

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

AB-8180

File: 20-39101 Reg: 03054377

CIRCLE K STORES, INC. dba Circle K Store # 980
703 Natoma Street, Folsom, CA 95630,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: July 8, 2004
San Francisco, CA

ISSUED AUGUST 20, 2004

Circle K Stores, Inc., doing business as Circle K Store #980 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerk, James Garcia, having sold a six-pack of Budweiser beer to Kyle Jensen, a 19-year-old police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 1, 1973. On

¹The decision of the Department, dated July 31, 2003, is set forth in the appendix.

January 30, 2003, the Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage to a minor.

An administrative hearing was held on May 13, 2003, at which time oral and documentary evidence was received. At that hearing, testimony in support of the accusation was presented by Kyle Jensen (the decoy), and by two Folsom police officers, Dwight Lockhart and Carl Siegler. Philip Holzman, appellant's retail territorial supervisor, testified on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and that appellant had failed to establish any affirmative defense under Rule 141. Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there was no compliance with Rule 141(b)(5); and (2) there was no compliance with Rule 141(b)(2).

DISCUSSION

I

The administrative law judge (ALJ) made the following factual finding regarding the transaction (Finding of Fact III):

On October 11, 2002, nineteen year old Kyle Jensen was working as a decoy for the City of Folsom Police Department. After entering Respondent's premises, he obtained a six-pack of Budweiser beer and took it to the sales counter where he was asked for his identification by the sales clerk.

The clerk looked at the customer's California Driver License and the decoy paid the sales clerk for the beer. After exiting Respondent's store, the decoy met with a police officer and handed the beer over to him. The decoy reentered the premises with the police officer and verbally identified the clerk who sold him the beer. The face to face identification was made from a distance of two or three feet and was observed by two police officers, including one who had observed the transaction from within the store. The clerk was identified as James Garcia and was issued a citation.

With evident reference to this finding, appellant asserts that the ALJ failed to

explain “a crush of conflicting evidence” as to compliance with Rule 141(b)(5).²

Appellant argues that Officer Lockhart’s testimony pertained only to a series of possible questions he may have asked the decoy at the time a face to face identification would have taken place, and that Officer Siegler’s testimony cannot establish compliance with the rule because it is in conflict with that of Officer Lockhart as to how the decoy was asked to make the identification. Further appellant suggests that the failure of the surveillance videotape of the transaction to show any pointing by the decoy, shows that there was no face to face identification at all. None of these contentions have merit.

There is extensive testimony in the record which, viewed as a whole, leaves no doubt that there was a face to face identification as required by the rule. We have set out this testimony at length to refute appellant’s exaggerated assertions that it is “wholly conflicting”:

Testimony of Officer Lockhart:

[RT 34-35]:

Q. Were you present when the decoy identified the clerk?

A. Yes.

Q. Can you explain how the decoy identified the clerk?

A. Officer Siegler had asked the decoy, “Is this the gentleman that sold you the beer,” or something of that nature, and “Was this the beer that you purchased,” and “Was this the money that was used,” because I am almost certain that Carl made pictures of the money. ...

Q. Was the clerk present when these questions were asked?

² Rule 141(b)(5) provides that “[f]ollowing any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of alcoholic beverages.”

A. Yes, he was.

...

Q. Do you have a personal recollection as to whether or not the citation was issued before or after the minor identified the clerk?

A. After.

Testimony of Officer Siegler:

[RT 39-40]:

Q. After the decoy left the store, do you know whether or not the decoy ever reentered the store again?

A. Yes, he did.

Q. And what did the decoy do when he reentered the store?

A. He reentered with Officer Lockhart, and we conducted the face-to-face identification.

Q. And could you briefly describe how the face-to-face identification is conducted?

A. Yes, I can.

I asked the decoy if he recognized the person who had sold him the alcoholic beverage, and he proceeded to point to the clerk, Mr. Garcia, I believe was his name.

...

Q. I believe we left off at the decoy pointed to Mr. Garcia.

Do you recall what occurred next after the decoy pointed to Mr. Garcia?

A. I believe that Officer – I believe I asked – I advised him of his rights per Miranda, and conducted a brief investigation as to what had occurred, as Officer Lockhart was filling out the citation.

[RT 48-50]:

Q. Let me ask you about page 3 of your report.

On the third full paragraph on the top, this is referencing after the purchase

occurred, you write: "I approached the register and contacted AR-1 (Garcia) and identified myself using my department credentials. I advised him that he had just sold an alcoholic beverage to a minor. The Witness 1 Jensen and Officer Lockhart reentered the business to conduct a face-to-face identifying of the clerk. I asked Witness 1 Jensen if he could identify the person who sold him the beer, and he proceeded to point at AR-1 Garcia and stated that he sold him the beer. Witness 1 Garcia was standing approximately four feet away from Garcia during the face-to-face, with the counter being the only barrier in the way."

Do you recall writing this?

A. Yes, I do.

Q. Is this an accurate description of how the face-to-face identification occurred?

A. I believe so, yes.

...

Q. But do you specifically recall – absent your reviewing the report today, do you specifically recall the circumstance of the face-to-face identification in this case?

A. I don't exactly understand what you are saying.

...

Q. Absent your review of the report, do you have an independent recollection of what happened with respect to the face-to-face identification?

A. Sure.

Q. And you had a recollection at the time of the incident when you prepared the report, right?

A. Correct.

[RT 51-52]:

Q. And then at some point Mr. Jensen comes back into the store, correct?

A. Correct.

Q. When Mr. Jensen comes back into the store, were you having any conversations with the clerk at that time?

A. I don't recall.

Q. Do you recall what, if anything, you were doing in terms of dealing with the clerk at the time that Mr. Jensen came back into the store to conduct the face-to-face?

A. I am sure I was advising him of his rights and talking to him about the incident.

Q. Were there any other clerks working on this matter?

A. Not that I recall.

During Officer Siegler's testimony, appellant's counsel, Mr. Evans, played a surveillance videotape of the transaction "to ascertain whether a valid face-to-face identification occurred as described in [Siegler's] report." Mr. Evans was attempting to demonstrate that the tape did not show the decoy pointing at the clerk.

We have reviewed the colloquy that took place at various times between the attorneys and the ALJ regarding the manner in which the video recording was made [RT 53- 65, *passim*]. It appears that two cameras were involved, switching from one to the other, with a three to four second gap in the switching process. In other words, events from one of the two scenes viewed by the cameras occurring during a span of three to four seconds might not appear on the videotape. The ALJ was alert to the problem [RT 57-59]:

Judge Dorais: I have a question about the tape.

I am not sure what I observed there.

Is it – are you – does the tape show everything that happened once the decoy reentered the store, or does it – it seems to scan intervals of his time in the store after he reentered and show another camera – another camera angle.

Are these intervals then – for instance, I don't see the clerk walk out from behind the counter.

That's not on the tape.

He didn't jump over the counter and appear.

Judge Dorais's conclusion, that "we aren't seeing what happens for three or four seconds" [RT 59] was confirmed by Mr. Evans and Mr. Lueders [*Ibid*]. That being the case, we do not see how the videotape lends any support to appellant's contention that the decoy did not do what the officers said he did. While in our own review of the videotape we did not observe any actual pointing, we did see the decoy and the clerk closely together after the decoy had reentered the store. This, coupled with the testimony of the police officers, convinces us that there was the face to face identification required by the rule.

The decoy was not questioned about the identification process. Exhibit 4, a statement he prepared some time after the decoy operation, and described what he did during that process, was admitted into evidence. In that statement, a portion of which was redacted in response to objections by appellant's counsel, the decoy wrote:

I, Kyle Jensen entered Circle K located at 46 Natoma St. in operation with ABC's decoy program. I entered and grabbed a 6-pack of Budweiser and placed it on the counter. I then gave him [sic] the \$10 after he rang me up. The clerk [redacted] gave me my change and the alcohol. I exited the store and was met by ABC officers. They then escorted me in and I gave a face to face confertation [sic]. I stated, "I am 19 years old and you sold me alcohol." At no point did the clerk ask for my age.

The premises in question is located at 703 Natoma Street in Folsom. The store location referred to in Exhibit 4 is "46 Natoma St." No explanation was offered concerning the discrepancy in locations or addresses. For that reason, we have not attributed any weight to this document. We note, however, that there is nothing in it that detracts from the testimony of the two police officers. Thus, we remain convinced that the officers conducted the face-to-face identification required by the rule.

II

Appellant quotes a portion of the ALJ's factual finding regarding the appearance of the decoy, and contends that the ALJ applied an incorrect standard in the finding. In

order to assess the validity of this assertion, we set out his factual finding in full, as well as his determination that the Rule 141(b)(2)³ was satisfied.

Finding of Fact IV:

On October 11, 2002, Kyle Jensen was 5 feet 9 inches tall and weighed 135 pounds. His driver's license, which was issued August 4, 2000, indicates the same height and weight. At the time of the transaction in Respondent's store, the decoy wore blue jeans and a white long-sleeve shirt with an insignia on the front. He did not wear any jewelry other than a hair band on his wrist and a decorated belt with a large buckle. He wore a baseball cap backwards.

At the hearing, the decoy testified he still weighed about the same, and was still 5 feet 9 inches tall. He testified in a calm and quiet manner and acknowledged a mistaken response during testimony when he was able to recall better when he had made a written report of the incident.

The decoy visited five licensed premises on October 11, 2002, as part of the decoy operation. He had not worked as a decoy before and has not since.

At the hearing, the decoy was dressed similarly to the casual manner in which he was attired on the date of the sale at Respondent's store. He wore a baseball cap in reverse fashion, jeans and a black short-sleeve shirt. He stated he had taken police orientation classes during his senior year in high school (he is now attending college) but did not complete the training. At the hearing, he appeared and acted decidedly youthful and conducted himself in a polite manner.

After observing the decoy's appearance, including his demeanor and taking into consideration all of the evidence surrounding his appearance on October 11, 2002, it is found that the minor decoy displayed the appearance of a person who could generally be expected to be under the age of 21 years when the sale of beer was made to him by Respondent's clerk on October 11, 2002. The minor's appearance at the hearing was substantially the same as his appearance presented to Respondent's clerk on October 11, 2002.

Determination of Issues II-A:

Pursuant to Findings of Fact IV, the decoy in this case displayed the appearance, both physical and otherwise, which could generally be expected of a person under the age of 21 years at both the administrative hearing and at the time of the alleged offense. Respondent has failed to establish any violation of

³ Rule 141(b)(2) requires a decoy "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."

Rule 141(b)(2).

Appellant states in its brief that, while the finding in question “discusses the appearance of a person who could generally be expected to be under 21 years of age,” the rule “requires that the appearance would be that which could generally be expected of a person under 21 years.” Appellant reasons that “although the two,” with apparent reference to the preceding statement, “may result in the same ultimate conclusion ... It is quite conceivable that the discrepancy between the Finding and the Rule could result in an incorrect conclusion.”

We have read and reread appellant’s contention, and it seems to us to boil down to an argument that the ALJ made the wrong choice when he used the word “who” rather than the word “which” in his factual finding. Given that the ALJ’s legal conclusion, that there was compliance with the rule, tracked the language of the rule, we do not think the so-called “discrepancy” is any reason to reverse the carefully written decision of the Department.

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, 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.