

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

AB-8234

File: 21-68599 Reg: 03055304

THRIFTY PAYLESS, INC., dba Rite Aid Store # 5525
1890 Ximeno Avenue, Long Beach, CA 90815,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 3, 2005
Rehearing: June 2, 2005
Los Angeles, CA

ISSUED AUGUST 25, 2005

Thrifty Payless, Inc., doing business as Rite Aid Store # 5525 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, all of which were stayed subject to appellant's discipline-free operation for one year, for appellant's clerk selling an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Thrifty Payless, Inc., appearing through its counsel, J. Daniel Davis, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated December 24, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 21, 1997. On June 24, 2003, the Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage by clerk Elisbeth Mendez to 19-year-old Jennifer Wilsey.

At the administrative hearing held on October 23, 2003, documentary evidence was received and testimony concerning the violation charged was presented by Department investigator Jeannine Peregrina, Jennifer Wilsey (the minor), and Elisbeth Mendez (the clerk).

The testimony established that the minor selected a bottle of Southern Comfort, an alcoholic beverage, and took it to the counter. There the clerk asked to see the minor's identification, and the minor gave the clerk a document that purported to be a Wyoming identification card. The clerk examined the ID, comparing the minor with the photograph on the card, checking the date of birth (which indicated the holder was 26 years old), and turning the card over to see that a magnetic stripe was there. She entered the birth date into the computer, and sold the alcoholic beverage to the minor.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged and appellant did not establish a defense under Business and Professions Code section 25660 (section 25660). Appellant filed an appeal contending the Department erred in concluding that appellant had not established a section 25660 defense.

DISCUSSION

Business and Professions Code section 25660 provides:

Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle

operator's license or an identification card issued to a member of the Armed Forces, which contains the name, date of birth, description, and picture of the person. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

"It is well established that reliance in good faith upon a document issued by one of the governmental entities enumerated in section 25660 constitutes a defense to a license suspension proceeding even though the document is altered, forged or otherwise spurious." (*Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1968) 267 Cal.App.2d 895, 897 [73 Cal.Rptr. 352].) However, to provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne Properties, Inc. v. Alcoholic Beverage etc. Appeals Board* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*); *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820] (*5501 Hollywood*).)

Reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. (*5501 Hollywood, supra*, 155 Cal.App.2d at pp. 753-754.) A licensee, or a licensee's agent or employee, must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne, supra*; *Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, supra*, 155 Cal.App.2d at p. 753.)

Although section 25660 was designed "to relieve vendors of alcoholic beverages from having in all events to determine at their peril the age of the purchaser," by allowing vendors to rely on certain documentary evidence of majority and identity, "the bona fides of such documents must be ascertained if the lack of it would be disclosed by reasonable inspection, the circumstances considered." (*Dethlefsen v. State Bd. of Equalization* (1956) 145 Cal.App.2d 561, 567 [303 P.2d 7].)

The licensee or his agent must act in good faith and with due diligence in relying on an apparently valid but actually fraudulent ID:

The defense must be asserted in good faith, that is, the licensee or the agent of the licensee must act as a reasonable and prudent [person] would have acted under the circumstances. Obviously, the appearance of the one producing the card, or the description on the card, or its nature, may well indicate that the person in possession of it is not the person described on such card.

(*Keane v. Reilly* (1955) 130 Cal.App.2d 407, 409-410 [279 P.2d 152].)

Appellant contends that the Department's findings include every element required for a section 25660 defense, and the Department's decision acknowledges appellant's entitlement to the defense by stating, in Conclusion of Law 9, that the "clerk acted reasonably and diligently." Therefore, appellant argues, the determination that a section 25660 defense was not established is erroneous.

Following are the findings in the Department's decision relevant to a section 25660 defense (Findings of Fact 5 -12, 15):

5. Wilsey appeared at the hearing and her appearance there and before Respondent's clerk on April 11, 2003, was in large part as is shown in Exhibit 4. She was 20 years of age at the hearing. Her appearance at the hearing and before Respondent's clerk on April 11, 2003, was substantially the same. She could have been over 21 years of age.

6. Wilsey arrived at Respondent's Licensed Premises with two female friends around 9:20 p.m. on April 11, 2003. Wilsey entered the store with

her friends and selected a single 750-ml bottle of Southern Comfort bourbon liqueur [sic], an alcoholic beverage. Wilsey took the Southern Comfort to the sales counter. By the time Wilsey arrived at the cash register, her friends had left her presence.

7. Respondent's on-duty clerk, Lisbeth Mendez [Mendez], waited upon Wilsey. Mendez asked Wilsey for identification. Wilsey presented Exhibit 2, a document on its face purporting to be a Wyoming ID. Wilsey handed the identification to Mendez.

8. It was not established whether Exhibit 2 looks like a valid Wyoming ID or not.

9. Wilsey purchased Exhibit 2 in Hawaii. It was not issued by any agency of government.

10. The ID Wilsey showed Mendez was issued in the name of Jennifer E. Greene, had a photograph of Wilsey two or three years older² and showed a date of birth of February 23, 1977, making the presenter 26 years of age. (*Id.*) The Exhibit 2 identification says it was issued on September 24, 1998, and, interestingly, states in the upper left-hand corner that it is "Valid indefinitely" and that the holder is "Age 21 in 1998," prior to its issuance. (*Id.*)

11. It was not established that the descriptive information shown on Exhibit 2 was substantially different from the way Wilsey appeared before Mendez on April 11, 2003.

12. After looking at the Exhibit 2 ID for a few seconds, focusing on Wilsey before her, and the photograph and date of birth on Exhibit 2, clerk Mendez completed the sale of the alcoholic beverage to Wilsey without asking her any questions. Wilsey left Respondent's store with the alcoholic beverage.

[¶] . . . [¶]

15. Clerk Mendez testified at the hearing. She said she looked at the Exhibit 2 identification on April 11, 2003, long enough to match Wilsey with the photograph on the ID. The ID said she was over 21 years of age and the photograph appeared to match. Mendez entered the date of birth into her computer, sold the item and moved on. She admitted to not

²It appears that this is a misstatement, probably intended to read "two or three years younger." Wilsey's testimony was that she had purchased the ID several years before, and that she was 16 or 17 when the picture was taken that appears on the ID. [RT 37, 41.]

having seen a Wyoming ID before and to not having or using an ID checking book to make a comparison. She did look at Exhibit 2, both front and back, saw the magnetic stripe and concluded that, while the ID was a little worn, it appeared valid. Mendez did not intentionally sell the Southern Comfort to an underage purchaser.

Conclusions of Law 7, 8, and 9 explain the ALJ's conclusion that the defense of section 25660 did not apply in this case:

7. . . . Clerk Mendez appeared to act reasonably and certainly acted in good faith in her inspection of the ID customer Wilsey presented. She looked at the front and the back of the ID and thought it appeared genuine. (Findings of Fact, ¶ 15.) She compared the photo with the person before her and believed it was a reasonable match. (*Id.*) She checked the date of birth (*Id.*) and, likely, also checked the description on the ID with Wilsey for any obvious discrepancies. Mendez performed a reasonable and thorough inspection of the document that was handed to her. Despite the opinion of Peregrina, nothing about the Exhibit 2 identification makes it appear to an untrained eye to be obviously fake or false.

8. The Exhibit 2 ID was not issued by a state, local or other governmental agency covered by the explicit wording of the statute. While *Kirby v. ABC Appeals Board* [Boyajian] (1968) 267 Cal.App.2d 895, 897-98, 73 Cal.Rptr. 352, and cases cited therein suggest that certain "altered, forged or otherwise spurious" documents may qualify under the statutory defense provided by Section 25660, there is no evidence in this record, that Exhibit 2 bears any resemblance whatsoever to a legitimate document issued by the state of Wyoming. (Findings of Fact, ¶ 8.) Clerk Mendez testified that she had never before seen a Wyoming ID. (Findings of Fact, ¶ 15.) Further, Respondent did not have an ID checking guide available for reference by its clerk. (*Id.*) Had it been shown that Wyoming issues ID cards that resemble Exhibit 2 and that the clerk was aware of them, either personally or by using a reference guide, the defense could apply even though the exact card presented by Wilsey was not issued by an agency of government. Section 25660 is an affirmative defense and the burden is on Respondent to show its application.

9. The Section 25660 defense was not established in this case.

Significant mitigation was established in that Respondent's clerk acted reasonably and diligently, with the exception of validating the Wyoming ID.

Section 25660 requires that the seller of alcoholic beverages "demanded, was shown, and acted in reliance upon" a government-issued document containing the

prospective purchaser's name, date of birth, description, and picture in order to maintain a defense under the section. Case law has established that a fake ID, purporting to be government-issued, may qualify for the defense, but reasonable reliance upon that identification must be demonstrated. (*Dept. of Alcoholic Bev. Control v. Masani* (2004) 118 Cal.App.4th 1429 [13 Cal.Rptr.3d 826].)

The Department's decision finds that the clerk "demanded, was shown, and acted in reliance upon" a purportedly government-issued document containing what appeared to be the prospective purchaser's name, date of birth, description, and picture. (Findings of Fact 6, 10 & 11.) It finds that the clerk made a reasonable, good faith, and thorough inspection of the card. (Conclusions of Law 7 & 9.) It finds that the clerk looked at the front and back of the card and compared the photograph and description with the appearance of the minor. (Findings of Fact 12 & 15; Conclusions of Law 7.) It concludes that there is nothing about the card that makes it appear obviously fake or false. (Conclusions of Law 7.) It finds that the minor's appearance was not shown to be substantially different from the descriptive information on the card. (Findings of Fact 11.) It finds that the minor's appearance, both at the hearing and in appellant's premises, was such that she could have been over 21 years of age. (Findings of Fact 5.)

Appellant is correct; this decision finds that all the statutory and decisional requirements for a section 25660 defense existed in this case. What makes this case unusual is that the ALJ made findings and determinations that showed the defense was established, but then went on to say that the defense did not apply.

The ALJ said that he rejected the defense because it was not shown that the ID looked like an actual Wyoming identification card and the clerk did not know what a

Wyoming identification card looked like, "either personally or by using a reference guide." That seems to imply that the clerk's inspection and reliance were not reasonable or diligent. Yet the decision had already found that the clerk was reasonable and diligent. The ALJ concluded that "[s]ignificant mitigation" was established by the clerk acting reasonably and diligently. However, having found that the clerk acted in compliance with the requirements of the statute, appellant was entitled to the defense provided by the statute, not simply mitigation of a penalty.

The ALJ's rejection of the defense flies in the face of all his findings. The Appeals Board is authorized to review Department decisions to see whether the decision is supported by the findings. (Bus. & Prof. Code, § 23084, subd. (c).) The findings in this case do not support the decision, and we cannot affirm it.

ORDER

The decision of the Department is reversed.³

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.