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

AB-8924
File: 20-236223 Reg: 08067966

7-ELEVEN, INC., AND DONNA A. BYRD, dba 7-Eleven # 2173-19651
1600 Santa Monica Boulevard, Santa Monica, CA 90404,
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 APRIL 1, 2010

7-Eleven, Inc., and Donna A. Byrd, doing business as 7-Eleven # 2173-19651 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, all stayed subject to a one-year probationary period, 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 Donna A. Byrd, appearing through their counsel, Ralph B. Saltsman and Jonathan R. Ota, 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 August 11, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 28, 1989. On February 19, 2008, the Department filed an accusation against appellants charging that, on October 30, 2007, appellants' clerk, José Olmedo (the clerk), sold an alcoholic beverage to 19-year-old José Rios. Although not noted in the accusation, Rios was working as a minor decoy for the Department at the time.

At the administrative hearing held on July 1, 2008, documentary evidence was received and testimony concerning the sale was presented by Rios (the decoy) and by Department investigator Wendi Casteel.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants then filed an appeal contending that rule 141(b)(5)[2] was violated because the face-to-face identification was unduly suggestive.

DISCUSSION

Rule 141(b)(5) requires, after a sale of an alcoholic beverage to a minor decoy, that the "officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages." Failure of the law enforcement agency to comply with any of the provisions of rule 141 provides a complete defense to a sale-to-minor charge. (Cal. Code Regs., tit. 4, §141, subd. (c).)

Appellants contend that the decision must be reversed because the ALJ "did not mention or address the issue of undue suggestion."

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[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.

In the present case, the investigator was in the store and she observed the sale of the beer to the decoy. The decoy, and then the investigator, left the store after the purchase; a few minutes later, the investigator re-entered the store, contacted the clerk, and told him that he had sold an alcoholic beverage to a minor. The investigator had the clerk step away from his position at the cash register to a place farther along the counter. The decoy was brought back into the store and, facing the clerk about three feet away from him, the decoy identified the clerk as the one who sold him the beer.

Appellants argue here, as they did before the ALJ, that the face-to-face identification was unduly suggestive because the investigator singled out one of the two clerks before the decoy made the identification. They support their conclusion by what they purport to be a quote from *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal. App. 4th 1687, 1698 [1 Cal.Rptr.3d 339] *(Keller)*: "a suggestive line-up with only one person is impermissible under Rule 141(b)(5)."

The language appellants "quote" does not appear in *Keller*, *supra*, on page 1698 or anywhere else in the opinion. There is language on page 1698 that is somewhat similar, but its import is considerably different:

> We note that single-person show-ups are not inherently unfair. (*In re Carlos M*. (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].) While an unduly suggestive one-person show-up is impermissible (*ibid*.), in the context of a decoy buy operations [*sic*], there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

While *Keller*, *supra*, did say that an *unduly suggestive* one-person line-up is impermissible, the court also noted that it is not "inherently unfair" to conduct an identification where only one person is presented to be identified. In *Keller*, the clerk

had been taken outside the store and brought to where the decoy was waiting with other officers. The court found that unobjectionable. As the facts of that case make clear, far more is necessary to establish that an identification was unduly suggestive than the law enforcement officer asking the clerk to stand in a certain place before the decoy was brought back into the store.

Keller, *supra*, cites the decision in *In re Carlos M*. (1990) 220 Cal.App.3d 372 [269 Cal.Rptr. 447] (*Carlos M.*), where an alleged assailant was transported to a hospital to be identified by the victim. The court in that case rejected the contention that the identification was unduly suggestive, stating:

> A single-person show-up is not inherently unfair. (*People v. Floyd* (1970) 1 Cal.3d 694, 714 [83 Cal.Rptr. 608, 464 P.2d 64].) The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted, i.e., to demonstrate that the circumstances were unduly suggestive. (*People v. Hunt* (1977) 19 Cal.3d 888, 893-894 [140 Cal.Rptr. 651, 568 P.2d 376].) Appellant must show unfairness as a demonstrable reality, not just speculation. (*People v. Perkins* (1986) 184 Cal.App.3d 583, 589 [229 Cal.Rptr. 219].)

(Ibid, at p. 386.)

The person shown to the victim in *Carlos M*. was wearing handcuffs, but the court did not consider even that circumstance to make the identification process unduly suggestive:

> While appellant claims the handcuffs influenced the victim to believe appellant was involved, the mere presence of handcuffs on a detained suspect is not so unduly suggestive as to taint the identification. (See *In re Richard W*. (1979) 91 Cal.App.3d 960, 969-971 [155 Cal.Rptr. 11].)

(*Carlos M.*, supra.)

This case involves conduct far less suggestive than that in *Keller* or *Carlos M*. Appellants did not convince the ALJ that this identification was unduly suggestive and they have not convinced us either.

As for the ALJ's failure to analyze appellants' argument that the identification was unduly suggestive, we are not aware of any requirement that an ALJ discuss an argument that will be rejected. Even if the failure to discuss it were error, which it is not, it would not be reversible error, but merely a procedural error.

ORDER

The decision of the Department is affirmed.[3]

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

[3]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.