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

AB-7810
File: 20-363535 Reg: 00049499

7-ELEVEN, INC., and KAMALJIT KAUR SANDHU
dba 7-Eleven Store #2172-18167
1020 South Bristol Street, Santa Ana, CA 92703,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: April 4, 2002
Los Angeles, CA

ISSUED MAY 28, 2002

7-Eleven, Inc., and Kamaljit Kaur Sandhu, doing business as 7-Eleven Store #2172-18167 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for co-appellant Kamaljit Kaur Sandhu having sold an alcoholic beverage (a six-pack of Budweiser beer) to Daniel Padron, a person then 19 years of age, in violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Kamaljit Kaur Sandhu, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and Matthew Gorman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated April 19, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 30, 2000. Thereafter, on September 6, 2000, the Department instituted an accusation against appellants charging that, on June 16, 2000, an alcoholic beverage was sold to a minor.

An administrative hearing was held on March 14, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Santa Ana police officer Victor Allen McNatt and Santa Ana police Sgt. Jon Centanni, and Daniel Padron, the minor decoy.[2] Appellants did not call any witnesses.

Officer McNatt testified that the decoy selected a six-pack of Budweiser beer from the cooler and took it to the counter. He heard co-appellant Sandhu ask the decoy for identification, and observed her swipe the card through a card reader after it was given to her. She then said "not valid," and asked the decoy if it was a fake. The decoy told her it was not a fake. Thereupon, she returned his identification to him, and told him the cost of the beer. He paid her, she gave him change, bagged the beer, and the decoy left the store with it. Officer McNatt remained in the store until the decoy returned, and at that time asked him to identify the person who sold him the beer. He identified co-appellant Sandhu. McNatt identified Exhibit 1 as a photograph of the decoy pointing to the clerk while identifying her as the seller.

On cross-examination, McNatt testified that Sgt. Jon Centanni and Department investigators Ryan and Cho accompanied the decoy and McNatt when they returned to the store after the sale. One of the three brought the beer back in, but McNatt could not recall who. He could not recall the color of the bag in which the beer had been placed,

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[2] Although not stated in the accusation, Padron (herein "the decoy") was acting as a decoy for the Santa Ana Police Department.

and was uncertain as to whether this was the same six-pack of beer that the decoy took from the store. He was not responsible for obtaining the evidence booking number for the beer.

McNatt further testified that co-appellant Sandhu told him she had received training recently, and believed that when the card reader said "invalid," she understood that to mean the decoy was over 21 years old.

The decoy testified that he was 19 years of age at the time of the sale. He selected a six-pack of Budweiser in 12-ounce cans from the cooler, and took them to the counter. He produced his California driver's license in response to co-appellant Sandhu's request for identification. She ran it through what the decoy described as "a computer kind of thing," and "mumbled to herself ... 'not valid,' kind of like she was talking to herself." She then asked if the license was fake, to which he responded "no, it's my driver's license." She said "okay," returned the license to him, accepted his money, gave him change, and he left the store with the beer. After he gave the beer to investigator Cho, he returned to the store with Cho and Sgt. Centanni, and, at Centanni's direction, identified co-appellant Sandhu as the seller.[3]

On cross-examination, the decoy testified that he visited 31 locations that day, and made purchases at six of those locations.. He does not know what Cho did with the beer; he only knows Cho had the beer when he entered the store for the identification process.

On redirect examination, the decoy identified a copy of the driver's license he had given to Sandhu.

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[3] Centanni later testified, as had McNatt, that McNatt had conducted the identification process.

Sgt. Centanni was the final witness. He testified that, in response to a signal from the decoy that he had made a purchase, he left his vehicle, taking a bag with a variety of paperwork and a camera with him, and went into the store, accompanied by investigator Cho and the decoy. He photographed the decoy while in the process of identifying Sandhu as the seller. He testified that he then took the beer from Cho, and placed it in an evidence bag - a brown paper sack. While at the store he wrote on the bag the case number, the approximate time, the date, McNatt's name as the investigator, the address, and, in quotation marks, the name "7-Eleven." Centanni also explained the significance of other documents affixed to the bag, relating to its withdrawal from evidence for the purpose of the hearing. On cross-examination he said he made the entries on the bag after it had been taken out to the van.

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 Department failed to show an adequate chain of custody, i.e., that the beer introduced into evidence was the actual item purchased by the decoy; (2) the decision failed to make adequate credibility findings; and (3) the decoy lacked the appearance required by Rule 141.

DISCUSSION

I

Appellant contends that the Department failed to establish that the beer which was introduced into evidence was the item purchased by the decoy. Appellants devote three tightly written pages in their brief to this issue, purportedly to show that contradictions between the testimony of Officer McNatt and Sgt. Centanni, coupled with

the absence of information concerning bar coding placed on the evidence after it was placed in the property evidence locker at the police station, make it uncertain that, at the hearing, the Budweiser beer in the evidence bag (Exhibit 3) was the same Budweiser beer purchased by the decoy.

Appellants' argument is not well taken. It is based on at least two mistaken premises - that there is a contradiction between the testimony of the two police officers, and that Sgt. Centanni testified inconsistently with respect to when he made certain writings on Exhibit 3.

The purported contradiction between the testimony of the two officers, according to appellants, is what is said to be Officer McNatt's testimony that the evidence was "bagged" at the police van, while Sgt. Centanni testified that the evidence was "bagged" in the store.

There is no contradiction. Appellant has simply used the term "bagged" in two different ways. Officer McNatt's testimony to which appellants refer [RT 44-46], was that the beer "was placed in the bag and placed in Sergeant Centanni's van ... the beer was placed in a van in a bag." That is not the same as appellants would have it, i.e., that the beer was "bagged" in the police van. McNatt did not know what Centanni did with the bag after it was placed in the van [RT 47]. He was not sure whether the bag was open or marked [RT 48], and did not know when the case number was placed on the bag [RT 50].[4]

Nor is it correct to say, as appellants do, that Sgt. Centanni testified that the beer

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[4] Thus, it is incorrect to say that McNatt testified he saw Centanni place the evidence in the brown paper bag when they were outside in the police van. All that can fairly be drawn from McNatt's testimony is that he saw Centanni place the evidence in a brown bag. The question he was asked had no time or place reference.

was "bagged" in the store. He said that it was while he was in the store that he placed the beer in a brown paper sack he had brought in with him, but consistently testified that he made the felt-tip pen entries on Exhibit 3, the brown paper sack only after he had taken the beer to his van, where he stapled the bag shut, attached the evidence tag, and sealed the bag with tape for added security [RT 102-104]:

> "Q. Now, this writing on the outside of Exhibit 3, was in the clear presence of the clerk?
>
> A. In my van.
>
> Q. So you didn't mark them inside the store.?
>
> A. I don't think I said inside the store. I said at the store.
>
> ...
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> Q. Am I incorrect, sir, that in regards to the markings in a felt-tip pen that you took pains to explain to the Judge on case number, approximate date, store, Investigator McNatt, 1020 South Bristol, 7-Eleven, did you put these markings on the bag inside the store?
>
> A. No, my van.
>
> Q. So it was not done inside the store.
>
> A. I carried it out and put it in the van. Then, when I got into the van where it was already stapled, I then sat in the back of the van writing that information and then set it down.
>
> The Court: You were writing that information with what?
>
> A. With the black felt-tip pen on the brown shopping bag, that's the last thing I would do after everything was stapled – the evidence tag, et cetera – when I finish that information.
>
> The Court: Where would you obtain the information to put on the brown paper?

A. The evidence tag that would have been completed before I left the store.[5]

It is clear from our reading of the entire record that the chain of custody was as follows; (1) the decoy left the store with the beer; (2) the decoy gave the beer to Department investigator Cho, who carried it back into the store, where Sgt. Centanni placed it in a brown paper bag; (3) Cho filled out the evidence tag, while Centanni wrote the citation; (4) Centanni left the store with the beer and plastic bag inside the brown bag destined to become Exhibit 3; (5) when at his van, he stapled the brown bag shut, attached the evidence tag, and taped the bag for added security; (6) for further added security, Centanni wrote on the brown paper bag, with the felt-tip pen, the information identifying the contents as being from appellant's store; (7) the bag was placed in the property evidence locker at the police station; (8) while at the police station a bar code was placed on the bag to record where it would be stored; and (9) the bag was brought to the hearing and then opened to remove its contents.

Having said that, it may well be that much time and effort has been wasted on a chain of custody contention that could have been dismissed out of hand. There is undisputed testimony from Officer McNatt and the decoy that the decoy purchased a six-pack of Budweiser beer. Indeed, appellants do not appear to question the fact that the decoy purchased a six-pack of Budweiser. Instead, they merely claimed the Budweiser six-pack offered at the hearing might have been a different six-pack than the one the decoy had purchased.

This is not a case in which the crime turns on whether an unknown substance is

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[5] The ALJ's comment [at RT 104] that he recalled Centanni insisting that he put the information on the bag in the store is simply mistaken. "At the store," Centanni's phrase, is not the same as "in the store," which Centanni never said.

in fact what the law prohibits, or merely something that resembles it, where the chain of custody could be critical. Here, the decoy purchased an alcoholic beverage which he and a police officer testified without contradiction was a six-pack of Budweiser beer in cans. The fact that the six-pack was labeled Budweiser, and the cans sealed and cold to the touch, is ample proof that an alcoholic beverage was sold to the minor decoy. If, as we do not believe the case to be, the six-pack placed in evidence at the hearing was a different six-pack, any error would have been harmless.

II

Appellants contend that the decision fails to explain its reconciliation of the contradictions between the testimony of the two police officers.

Little time need be spent on this contention.

As demonstrated in part I, there is no significant contradiction between the testimony of the two witnesses. Officer McNatt simply lacked knowledge as to when Sgt. Centanni added the felt-tip pen markings to the brown paper bag. His testimony that Centanni placed the beer in the bag while in the store is not contradicted by Centanni.

Once again the Board is asked to follow the decision in Holohan v. Massanari (9th Cir. 2001) 246 F.3d 1195, which explains a rule of evidence applicable to Social Security disability claims. This Board has consistently rejected this argument, as not reflecting California law, and does so once again.

Citing McBail & Co. v. Solano County Local Agency Formation Commission (1998) 62 Cal.App.4th 1223, appellants suggest that the court failed adequately to explain its findings.

We have reviewed the decision, and are satisfied with the adequacy of the

findings.

III

Although the record is silent as to whether appellants raised the issue of the decoy's appearance at the hearing, they now contend he did not display the appearance of a person under 21 years of age. They point to the decoy's height and weight, his age (19), the number of locations he visited on the night in question, and his prior experience as a decoy.

By not raising any question at the hearing about the decoy's appearance, appellants can be said to have waived the issue.

In any event, the ALJ, after considering the same factors listed by appellants, reached an opposite conclusion.

Appellants have offered no persuasive reason why the Board should substitute its judgment for that of the trier of fact.

ORDER

The decision of the Department is affirmed.[6]

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

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[6] 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.