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

AB-7599

7-ELEVEN, INC., PARAMJEET KAUR UPPAL , and SHINDA UPPAL
dba 7-Eleven Store #2237-32241A
4101 Calloway Drive, Bakersfield, CA 93312,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-344655 Reg: 99046891

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: April 5, 2001
Los Angeles, CA
ISSUED JUNE 20, 2001

7-Eleven, Inc., Paramjeet Kaur Uppal, and Shinda Uppal, doing business as 7-Eleven Store #2237-32241A (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Hakam Singh Dhaliwal ("Dhaliwal"), having sold an alcoholic beverage (a twelve-pack of beer) to Marcos Andres Maese ("Maese"), a minor, 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). Maese was 17 years of age at the time of the sale.

Appearances on appeal include appellants 7-Eleven, Inc., Paramjeet Kaur Uppal, and Shinda Uppal, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control,

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[1]The decision of the Department, dated February 10, 2000, is set forth in the appendix.

appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 14, 1998. On July 27, 1999, the Department instituted an accusation against appellants charging the sale by appellants' clerk of an alcoholic beverage to a 17-year-old minor on July 9, 1999.

An administrative hearing was held on October 20, 1999, and January 13, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Jason Montgomery, who witnessed the transaction; by Maese, the minor; and by Dhaliwal, the clerk.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and that appellants had failed to establish a defense under Business and Professions Code §25660.[2]

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) The ALJ erred in rejecting the defense under §25660 based upon the selling clerk having relied upon the advice of a second clerk to whom valid identification had been presented; and (2) the ALJ erred in his use of Rule 141 guidelines in reaching his decision. There is no dispute that Maese was a minor or that he was sold an alcoholic beverage by Dhaliwal.

[2] All statutory references hereinafter are to the Business and Professions Code.

DISCUSSION

I

Appellants claim that the Administrative Law Judge (ALJ) erred in rejecting appellants' defense based upon §25660.

Section §25660 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 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."

Appellants contend that the ALJ erred by failing to acknowledge that it was unnecessary in the circumstances of this case for the clerk himself to rely upon bona fide documentary evidence of majority. It is appellant's position that, under the rule established in Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 186-187 [67 Cal.Rptr. 734], the clerk was entitled to the protection of §25660 when he made the sale, upon having been told by a fellow clerk that he knew the minor and the minor was over 21.

In Lacabanne Properties, Inc., two minors gained entry to an on-sale public premises by displaying what the hearing officer found was bona fide documentary evidence of majority under §25660. The administrative law judge so found, and dismissed counts of an accusation which had charged the licensee with having permitted the minors to enter and remain on the premises without lawful business

thereon, in violation of Business and Professions Code §25665. The hearing officer refused to dismiss charges of sales of alcoholic beverages to the two minors, in violation of §25658, subdivision (a), and of permitting them to consume such beverages, in violation of §25658, subdivision (d). The Appeals Board reversed the counts applicable to one of the two minors, holding that the bartender who served that minor had met the requirement of §25660 by confirming with the doorman that the minor had displayed bona fide documentary evidence of majority. The Board affirmed the two remaining counts applicable to the other minor because the bartender who served that minor had requested identification but had not followed up on his request after another customer vouched for the minor.

The appeals court reversed the Board as to the two counts the Board had sustained, holding that there was no duty to make a second demand for identification before serving the minor, because the licensee had the right to rely on the original determination by the doorman that the patron had shown bona fide documentary evidence of majority.

The Lacabanne Properties , Inc. decision does not control this case, for several reasons.

In that case, the court was strongly influenced by the fact that the sale occurred shortly after the minor "possessed, had shown, and could have again exhibited a driver's license, which, although altered, was found to show he was over the age of 21 years." (See Lacabanne Properties, Inc., supra, 67 Cal.Rptr. at 740.) The same thought is expressed on the following page (67 Cal.Rptr. at 741):

> "It may well be that the licensee and his employees act at their peril in serving a minor, but it does not follow that they may not be relieved when the requirements for a defense were not only in fact complied with on entry, but, as in this case,

were also present, although unexhibited at the time the minor was served."

The court summed up its position in what can only be described as an extremely narrow holding:

> "It is concluded that where the minor patron has exhibited to one employee on entry, and at all times thereafter has on his person, what is found to be bona fide evidence of majority and identity, the licensee may assert reliance on the original demand and exhibition in selling, furnishing or permitting the consumption of an alcoholic beverage by that minor following that entry; and that such defense is not lost because a second employee pursued an inadequate inquiry before serving the minor. "
> (Lacabanne Properties, Inc., 67 Cal.Rptr. at 742.)

A review of the ALJ's findings in this case, and of the evidence persuades us that the "Lacabanne rule" simply has no application in this case.

First, there is no evidence that bona fide documentary evidence of majority was ever presented to anyone. The only evidence found on Maese's person was his own driver's license, which showed his true age of 17. Appellants' suggestion that he may have used false identification and then "ditched it" is little but speculation.

The ALJ 's discussion of the clerk's testimony in Finding of Fact III-1 leaves it uncertain which part is mere recitation of what the clerk said, and which is what the ALJ found to be true. In either case, it can hardly be said that the clerk acted reasonably. He was confronted with a youthful person whom he was not sure was 21, who refused to take his identification from his wallet when asked. That in itself ought to have spelled the end of the transaction.

II

Appellants assert that the ALJ committed error when he "incorporated Rule 141 into this case and used the Rule as some sort of guideline in reaching his decision."

This is a frivolous argument. Aside from the fact that the ALJ never once referred to Rule 141, appellants are not even sure whether, even if the ALJ did what they accuse him of having done, it had any effect on the case.

Appellants quote from the ALJ's findings (Findings of Fact III-3 and III-4) that after Maese identified the clerk as the seller the officer issued a citation, and that Maese is youthful looking and displayed the demeanor of a person under 21 years of age. Appellants state in their brief (at page 8):

> "Unfortunately, the ALJ in his proposed decision places some reliance on Rule 141 elements in a case where clearly this Rule finds absolutely no application whatsoever. It is not clear to what extent this apparent reliance on Rule 141 influenced the ALJ's final conclusion. What is clear however that the Proposed Decision demonstrates that the ALJ did make Rule 141 findings in a case where there was no conceivable reason to consider Rule 141."

We will concede to appellants that there is a similarity between the language used by the ALJ in this case and the all too familiar language seen in Rule 141 cases. But to say that such findings have no application in this non-Rule 141 case is incorrect.

Dhaliwal's role as the clerk who made the sale is relevant in assessing the availability of the §25660 defense, and the minor's appearance and demeanor as that which could generally be expected of a person under 21 years of age is relevant to the issue of the clerk's reasonableness in making the sale to a person he thought might not be 21 but who would not remove his identification from his wallet.

A licensee has a dual burden under §25660: "[N]ot only must he show that he acted in good faith, free from an intent to violate the law ... but he must demonstrate that he also exercised such good faith in reliance upon a document delineated by §25660." (Kirby v. Alcoholic Beverage Control Appeals Board (1968)

267 Cal.App.2d 895 [73 Cal.Rptr. 352, 355].)

As the cases contemporaneous with and prior to Kirby have made clear, that reliance must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 739]; 5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control (1957) 155 Cal.App.2d 748 [318 P.2d 820, 823, 824].)

At best, it appears there was no more than a casual inspection of Maese's identification. Whether and to what extent the second clerk inspected the identification when it supposedly was shown to him is not known. He did not testify, and the record is silent as to why. We can only presume that if he had testimony relevant to establishing appellants' §25660 defense, appellants would have presented him as a witness.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3] 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.