

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

AB-7771

File: 20-243727 Reg: 00049509

7-ELEVEN, INC., and SALEM ENTERPRISES, INC., dba 7-Eleven #3011-15591
3407 College Blvd., Oceanside, CA 92056,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 7, 2002
Los Angeles, CA

ISSUED APRIL 17, 2002

7-Eleven, Inc. and Salem Enterprises, Inc., doing business as 7-Eleven #3011-15591 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold an alcoholic beverage to 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).

Appearances on appeal include appellants 7-Eleven, Inc. and Salem Enterprises, Inc., appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Kim.

¹The decision of the Department, dated February 1, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 29, 1990.

Thereafter, the Department instituted an accusation against appellants charging that, on March 25, 2000, appellants' agent, employee, or servant, Tuan Le Anh Tran (hereinafter "the clerk"), sold an alcoholic beverage (beer) to Jason M. Delvecchio, who was then approximately 18 years of age.

An administrative hearing was held on December 13, 2000, at which time oral and documentary evidence was received. At that hearing, Delvecchio testified on direct examination that he picked out two 12-packs of Coors Light beer and a 24-ounce can of Budweiser beer from appellants' cooler and brought them to the counter. He further testified that, in response to the clerk's request, he displayed his valid California driver's license, but that he did not have it with him at the hearing. Delvecchio testified he left the store with the beer after the clerk rang up the sale, got in his car, and placed the key in the ignition, at which point an officer tapped on his window. Delvecchio testified that he had been in the store "a couple of hundred" times previously, but had never purchased alcohol from the clerk before, nor had he ever shown the clerk an identification which was not his.

On cross-examination, Delvecchio confirmed that he had been in the store 150 to 200 times, when he lived next to the store. He had not brought his driver's license with him to the hearing. When the police officer asked for his driver's license on the night in question, he told the officer that he did not have it with him, although, in fact, he did have it. He recalled being asked by the officer to write down his name, address, and date of birth, but did not recall refusing to write his date of birth. His license was in

his wallet, and the officer took his wallet from him. He was cited for the purchase of alcoholic beverages, and for refusing to show his identification to a police officer. He denied having been cited on any prior occasion for possessing false identification or purchasing alcohol.

Larry Page, a California Highway Patrol officer, testified that, while on a coffee break outside the 7-Eleven store, he observed Delvecchio commit a traffic violation when entering the parking lot. The store interior was brightly lit, and while watching through the store window, Page saw Delvecchio approach the counter with beer, place it on the counter, and leave the store with the beer after a brief exchange with the clerk. Page made contact with Delvecchio when Delvecchio reached his car. Delvecchio admitted making an illegal left turn, but denied having his driver's license with him. Field sobriety and drug tests proved negative. A search of Delvecchio disclosed that Delvecchio's driver's license was in his wallet. No false identification was found. Delvecchio told Page he had not shown any identification to the clerk. Delvecchio was cited for violations of Business and Professions Code §25658, subdivision (b) (purchase of alcohol by minor) and Vehicle Code §12951, subdivision (b) (failure to present driver's license to peace officer).

Page also questioned the clerk, and was told Delvecchio had said he did not have any identification with him. The clerk also told Page he had not sold any beer to Delvecchio at any time before, but admitted making the sale in question.

On cross-examination, Page reaffirmed that Delvecchio had not started his car when first confronted by Page, and that he could not recall Delvecchio's answer as to whether Delvecchio had previously purchased beer from the store. Page

acknowledged that he had detected an odor of alcohol on Delvecchio, and conducted the sobriety tests as a consequence. He also testified that he had to be persistent to get Delvecchio to write his date of birth. Page also acknowledged that his written report is silent as to whether he conducted a search of Delvecchio for false identification.

Barbara Salem, corporate secretary for Salem Enterprises, Inc., testified that the clerk was first employed in August, 1999, had been provided training in the sale of alcoholic beverages, including written materials and the Southland "Come of Age" video, and had passed a test before being hired. Ms. Salem also testified that the clerk told her he had checked Delvecchio's identification on a prior occasion, and believed him to be 21. She also confirmed that, although the register requires identification to be entered in connection with a sale of alcohol, the feature can be overridden, and the receipt would not indicate whether it was overridden or not.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the clerk's prior reliance upon identification constitutes a defense under Business and Professions Code §25660; (2) the decision fails to include factual findings pertaining to the credibility of Delvecchio concerning the details of the purchase; and (3) the factual findings regarding credibility must be explicit. Issues 2 and 3 are related, and will be treated as a single issue.

DISCUSSION

I

Citing Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 186-187 [67 Cal.Rptr. 734], appellants contend that they established a defense under Business and Professions Code §25660, relying upon the hearsay statement of the clerk that he had been shown identification on a previous occasion which stated Delvecchio's age as 21. Appellants contend that this statement is sufficient to establish the defense because it is corroborated by Delvecchio's testimony that he had shown identification during previous visits to the store. Appellants further suggest that Delvecchio must have presented false identification and purchased alcoholic beverages on his earlier visits to the store, or he would not have been so confident with his sizeable purchase on the night in question.

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."

The clerk did not testify. His out-of-court statement that Delvecchio had previously shown him identification did not identify what that identification was.

Appellant's surmise that it must have been false identification is mere conjecture.

In Lacabanne Properties, Inc., *supra*, 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.)

It follows that the Lacabanne decision simply does not lend itself to a §25660 defense where the identification supposedly relied upon is nowhere to be found.

Kirby v. Alcoholic Beverage Control Appeals Board (1968) 267 Cal.App.2d 895 [73 Cal.Rptr. 352], was 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, which she created herself and then signed before a notary. The Appeals Board decision had sustained a defense based upon §25660. The court reversed, stating (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.)

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.)

Here, we have no idea what it is that Delvecchio supposedly displayed to the clerk on some earlier occasion. Appellants' suggestion that it must have been some kind of false identification is, as we have said, conjecture. Even assuming that the clerk's hearsay statement is true, it does not meet appellants' burden, since there is no proof that the clerk was shown a governmentally issued document.

II

Appellants contend the decision is defective because it does not contain any factual findings with respect to Delvecchio's testimony about the details of his purchase, and why it should be deemed credible.

Appellants rely upon Government Code §11425.50, which states that an agency decision shall, among other things, “identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the [credibility] determination.” That same section also provides that, upon judicial review, great weight will be given a credibility determination that identifies such factors.

We think that the Administrative Law Judge's summary of the evidence is sufficient to satisfy the general requirements of §11425.50.

The contention that there are serious credibility issues has little to support it. There is no dispute that there was sale of an alcoholic beverage. There is no dispute that Delvecchio is a minor. The only dispute concerns the possible existence of false

identification. and appellants have offered no evidence that any false identification ever existed. Even if Delvecchio's denial of ever possessing false identification is disbelieved, it is a major leap to assume that he did possess false identification issued by a governmental agency, sufficient to meet the challenge of §25660.

Having said that, we are simply unwilling to assume, merely upon appellants' say-so, that Delvecchio possessed false identification.

ORDER

The decision of the Department is affirmed.²

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

² 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.