

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

AB-7860

File: 20-221571 Reg: 01050418

7-ELEVEN, INC., and EUGENE VILLAGRANA dba 7-Eleven Store #27771
1771 Oro Vista Road, San Diego, CA 92154,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 15, 2002
Los Angeles, CA

ISSUED OCTOBER 3, 2002

7-Eleven, Inc., and Eugene Villagrana, doing business as 7-Eleven Store #27771 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold a six-pack of Miller Genuine Draft beer, an alcoholic beverage, to a minor decoy, 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 section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Eugene Villagrana, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated July 12, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 8, 1988. Thereafter, on February 27, 2001, the Department instituted an accusation against appellants charging that their employee, Patria Vidal ("the clerk"), sold an alcoholic beverage (beer) to David West ("the decoy"), a minor.

An administrative hearing was held on May 18, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by West, the decoy; Vidal, the clerk; and Ruben Villegas, a San Diego State University police officer.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and appellants had not established any defense to the charge.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the possible impact from the presence of a second decoy was not taken into consideration by the Department; (2) Villegas lacked jurisdiction to conduct the decoy operation; and (3) the Department violated Business and Professions Code section 25666 by failing to have the second decoy at the hearing.

DISCUSSION

I

Appellants contend that the Department's failure to consider the possible impact of the presence of a second decoy is ground for reversal.

We have serious doubts, based upon our review of the record, that appellants

preserved this issue for appeal. Nothing was said to the Administrative Law Judge in the course of the hearing, or in the closing argument by appellants' counsel, to indicate that any issue was being raised with respect to the second decoy's presence.

Nevertheless, we have considered the issue and find it lacking in merit.

The decoy testified that he was accompanied to the store by Carlos Rodriguez, a fellow police cadet with the San Diego Police Department. Rodriguez was standing next to the decoy when the decoy purchased the beer, but, according to the decoy, doing nothing more than that. The two conversed while at the beer cooler. The decoy was asked for his identification.

Rodriguez was not present at the hearing. The clerk was the only person who testified about his appearance, saying only that he appeared to be "much older than the other," referring to the decoy. The clerk testified that West (the decoy) appeared to be older than 21 because he appeared older than students from a nearby high school who come into the store. She recalled that his driver's license stated "21 in 2000." In fact, the license (Exhibit 2) states "21 in 2002."

The clerk did not claim that her decision to sell to the decoy was influenced in any way by Rodriguez's presence. Indeed, although she asked for the decoy's identification, in accordance with store policy, she simply misread it.

Appellants have made no claim that the decoy, West, lacked the appearance required by Rule 141(b)(2).² At best, they suggest that the clerk must have thought the

² Rule 141(b)(2) requires that "the decoy shall display 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 at the time of the alleged offense."

decoy to be older than he actually was because he was accompanied by another person who, according to the clerk, looked even older.

We think the Administrative Law Judge's (ALJ's) assessment of the decoy's appearance indicates that he placed little, if any, weight on the clerk's testimony. He wrote (Finding of Fact II-F):

The overall appearance of the decoy including his demeanor, his poise, his size, his mannerisms and his physical appearance were consistent with that of a nineteen year old and his appearance at the time of the hearing was substantially the same as his appearance on the day of the decoy operation. The decoy is tall and lanky. On the date of the sale, the decoy was clean-shaven and his hair was relatively short. The decoy testified that he had volunteered as a police cadet since January of 2000, that he had participated in ten or fifteen prior decoy operations, that he was comfortable being a decoy and that he was not nervous when he was at the premises. Exhibit 3 was taken at the premises on the night of the sale and the photograph depicts what the decoy looked like on the night of the sale. After considering the photograph (Exhibit 3), the decoy's youthful appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

While it is true that the ALJ had little to say about the second decoy, it was only because he was never alerted that anyone expected him to say anything about the second decoy.³ Absent any contention that the second decoy's presence had an impact on the transaction, or that his conduct may have misled or confused the clerk, the ALJ reasonably focused his attention only on the decoy who actually made the purchase. We do not think he erred in doing so.

II

³ Based upon the decoy's description of a police cadet as someone under the age of twenty and one-half, we may reasonably assume that Rodriguez was also under the age of 21.

Appellants contend in their brief that officer Villegas was not a peace officer within the meaning of Business and Professions Code section 25658, subdivision (f), the statutory authority for the conduct of decoy operations. The issue was not addressed during argument.

Penal Code section 830.2 identifies certain categories of persons who are "peace officers whose authority extends to any place in the state." Subdivision (c) thereof extends the status of "peace officer" to one who is a member of the California State University and College Police Departments appointed pursuant to section 89560 of the Education Code, "provided that the primary duty of any such police officer shall be the enforcement of the law within the area specified in Section 89560 of the Education Code."

Section 89560 authorizes trustees of the California State University system to establish police departments, members of which are peace officers. Section 89560 further provides that such peace officers shall not exercise their powers or authority except (a) in an area within one mile of the exterior of the boundaries of a campus and (b) as provided in section 830.2 of the Penal Code.

Business and Professions Code section 25755, empowers, among others, peace officers of the California State University police departments, to visit and inspect the premises of any licensee located on state property at any time during which the licensee is exercising the privileges authorized by his or her license on the premises,

Appellants read section 25755 as imposing a geographical boundary on peace officers such as Villegas, and argue that if he can conduct a decoy operation at a location 20 miles from his campus and not on state property, then all three statutes are

devoid of meaning.

We disagree. We read Penal Code section 830.2, subdivision (c), as granting Villegas state-wide authority, so long as his primary duties are exercised on or within one mile of the San Diego campus, as provided in Education Code section 89560. Business and Professions Code section 25755 conveys to Villegas the additional power to visit and inspect premises on state property. We do not read section 25755 as limiting in any way any authority he might possess by virtue of Penal Code section 830.2, subdivision (c), or Education Code section 89560.

The record does not disclose how Villegas happened to be involved in a decoy operation on private property 20 miles from his home campus. However, we do believe that, as a campus police officer, one of his enforcement concerns would undoubtedly be underage drinking by college students. Hence, we do not find it altogether too surprising that he might work with another enforcement agency, in this case, the San Diego Police Department, in a joint decoy operation.

Appellants suggest that Villegas must have been conducting a decoy operation on his own, stating:

“For the decoy operation to be conducted by a San Diego State University police officer twenty miles off campus is to leave these statutes without any force or effect. Finally, the Department can take no comfort in the presence of Larry Darwent. Administrative Law Judge Echeverria may or may not know Larry Darwent, but the record does not establish by competent nonhearsay evidence who Larry Darwent is or how he earns his living.”

Appellants are much mistaken. Villegas testified without objection that Larry Darwent is a detective with the San Diego Police Department. [RT 42]. Appellants' counsel's objection to a similar response to a different question was then sustained. Later, Villegas was permitted, over objection, to testify that Darwent was so employed,

and he believed this because Darwent “has a San Diego Police Department badge. I’ve been working with him for ten months now in San Diego Police Department office headquarters. He’s supervised by a sergeant.” [RT 44]. Unless we are to assume Darwent is some sort of impostor, capable of fooling Villegas and police headquarters personnel for nearly a year, we can only conclude that Darwent is also a peace officer. Further, based on Villegas’s testimony, it is apparent that this was a joint decoy operation he and Darwent were conducting, and that the locations visited had been the subject of complaints.

We do not know from the record where this particular series of decoy operations began, or how it related to the San Diego State University campus. Nor do we believe we need to know. It is enough for us that Villegas was a peace officer engaged in an activity which could be said to have a reasonable relationship with his primary responsibility as a campus peace officer. If, as he testified, the locations visited, including appellants’ store, had been the subject of complaints, it is not inconceivable that those locations might be patronized by underage students at Villegas’s San Diego campus.

We think language quoted by appellants from the case of *Baughman v. State of California* (1995) 38 Cal.App.4th 182, 189 [45 Cal.Rptr.2d 82] is instructive, and supports the result we reach:

“There are no cases delineating the authority of campus police under these statutes. Education Code section 89560 does not absolutely limit the exercise of the powers or authority of campus police to within one mile of campus. It expressly provides that such officers shall exercise such powers and authority within one mile *and* as provided by Penal Code section 830.2. Penal Code section 830.2 states that the authority of such officers extends throughout the state, even though the primary duty of such officers is within one mile of the campus.

“Here the various alleged crimes which led to this investigation occurred on campus and other places. The purpose of Education Code section 89560 and Penal Code section 830.2, when read together, is to ensure that campus police may fulfill their duties as police officers when the need extends beyond a one-mile radius of a campus. Under the facts here, the purpose of these statutes would be thwarted if campus police were precluded from continuing an investigation which began on campus.”

In this day and age, when many college students (we are tempted to say most) have motor vehicles, those of them who are underage and who are seeking locations which may sell them alcoholic beverages, are not limited to the immediate campus environs. It is understandable that campus police would have an interest in protecting their students. Becoming involved with San Diego Police Department decoy operations seems an appropriate way to do so. We leave it to Villegas’s superiors to take such action as they might deem appropriate if it appears (it should be noted that appellants have not so contended) that Villegas has neglected his primary duty to enforce the law within the campus area and the one-mile radius surrounding it.

III

Appellants contend that the Department was obligated by Business and Professions Code section 25666 to produce Rodriguez, the second decoy, at the hearing, and its failure to do so is ground for reversal.

This is another issue which does not appear to have been raised at the hearing, and we would be justified in declining to consider it. However, we know that there have been other instances where two decoys entered a premises together, but only one is present at the hearing and there will likely be similar instances in the future. Thus, we think our brief consideration of the issue could provide useful guidance to the Department and affected licensees in future cases.

Business and Professions Code section 25666 provides, in pertinent part:

“In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing”

There is a paucity of reported case law involving the three statutes. Each of the three Code provisions enumerated in section 25666 addresses unlawful activity by or involving a minor. Section 25658 applies to sales to a minor (subdivision (a)), purchases by a minor (subdivision (b)), purchases by an adult for a minor (subdivision (c)), and permitting consumption by a minor in on-sale premises (subdivision (d)). Section 25663 applies to the employment of a minor in any portion of the premises primarily designed for the service and consumption of alcoholic beverages on the premises, and the unsupervised employment by an off-sale licensee of a minor under 18 years of age for the sale of alcoholic beverages. Section 25665 applies to the permitting of a minor to enter and remain in an on-sale public premises without lawful business therein. Only section 25658, subdivisions (a) and (b), have any direct relevance to decoy operations. In all three of the named statutes, the involvement of a minor is critical to the charge. It is our belief that the term “alleged minor” as used in section 25666 refers only to the person whose age underlies the charge that one of those statutes was violated, and does not acquire a broader meaning simply because a decoy operation is involved.

In this case, decoy West was the person to whom the sale was made, and proof of his minority is essential to the charge. At best, Rodriguez was a witness either party could have called.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.