

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

AB-8187

File: 20-317568 Reg: 03054815

CHEVRON STATIONS, INC. dba Chevron
1200 West San Marcos Boulevard, San Marcos, CA 92069,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED JULY 29, 2004

Chevron Stations, Inc., doing business as Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerk, Scott K. Lee, having sold a six-pack of Miller Genuine Draft beer to Nathan Wall, an 18-year-old police decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Gary D. Labin, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 23, 1996.

¹The decision of the Department, dated August 21, 2003, is set forth in the appendix.

On April 11, 2003, the Department instituted an accusation against appellant charging an unlawful sale on November 22, 2002, of an alcoholic beverage to a minor.

An administrative hearing was held on July 17, 2003, at which time oral and documentary evidence was received. 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.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises a single issue: the manner in which the face-to-face identification was conducted violated Rule 141(a) and 141(b)(5).

DISCUSSION

Rule 141(a) requires that law enforcement agencies conduct minor decoy operations "in a fashion that promotes fairness." Rule 141(b)(5) requires that, after a sale is made and before a citation is issued, the officer directing the decoy shall attempt to enter the premises and have the minor decoy make a face-to-face identification of the seller of the alcoholic beverage. Violation of any of the provisions of rule 141 provides a licensee with a defense to the charge of an unlawful sale to a minor decoy. (4 Cal. Code Regs., §141, subd. (c).)

Appellant contends that, rather than having the decoy identify the seller, the officer identified the clerk for the decoy and the decoy merely agreed with the officer's identification. This, appellant argues, was unduly suggestive and unfair, violating both rule 141(a) and 141(b)(5).

The identification of the seller was described in the third paragraph of Finding of Fact II:

The evidence established that a face to face identification of the seller of the

beer did in fact take place. Shortly after the decoy had exited the premises with the beer, Deputy Dollard took the decoy back into the premises. Dollard and the decoy proceeded to the sales counter and Dollard asked the decoy to point out the person who had sold him the beer. The decoy then pointed to Lee who was behind the counter. Dollard subsequently asked the decoy, "Was this the person who sold you the alcohol?" The decoy then stated, "Yes, this is the man." Other than Dollard and the decoy, no one else was in the premises at the time of this identification except for Lee. Additionally, Lee and the decoy were on opposite sides of the sales counter and in close proximity to each other when this identification was made. A citation was later issued to Lee.

The decoy testified that after he had exited the store, Deputy Dollard met him outside and asked him to go back into the store to point out the person who sold him the alcohol. This occurred before the decoy, once inside the store, was asked, "Was this the person who sold you the alcohol." Although the finding states that Deputy Dollard's initial direction to the decoy to point out the seller occurred inside the store, we do not think this is a material discrepancy. The fact that a single, direct question was asked, accepting appellant's version of events, could hardly be suggestive, especially when there was only one clerk and no one else in the store.

The following language comes from the Board's decision in *The Vons Companies, Inc.* (2004) AB-8058:

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 Board² 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.

(See also *7-Eleven, Inc./Vameghi* (2004) AB-8065.)

This reasoning applies with equal force in this case.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² *7-Eleven/Keller* (2002) AB-7848.

³ 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.