

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

AB-7845

File: 20-344258 Reg: 01050392

EQUILON ENTERPRISES, LLC dba Texaco
9205 Twin Trails Drive, San Diego, CA 92129,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED JULY 26, 2002

Equilon Enterprises, LLC, doing business as Texaco (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk, Seanpatrick MacMillan, having sold an alcoholic beverage (a six-pack of Budweiser beer) to Deborah White, a nineteen-year-old minor,² 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 Equilon Enterprises, LLC, appearing through its counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its

¹The decision of the Department, dated June 21, 2001, is set forth in the appendix.

²White was acting as a decoy for the San Diego Police Department.

counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 11, 1999. Thereafter, on February 22, 2001, the Department instituted an accusation against appellant charging an unlawful sale of an alcoholic beverage to a minor on October 21, 2000.

An administrative hearing was held on May 11, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Deborah White, the minor. White testified that when she placed the beer on the counter, the clerk said the scanner was not working, and asked her to tell him the price of the beer. In the course of the transaction, he asked for her identification. She handed him her California driver's license which showed her age as 21 in 2003. The clerk examined it, and, while doing so, made the remark "Born in 1981. You check out okay." (Finding II-A.1.)

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation, and rejected defenses asserted by appellant.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Rule 141(a) was violated when the police officer failed to halt the decoy operation when circumstances indicated the store's cash register was not functioning; (2) the same rule was violated when the decoy failed to respond to a statement by the clerk which implied that she was 21 years of age or older; and (3) the decoy displayed an appearance of a person older than 21 years of age, in violation of Rule 141(b)(2).

DISCUSSION

I

Rule 141(a) requires that a decoy operation must be operated “in a fashion that promotes fairness.” Appellant says this rule was violated because the police officer did not halt the operation once it became apparent that the scanner feature of the register was malfunctioning. Appellant asserts that the clerk would have been distracted by having to ask the decoy to price the beer for him.

The biggest hurdle for appellant to overcome is the absence of any testimony from the clerk that he was distracted. For all we know, he had been working with a malfunctioning register his entire shift, and would have become accustomed to accepting the assistance of his customers in pricing their purchases. Additionally, while a malfunctioning scanner may result in a mistake with reference to the price of the purchase, it has, at least on the basis of the record in this case, nothing to do with confirming the age of the purchaser. In any event, appellant’s claim of confusion or distraction rests entirely on speculation.

Appellant’s reliance on the Board’s decision in KV Mart (2000) AB-7459 is misplaced. The Board was there addressing the hypothetical situation where an unacceptable level of distraction was generated by patron activity. While a malfunctioning scanner may be unusual, it does not automatically follow that confusion or distraction will result. We know from experience that many registers operate without scanners. At most, in such a situation, there may be a mistake in the price charged for an item. We do not see any meaningful connection between the scanner malfunction and any relaxation of the need to exercise caution when selling to one who may be a minor. Indeed, the malfunction did not prevent the clerk from asking the decoy for her

identification. It would seem much more likely that he simply was negligent in his examination of the driver's license presented to him.

II

Appellant next argues that it was unfair for the decoy to remain silent in the face of a statement about her age. Appellant contends that since Rule 141 requires a decoy to respond truthfully to **questions** about his or her age, the fairness concept of the rule requires a decoy to respond truthfully as well to statements that may indicate a belief on the part of the seller that he or she is old enough legally to purchase an alcoholic beverage. Appellant analogizes to the concept of an adoptive admission by silence, citing Southers v. Savage (1961) 191 Cal.App.2d 100 [12 Cal.Rptr. 470] for the proposition that a reasonable person would speak out to clarify or correct the statement of another were it untrue.

The Department argues that the clerk's statement is no more than an utterance of his mental calculation, a mistake the decoy is under no duty to correct.

Southers v. Savage, *supra*, arose from an automobile collision. Southers, a passenger, sat silently immediately following the collision while Savage, the driver, gave a version of the accident completely contrary to the version Southers later put forth at the trial. The court ruled that the jury was entitled to consider whether Southers' silence at the time meant agreement. While it is the judge's duty first to determine whether the doctrine of adoptive admission by silence should apply, the court held, the ultimate determination of the question, where the evidence is conflicting, is for the jury.

While we do not believe the doctrine of adoptive admission by silence has a role in the operation of a decoy program, the decoy's silence may be significant in light of Rule 141(b)(2).

Rule 141 requires that a decoy shall answer truthfully questions about his or her age. There is nothing in the rule that requires a decoy to volunteer information about his or her age, or to clear up what may be a misconception about age where a seller is silent and simply goes ahead with the sale either without having requested proof of age or, upon request, having been provided identification. Since a decoy is engaged in a law enforcement process to determine the extent to which sellers are complying with the law regarding sales of alcoholic beverages to minors, it would seem unreasonable to expect that process to function if the decoy was obligated to clear up what might be a mistake or misconception on the part of the seller.

For example, many transactions involve a seller who requested identification, was furnished identification which showed the decoy to be a minor, yet proceeded with the sale. It could reasonably be assumed the seller was careless, or unable to interpret the information provided. It might also be assumed the seller really did not care, although this is undoubtedly much less frequent.

However, where there has been a verbalization of the seller's thought processes such as that in this case, a decoy may be expected to respond. Rule 141 says that a decoy is required to respond to a question. As the Board has said in an earlier case, there may be a thin line between what is a statement and what is a question. And when that line blurs, and the verbalization borders on the ambiguous, it may well be that a response is required. We said, in Circle K Stores, Inc. (1999) AB-7227:

Our concern is that it is asking too much of a decoy to leave it to him or to her to make that critical judgment whether a remark about age is intended to elicit from them either a confirmation or a correction, or is simply conversation. If fairness of the decoy operation is an important goal, as the Rule proclaims, then, in its implementation, it ought to be the case that where the clerk's remark about age is such that an honest clarification from the decoy may prevent a sale from occurring, the decoy has the obligation to offer such clarification by saying "No, I

am not 21,” or words to that effect.”

We think the facts of this case are sufficiently close to those in Circle K Stores, Inc., supra, that the same result should follow.

III

Appellant contends that the decoy did not present the appearance required by Rule 141(b)(2) - that which could generally be expected of a person under 21 years of age, in the actual circumstances presented to the seller of alcoholic beverages.

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, that he or she possessed the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages.

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.

The rule, through its use of the phrase “could generally be expected” implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of

age, or even older.

We think it worth noting that we hear many appeals where, despite the supposed existence of such a policy, the evidence reveals that the seller made the sale in the supposed belief that the minor was in his or her early or mid-20's, and for that reason did not ask for identification and proof of age. It is in such cases, and in those where there is a completed sale even though the buyer - not always a decoy - displayed identification which clearly showed that he or she was younger than 21 years of age, that engenders the belief on the part of the members of this Board that many sellers, or their employees, do not take sufficiently seriously their obligations and responsibilities under the Alcoholic Beverage Control Act.

By the same token, we appreciate the fact that, on occasion, police have used decoys whose appearance, because of large physical stature, facial hair, or other feature of appearance, is such that a conscientious seller may be unfairly induced to sell an alcoholic beverage to that person. Within the limits that apply to this Board as a reviewing tribunal, we have attempted to deter such practices, either by outright reversal, or by stressing the importance of compliance with Rule 141. If licensees feel more is necessary, their resort must be to another body.

ORDER

The decision of the Department is reversed for the reasons stated in part II, supra.³

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

³This 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.