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

AB-7626

CIRCLE K STORES, INC. dba Circle K Food Store # 5244
16125 Baseline, Fontana, CA 92336,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-295721 Reg: 99047664

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: March 1, 2001
Los Angeles, CA

ISSUED APRIL 30, 2001

Circle K Stores, Inc., doing business as Circle K Food Store #5244 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Carlos Romero, having sold an alcoholic beverage (20- or 22-ounce bottle of Budweiser beer) to Mario Gomez, a minor, 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).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated April 6, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 15, 1994. On November 12, 1999, the Department instituted an accusation against appellant charging a violation of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on February 16, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Mario Gomez ("the decoy") and by Fontana police officer Ray Stigers ("Stigers")

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved, and ordered appellant's license suspended for 15 days.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Rule 141(b)(5) was violated, in that the record fails to show that the face-to-face identification of the seller preceded the issuance of the citation; (2) Rule 141(b)(2) was violated because the decoy had a nearly shaved head; (3) the decoy operation was conducted during rush hour, in violation of Rule 141's requirement that it not be conducted in an unfair manner; and (4) appellant was denied its right to discovery and to a transcript of its discovery motion hearing to which it was entitled.

DISCUSSION

I

Appellant contends that Rule 141(b)(5) was violated, in that the record fails to show that the face-to-face identification of the seller preceded the issuance of the citation.

Aside from the fact that it was not raised at the administrative hearing and need not even be considered by the Board, appellant's contention that the record fails to show that the face-to-face identification preceded the issuance of the citation is in complete disregard of the record and of common sense.

The decoy testified that when he left the store after the purchase, he was met by Officer Stigers, and was instructed to return to the store with Stigers. He testified that he did so, and at that time identified the clerk who had sold him the beer. [RT 12-13.] Stigers testified that he was seated in his vehicle while the transaction between the decoy and the clerk was in progress, and left the vehide to meet the decoy as he left the store, it having appeared that the decoy had made a purchase. Stigers further testified that he and the decoy returned to the store, encountered the clerk just outside the door, where the clerk had emerged with a dust broom in hand, and at that time the decoy confirmed that the clerk was the person who sold him the beer. When asked by Stigers, the clerk acknowledged that he had sold the beer to the decoy. [RT 27-30.]

Despite the slight disagreement between the two witnesses as to whether the identification occurred just outside or inside the store, it is painfully clear that the identification necessarily preceded the issuance of the citation. Stigers could hardly have cited the clerk while seated in his vehicle. It is equally clear that this is another example of irresponsible briefing to the Appeals Board and a misrepresentation of the content of the record.

We know, from the many appeals that have been heard by the Board since the advent of Rule 141, that it is the normal course in decoy operations for the face-to-face

identification process to have occurred prior to the issuance of a citation.[2] This being so, we do not think it untoward to remind appellate counsel that the mere contention that the proper sequence was not followed, without supporting evidence, is unlikely to be warmly received by this Board.

II

Appellant contends that Rule 141(b)(2) was violated by the use of a decoy who had significantly altered his appearance by nearly shaving his head.

The Administrative Law Judge (ALJ) made the following finding with respect to the appearance of the decoy:

> "Mario Gomez was, at the time of the sale, wearing blue jeans and a green-colored, long-sleeved, collared sports shirt over a gray t-shirt. (Exhibit 3.) The shirt collar was worn open so that the t-shirt showed through and the sleeves were rolled up over Gomez's forearms. ... Gomez stood about 5 feet, 8 inches tall and weighed about 175 pounds. He was clean shaven and his hair was cut short. ... He appeared at the hearing and his appearance there, that is, his physical appearance, his poise, demeanor, maturity and mannerisms, was that generally expected of a person his age. The appearance of Mario Gomez at the hearing was substantially the same as his appearance before respondent's clerk on September 24, 1999."

Gomez did not, as appellant represents (App.Br., at page 8), admit that his head was nearly shaved at the time of the decoy operation. He testified that his hair was "a little longer" at the time of the decoy operation than it was at the time of the hearing. The decoy agreed with appellant's counsel that, at the hearing, his head was almost shaved, and his scalp could be seen through his hair, but that in the photograph taken at the time of the decoy operation, his scalp could not be seen because his hair was

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[2] In the early days of Rule 141, this was not necessarily the case. Once the requirements of the rule became better known and understood, the absence of a face-to-face identification became uncommon. More often, now, the issue concerns the mechanics of the identification process.

longer. [RT 21-22.]

Appellant's argument, reduced to its essence, is that no matter how young a decoy may be or appear to be, if his head is closely-cropped, he no longer presents the appearance which could be generally expected of a person under the age of 21. The argument is without merit either in the abstract or on the facts of this case.

III

Appellant contends that the fairness requirement of Rule 141 was violated because the decoy operation was conducted at a time appellant claims was "rush hour." Appellant asserts that the store was "quite busy," with both cash registers in operation, customers who were fueling their vehicles were required to enter the premises to pay for their gasoline, and the decoy was required to wait in line with customers before and after him. Further, appellant cites the testimony of officer Stigers that he had been instructed not to conduct a decoy operation when a store was "extremely busy."

The Board has heard several appeals where this or a similar contention has been asserted, but has not been receptive to the argument. (See Tang and Tran (October 19, 2000) AB-7454; TBD Ent., Inc. (November 2, 1999) AB-7253.)

The decoy operation was conducted on a Friday evening, at about 6:00 p.m. Officer Stigers testified that there may have been two customers in line in front of the decoy, and one or two after him [RT 27], but it is apparent from his testimony that he did not believe the store was crowded.

In Saif Assaedi (1999) AB-7144, the Board speculated that it would be unfair for a law enforcement agency to engage in a decoy operation during a true rush hour circumstance, contrary to Department guidelines antedating Rule 141. We

believe, however, that such an instance will be rare, because the guidelines are merely that, and are not written with sufficient precision to warrant their application as if they were rules of law.

"Rush hour" is a term of imprecision ordinarily used in connection with freeway traffic, and associated with commuters traveling to and from their workplace and residence. As applied to individual premises, the term has little practical meaning, and is of little use as a guideline.

The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy.

We believe it asks too much to require law enforcement to predict the time of day that, for a particular premises, would fairly be considered "rush hour."

It is conceivable that where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate. This does not appear to be such a situation. The testimony revealed that there were two clerks on duty at the time of the decoy operation, and one of the clerks was able to leave his register and engage in cleaning activity.

If all that must be shown is a "steady stream of customers," or that Friday and Saturday are particularly busy days of the week, then Circle K and its many stores would be virtually immune to a decoy operation on those days, which,

coincidentally, are what might be thought the days on which it would be most likely for underage high school and college students to attempt to explore the temptation of alcoholic beverages, and when sellers should be all the more vigilant.

We do not believe it can be said that the decoy operation in this case was conducted in an unfair manner.

IV

Appellant claims it was prejudiced in its ability to defend against the accusation by the Department's refusal and failure to provide it discovery with respect to the identities of other licensees alleged to have sold, through employees, representatives or agents, alcoholic beverages to the decoy involved in this case, during the 30 days preceding and following the sale in this case. It also claims error in the Department's failure to provide a court reporter for the hearing on its motion to compel discovery. Appellant cites Government Code §11512, subdivision (d), which provides, in pertinent part, that "the proceedings at the hearing shall be reported by a stenographic reporter." The Department contends that this reference is only to an evidentiary hearing and not to a hearing on a motion where no evidence is taken.

The Board has issued a number of decisions directly addressing these issues. (See, e.g., The Circle K Corporation (Jan. 2000) AB-7031a; The Southland Corporation and Mouannes (Jan.2000) AB-7077a; Circle K Stores, Inc. (Jan. 2000) AB-7091a; Prestige Stations, Inc. (Jan. 2000) AB-7248; The Southland Corporation and Pooni (Jan. 2000) AB-7264.)

In these cases, and many others, the Board has reviewed the discovery provisions of the Civil Discovery Act (Code of Civ. Proc., §§2016-2036) and the

Administrative Procedure Act (Gov. Code §§11507.5-11507.7). The Board determined that the appellants were limited to the discovery provided in Government Code §11507.6, but that "witnesses," as used in subdivision (a) of that section was not restricted to percipient witnesses. We concluded that:

> "A reasonable interpretation of the term 'witnesses' in §11507.6 would entitle appellant to the names and addresses of the other licensees, if any, who sold to the same decoy as in this case, in the course of the same decoy operation conducted during the same work shift as in this case. This limitation will help keep the number of intervening variables at a minimum and prevent a 'fishing expedition' while ensuring fairness to the parties in preparing their cases."

The Board also held in the cases mentioned above that a court reporter was not required for the hearing on the discovery motion. We continue to adhere to that position.

ORDER

The decision of the Department is affirmed in all respects except that involving the issue of discovery, and the case is remanded to the Department for reconsideration in light of our comments with respect to that issue.[3]

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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.

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