

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

AB-7641

CIRCLE K STORES, INC. dba Circle K Food Store #8675
8899 La Mesa Boulevard, La Mesa, CA 91941,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-206886 Reg: 00048022

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED APRIL 26, 2001

Circle K Stores, Inc., doing business as Circle K Food Store #8675 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a person under the age of 21, 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).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated May 11, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 9, 1993. Thereafter, the Department instituted an accusation against appellant charging that, on October 28, 1999, appellant's clerk, Suzie Greer ("the clerk") sold beer to 18-year-old Charlene Mani. Mani was acting as a decoy for the La Mesa Police Department at the time of the unlawful sale.

An administrative hearing was held on March 28, 2000, at which time documentary evidence was received and testimony was presented by Mani ("the decoy"), and by Juan Carlos Medero and David Bond, both La Mesa police officers. Appellant called no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proven and no defenses had been established.

Appellant thereafter filed a timely appeal in which it raises the following issues: (1) Rule 141(b)(2) was violated, and (2) Rule 141(b)(5) was violated.

DISCUSSION

I

Appellant contends the decoy's appearance was not that which could generally be expected of a person under the age of 21 because she was a "mature looking young woman" who was "displaying a wedding ring . . . placed in [a] prominent position on the ring finger of the left hand, similar to where married individuals in this culture wear their wedding rings." (App.Br. at 7.) Appellant asserts that "since one would not generally expect to find someone under the age of 21 married and wearing a wedding ring, Rule 141(b)(2) is violated immediately upon the presentation of a decoy who is married and displaying a wedding ring." (Ibid.)

The ALJ, appellant argues, acknowledged the presence of the wedding ring, but then either "ignored . . . or didn't understand the significance of [the decoy wearing a wedding ring]." (Ibid.) The ALJ stated that "the evidence did not establish that the clerk noticed or was influenced in any manner whatsoever by the rings which the decoy was wearing." (Finding I.E.) Appellant rejects what it calls this "attempt by the Administrative Law Judge to circumvent that rule violation," arguing that where there is a rule violation, it does not matter if the seller is influenced by the violation or not: "The rule, once violated, cannot be rendered not violated by the actions or inactions of the licensee." (App.Br. at 8.)

The crux of appellant's argument is that, by definition, a decoy wearing a wedding band violates Rule 141(b)(2). We do not agree. Jewelry of any kind worn by a decoy is just one factor to be considered. While a wedding ring may be seen as an indicator of age, it can only indicate that the person is at least 18. Can a person wearing a wedding ring display the appearance one could generally expect from a person under the age of 21? We believe the answer has to be yes. The presence of the wedding ring is only one thing to consider. It is certainly possible for someone wearing a wedding ring to have overall physical and behavioral features that clearly show he or she is under 21. The ALJ must consider the decoy as a "whole person," and not limit consideration of appearance to any one single aspect.

The question in the present appeal is whether this particular decoy displayed the appearance that could generally be expected of a person under the age of 21. The ALJ, who observed the decoy during the course of the hearing, found that she did. With regard to the decoy's appearance, the ALJ found (Finding II.E. and I.F.):

"E. The decoy's appearance as a whole including her demeanor and her

mannerisms were consistent with that of an eighteen year old, and her appearance at the time of the hearing was essentially the same as her appearance at the time of the sale. Exhibits 3A and 3B are photographs of the decoy which were taken on October 28, 1999, and they accurately depict the decoy's appearance as of that date. The decoy was not wearing any make-up at the time of the sale, but she was wearing two rings one of which was a wedding ring consisting of a gold band with an emerald and two small diamonds. However, the evidence did not establish that the clerk noticed or was influenced in any manner whatsoever by the rings which the decoy was wearing.

"F. After considering the entire appearance of the decoy including her demeanor and the manner in which she conducted herself at the hearing, a finding is made that the decoy displayed the appearance and demeanor which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense."

The ALJ stated that the decoy wore a wedding ring and then added the last sentence of the paragraph, The last sentence of paragraph E. above, beginning with "However," raises the possibility that the ALJ thought the wedding ring made the decoy appear older or could have influenced the clerk's perception of the decoy's age, but he found it unnecessary to consider the effect of the wedding ring because there was no evidence the clerk had been influenced by it. However, in light of the rest of the ALJ's analysis of the decoy's appearance, that sentence appears simply to be the ALJ's observation that even appellant did not assert that the clerk in this particular case was misled.

The two paragraphs together persuade this Board that the ALJ did not believe the ring made the decoy look older than 21 or created a misleading impression as to the decoy's age. At the beginning of each of the two findings, the ALJ specifically stated that, considering the decoy's appearance as a whole, she looked her actual age. Clearly the ring was taken into consideration, but it did not overcome the overall appearance of the decoy.

As this Board has often said, the ALJ had the opportunity, which the Board has

not, to observe the decoy in person. The Board is not in a position to second guess the ALJ's evaluation under these circumstances.

The ALJ's statement about the clerk's lack of perception of the ring indicates clearly that the ALJ did not accept appellant's characterization of a decoy wearing a wedding ring as a per se violation of Rule 141(b)(2). If it is not a per se violation, then the actual circumstances of the particular sale must be considered, and whether or not the clerk noticed or was influenced by the ring becomes a relevant inquiry. Certainly it is conceivable that in a particular case, it could be shown that a clerk was influenced by a wedding ring on the decoy's finger and the ring in that case might be considered at least partly the basis for finding a violation of 141(b)(2). This is not that case.

II

Appellant contends identification of the seller by the decoy was not in accordance with the rule because the clerk did not know she was being identified. In addition, appellant argues that the Department has not shown that the identification took place before the citation was issued to the clerk, as required by Rule 141(b)(5).

Appellant is really challenging the ALJ's findings regarding the face-to-face identification in Finding II.C.:

"C. The preponderance of the evidence established that a face-to-face identification of the seller of the beer did in fact take place.

"1. The decoy testified that she returned to the premises with Officer Bond to identify the person who had sold her the beer, that she walked toward the rear of the store to the side of the counter, that she observed the clerk who had sold her beer standing behind the counter, that either Bond or the Department's investigator asked her to identify the clerk who had sold beer to her, that she pointed to the clerk (Greer) who was standing in close proximity to her and that she also verbally identified Greer as the clerk who had sold her the beer.

"2. Officer Bond was directing the decoy that evening and he confirmed that he returned to the premises with the decoy, that he asked the decoy to identify the

clerk who had sold her the beer, that the clerk was standing behind the counter, that the decoy did point to the clerk and that the decoy also verbally indicated that Greer was the person who had sold beer to her. Although Bond was not sure whether he actually asked the decoy to identify the clerk as they were entering the premises or after they entered the premises, Bond testified that the clerk was looking at the decoy when the decoy identified the clerk, and that the clerk said 'Oh my God' and walked away after the decoy identified the clerk. The clerk also stated that she had carded the decoy, but that she had counted wrong.

"3. Officer Medero also confirmed that the decoy was asked to identify the person who sold her the beer, that the decoy pointed to the clerk, that the decoy also identified the clerk verbally and that the decoy and the clerk were standing about eight or nine feet away from each other when the identification was made. Although Medero did testify initially that the clerk and the decoy were not standing face-to-face during the identification, Medero subsequently explained that the clerk and the decoy were face-to-face during the identification but that they were about eight or nine feet from each other. The evidence also established that the police report states that there was a face-to-face identification which is consistent with the testimony from the decoy and the two police officers."

Appellant contends that the three witnesses told four different stories (the decoy having told a different story when called back for re-examination), and the ALJ "cobble[d] together pieces of everyone's story" in order "to construct and fabricate a scenario that complies with Rule 141(b)(5)" (App.Br. at 10-11.) Appellant asserts that conflicts in the witnesses' testimony "are truly impossible to resolve." (App.Br. at 11.) It points out inconsistencies as to how far apart the decoy and the clerk were when the identification was made, who asked the decoy to make the identification, and when the clerk reacted by saying "Oh my God."

According to appellant, if the events occurred as described in the ALJ's findings, the clerk had the opportunity to know and understand she was being identified by the decoy, but "that construct leaves the sequence of events insofar as whether the face-to-face identification preceded the issuance of the citation adrift." (App.Br. at 11.) Appellant's argument implies that the ALJ should have found that the clerk was not

aware of the identification because she was occupied with a customer while being identified and thus the rule was violated. It appears that appellant's alternative argument is that, if the findings of the ALJ are correct, there was still a violation because the evidence the ALJ relied on for his finding does not show that the citation was issued after the face-to-face identification took place.

None of the witnesses expressed any doubt that the decoy identified the seller. That they may have had different recollections concerning some of the lesser details of the identification process is not at all unusual or surprising. Each, it may be assumed, was giving his or her best recollection of events which occurred five months earlier.

All the witnesses described the identification as taking place when the decoy and the clerk were in close proximity to each other. The greatest distance apart testified to was nine feet. This is well within the realm of the necessary proximity for purposes of Rule 141(b)(5). (See, e.g., The Southland Corporation & Anthony AB-7292 (Nov. 14, 2000); Circle K Stores, Inc. (2000) AB-7337; Prestige Stations, Inc. (2000) AB-7437.)

Both the decoy and officer Bond testified that the clerk's attention was directed at the decoy when the identification was made [RT 48, 54-55]. Officer Medero believed that the clerk was finishing a transaction with a customer when the decoy identified her [RT 37], but he also testified that the decoy and the clerk were facing each other during the investigation [RT 38-39]. Given that the decoy both pointed to and verbally identified the clerk from a relatively short distance away, the clerk should reasonably have been aware that an identification process was occurring. The fact that the clerk did not testify would ordinarily leave only speculation as to what she might or might not have been aware of. In this case, however, regardless of the sequence of events – either 1) the decoy identified the clerk, officer Medero identified himself and told the

clerk she had sold to a minor, and the clerk then exclaimed "Oh my God" and left, or 2) officer Medero identified himself and told the clerk she had sold to a minor, the decoy identified the clerk, and the clerk then exclaimed "Oh my God" and left – the clerk's reaction indicates clearly that she was indeed aware that the decoy was identifying her.

As for the timing of the citation, the testimony leaves no doubt in our minds that the identification took place first and the citation was issued thereafter. Medero testified that, after the sale had taken place, the decoy came in "right behind" him [RT 44]. There is no evidence of any appreciable amount of time passing between the decoy's entry and her identification of the clerk, nor of any appreciable amount of time between the decoy's identification of the clerk and Medero's identification of himself to the clerk (regardless of which came first). As noted above, the identification by the decoy of the clerk and by the officer of himself, in whichever order they occurred, were followed immediately by the clerk's retreat to the back room or storeroom of the premises. Medero testified that, "[a]t the conclusion of the decoy operation at that location," he identified the clerk by means of her California driver's license, which she gave to him, and then he issued a citation to her [RT 35].

Yet appellant would have us believe that there is some doubt that the face-to-face identification occurred before the citation was issued. The normal sequence of events in the decoy operations that this Board has reviewed, is that the face-to-face identification is followed by issuance of the citation. To doubt that this sequence occurred, one would have to believe either that the clerk presented her driver's license to Medero, and he issued the citation to her, in the moments between Medero's entry and the decoy's, or, that Medero identified himself before the decoy identified the clerk, and the clerk gave Medero her driver's license and he issued the citation to her in the

moments between those two identifications. Either scenario stains credulity and is not consistent with the testimony of the witnesses.

It was the task of the Administrative Law Judge to sort through the testimony to determine what happened. His findings are supported by the record, and are sufficient to support the determination that the identification requirement was met.

ORDER

The decision of the Department is affirmed.²

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

²This 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.