

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

AB-7979

File: 21-149395 Reg: 02052295

SONG CHIN HONG and YONG YI HONG dba Johns Liquor
9551 ½ Telegraph Road, Pico Rivera, CA 90660,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: February 13, 2003
Los Angeles, CA

ISSUED APRIL 3, 2003

Song Chin Hong and Yong Yi Hong, doing business as Johns Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk, Jae Kwon Kim, having sold an alcoholic beverage (a six-pack of Smirnoff Ice) to Noel Esquivel, a 17-year-old minor, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Song Chin Hong and Yong Yi Hong, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Roxanne Paige.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on January 19, 1984. Thereafter,

¹The decision of the Department, dated May 9, 2002, is set forth in the appendix.

the Department instituted an accusation against appellants charging an unlawful sale to a minor on October 5, 2001.

An administrative hearing was held on April 17, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Enrique Alcala, a Department investigator who witnessed the transaction; by Esquivel, the minor; and by Jae Kwon Kim, appellants' clerk.

Subsequent to the hearing, the Department issued its decision which determined that a sale in violation of section 25658, subdivision (a), had taken place, and that appellants' claim of a defense under Business and Professions Code section 25660 lacked merit.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) The findings are not supported by substantial evidence; and (2) a defense was established under Business and Professions Code section 25660. Appellant has treated these as related issues, and we shall do so as well.

DISCUSSION

Appellants' clerk testified that he examined the driver's license presented to him by Noel Esquivel for 25 seconds before making the sale that gives rise to this appeal. Noel Esquivel was born on December 27, 1983. The license was that of his older brother Saul, whose date of birth was September 29, 1980. The license had not expired, and contained the legend "21 in 2001" across the red stripe.

The clerk testified that he compared the photo on the license and looked into Noel's face. He checked the date of birth, the color of his hair, the height, "and all that."

He first looked at the license without light, then brought it under the light "to make sure." He checked the face, and noted the Hispanic-sounding name. The hair was the exact same color, and Noel's face and nose appeared similar to the license photo. In his opinion, the eyes were the same color. Noel appeared to be slightly taller, viewed from the waist up. He also thought the weight matched. He concluded that Noel was the person pictured on the license.

The Administrative Law Judge (ALJ) rejected appellants' defense based upon Business and Professions Code section 25660, reasoning as follows (Determination of Issues II-A through II-C):

Respondents argued that their clerk's reliance on Saul Esquivel's driver license as bona fide evidence of Noel Esquivel's majority was reasonable. The evidence does not support this argument.

Respondent's comparison of Noel Esquivel's face, hair, and nose with Saul Esquivel's face, hair, and nose, as shown on Saul's driver license is not persuasive. In the opinion of the Administrative Law Judge, only the noses appear similar. Saul Esquivel's hair is much shorter than Noel Esquivel's hair, and Saul Esquivel's face is darker and thinner than Noel Esquivel's.

But assuming that reasonable minds may differ regarding whether the two brothers features are similar, and even if one accepts that they are, and even if one accepts that Noel Esquivel appears Spanish, the reliance on Saul Esquivel's driver license was still not reasonable. Noel Esquivel was approximately 5' 7" tall and weighed between 130 to 135 pounds. Saul Esquivel is indicated on his driver license as being 5' 11" tall and weighing 170 pounds. The four-inch difference and the 35-to-40 pound difference are simply too great.

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.

It is essential to a successful defense under section 25660 that the operator's license or other evidence of majority be presented by one whose appearance indicates that he or she could be 21 years of age, and a reasonable inspection of the document must be made by the licensee or his agent. (See *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820].)

Obviously, the clerk was wrong in his conclusion that Noel was the person shown on the driver's license. The question presented is whether it can be said that his reliance on the license was unreasonable.

5501 Hollywood, supra, tells us that this is a question for the trier of fact, in this case the ALJ:

Whether a reasonably careful inspection of the license and comparison with [Noel's] appearance would have done something more than raise a suspicion in the mind of a reasonably prudent man, whether it would prompt him to require something additional by way of evidence of the bona fides of the license or to refuse altogether to serve [Noel] was a question for the trier of fact.

We have reviewed the exhibits in the record, specifically the photographs of Noel taken on the night in question (Exhibits 3-A and 3-B), and the photograph of his brother, Saul, on Saul's driver's license (Exhibit 5). Having done so, we can find no reason to fault the ALJ's conclusions.

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.