

ISSUED JANUARY 9, 2001

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

7-ELEVEN, INC. and KULBINDER and	)	AB-7534
SATINDER GILL	)	
dba 7-Eleven	)	File: 20-330656
2700-A Yulupa Avenue	)	Reg: 98045193
Santa Rosa, CA 95405	)	
Appellant s/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Jeevan S. Ahuja
	)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	September 21, 2000
Respondent.	)	San Francisco, CA
	)	

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7-Eleven, Inc., and Kulbinder and Satinder Gill, doing business as 7-Eleven (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 10 days for their clerk, Douglas Ellis, having sold an alcoholic beverage (a six-pack of Henry Weinhard's beer) to Garrett Mifsud, an 18-year-old minor, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a

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<sup>1</sup>The decision of the Department, dated December 2, 1999, made pursuant to Government Code § 11517, subdivision (c), is set forth in the appendix, together with the proposed decision of the Administrative Law Judge.

violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Kulbinder and Satinder Gill, appearing through their counsel, Richard D. Warren and Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

#### FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 29, 1997. On December 3, 1998, the Department instituted an accusation charging a sale-to-minor violation by appellants' clerk.

An administrative hearing was held on March 3, 1999, following which the Administrative Law Judge (ALJ) issued a proposed decision which dismissed the accusation, concluding that appellants had established a defense under Business and Professions Code §25660. The ALJ found that appellant's clerk had relied in good faith upon false identification presented by the minor which showed him to be 23 years of age.

The Department did not adopt the proposed decision. Instead, it issued its own decision pursuant to Government Code §11517, subdivision (c). The Department rejected the determination that a defense had been established under Business and Professions Code §25660, since the identification upon which appellants' defense was premised was not one issued by any federal, state, county, or municipal government or subdivision or agency thereof. The Department further concluded that the clerk had not acted in good faith, because he failed to take steps which would have disclosed that the identification was fraudulent.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants contend that the clerk's reliance upon the identification presented by the minor affords them a complete defense, relying upon Government Code §25660. More specifically, appellants contend that the clerk reasonably relied upon the identification presented to him, and the Department's finding that he failed to act with good faith and with diligence in so doing is not supported by substantial evidence.

## DISCUSSION

### I

Appellants, in sharp disagreement with the Department, contend that the identification which was presented to their clerk met the requirements of §25660. They assert that the Department's position, that the defense afforded by the statute is available only if the document is in fact one issued by a governmental agency, "turns the statute on its head." Instead, they argue, the defense "only" comes into play when the document presented turns out not to be genuine in some fashion.

Appellants rely principally upon the decision of the court in Keane v. Reilly (1955) 130 Cal.App.2d 407 [279 P.2d 152], a case decided before the enactment of §25660 in its present form.<sup>2</sup>

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<sup>2</sup> Business and Professions Code §25660, in its present form, provides:

"Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license or an identification card issued to a member of the Armed Forces, which contains the

In Keane v. Reilly, the identification in question was an identification card prepared by the minor, containing his picture, his fingerprints, his name, address and telephone number, his height and weight, the name of his employer, and his age, which he misrepresented as 21. The minor testified that he had attempted to make the card look official so he could fool bartenders.

In reliance upon an earlier decision (Conti v. Board of Equalization (1952) 113 Cal.App.2d 465 [248 P.2d 31]), and its own determination that the bartender acted reasonably in believing the identification was official, the court sustained the §25660 defense, stating:

“The law does not require the bartender to inspect the identification submitted to him at his peril. If he acts in good faith and with reasonable diligence he is protected and that is so whether the document is validly issued by some agency or is made to look like an officially issued document.”

The Department relies upon the decision in Kirby v. Alcoholic Beverage Control Appeals Board (1968) 267 Cal.App.2d 895 [73 Cal.Rptr. 352], a case decided after §25660 had been amended by the Legislature to its present form. In that case, a minor had obtained employment after presenting to the licensee a birth certificate, which was her sister's, and an identification card with her photograph,

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name, date of birth, description, and picture of the person. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.”

At the time of the decision in Keane v. Reilly, supra, the statute provided a defense where the seller had demanded, and was shown “a motor vehicle operator's license or a registration certificate issued under the Selective Service Act or other bona fide documentary evidence of majority and identity of such person.”

which she created herself and then signed before a notary. Reversing an Appeals Board decision which had sustained a defense based upon §25660, the court stated (73 Cal.Rptr. at 354):

“It is well-established that reliance in good faith upon a document issued by one of the governmental entities enumerated in section 25660 constitutes a defense to a license suspension proceeding even though the document is altered, forged or otherwise spurious. (Dethlefsen v. State Bd. of Equalization, 145 Cal.App.2d 561, 303 P.2d 7.)

“Thus the question narrows to whether reliance in good faith upon evidence of identity and majority other than a document emanating from sources specified in section 25660 serves to relieve a licensee from the consequences of committing acts forbidden by sections 25658, 25663, or 25665. The Department concluded that it does not; the Appeals Board ruled that it does. We agree with the Department.”

Describing the Appeals Board’s decision as having established a “non-statutory defense,” the court cited and quoted language from Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr.735] to the effect that as an exception to the statute prohibiting sales to minors, §25660 must be narrowly construed.

“Thus a licensee charged with violating sections 25658, 25663, or 25665 has to meet a dual burden; not only must he show that he acted in good faith, free from an intent to violate the law, as the licensee did here, but he must demonstrate that he also exercised such good faith in reliance upon a document delineated by section 25660. Where all he shows is good faith in relying upon evidence other than that within the ambit of section 25660, he has failed to meet his burden of proof.”

(Kirby v. Alcoholic Beverage Control Appeals, supra, 73 Cal.Rptr. at 355.)

Since Kirby v. Alcoholic Beverage Control Appeals was decided after the decisions in Keane v. Reilly and Conti v. Board of Equalization, supra, as well as after §25660 was amended by the Legislature, it is obviously the most persuasive

precedent. Indeed, appellants are now asking the Appeals Board to accept the very same line of reasoning that led to the Board's being reversed in the Kirby case.

Given the directness of the language in Kirby, not to heed it would be unwise.

The Appeals Board has previously rejected the argument that the identification relied upon may be something other than a government-issued document. (See The Circle K Corporation (2000) AB-7187.) In Mokhles and Nagiba Athanasious (1999) AB-7052, the Appeals Board ruled similarly in a case involving a so-called "Texas identification card," the display of which induced a clerk to sell an alcoholic beverage to a minor.

In keeping with the admonition that an exception to a statute must be narrowly construed, it would seem that §25660, read literally, is not available when the identification proffered by a minor is that of a person other than the minor - "Bona fide evidence of majority and identity of the person is a document ... including, but not limited to, a motor vehicle operator's license ... which contains the name, date of birth, description, and picture of the person." (Emphasis added.) However, the Board need not go this far to sustain the Department in this case.

Nor does the Board have to address appellant's hypothetical case of a perfect forgery of a government-issued identification. The identification in this case was clearly not that.

## II

Appellants contend that the Department erred in determining that the clerk failed to act in good faith and with diligence in his examination of the "Texas

identification.”

The Department’s view is that the clerk failed to act diligently in his examination of the “Texas identification” while appellants contend that he acted reasonably and was simply fooled, despite his efforts.

Were it necessary for the Board to reach this issue, we think the Department has the better argument. The so-called identification itself disclaimed it as being a government-issued document, and the fact that it purported to be an unfamiliar, out-of-state identification should have put the clerk on notice that more than ordinary scrutiny was required.

The factors cited by the Department to demonstrate the inadequacy of the clerk’s examination are striking: the failure to notice the disclaimer of government issue; the absence of a state seal or a description of what kind of identification it purported to be; the absence of a zip code for the address; the reference to “novelty identification.”

By its reliance upon these factors to demonstrate the lack of diligence,<sup>3</sup> the Department sends a message to licensees that needs to be heard - when there is doubt about a purchaser’s legal age, and identification is requested, the identification which is produced must be examined carefully, and the seller must be careful not to simply assume that the mere offer of identification is itself proof of drinking age.

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<sup>3</sup> We do not believe that, on the facts of this case, the clerk’s lack of diligence is the same as a lack of good faith. Simple negligence and bad faith are not synonymous.

ORDER

The decision of the Department is affirmed.<sup>4</sup>

TED HUNT, CHAIRMAN  
RAY T. BLAIR, JR., MEMBER  
E. LYNN BROWN, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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

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