

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

AB-9075

File: 20-214400 Reg: 09070965

7-ELEVEN, INC., and PARMINDER PAL SINGH, dba 7-Eleven Store No. 2173-18532
2900 Hyperion Avenue, Los Angeles, CA 90027,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 4, 2010
Los Angeles, CA

ISSUED DECEMBER 14, 2010

7-Eleven, Inc., and Parminder Pal Singh, doing business as 7-Eleven Store No. 2173-18532 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, all conditionally stayed for one year, for their clerk, Piara Singh Gill, having sold a can of Budweiser beer to Yahely Saucedo, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven Inc., and Parminder Pal Singh, appearing through their counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated October 5, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. On April 27, 2009, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a person under the age of 21.

At the administrative hearing held on August 19, 2009, documentary evidence was received and testimony concerning the violation charged was presented by Yahely Saucedo (the decoy), and Luis Reyes, a Los Angeles police officer.

The evidence established that the decoy was asked for identification, and handed her California Identification Card to the clerk. The card contained the decoy's true date of birth and a red stripe indicating "Age 21 in 2010." The clerk looked at the identification card, handed it back to the decoy, and completed the sale. (Finding of Fact II-A.)

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proved, and appellants had failed to establish any affirmative defense under Rule 141.

Appellants have filed an appeal making the following contentions: There was no compliance with Rules 141(b)(2) and 141(b)(5), and the decoy's testimony was tainted.

DISCUSSION

I

Appellants contend that the use of a decoy only one month short of 20 years of age, of unusual appearance,² trained in the Explorer program, and who participated in

² There is neither a finding nor evidence that the appearance of the decoy was unusual. The repetitive claims to this effect in appellants' brief (App. Br., pp. 2, 5, 9, 10) are based upon an erroneous and out of context reading of Department (continued...)

three or four prior decoy operations was unfair, in that the decoy did not display the appearance required by Rule 141(b)(2).³

The administrative law judge (ALJ) found to the contrary (Findings of Fact II-D-1-5):

D. The overall appearance of the decoy including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation except that she was approximately three pounds heavier at the time of the hearing and she was wearing different eye glasses.

1. The decoy is a short and youthful looking young lady who is four feet eleven inches in height and who weighed one hundred forty-nine pounds on the day of the sale. Even though the decoy is short and stubby, she has a very young looking face. On the day of the sale, the decoy was wearing light make-up consisting of brown eye shadow, mascara, and eyeliner the same as the makeup she wore to the hearing. Her clothing consisted of blue jeans, a black shirt and tennis shoes and she was wearing eye glasses with a black frame. The decoy's long hair was combed down and she also had bangs.

2. No photographs of the decoy were available. However, the sale took place just shy of six months prior to the hearing and the decoy's appearance had not changed much since the day of the sale.

3. The decoy had participated in approximately three or four prior decoy operations and she visited seven to ten locations per operation. She has also been an Explorer with the Los Angeles Police Department since age 16. As an Explorer, she went through a sixteen day academy attending one Saturday per week [*sic*]. At the academy, she learned CPR, about the history of LAPD and about penal and radio codes. She also worked with community services helping to direct traffic at special events. She achieved the rank of a sergeant and she helped to train new Explorers.

²(...continued)

counsel's remark to the effect that the *hearing* was unusually prompt, coming only six months from the date of the violation, (See RT 34.)

³ Rule 141(b)(2) (4 Cal. Code Regs., §141(b)(2)) provides:

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.

4. There was nothing about the decoy's speech, her mannerisms or her demeanor that made her appear older than her actual age.

5. After considering the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under the age of twenty-one under the actual circumstances presented to the seller at the time of the alleged offense.

We accord our usual deference to the ALJ's factual determinations. Appellants' description of the decoy's appearance suffers primarily from its failure to acknowledge this Board's prior decisions rejecting the notion that Explorer experience or prior decoy experience will necessarily cause a person in his or her teens appear to be over the age of 21.

As we said in *Azzam* (2001) AB-7631:

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 where 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 old or older.

The ALJ's assessment of the decoy's appearance explicitly took into consideration the factors appellants rely on, and reached a conclusion opposite theirs.

II

Rule 141(b)(5) requires a decoy, after the sale and before a citation is issued, to make a face to face identification of the alleged seller of the alcoholic beverages.

The ALJ found there was compliance with this rule (Findings of Fact II-C-1, 2):

C: The preponderance of the evidence established that a face to face identification of the seller of the beer did in fact take place and that the identification complied with the Department's Rule 141.

1. Shortly after the sale had taken place, one of the officers brought the decoy back into the premises and they met Officer Reyes and the clerk behind the sales counter. When the decoy was asked to point out the person who had sold her the beer, the decoy pointed to the clerk and stated, "He sold me the beer." When this identification took place, the decoy and the clerk were approximately two feet from each other.

2. A citation was issued to the clerk after this identification had taken place.

Appellants argue that the evidence that a face to face identification was made is "misleading and incomplete" (App. Br., p. 13), placing particular emphasis on the absence of any photograph of the identification process.

Two witnesses testified that an identification took place while the decoy and the clerk stood next to each other, two feet apart - the decoy (RT 14) and Los Angeles Police Officer Luis Reyes (RT 27-28). Neither was cross-examined on the issue.

Despite testimony from the decoy that a photograph was taken as she identified the clerk as the seller, no photograph was placed in evidence. Appellants' counsel argued that the absence of the photograph impaired the ALJ's ability to correctly assess the appearance of the decoy, but made no reference to its relevance on the issue of identification. In their brief in this appeal, however, they argue, without foundation, that the evidence of the identification process was hearsay and the identification process a "phantom" because of the absence of the photograph. We find appellants' arguments totally unpersuasive.

III

Appellants argue that the decoy's testimony was tainted when, prior to the administrative hearing, she spoke to Department counsel and the police officers who accompanied her on the decoy operation. The decoy was asked about the conversations on cross-examination. She testified she had reviewed the police report, that she was asked questions, and that, "We were trying to remember the location." (RT 20.)

We do not find it surprising that the witness's memory would have been refreshed about the transaction and the location after reviewing a police report and being questioned by police officers, especially in light of the relatively short time between the transaction and the hearing. Nor do we find anything nefarious in an interview with a witness prior to that witness's appearance on the stand, especially in the absence of evidence to the contrary..

The argument that the decoy's testimony was tainted lacks merit.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.