against the charge of the accusation; and (2) the Department erred in rejecting appellants' defense based upon their claim that the clerk reasonably relied upon false identification.

DISCUSSION

I

Appellants contend they were prejudiced in their defense against the charges of the accusation by the Department's failure and refusal to comply with subpoenas issued by appellants. In view of our holding on the merits, we do not need to address this issue.

II

Appellants claim they are entitled to the defense provided by Business and Professions Code §25660, which provides that reliance upon bona fide evidence of identification, as there defined, shall be a defense to any criminal prosecution or proceeding for license suspension or revocation. It is appellants' contention that Younessi presented a false identification to their clerk, and that his purpose in exiting the store mid-transaction was to rid himself of the false identification rather than obtain additional funds to pay for the beer.

Appellants point to Younessi's testimony that he believed he had \$10.00, and that he believed the beer cost between \$12.00 and \$15.00, while the cash register tape showed the beer cost only \$8.97. Appellants argue that this shows Younessi must have had some other reason for leaving the store when he did, and since it could not have involved money, the only other logical reason would have been to rid himself of false identification. Appellants stress the failure of the investigators and police officer to conduct any meaningful search of Younessi which might have discovered the identification the clerk claimed he was shown.

The Department argues that the issue is one of credibility - that the ALJ simply chose to believe the minor's testimony that he displayed his valid California driver's license, and never possessed false identification. We think more is involved.

Appellants are able to point to a number of factors from which one could reasonably believe their clerk's claim that he was shown false identification. Although the conclusion does not follow ineluctably, that his testimony must be believed and that of the minor disbelieved, and although credibility is ordinarily an issue for the trier of fact, the factors set out in appellants' brief are highly persuasive.

The Department reads the decision as if the ALJ actually concluded that Younessi presented his valid California driver's license. We do not think it follows

necessarily that the ALJ so concluded. It appears to us that he was unable or unwilling to make such a definitive finding. It is as if the ALJ is saying “I do not know if false identification was shown, but if it was, a reasonable person would not have relied upon it.” This is not the sort of finding that will support an order of revocation.

We do not know what the result of a careful and properly conducted search and investigation would have disclosed. We think, however, that it rises to the level of unfairness to deprive these licensees of the right to sell alcoholic beverages where, as here, there was such an ineffective search for evidence that might have vindicated them, and the evidence sufficiently questionable that the ALJ was either unable or unwilling to make a definitive finding on a critical issue,

ORDER

The decision of the Department is reversed.⁴

TED HUNT, CHAIRMAN
 RAY T. BLAIR, JR., MEMBER
 JOHN B. TSU, MEMBER
 ALCOHOLIC BEVERAGE CONTROL
 APPEALS BOARD

⁴ *This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.*

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.