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

AB-8880
File: 20-401808 Reg: 07066124

7-ELEVEN, INC., and DHRU ENTERPRISES, INC., dba 7-Eleven Store No. 25085
895 Broadway, El Cajon, CA 92021,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 3, 2009
Los Angeles, CA

ISSUED MARCH 10, 2010

7-Eleven, Inc., and Dhru Enterprises, Inc., doing business as 7-Eleven Store No. 25085 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 20 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Dhru Enterprises, Inc., appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Alicia R. Ekland, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

---

[1]The decision of the Department, dated May 2, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 18, 2003. In 2007, the Department filed an accusation charging that appellants' clerk sold an alcoholic beverage to 18-year-old Christine Johnson on February 2, 2007. Although not noted in the accusation, Johnson was working as a minor decoy for the El Cajon Police Department at the time.

At the administrative hearing held on March 10, 2008, documentary evidence was received and testimony concerning the sale was presented by Johnson (the decoy), by El Cajon police officer Moore, and by the clerk. Bharat Patel, president of co-licensee Dhru Enterprises, Inc., testified about the store's alcoholic beverage policies and employee training.

The testimony established that the decoy selected a 24-ounce can of Miller Genuine Draft beer and took it to the sales counter. The clerk did not ask the decoy her age or for identification, but sold the beer to her. The decoy left the premises with the beer and met with police officers outside. She reentered the premises with the officers and identified the clerk who sold her the beer. The clerk told one of the officers he thought the decoy was 24 years old.

The Department's decision determined that the violation charged was proved and no affirmative defense was established. Appellants then filed an appeal contending that the Department relied on a legally invalid prior violation for penalty enhancement and that the decoy's appearance violated rule 141(b)(2).[2]

---

[2]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.

DISCUSSION

I

Appellants contend that the Department violated the Administrative Procedure Act[3] ex parte communication prohibitions during the disciplinary proceeding for an earlier sale-to-minor violation and that the Appeals Board erroneously upheld the Department's decision. In light of the subsequent holdings 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 *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274 [60 Cal.Rptr.3d 295] (*Rondon*), they assert, the decision of the Appeals Board "is no longer legal." (App. Br. at p. 2.) Therefore, appellants argue, the Department abused its discretion by relying "on this legally invalid prior for enhancement" of the penalty in the present case (*ibid*.), and this matter must be reversed and remanded to the Department.

The Department argues that appellants waived any right to raise this issue by their failure to object to evidence of the prior disciplinary action during the administrative hearing. It also contends that the *Quintanar* decision cannot be applied retroactively to invalidate a prior final decision.

In the prior case, the Appeals Board sustained the Department's decision regarding appellant's November 19, 2004, sale-to-minor violation (*7-Eleven, Inc./Dhru Enterprises, Inc*. (2006) AB-8464), and appellants petitioned the Court of Appeal for a writ of review. The appellate court denied the petition on November 29, 2006, and the Department's decision became final.[4]

---

[3]Government Code sections 11340-11529.

[4]An order granting an offer in compromise was issued on August 16, 2007, i.e., appellants paid a fine in lieu of serving a suspension.

Quintanar, *supra*, was decided by the California Supreme Court on November 13, 2006, about two weeks before the Court of Appeal denied appellants' petition for writ. The Court of Appeal for the Sixth Appellate District issued its decision in *Rondon*, *supra*, in May 2007.

Appellants do not contest the Department's assertion that they failed to object to evidence of the prior decision during the hearing in the present matter. They concede that, generally, defenses not raised at the administrative hearing are considered waived. However, they argue, the Department's lack of jurisdiction over a matter may be asserted as a defense at any time. Appellants contend that by engaging in prohibited ex parte communication during the decision making process for the November 19, 2004, violation, the Department exceeded its authority and, thus, acted without jurisdiction.

Appellants have confused the concepts of fundamental jurisdiction (the power to hear and determine a matter) and jurisdiction to act (authority or power to act in a certain way or to grant certain kinds of relief). (See *Abelleira v. District Court of Appeal, Third District* (1941) 17 Cal.2d 280, 288 [109 P.2d 942].) Defects in fundamental jurisdiction, that is, jurisdiction over the parties and the subject matter, may be raised on appeal or in a collateral attack on the decision, such as appellants attempt here. Actions in excess of jurisdiction, however, are waived if not raised at the trial level; these issues may not be raised for the first time on appeal nor may they be the basis for a collateral attack on the decision. (2 Witkin, Cal. Procedure (5th ed. 2008) Jurisdiction, §§ 285, 287, pp. 891-892, 894-895.)

Appellants allege here that the Department acted in excess of jurisdiction in the prior appeal, but do not a assert a lack of fundamental jurisdiction. As explained above,

this type of issue must be raised at the trial level or it is waived and may not be raised on appeal.

Even if this issue had not been waived, appellants could not prevail in their attack on the prior decision:

> "[A] final judgment or order is res judicata even though contrary to statute where the court has jurisdiction in the fundamental sense, i.e., of the subject matter and the parties." (*Pacific Mut. Life Ins. Co. v. McConnel*, 44 Cal.2d 715, 725 [285 P.2d 636].)

(Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control (1961) 55 Cal.2d 728 [361 P.2d 712; 13 Cal.Rptr. 104].)

The Department had fundamental jurisdiction in the prior matter. Even if the Department had wrongly decided the matter, appellants were foreclosed from collaterally attacking the decision once it became final.

II

Appellants contend that the administrative law judge (ALJ) erred in finding that the decoy's appearance complied with the requirement of rule 141(b)(2), which states: "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense."

Appellants urge that by looking at the photographs of the decoy, one can readily see that she appeared to be over the age of 21. They point out her clothing (a black, pleated blouse over blue jeans) and her shoes (black flats), the apparent dark eyeliner worn below her eyes (although she testified she wore no makeup on the day of the decoy operation), and her participation in prior decoy operations as the factors that lead them to conclude that she looked as if she were at least 24 or 25 years old.

The ALJ is the trier of fact, and had the opportunity, which this Board did not, of observing the decoy as she testified. The Appeals Board is not in a position to second-guess the trier of fact, nor is it inclined to where appellants have merely recited the same evidence considered by the ALJ and reached an opposite conclusion.

ORDER

The decision of the Department is affirmed.[5]

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

---

[5]This 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.