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

AB-9190
File: 21-477552 Reg: 11074277

GARFIELD BEACH CVS LLC and LONGS DRUG STORES CALIFORNIA LLC,
dba CVS Pharmacy # 9541
23330 El Toro Road, Lake Forest, CA 92630,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 16, 2012
Los Angeles, CA

ISSUED SEPTEMBER 26, 2012

Garfield Beach CVS LLC and Longs Drug Stores California LLC, doing business as CVS Pharmacy # 9541 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 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 Garfield Beach CVS LLC and Longs Drug Stores California LLC, appearing through their counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated August 31, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. The Department filed an accusation against appellants charging that, on August 23, 2010, their clerk sold an alcoholic beverage to a 17-year-old minor decoy, Garrett E.

At the administrative hearing held on June 23, 2011, documentary evidence was received and testimony concerning the sale was presented by the decoy and by Eric Gray, a Department investigator. They testified that the investigator entered the store before the decoy and observed the decoy from the time he entered until he left the store. The decoy took a 6-pack of Budweiser beer from the cooler and took it to the counter where the clerk scanned it. The clerk asked for the decoy's identification and he handed her his California driver's license bearing a red stripe that said "Age 21 in 2013." The clerk looked at the license, entered numbers in the register, and completed the sale. Later, the decoy identified the clerk as the person who sold the beer to him. When questioned by an investigator, the clerk said that she always entered the date of 10/10/40 in the register because it was easy to remember.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants then filed an appeal contending: (1) Rule 141(b)(2)[2] was violated and (2) the Department destroyed evidence.

DISCUSSION

I

Appellants contend that the decoy did not display "the appearance which could generally be expected of a person under 21 years of age, under the actual

[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.

circumstances presented to the seller of alcoholic beverages at the time of the alleged offense," as required by rule 141(b)(2), because of the training and experience he had as a police Explorer. This training and experience, appellants assert, "inevitably influenced" his appearance and demeanor. (App. Br. at p. 4.) They also argue that the administrative hearing does not provide the administrative law judge (ALJ) with an accurate perception of the decoy for purposes of rule 141(b)(2) because the rule requires the ALJ to determine whether the decoy appeared to be less than 21 years of age "under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense."

As the Appeals Board has said many times, a violation of rule 141(b)(2) is not established simply by showing that a decoy had training or experience; "it is only the *observable effect* of that experience that can be considered by the trier of fact." (*Azzam* (2001) AB-7631.) Appellants contend that the decoy's training and experience caused him to have a confident demeanor, unlike a typical teenager. The ALJ, however, concluded that "There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about his speech, his mannerisms or his demeanor that made him look older than his actual age." (FF 10.)

It is the ALJ who must make the determination as to the decoy's apparent age, not this Board. The Board must defer to the factual determinations of the ALJ as long as they are not clearly unreasonable. As a practical matter, the Board is in no position to second-guess the ALJ's determination about appearance, since the Board, unlike the ALJ, has not seen and heard the decoy in person.

We also note that, while the decoy had been a police Explorer for a little more than three years at the time of the decoy operation, this was the first decoy operation in

which he participated. When asked specifically whether his Explorer experience gave him confidence going into the decoy operation, the decoy answered "No." [RT 17.]

Appellants also appear to argue that the ALJ cannot depend upon the decoy's appearance at the hearing to determine how he appeared at the time of the sale at the licensed premises. While it is true that the ALJ is not able to see the decoy "under the actual circumstances presented to the seller," that does not preclude being able to make a reasonable determination of the decoy's appearance at the time of the sale. The Board has considered a similar argument before, and concluded:

> We are well aware that the rule requires the ALJ to undertake the difficult task of assessing that appearance many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date.

(*The Southland Corporation/Kim*, fn. 2, (2000) AB-7267.)

Appellants have not convinced us that the ALJ's determination of the decoy's apparent age was unreasonable.

II

After the sale to the decoy, one of the officers took a photograph of the decoy, the alcoholic beverage, and the clerk. The photograph was not produced at the hearing, however, the Department witness explaining that the digital file did not transfer from the camera to a computer and he was not able to recover it.

Appellants contend the Department's "spoilation of evidence" is a "grave affront to the cause of justice" (App. Br. at p. 5), and there is a possibility that the photograph would have been favorable to their case because it "may have helped establish a

defense under Rule 141." (*Ibid*.) They assert that their "burden to establish that the evidence would be favorable is satisfied if there is a reasonable possibility that the missing evidence would constitute favorable evidence. *People v. Hitch* (1974) 12 Cal.3d 641, 648-49." (*Ibid*.)[3]

Even if appellants had correctly stated its holding, *Hitch* no longer is the standard for determining if sanctions should be imposed when the prosecution fails to preserve evidence. The Board discussed this in *Mr. S Liquor Marts Inc.* (2005) AB-8319:

> In certain instances, sanctions may be imposed for law enforcement's destruction of evidence. The California Supreme Court has explained that the prosecution's duty to preserve evidence is set out in *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413] and *Arizona v. Youngblood* (1988) 488 U.S. 51 [109 S.Ct. 333, 102 L.Ed.2d 281]. These decisions held that, in order to sustain a charge of failure to preserve evidence, the defendant "must show the exculpatory value of the evidence at issue was apparent before it was destroyed, . . . that the defendant could not obtain comparable evidence by other reasonable means[, and] must also show bad faith on the part of the police in failing to preserve potentially useful evidence." *(People v. Frye* (1998) 18 Cal.4th 894, 943 [959 P.2d 183; 77 Cal.Rptr.2d 25].)

Appellants' contention that the photograph may have helped establish a rule 141 defense is unexplained and unsupported, nothing more than speculation. In any case,

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[3]We are not sure what appellants intended to say in this circular argument. What is actually said at the pages cited from *Hitch* is a quotation from *Price v. Superior Court* 1 Cal.3d 836, 842-843, regarding a criminal defendant's burden of proof to compel disclosure of the identity of a police informant:

> "'Since they do not know his identity they cannot possibly state factually what he will say if he is required to testify. All that defendants are required to do is to demonstrate "a reasonable possibility that the anonymous informant . . . could give evidence on the issue of guilt which might result in [their] exoneration." [Citation.]'" (Original italics.) (1 Cal.3d at p. 843.)

Hitch says that, for sanctions to be imposed against the prosecution, a defendant needs to show a reasonable possibility that the destroyed evidence would be *material* evidence on the issue of guilt or innocence.

regardless of any possible exculpatory value the missing photograph might have had, appellants have not shown that the Department's "failure to preserve" the evidence was done in bad faith.

Evidence Code section 413 provides, in pertinent part:

> In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

Appellants contend that, pursuant to this code section, they "should have been afforded the presumption that the destroyed evidence was unfavorable to the Department." (App. Br. at p. 6.) However, appellants have presented no evidence of willful suppression, so Evidence Code section 413 is inapplicable.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]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.