

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

AB-7864

File: 21-296142 Reg: 00050063

RAWA R. RAZOOKY and SAMIR Z. RAZOOKY dba Los Coches Liquor
13305 Highway 8 Business, El Cajon, CA 92021,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: May 9, 2002
Los Angeles, CA

ISSUED JULY 26, 2002

Rawa R. Razooky and Samir Z. Razooky, doing business as Los Coches Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days, with 10 days thereof conditionally stayed for one year, for having sold alcoholic beverages to minors on two occasions, one of such occasions involving a sale to a seventeen-year-old decoy, 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 Rawa R. Razooky and Samir Z. Razooky, appearing through their counsel, John J. McCabe, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated July 26, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on July 26, 1994. Thereafter, the Department instituted an accusation against appellants charging that, on June 17 and July 21, 2000, Samir Razooky sold beer to underage customers.

An administrative hearing was held on June 20, 2001, at which time oral and documentary evidence was received. Jennifer Hill and Peter Tyndall, Department investigators, and Brian Laird, the minor, testified on behalf of the Department concerning the transaction on June 17, 2000 (count 1 of the accusation). Dana Dugall, the decoy, testified on behalf of the Department concerning the transaction of July 21, 2000 (count 2 of the accusation). The June transaction involved a six-pack of bottled New Castle brand ale or beer. The July transaction involved a six-pack of Budweiser beer.

Subsequent to the hearing, the Department issued its decision which determined that the evidence established that both violations had occurred, and ordered the suspension from which this timely appeal has been taken.

Appellants raise the following issues: (1) the Administrative Law Judge (ALJ) erred in admitting hearsay testimony from Department investigator Tyndall and San Diego County sheriff's deputy Sadler; (2) the destruction of the items purchased denied appellants due process; and (3) the ALJ erred in rejecting appellants' defense under Business and Professions Code §25660.

DISCUSSION

I

Appellant contends that the ALJ admitted, over objection, and based findings on, hearsay testimony from Department investigator Peter Tyndall and San Diego County

deputy sheriff Sadler. Tyndall testified in connection with the sale which took place on June 17, 2000. Appellants assert that Tyndall testified to what Hill had told him. Deputy Ross did not testify, but provided to Thomas Sadler, a fellow deputy who did testify, the information Sadler included in his report concerning the sale to the decoy on July 21, 2000.

The June 17, 2000, transaction

Department investigator Hill testified that she followed Brian Laird into appellants' premises after observing Laird and another youthful looking individual pull into the store parking lot. Hill stood directly behind Laird at the checkout counter. Laird had a six-pack of bottles which appeared to be beer. The brand was New Castle. (Laird had earlier testified that he purchased a six-pack of New Castle ale.) Hill said appellant Samir Razooky asked Laird if he was 21. Laird replied that he was 23. Laird removed money from his wallet. Hill was able to see the wallet, but no identification was apparent. (Laird had earlier testified that he had held his wallet open so that the clerk could have access to whatever was in it, but was unaware where in the wallet was the false identification he admitted possessing.) Hill stopped Laird as he left the store, and investigator Tyndall, who had remained outside the store, took over the questioning of Laird.

Investigator Tyndall testified that Laird told him he was 19 years of age. Laird had a six-pack of New Castle bottles with him. The bottles were sealed. Laird acknowledged that he possessed false identification, opened his wallet, and removed the identification from behind several cards in the clear plastic portion of the wallet.

Tyndall also testified that, upon his return to the store, appellant Razooky admitted the sale to Laird, but claimed to have seen identification showing Laird to be

23 years of age.

Appellants' objections to the portions of Tyndall's testimony that they consider inadmissible hearsay lack specificity. In our review of the record, the only hearsay objections we can find having been made were to Tyndall's responses to questions whether he had asked Laird his age and whether he had false identification, neither of which appears to be disputed. We have been unable to find anything Tyndall supposedly attributed to Hill, let alone any hearsay objection to such.

The July 21 transaction

Appellants' contention that deputy Sadler's testimony was inadmissible hearsay is even more perplexing. Sadler's testimony was elicited in its entirety by appellants' counsel. Department counsel did not even cross-examine. Although Sadler acknowledged that the report he prepared was based upon what he had been told by deputy Ross, he did not testify about the contents of the report, and the report was not placed in evidence. If it could be said that Sadler offered hearsay testimony, it was elicited by appellants' counsel, and any error was invited by appellants' counsel.

We can only conclude that appellants' contentions regarding hearsay are without merit. Similarly, appellants' contention that the testimony of Tyndall and Sadler lacked foundation because based upon hearsay must also be rejected.

II

Laird testified that he purchased New Castle brand ale. Investigator Hill testified that Laird had a six-pack of bottles which appeared to be beer. The brand was New Castle. Hill testified that the six-pack had been destroyed:

Q. Now, the six-pack of New Castle brown ale, did you bring it with you today?

A. No.

Q. And why not?

A. It was destroyed.

Q. Intentionally?

A. Well, it was destroyed through a destruct order intentionally but by mistake if that makes sense.

Appellants now contend this resulted in a denial of due process.

This issue appears to relate only to count 1 of the complaint. Although appellants' brief suggests that the Budweiser beer which was the subject of count 2 was also destroyed, there is no evidence that this happened. Nothing was asked about what may have been the disposition of the Budweiser beer. Indeed, it is difficult to tell from appellants' brief whether appellants are even contesting the decision regarding count 2 of the accusation.

If there was any dispute as to what it was that Laird purchased, we would have to address this issue. However, there is no dispute. Appellant Samir Razooky expressly admitted that Laird purchased a six-pack of New Castle beer. [RT 85.]

In light of appellant Razooky's testimony, we are unable to understand how the absence of the beer at the hearing could have impaired his ability to defend.

Appellants' broadly asserted due process claim lacks merit.

III

Appellants assert with respect to count 1 that the ALJ erred in rejecting their defense under Business and Professions Code §25660.

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."

Appellant Samir Razooky testified that Laird displayed an "out-of-state I.D." The identification card was in clear plastic in a black wallet. Razooky could not remember which state supposedly issued the identification card. Laird had previously testified that it was issued by the State of Florida.

The ALJ concluded that the evidence did not support a finding that Razooky looked at, or relied upon, the information on the identification card. There is substantial evidence that supports this determination.

Laird testified that he simply held his wallet open, giving Razooky access to its contents. Razooky did not handle the wallet or remove the identification from where he claims he saw it. Tyndall testified that, when he examined Laird's wallet after he left the store, the Florida identification was beneath other cards in the plastic portion of the wallet. If this were so, then Razooky could not have seen it, and could not have relied upon it.

The ALJ acknowledged appellant Razooky's claim that he had seen false identification, but rejected as not credible his testimony that he saw the identification card which showed Laird's year of birth as 1977.

We concede that appellant Razooky's contemporaneous claim to investigator Tyndall that he had seen an out-of-state identification purporting to show Laird to be 23

years of age, coupled with the evidence adduced at the hearing that such an identification did in fact exist, suggests that appellants' claim to a defense under §25660 is not frivolous.

However, the ALJ, who, with the Department, is the judge of credibility, chose to accept the testimony of Tyndall and Laird, the net of which was that Razooky could not have really seen enough of the card to rely on it. No one testified the Florida identification card had been removed from Laird's wallet, and when Tyndall found it, the card was beneath other cards in the plastic insert, and could not have been seen.

It is not the Board's function to second guess the ALJ's credibility determinations. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

With these principles in mind, we are satisfied that the decision of the Department was correct.

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.