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

AB-7798
File: 21-339981 Reg: 00049423

MOHAMMED NAEEM dba Stop & Shop
39 Wabash Avenue, Eureka, CA 95501,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Arnold Greenberg

Appeals Board Hearing: February 14, 2002
San Francisco, CA

ISSUED MAY 16, 2002

Mohammed Naeem, doing business as Stop & Shop (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 35 days, with 15 days thereof stayed for a probationary period of two years, for appellant's clerk selling alcoholic beverages to a person who was obviously intoxicated and to a minor decoy, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§ 25602, subdivision (a), and 25658, subdivision (a).

Appearances on appeal include appellant Mohammed Naeem, appearing through his counsel, Kelly M. Walsh, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

---

[1]The decision of the Department, dated March 29, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 3, 1998. Thereafter, the Department instituted a two-count accusation against appellant charging that, on August 23, 2000, appellant's clerk, Sardar E. Mulk ("the clerk"), sold alcoholic beverages as noted above, in violation of law.

An administrative hearing was held on February 8, 2001, at which time documentary evidence was received and testimony was presented by Eureka police officer Rocky Harpham, Department investigator Tony Carrancho, and the decoy, Brett Harpham.

The testimony revealed that officers Harpham and Carrancho were conducting a decoy operation in which officer Harpham's nephew, Brett ("the decoy"), was acting as a minor decoy. The decoy entered the premises while the officers waited outside in their car. At about the same time the decoy was entering the premises, a taxi pulled up across the street from the premises and the officers observed a man get out. The man, later identified as Stanley Boursse, fell against the car twice and staggered as he crossed the street, where he entered the premises.

Carrancho followed Boursse into the store and watched him stagger as he walked along in front of the counter behind which the clerk stood. From his position about five feet behind Boursse as he followed him, Carrancho could smell the strong odor of alcohol emanating from Boursse's person. Boursse staggered to a point in front of the distilled spirits display, about three feet to the right of the clerk. During this time, there were no customers at the counter and the clerk's view of Boursse was apparently unimpeded. Boursse spent a few minutes deciding on a purchase, swaying back and forth as he stood in front of the distilled spirits. While he was deciding, the clerk waited

on an unknown customer and then the decoy. Boursse took his selection, a bottle of McCormick whiskey, to the counter as the decoy's transaction was being completed.

Boursse placed the bottle on the counter, removed a wad of currency from his pocket, and placed it on the counter in front of the clerk, swaying from side to side as he did so. Carrancho stood about one foot behind Boursse and noticed that his eyes were glassy and bloodshot, his speech was very slurred, and the odor of alcohol from him was very strong. The clerk took the money from the counter and began to put the whiskey in a bag. At that point, Carrancho left the store to let Harpham know about his observations. Boursse left the store a few moments after Carrancho, carrying a bag. Harpham had not seen anything in Boursse's hands as he was leaving the taxi and entering the store. Carrancho and Harpham contacted Boursse after he left the store and Harpham asked him if he had purchased alcohol at appellant's premises. Boursse said he had and produced a bag containing a bottle of McCormick whiskey. The odor of alcohol coming from Boursse was much stronger while Carrancho was face to face with him.

While Carrancho was observing Boursse, the decoy went to a cooler in the premises, selected a 40-ounce bottle of Budweiser beer, and took it to the counter, where the clerk was finishing a transaction with another customer. When it was the decoy's turn, the clerk told him the price of the beer. He did not ask for the decoy's identification or his age. The decoy paid for the beer, the clerk put it in a bag, and the decoy left the store with the bagged beer. Outside, he met with the officers and later re-entered the store with them. The decoy, while three to four feet from the clerk, told the officers that the clerk was the seller of the alcoholic beverages and pointed at the clerk.

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

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) there is insufficient evidence to support the findings in the Department's decision, and (2) the ALJ erred in denying a requested continuance.

DISCUSSION

I

Appellant contends there is insufficient evidence to support the finding of a sale either to an obviously intoxicated person or to a person under the age of 21.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]

[2]The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

Sale to an obviously intoxicated person

Appellant asserts that there is no direct evidence of a sale to the allegedly intoxicated person because the officer did not witness the actual sale; that there was no showing the clerk had sufficient opportunity to observe the behavior observed by the officer; and that the clerk cannot be held to the same standard as the officer in his ability to detect an obviously intoxicated individual.

While it is true that Carrancho did not see Boursse actually take possession of the bag containing the whisky bottle, he did see Boursse select the bottle of McCormick whiskey, take it to the counter, and pay for it. He also saw the clerk accept the money and put the bottle into a bag. Harpham testified that Boursse had nothing in his hands when he entered the premises, but left, moments after Carrancho did, carrying a bag. When the officers confronted Boursse a few minutes later, he produced a bag containing a bottle of McCormick whiskey, which he said he had purchased in the premises. When told that he had sold an alcoholic beverage to an obviously intoxicated

person, the clerk did not deny it. While Carrancho did not see Boursse pick the bag up off the counter after he paid for the whiskey, the direct and circumstantial evidence, wholly uncontradicted, is clearly sufficient to support a finding that the clerk sold an alcoholic beverage to Boursse.

Appellant also contends there was no showing that Boursse's conduct or appearance while inside the store was sufficient to allow the clerk, "during the brief encounter at the cash register" (App. Br. at 5), to conclude that Boursse was obviously intoxicated. The term "obviously" denotes circumstances "easily discovered, plain, and evident" which place upon the seller of an alcoholic beverage the duty to see what is easily visible under the circumstances. (People v. Johnson (1947) 81 Cal.App.2d Supp. 973 [185 P.2d 105].) Such signs of intoxication may include bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, slurred speech, unsteady walking, or an unkempt appearance. (Jones v. Toyota Motor Co. (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611].)

We note first that the clerk's opportunity to observe signs of intoxication was not limited to a "brief encounter at the cash register." In addition to the time at the cash register, the clerk had an unimpeded view of Boursse as he staggered past the counter where the clerk was standing. He also had the opportunity to observe Boursse as he swayed back and forth for several minutes in front of the distilled liquor display. While the time may not have been long, it was, at most, only a couple of minutes less than the time Carrancho had to observe Boursse.

During this period of time, the clerk would have been able to observe, and should have observed, a number of the hallmarks of obvious intoxication: bloodshot or watery

eyes, slurred speech, unsteady walking and standing, and the strong odor of alcohol. Under these circumstances, the clerk had a duty to observe what was plainly in front of him and act accordingly, by refusing to sell an alcoholic beverage to Boursse.

It is true that the clerk is held to the same standard as the officers in this case. However, the standard to be applied – "obviously intoxicated" – does not require any but the most rudimentary, commonplace experience and the willingness to see what is plainly in front of one. The experience and expertise of the officers simply was not necessary to identify an obviously intoxicated individual.

Sale to minor decoy

Appellant asserts that the sale-to-minor violation was the direct result of entrapment. While conceding that a decoy operation is not entrapment per se, appellant insists that the circumstances in this instance amounted to entrapment.

The circumstances to which appellant refers are the decoy's "larger-than-average size," the "disguising" of the decoy by having him wear a baseball cap with the hood of a hooded sweatshirt pulled over it, and the ALJ's use of the decoy's voice as evidence to justify the ruling, when the record reveals that the decoy said nothing to the clerk during the transaction.

The ALJ made this finding regarding the decoy's appearance (Finding III.C.):

> "The minor appeared at the hearing, and his appearance then was similar to his appearance at the time of sale on the evening of April 12, 2000. However, the minor's face at the time of sale was void of any facial hair because the minor did not begin to shave until the autumn of the year 2000. At the time of the alleged sale, the minor was wearing blue jeans and a black sweat-shirt with a hood pulled down over a Stanford baseball cap on his head (see Exhibit 2). The hood failed to cover up the minor's soft, child-like features and lack of facial hair. He had never before participated in a decoy operation. He was soft-voiced and hesitant. Since the minor is 5 feet, 11 inches in height and weighs 164 pounds, he could be accurately described as a 'gangly youth.' Indeed, when considering

> the photograph, the minor's overall appearance and the way he conducted himself at the hearing, it is found that the minor displayed an overall appearance that 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 obviously considered the decoy's size, but reached the conclusion that the decoy appeared to be a "gangly youth" rather than a "larger-than-average individual." As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141. We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

Appellant does not mention Rule 141(b)(2), so it is not clear that he is raising this issue as an affirmative defense under the rule. However, even if the rule is not invoked, the California Supreme Court in Provigo Corp. v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561, 569 [28 Cal.Rptr.2d 638, 643], made it clear that use of a large or mature decoy does not constitute entrapment: "Because the seller cannot avoid liability by relying solely on the appearance of the buyer, it is not unfairly entrapped by the use of mature-looking decoys."

The ALJ also considered and addressed the wearing of the cap with a hood over it, and determined that it did not prevent one from viewing the decoy's face and noting his "child-like features and lack of facial hair." This Board is not a fact-finding body, and we accept the factual determinations of the ALJ unless given some reason to believe that they are clearly erroneous. We have been given no reason to do so in this instance.

Appellant asserts the ALJ erred in using the decoy's voice to "justify" his finding that the decoy's appearance at the time of the sale was that of a person under the age of 21, because there is no evidence that the decoy spoke to the clerk. Appellant overlooks, however, the decoy's testimony that when the clerk asked "if this was it," the decoy replied "yeah" [RT 29]. Even conceding that this provided little opportunity for the clerk to judge the decoy's voice, we cannot say the ALJ's reference to the decoy's voice invalidates the finding in any way. The decoy's voice was only one among several indicia the ALJ used to determine whether the decoy's appearance complied with Rule 141(b)(2). If that language were stricken, the finding would still stand.

II

Appellant contends the ALJ erred in denying the request of appellant's counsel at the hearing for a continuance. The reason given was appellant's retention of counsel only the day before the hearing. The denial, appellant asserts, deprived him of the ability to present relevant evidence at the hearing and the ability to prepare an adequate defense.

Pursuant to Government Code §11524, the ALJ has the right to grant or deny a request for a continuance for good cause. Under subdivision (b) of that section, a party is ordinarily required to apply for the continuance within 10 working days after discovering the good cause for the continuance, unless that party did not cause and sought to prevent the condition or event establishing the good cause. An appellant has no absolute right to a continuance; one is granted or denied at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

Appellant's counsel at the administrative hearing, Paul Warner, requested a continuance at the beginning of the hearing, stating that he had only been contacted by appellant at 2:30 p.m. the day before the hearing. Warner stated that he had not had sufficient time to review any discovery or talk to the clerk, who had apparently moved to the Los Angeles area, and this left him unable to prepare a defense.

Appellant filed his Notice of Defense on September 11, 2000, and was served a Notice of Hearing on October 16, 2000, which set a hearing for November 30, 2000. That hearing was continued, and on January 16, 2001, appellant was served with a Notice of Continued Hearing which set the hearing for February 8, 2001. (Exhibit 1.)

Counsel for the Department objected to a continuance, stating that the prior continuance had been granted at appellant's request so that he could go overseas, and appellant at that time had stated that he would not need any further continuance. In addition, counsel pointed out, the Department had brought all its witnesses to the hearing, one of them "at tremendous inconvenience." [RT 5-6.]

The ALJ reviewed the jurisdictional documents and noted that appellant had ample opportunity to hire counsel over the almost five months since he had filed his Notice of Defense. The ALJ stated, "Going over the circumstance of the case and considering the prejudice to the Department by reason of its coming here today, securing the witnesses, traveling at great expense to the state and absent a showing of due diligence on the part of [appellant] himself in securing counsel, I have to deny the motion, and we'll proceed [RT 7]." The ALJ clearly did not abuse his discretion in refusing to grant a continuance in this instance.

ORDER

The decision of the Department is affirmed.[3]

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

[3]This 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.