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

AB-8264
File: 20-386231 Reg: 03055913

BP WEST COAST PRODUCTS LLC dba Arco AM PM #590
5201 Century Boulevard, Los Angeles, CA 90045,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

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

ISSUED AUGUST 25, 2005

BP West Coast Products LLC, doing business as Arco AM PM 590 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk having sold a can of Bud Light beer to Guadalupe Tapia, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant BP West Coast Products LLC, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 26, 2002. Thereafter, on September 24, 2003, the Department instituted an accusation against

[1]The decision of the Department, dated March 11, 2004, is set forth in the appendix.

appellant, charging that its clerk sold an alcoholic beverage to a minor on July 19, 2003. An administrative hearing was held on February 6, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and ordered the suspension from which this timely appeal has been taken.

Appellant raises the following issues: (1) the administrative law judge (ALJ) erred in admitting testimony violative of the Secondary Evidence Rule; (2) there was no compliance with Rule 141(b)(2); and (3) appellant was denied due process when a Report of Hearing was made available to the Department's decision maker.

DISCUSSION

I

The decoy was permitted to testify, over objection, that she purchased a 24-ounce can of "Bud Light." Bud Light is a nationally known brand of beer. (See *Patel* (2000) AB-7449.) Appellant contends that, because the can itself was not brought to the hearing, the admission of the decoy's testimony violated the Secondary Evidence Rule set forth in Evidence Code section 1523, subdivision (a).[2]

The Department, on the other hand, asserts that the product purchased by the decoy was labeled "Bud Light," and the label, required by law, was not a writing under section 1523.

In addition to the decoy's testimony, a photograph (Exhibit 2) of the decoy holding a large can prominently labeled "Bud Light" was also admitted into evidence over appellant's objection.

This case is much like one heard and decided by the Board in 1989. (See *R. L.*

---

[2] That section states: Except as otherwise provided by statute, oral testimony is not admissible to prove the contents of a writing."

Dillman, Inc. (1989) AB-7166.) In that case, the licensee had objected, on best evidence grounds under Evidence Code section 1500, to testimony about a six-pack of Budweiser beer which had been seized by a deputy sheriff, but which had not been produced at the hearing. The Department overruled the objection, and the Appeals Board sustained that part of the Department's decision.[3]

The Appeals Board found it "highly unlikely" that both the decoy and the deputy sheriff would have been mistaken as to what the decoy purchased, and treated the case as involving an inscribed chattel.

This issue was discussed extensively in *People v. Mastin* (1981) 115 Cal.App.3d 978 [171 Cal.Rptr. 780], where photographs of stolen guns and a knife bearing the owner's initials were introduced over objection. The court held that it was a matter of trial court discretion as to whether to allow into evidence photographs of inscribed chattels in the face of a best evidence objection. Since the inscriptions, consisting of the owner's initials, were simple, the photographs, had they depicted the initials, would have been reliable evidence, and admissible. The test advocated by the court is a balancing test, consisting of a weighing of the complexity of the inscription, the difficulty in its production, the degree to which the evidence is critical, and the importance of examining the original. (See generally, *People v. Mastin, supra*, 115 Cal.App.3d at 985.)

In this case, the inscription is not at all complex, consisting of the two words "Bud Light" on a sealed can. While it would not have been difficult to preserve the actual can for production at the hearing, it cannot be said the physical object itself is critical to ascertaining the truth. We do not think it can be said that the ALJ abused his discretion

---

[3] The Board reversed the decision because the Department utilized an improper standard under Rule 141(b)(2).

by admitting the testimony and the photograph.

In *People v. Bizieff* (1991) 226 Cal.App.3d 1689 [277 Cal.Rptr. 678], the "writing" in issue was a credit card which the defendant allegedly had stolen. Because the card was unavailable, a police officer was permitted to testify concerning the name he saw on a receipt printed from the card. The court pointed out that the appellant had not challenged the accuracy of the police officer's testimony regarding the name on the receipt. The inscription on the receipt was simple, and there was little chance the officer had read the name incorrectly.

The same can be said of this case. The two word inscription on the label was prominent. There was little likelihood the decoy had read incorrectly the name on the label, especially when her testimony was corroborated by the photograph showing the decoy holding the can. Appellant has never contended the decoy was mistaken about what she purchased.

II

Appellant contends that the ALJ failed to consider the decoy's extensive experience as a decoy in his assessment of her appearance under Rule 141(b)(2).[4] The rule requires that the decoy display the appearance which could generally be expected of a person under 21 years of age. Appellant asserts that because this decoy has participated in so many decoy operations that she cannot keep count of them, was comfortable in her role as a decoy, and even trained other decoys, she did not display such an appearance. Appellant further asserts that two other clerks sold to her on the night in question without requesting her identification, indicating that she had the appearance of someone over the age of 21.

---

[4] References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

It cannot be said that the ALJ did not consider the decoy's prior experience as a decoy. It is clear that he did, but simply would not give it the weight appellant claims it deserved.

The ALJ wrote (Findings of Fact VI through VIII):

> The decoy had worked as a decoy since February 2001 and had worked on many decoy operations prior to July 2003. As a result of this experience, the decoy felt "comfortable" while purchasing the Bud Light beer from Respondent's clerk.
>
> The decoy was 5' 2" tall and weighed 110 pounds on July 19, 2003 and on the day of the hearing.
>
> While in Respondent['s] store, the decoy wore a white shirt with a black shirt underneath, blue jeans, and tennis shoes. She also wore star earrings. She did not wear any make up. Her hair was dark, combed down, with bangs on the sides.
>
> On the day of the hearing, the decoy's hair was combed up and contained some red in it. Otherwise, the decoy's appearance at the hearing was similar to her appearance [in] Exhibit 2. She sat with her hands folded and spoke softly. She appeared nervous and stated that she was.
>
> Respondent argued that the decoy's experience as a decoy made her appear older than her age. This argument is rejected, just as it has been rejected on many occasions by the Alcoholic Beverage Control Appeals Board. See Prestige Stations, Inc. (2002) Alcoholic Beverage Control Appeals Board Case Number AB-7802, pages 5 to 6, 7-Eleven / Azzam (2001) Alcoholic Beverage Control Appeals Board Case Number AB-7631, page 5, 7-Eleven / Virk (2001) Alcoholic Beverage Control Appeals Board Case Number AB-7597, page 4, The Vons Companies (2001) Alcoholic Beverage Control Appeals Board Case Number AB-7568, page 3.
>
> There is no evidence that the decoy's experience made her appear older, or younger, that her age when she purchased the Bud Light beer from Respondent's clerk.
>
> The Administrative Law Judge observed the decoy's appearance, mannerism, demeanor, and poise while the decoy testified. Taking into consideration that observation, Exhibit 2, and the testimony about the decoy's appearance on July 19, 2003, the Administrative Law Judge finds that the decoy displayed the appearance which could generally be expected of a person under twenty-one years old when she purchased the beer from Respondent's clerk.

Nor does the fact that two clerks sold to her without requesting identification establish that she appeared to be over 21. There are any number of reasons why identification may not have been requested, appearance being only one of them.

As we observed in *Azzam* (2001) AB-7631, one of the cases cited by the ALJ:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the observable effect of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even when there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years or older.

III

Appellant asserts the Department violated its right to procedural due process when the attorney (the advocate) representing the Department at the hearing before the ALJ provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision.

The Appeals Board discussed this issue at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").[5]

---

[5] The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions. In response to the Department's petition for rehearing, the court

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt*, *supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the ALJ had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its

---

modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. *(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellant at the hearing. Appellant has not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellant has not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellant, it appears to us that appellant received the process that was due it in this administrative proceeding. Under these circumstances, and with the potential of an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

ORDER

The decision of the Department is affirmed.[6]

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

---

[6] 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.