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

AB-8625
File: 21-422318 Reg: 05061156

7-ELEVEN, INC., and LUCKY SEVENS, INC. dba 7-Eleven Store No. 2174 - 16931E
10011 Mills Road, Whittier, CA 90604,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: December 6, 2007
Los Angeles, CA

ISSUED FEBRUARY 26, 2008

7-Eleven, Inc., and Lucky Sevens, Inc., doing business as 7-Eleven Store No. 2174 - 16931E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 20 days, 5 of which were conditionally stayed for one year, for their clerk having furnished alcoholic beverages to a 16-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Lucky Sevens, Inc., appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated September 28, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on April 26, 2005. On November 22, 2005, the Department instituted an accusation against appellants charging the furnishing of alcoholic beverages to 16-year-old Lonnie Stenson and 15-year-old Nicholas Salerno.

An administrative hearing was held on June 2, 2006, at which time oral and documentary evidence was received. At that hearing, the undisputed evidence established that Stenson and Salerno entered appellants' premises together, and Salerno asked appellants' clerk, Richard Roldan, if he would sell them beer. Roldan initially said "no," but then said he might do so when on a break. Both Stenson and Salerno left the store. Salerno returned to the vehicle in which he, Stenson and other companions had arrived, and played no further part in the events which followed. Stenson remained outside the vehicle, contacted a customer entering the store, and asked him to purchase beer for him. The customer purchased an 18-pack of Miller Genuine Draft beer for Stenson. Stenson paid the customer for the beer. Roldan then exited the store while sweeping, saw Stenson and the others, and asked what he could get them. Stenson requested two bottles of Smirnoff Ice. Roldan went into the store, came back out, and told Stenson he did not have the flavor requested. Stenson made another selection. Roldan exited the store a short time later carrying two boxes, told Stenson to follow him, and walked to the trash bin on the side of the store. Roldan removed two one-pint eight-ounce glass bottles of Smirnoff Twisted V Green Apple, an alcoholic beverage, from one of the boxes, and handed them to Stenson. At this point Department Investigator Armentrout intervened and seized the alcoholic beverages.

Gurbax Marwah, the president of appellant Lucky Sevens, Inc., testified that the

two bottles of Smirnoff were never entered on the store's cash register. He testified further that an audit conducted in early September 2005 established a shortage of $22,000 for the preceding three months, while a normal audit would have revealed a discrepancy of $1000 at most. When confronted with this information, Roldan admitted he had been stealing merchandise. Roldan was arrested, convicted, and sentenced to 18 months in jail.

Subsequent to the hearing, the Department issued its decision which determined that the charge that an alcoholic beverage had been furnished to Stenson had been established by the evidence. A similar charge involving Salerno was dismissed for failure of proof.

Appellants have filed a timely appeal, and contend that the actions of Roldan should not be imputed to them. They contend that Roldan was a "rogue" clerk who concealed his criminal actions from them. Citing the court's decision in *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523], they argue that the same factors that led the court in that case to annul the Department's order are present in this case. Appellants also contend that the Department communicated with its decision maker on an ex parte basis, a practice condemned in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585].[2]

[2] Appellants have also filed a motion to augment the record by the addition of any report of hearing submitted to the Department's decision-maker. In light of our disposition of this matter, the motion is moot, and is denied.

DISCUSSION

I

Appellants argued at the hearing, as they do in this appeal, that the accusation should have been dismissed because they had no knowledge of Roldan's unlawful act, that his act had no nexus to the sale of alcoholic beverages, that they took strong measures to prevent such an act, and that they did not benefit from his act, but were its victims. Appellants cite and quote extensively from *Santa Ana Food Market, Inc., supra,* where the court held that a store clerk's single criminal act involving the sale of food stamps, contrary to the store's policy and concealed from her employer, lacked a sufficient nexus to the sale of alcoholic beverages to have a rational effect on public welfare and morals.

Appellants argue that Roldan's conduct in this case was so like the conduct of the store clerk in *Santa Ana Food Market, Inc.*, as to compel the same result, a dismissal of the accusation. We must disagree.

The *Santa Ana Food Market, Inc.* decision is distinguishable from this case on the critical point whether the actions of the clerk were sufficiently related to the sale of alcohol. The language of the court in that case makes it clear that this case is fundamentally different:

> To be reasoned and not arbitrary, license suspensions must further the goal of the constitutional and statutory provisions. That goal in general is to protect public welfare and morals, but it must be viewed in the context in which it arose – the sale of alcoholic beverages. For a suspension to be rational, the acts giving rise to it must have some minimal nexus to the licensee's sale of alcoholic beverage. Application of the rule of imputed knowledge must have that nexus as well.

In *Santa Ana Food Market, Inc.*, the clerk's illegal purchase of food stamps was totally

unrelated to the sale of alcohol. In this case, however, the nexus between the clerk's actions and the sale of alcohol is much too strong to ignore. Alcoholic beverages underlay the entire series of events. Salerno's request to buy an alcoholic beverage, Roldan's qualified response that he might be wiling to do something later, his subsequent offer to provide an alcoholic beverage Stenson requested, and his willingness to supply an alterative when Stenson's first choice was unavailable, all involved a minor's attempt to buy an alcoholic beverage, and the series of events culminated in an alcoholic beverage being furnished to a minor.

This case differs from *Santa Ana Food Market, Inc*. in another important aspect. In that case, the evidence established that the licensee had a manager on duty, and one of his responsibilities was to supervise the cashiers in the administration of their duties. Additionally, security cameras were trained directly on the check stands, and the clerks, including the clerk in question, had undergone a training program concerning the requirements of the food stamp program. The court stated:

> [T]here was no cause to apply the rule of imputed knowledge here. The rule apparently arose to prevent licensees from staying away from the premises to avoid responsibility for wrongful acts occurring there. ... It may also exist to encourage licensees to monitor their employees and patrons and to relieve the ABC from proof problems. But none of these purposes are served where, as here, the licensee concededly took great measures to deter criminal activity by employees through education and surveillance and was unaware of an employee's criminal act until after the fact.

In the present case, there was little, if any, supervision. Although the premises was equipped with a surveillance camera, there is no evidence that anyone viewed what was recorded until after the incident in question arose. Roldan, some time after his employment was terminated, returned to the store and, volunteering to help dispose of trash, stole additional merchandise using as a ruse his offer to help dispose of the

trash. Although this incident was discovered when the surveillance recording was viewed, there was no evidence of any surveillance recording being reviewed during the period of Roldan's employment. The absence of supervision is also evidenced by Roldan's ability to embezzle substantial funds from the licensees during the month he worked at the store, a crime uncovered only after the Department intervened in Roldan's dealings with 16-year-old Stenson and 15-year-old Salerno.

We cannot agree that the Department abused its discretion in this case. Roldan could have told the two to leave the store when Salerno first approached him and indicated he wanted to buy an alcoholic beverage. He did not, and everything that followed was because he was willing to furnish alcoholic beverages to a minor. His actions must be imputed to his principals.

II

Appellants contend the Department violated the Administrative Procedure Act (APA)[3] by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision. They rely on the California Supreme Court's holding in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*) and an appellate court decision following *Quintanar*, *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6]. They assert that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte communication occurred.

[3]Government Code sections 11340-11529.

The Department disputes appellants' allegations of ex parte communications and asks the Appeals Board to remand this matter so that the factual question of whether such a communication was made can be resolved.

We agree with appellants that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar*, *supra*.

Both parties agree that remand is the appropriate remedy at this juncture. We agree, and as we have done in the numerous other cases involving this issue, we will remand the matter to the Department for an evidentiary hearing.

ORDER

The decision of the Department is affirmed as to issues other than that concerning the alleged ex parte communication, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[4]

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

[4]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.