

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

AB-8217

File: 20-216686 Reg: 03055233

CIRCLE K STORES, INC. dba Circle K #5087
40-100 Washington, Bermuda Dunes, CA 92201,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 2, 2004
Los Angeles, CA

ISSUED NOVEMBER 9, 2004

Circle K Stores, Inc., doing business as Circle K #5087 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, all of which were conditionally stayed for one year, for its clerk, Mario Barraza-Martinez, having sold a 24-ounce can of Bud Light beer to Bianca Virgen, a police minor 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, John W. Lewis.

¹The decision of the Department, dated December 11, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on November 29, 1989. Thereafter, the Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage to a minor. An administrative hearing was held on October 21, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Virgen, the decoy, and Marc Diaz, a Riverside County deputy sheriff. No one testified on appellant's behalf.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved, and no affirmative defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that there was no compliance with Rule 141(b)(5).

DISCUSSION

The administrative law judge (ALJ) found as follows (Finding of Fact II-C) with respect to the face to face identification required by Rule 141(b)(5):

The evidence established that a face to face identification of the seller of the beer did in fact take place and that the identification complied with the Department's Rule 141. Shortly after the decoy had exited the premises with the beer, the decoy described the clerk who had sold to her to the deputies. She also pointed to the clerk and indicated what the clerk was wearing. Deputy Diaz then entered the premises and he contacted the clerk that had been pointed out by the decoy. The evidence also established that there was only one male clerk in the premises. After Deputy Diaz brought the clerk outside, one of the deputies asked the decoy to identify the clerk who had sold beer to her. The decoy then pointed to the clerk and stated, "He was the one that sold me the beer." When this identification took place, the clerk and the decoy were standing in close proximity and facing each other. Following this identification, a photograph (Exhibit 2) was taken and it depicts the decoy holding the beer that she purchased at the premises and pointing to the clerk that had sold her the beer. A citation was issued to the clerk after the clerk was brought outside and after

the decoy had conducted the face to face identification of the clerk who had sold beer to her.

Appellant challenges the accuracy of that part of the finding that states that the decoy “also pointed to the clerk” before he was brought from the store. Appellant claims that it is “an incorrect summary of a most crucial fact sequence” in what appellant says was an unduly suggestive identification.

Appellant cites and attempts to distinguish *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Keller* (2003) 109 Cal.App.4th 372, 386 [3 Cal.Rptr.3d 339], a case which held that a face to face identification was not unduly suggestive even though the clerk who had sold the alcoholic beverage was brought outside the store and there identified by the decoy as the seller. Appellant argues that its case is different because in *Keller, supra*, a police officer had been in the store, and observed the transaction, contrary to the facts in the case.

In this case, appellant reasons, all the deputies had to rely on when they selected the clerk to bring from the store was a description of the clerk and what “that person” was wearing, and it was unduly suggestive on the part of the deputies to present the decoy with a person the deputies themselves had not seen make the sale. This somewhat ingenuous argument ignores several important facts. The decoy testified that when she brought the beer to the counter, the clerk on duty was male. Deputy Diaz testified that the decoy described the clerk and told him what *he* was wearing. Deputy Diaz also testified that Barraza-Martinez was the only male clerk in the store.

It stretches the imagination to conclude that the identification was unduly

suggestive - or even suggestive at all. The decoy described a male clerk and what he was wearing, and the only male clerk in the store is the one she identified when he was brought outside. Virtually no time had elapsed between the sale and the outside-the-store identification, so the transaction was fresh in the decoy's mind. Nothing in the decoy's testimony suggests that she had the slightest doubt that she identified the proper person.² Even if, as appellant asserts, the ALJ incorrectly found that the decoy pointed to the clerk before he was brought outside, we do not think the overall correctness of the finding is weakened in any way.

Appellant cites a number of cases, either distinguishable on their facts or reflecting a legal principle that is not involved in this case.

The facts of this case meet the strict compliance standards for Rule 141 set forth in *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126]. We find nothing that could be said to be "corrupting" in the identification process, the concern of the court in *Manson, Correction Commissioner v. Brathwaite* (1977) 432 U.S. 98 [97 Sup.Ct. 2243]. In *People v. Slutts* (1968) 259 Cal.App.2d 886 [66 Cal.Rptr. 862], an identification was found unduly suggestive after the witness had been shown a photograph with a beard drawn on it, rather than an unmarked photograph. Nothing approaching that took place in this case.

Appellant's contentions are lacking in merit.

² We do not find particularly cryptic the clerk's comment "Just this time," when the decoy was unable to produce identification when asked. The unmistakable message, "I'm letting you get by with this" would no doubt make the event even more memorable to the decoy, and render it highly unlikely she would identify any person other than the one who made that remark to her.

ORDER

The decision of the Department is affirmed.³

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

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.