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

AB-8184
File: 21-280942 Reg: 03054711

THE VONS COMPANIES, INC. dba Vons
2101 North Rose Avenue, Oxnard, CA 93030,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: June 10, 2004
Los Angeles, CA

ISSUED JULY 30, 2004

The Vons Companies, Inc., doing business as Vons (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for its clerk having sold a 16-ounce can of Bud Light beer to a 16-year-old police 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 Gary Labin, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 29, 1997. Thereafter, the

[1]The decision of the Department, dated August 14, 2003, is set forth in the appendix.

Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on June 18, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Oxnard police officer Nelson Latimer and 16-year-old police decoy Aubrey Powell concerning the latter's purchase of a single 16-ounce can of Bud Light beer. Both testified that the clerk requested identification from Powell, examined it briefly, and then went forward with the sale. No one 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 no defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the face-to-face identification was conducted in an unduly suggestive manner; and (2) the evidence failed to demonstrate that the sales clerk was contemporaneously aware she was being identified as the seller.

DISCUSSION

I

Appellant contends that, since the police officer who conducted the face-to-face identification asked the decoy if *the clerk* had sold her the beer, rather than asking *who* sold her the beer, the identification process was unduly suggestive.

Appellant cites *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Keller* (2003) 109 Cal.App.4th 1687,1698 [1 Cal.Rptr.3d 339], for its statement that, while single person show-ups are not inherently unfair, an unduly

suggestive one person show-up is impermissible in the context of a decoy operation. In that case, the court upheld a face-to-face identification which was made after the clerk had been brought out from the store to where the decoy was standing. The court did not provide an example of what would be an unduly suggestive identification, but the case authority it cited for its point that a single person show-up was not inherently unfair demonstrates that the identification in this case was not unduly suggestive.

The court cited the decision in *In re Carlos M*. (1990) 220 Cal.App.3d 372 [269 Cal.Rptr. 447], where an alleged assailant was transported to a hospital to be identified by the victim. The court in that case rejected the contention that the identification was unduly suggestive, stating:

> A single person show-up is not inherently unfair. [Citation] The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted, i.e., to demonstrate that the circumstances were unduly suggestive. [Citation] Appellant must show unfairness as a demonstrable reality, not just speculation. [Citation]

In re Carlos, 220 Cal.App.3d at 386.

The court soundly rejected the contention that a compelling reason had to be shown before a one-person show-up could be conducted*:*

> Appellant contends, incorrectly, that single-person show-ups are impermissible absent a compelling reason. To the contrary, single-person show-ups *for purposes of in-field identifications* are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended. [Citation] The law permits the use of in-field identifications arising from single-person show-ups so long as the procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. [Citation]

In re Carlos, 220 Cal.App.3d at 387.

Rule 141(b)(5), by its terms, requires an in-field identification. In this case, the identification was conducted shortly after the sale, when the events were fresh in the decoy's mind. It is doubtful to the extreme that the decoy would have identified a person other than the actual seller simply from the way the question was asked.

II

Appellant contends that there was no proof of compliance with Rule 141(b)(5) because there is no evidence the clerk was aware she was being identified as the seller. Appellant argues that, because the clerk was "standing listening to Officer Gomez," she would not have been aware that the decoy had pointed to her from six feet away and stated that she, the clerk, had sold the beer.

As in so many of these cases where the claim is made that the selling clerk was unaware he or she was being identified as the seller of the alcoholic beverage, what the clerk knew or did not know is unknown, because he or she did not testify. In such cases, the Appeals Board is asked to speculate that the clerk was ignorant of what was happening in his or her immediate presence. In this case, for example, appellant suggests that, because the decoy stood six feet from the clerk, the likelihood was increased that the clerk was not looking at the decoy.

We simply do not see how it follows that one can determine what the clerk was looking at from the simple fact that the decoy stood six feet away. Indeed, we find it difficult to believe one could not be aware of what a person standing only six feet away was doing or saying. Nor does it follow that, because a decoy may have been looking at the camera the moment when his or her photograph is being taken, he or she was unaware of the identification process.

Appellant cites *Chun* (1999) AB-7287 for the proposition that the sales clerk

must be contemporaneously aware he or she is being identified. That stretches Chun farther than its language warrants. In *Chun*, the Board said that the seller is, *or reasonably ought to be*, knowledgeable that he or she is being accused. And, as the Board has said in *Greer* (2000) AB-7403, it is not necessary that the clerk *actually* be aware that the identification is taking place.

In *Department of Alcoholic Beverage Control v Alcoholic Beverage Control Appeals Board/Keller* , *supra*, the court observed that Rule 141(b)(5) was "primarily designed" to insure that the seller will be given the opportunity, soon after the sale, "to come face to face" with the decoy. While the Board in past decisions may not have acknowledged such a "primary" design, it has always recognized that the seller is entitled to a reasonable opportunity to view the decoy in the course of the identification process. (See, e.g., *7-Eleven, Inc./Chawla* (2003) AB-8107: "It is clear that the Board believes that the focus must be on the decoy's identification of the seller. That approach reduces to an absolute minimum the possibility that an innocent clerk, one who had no involvement in the transaction, will be falsely accused. And, since the practical requirement of the identification process is to return the decoy to the store shortly after his or her purchase, the likelihood that his or her renewed presence, accompanied by police officers, will go unnoticed by the selling clerk is virtually non-existent; and see *Chun, supra*: "'[F]ace to face' means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller *is*, *or reasonably ought to be*, knowledgeable that he or she is being accused and pointed out as the seller" (emphasis supplied).)

We are satisfied that there was compliance with Rule 141(b)(5).

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.