

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

AB-8058

File: 21-369696 Reg: 02052921

THE VONS COMPANIES, INC., dba Vons Grocery Company
931 Lomas Santa Fe Drive, Solana Beach, CA 92075,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED JANUARY 21, 2004

The Vons Companies, Inc., doing business as Vons Grocery Company (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, all of which were stayed for a probationary period of one year, for appellant's clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant The Vons Companies, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, issued pursuant to Government Code section 11517, subdivision (c)(2)(B), and dated November 14, 2002, is set forth in the appendix, along with the proposed decision of the administrative law judge. The Department decision adopted the proposed decision with the exception of the penalty, which the Department reduced.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on November 30, 1988. On May 9, 2002, the Department filed an accusation against appellant charging that, on September 24, 2001, appellant's clerk sold an alcoholic beverage to 19-year-old Thomas E. Flanders. Although not noted in the accusation, Flanders was working as a minor decoy for the San Diego County Sheriff's Department at the time.

At the administrative hearing on August 2, 2002, documentary evidence was received, and testimony concerning the sale was presented by Flanders and by Morad M. Garmo, a San Diego County Sheriff's detective.

Flanders selected a 32-ounce bottle of Corona beer from the beer cooler in the premises and took it to a check-out lane. Deputy Garmo and another officer got in line behind him. The clerk asked for Flanders' identification, and he handed her his California driver's license, which shows his birth date of July 8, 1982, and bears the words "AGE 21 IN 2003" in white letters on a red stripe. The clerk looked at the driver's license briefly, handed it back to Flanders, and completed the sale.

Flanders took the beer and left the store. Garmo told the clerk, "You sold beer to a minor. Stand by." and went to bring Flanders back to identify the seller. Standing a few feet from the clerk, Garmo asked Flanders if she were the one who sold beer to him. Flanders answered that she was the one who had sold to him.

The subsequent Department decision determined that the unlawful sale had occurred as charged, and no defense had been established. Appellant has filed a timely appeal making the following contention: Rule 141(b)(5)² was violated.

²References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

DISCUSSION

Appellant contends there was not compliance with Rule 141(b)(5), which requires, after a sale to a minor decoy, that the "officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages." It asserts the officer identified the seller for the decoy, rather than the decoy identifying the seller for the officer, when the officer, before exiting the store to bring the decoy back in, told the clerk she had sold to a minor, and then asked the decoy if that clerk had sold to him, "suggesting the answer."

The ALJ made the following finding with regard to the face-to-face identification (Finding III):

A. The preponderance of the evidence established that a face to face identification of the seller of the beer did in fact take place.

B. After the sale of the beer had taken place, Flanders returned to the premises. When Deputy Garmo asked him to identify the person who had sold him the beer, Flanders identified the clerk as the person who had sold him the beer. When this identification took place, Flanders and the clerk were standing in close proximity and the clerk was looking at Flanders. This identification of the clerk by Flanders did comply with the Department's Rule 141(b)(5). Following this identification, a citation was issued to the clerk.

The Board has addressed this issue before, rejecting the same argument appellant makes here. In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board said:

The fact that the officer first contacts the clerk and informs him or her of the sale to a minor has been used to show that the clerk was aware of being identified by the decoy. (See, e.g., *Southland & Anthony* (2000) AB-7292; *Southland & Meng* (2000) AB-7158a.) ¶ . . . ¶ As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

Appellant cites to *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. & 7-Eleven/Keller* (2003)109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339] (*Keller*), asserting that the Court of Appeal held "that type of suggestive line-up with only one person is impermissible under Rule 141(b)(5)." In *Keller*, the appellate court annulled the decision of the Appeals Board³ that found a violation of rule 141(b)(5) where the decoy remained outside, the officer brought the clerk outside, and the decoy then identified the clerk as the seller. The court said, at page 1698:

We note that single person show-ups are not inherently unfair. (*In re Carlos M.* (1990) 220 Cal. App. 3d 372, 386 [269 Cal. Rptr. 447].) While an unduly suggestive one person show-up is impermissible (*ibid.*) in the context of a decoy buy operations [sic], there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

This does not support appellant's contention. While an "unduly suggestive" identification might be impermissible, appellant presented no evidence that the identification was unduly suggestive.

ORDER

The decision of the Department is affirmed.⁴

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

³ *7-Eleven/Keller* (2002) AB-7848.

⁴This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.