

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

AB-9320

File: 21-479441 Reg: 12076924

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9726
1411 Lincoln Boulevard, Santa Monica, CA 90401-2732,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: September 5, 2013
Los Angeles, CA

ISSUED NOVEMBER 15, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9726 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk selling an alcoholic beverage to a Department 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 Barat Saltzman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing

¹ The decision of the Department, dated September 28, 2012, is set forth in the appendix.

through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 3, 2009.

Thereafter, the Department instituted an accusation against appellants on May 10, 2012, charging that, on March 22, 2012, appellants' clerk, (the clerk), sold an alcoholic beverage to 17-year-old Alexx J. Although not noted in the accusation, Alexx J. was working as a minor decoy for the Department at the time.

An administrative hearing was held on July 31, 2012, at which time documentary evidence was received, and testimony concerning the sale was presented by Alexx J. (the decoy). Appellants presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants have filed a timely appeal making the following contentions: (1) the decoy did not display the appearance required by rule 141(b)(2); and (2) the ALJ failed to address or make credibility findings regarding the decoy's testimony.

DISCUSSION

I

Appellants contend the decoy did not display the appearance of a person under 21 years of age, in violation of rule 141(b)(2).² They argue that he lacked the required

² Rule 141 requires that a decoy operation be conducted in a manner which promotes fairness. To that end, rule 141(b)(2) requires that a 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." Proof of a violation of the rule provides an affirmative defense to the charge of a sale of an alcoholic beverage to a minor.

appearance because he was over six feet tall,³ had a fully developed adult male physique, and participated in approximately 50 decoy operations. (App. Br. at pp. 1-2.)

There are limitations on this Board's power:

Our review "is limited to a determination of whether the Department has proceeded without or in excess of its jurisdiction; whether the Department has proceeded in the manner required by law; whether the Department's decision is supported by its findings; whether those findings are supported by substantial evidence; or whether there is relevant evidence which, in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the Department." [Citations.]

Certain principles guide our review. ... We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor this court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for the consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals

Board (2004) 118 Cal.App. 4th 1429, 1437 [13 Cal.Rptr.3d 826].

Findings of Fact 4, 5, 8, and 9 contain the ALJ's findings regarding the decoy's age and appearance:

FF4. Alexx was born on June 28, 1994. He served as a minor decoy during an operation conducted by the Department on March 22, 2012. On that date he was 17 years old.

FF5. Alexx appeared and testified at the hearing. On March 22, 2012, he was 6'1" tall and weighed 175 pounds. He was wearing a t-shirt, jeans, and tennis shoes. His hair was short and unkempt.

³ The decoy is 6' 1" tall and weighs 175 pounds. [Finding of Fact 5.]

FF8. Alexx's father formerly worked for the Department, which is how he learned of the decoy program. He had served as a decoy approximately five times before March 22, visiting approximately ten locations each time.

FF9. Alexx appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of the clerk at the Licensed Premises on March 22, 2012, Alexx displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk.

The short answer to appellant's contention that the decoy lacked the appearance required by rule 141(b)(2) are the ALJ's factual findings to the contrary. Appellants have not pointed to any error of law committed by the ALJ in making that determination, and we find none.

This Board has said many times that the ALJ's determination regarding the appearance of the decoy, measured by rule 141(b)(2), is a question of fact, binding on this Board, yet, apparently, not said often enough for appellants' counsel. We reject appellants' contention as lacking of merit.

II

The proposed decision did not address appellants' challenge to the decoy's credibility with respect to the CVS store where he made the purchase in question. Our review of the hearing transcript leads us to believe that the decoy remembered so little of the transaction, particularly his identification of the CVS store where the purchase was made, that, without his having led by Department counsel on redirect examination, the Department would not have proved its case.

The Department's surprisingly limited direct examination left unanswered which CVS store was responsible for the sale. The decoy testified, in substance, that he had heard of CVS pharmacy, that he went to a CVS pharmacy on March 22, 2012,

purchased a three-pack of beer, paid for it and left the store. He could not recall what kind of beer it was. [RT 8-9.] Department counsel made no attempt during its case in chief to identify the specific CVS store where the decoy made the purchase in question, even though the store's identity was an essential element of the Department's burden of proof.

On cross-examination, the decoy was repeatedly unable to offer any specific information to pin down which CVS store it was where he made the purchase alleged in the accusation. His testimony revealed that he had made purchases at other CVS stores during his five decoy operations, so appellants' attack on his memory of the transaction, and where it took place, was clearly warranted. We have summarized relevant portions of that cross-examination to illustrate our point; it is important to note that the decoy testified that he had participated in five decoy operations, visiting approximately ten stores in each operation:

MS. RENSHAW: ...What CVS – do you recall what CVS you're testifying about today?

A. Yes.

Q. And what CVS is that?

A. I don't recall the city, but I recall the location.

Q. And can you then give us a little bit more specificity as to the location?

A. Could you restate the question?

Q. Sure. You said that you don't remember the city, is that correct?

A. Correct.

Q. And do you remember the city of any other CVSes that had sold alcohol to you while you were participating in the decoy operation?

A. Yes.

Q. And what other cities then?

A. I can't remember at the moment.

Q. And so how do you remember this particular CVS in this particular sale as to the other CVSes and the other sales that have occurred while you have been participating in the decoy operation?

A. I was debriefed on which one this was.

Q. And when you were debriefed, what does that mean?

A. I was shown pictures that have sparked my memory of which incident this was.

Q. But you don't remember the city this took place in; is that correct?

A. Correct.

[RT 14-15.]

...

Q. And what agents were you working with?

A. Kim and Andre.

Q. And those are first names?

A. Yes.

Q. Do you know their last names by any chance?

A. Kim Marquez and Andrea Florentinus.

Q. And were you working with them on your other decoy operations where you went to other CVS locations?

A. Yes.

Q. And did you speak with either agent or this prosecutor regarding the facts of this case before testifying today?

A. Could you restate the question?

Q. Sure. Did you speak with either of the agents that you just testified about or this particular prosecutor about the facts of today's case?

A. Yes.

Q. And so are you testifying as to the facts and the pictures that they've shown you regarding this particular sale or are you now testifying from your memory of this particular sale?

...

A. Could you restate the question?

Q. Sure. Are you testifying today from the debriefing – let me put it that way – from the debriefing that you had prior to the hearing or are you testifying from your recollection, your personal recollection of what happened at this particular location?

A. Wouldn't it be both?

Q. Well, I'm asking you.

A. From the debriefing and the memory.

Q. And when you first arrived at this CVS, do you remember on what street it's located?

A. No.

Q. And do you remember how many CVSes you have visited as a decoy?

A. No.

Q. And do you remember how many CVSes had sold to you as you participated in the decoy operations?

A. No.

Q. Has it been more than two?

A. Yes.

Q. And do you remember when those other decoy operations took place where a CVS had sold alcohol to you?

A. I do not remember.

Q. And when you first came to this particular CVS that you are testifying about today, had you ever visited the CVS before?

A. No.

...

Q. Was this particular CVS laid out or had the same type of layout as the other CVS locations that you visited as a decoy?

A. Yes, basically.

Q. ... On those other operations when you visited other CVSes, did you select the same type of alcohol as you selected here?

A. I don't remember.

Q. Because you don't remember what type of alcohol you selected here; is that correct?

A. Yes.

[RT 16-18.]

...

Q. Do you remember how many other locations you went to on this particular operation?

A. Not exactly.

Q. Okay. When you say "not exactly," could you give a best estimate?

A. Approximately ten.

Q. And do you remember on this particular occasion if any other location sold alcohol to you other than this particular CVS?

A. I do not remember.

Q. And just to reiterate one last time, you don't remember where the CVS is located; is that correct?

A. Not its exact location, no.

[RT 38-39.]

Only on redirect examination, and only after considerable assistance from Department counsel, was Alexx J. able to identify the store in question:

MS. VENT: I don't know where I left off, but when you first testified earlier today, you had testified that you knew where the store – do you recall what you testified to, to that? I thought you had said you recalled where the store was, but you didn't have the address or the city but you knew where the location was.

THE COURT: Let's start with do you recall your earlier testimony about your knowledge of the location of the store.

...

MS. VENT: What do you recall testifying to?

A. I recall that I knew the location, but I did not know the address or the city.

Q. So how did you know the location?

A. From the debriefing. If I may ask, there was a paper I saw earlier that had all the facts on it.

Q. Before that, is it that you don't know like you just don't know or you can't remember?

A. I cannot remember.

Q. If I were to show you something, perhaps a report from that day, to refresh your recollection and your Honor approves, do you think that could

A. Yes.

Q. – make your memory come back?

A. Yes.

...

THE COURT: If you want to refresh his memory, go ahead.

Ms. Vent: Thank you. I'm showing him the report, not putting it into evidence. I'm just showing it to him. I'm showing the witness an investigation report from that date.

Q. Does this report look familiar to you?

A. Yes.

Q. Is this what you referred to when you said you were debriefed earlier?

A. Yes.

Q. I'm going to hand you this, and if you could look and see if it refreshes your recollection, let me know; and if not we can move on to something else?

A. Yes, it does refresh my memory.

Q. Okay. So, now, where is the location of the store that the clerk in Exhibit B sold alcohol to you?

A. It was in Santa Monica.

Q. Do you recall the street address –

A. 1 –

Q. – or the street name?

A. Lincoln.

[RT 40-42.]

Appellants have challenged this testimony as lacking credibility. We see it as involving not only an issue of credibility, but also a question of whose testimony it really was, and on what it was based.

It is clear from the decoy's testimony that he recalled very little about the transaction, despite having been debriefed and shown some unidentified report prior to the hearing, and then again at the hearing. The record does not show who wrote the report, or its content, other than, we must assume from the decoy's responses to Department counsel's suggestions, an address in Santa Monica that corresponded with a CVS pharmacy location.

Assessment of a witness's credibility would seem to require, at a minimum,

cross-examination testing a determination whether the witness really believes what he says when testifying that his memory has been refreshed. In this case, there is, at least in our minds, a question whether the decoy in this case may have simply been mouthing the words Department counsel wanted him to say, and actually had nothing in his recollection refreshed.

But, as much as we might have been tempted to dismiss this case as not proven, that would mean we were resolving a factual question more appropriately left for the ALJ.

Since his proposed decision did not address the question of credibility, we have no idea whether it occurred to him that the decoy, seemingly oblivious of almost everything about the transaction, might not realize that he was not testifying from a refreshed recollection at all, but simply agreeing with Department counsel as to what the words were on the report shown to him.

There is no question that both the Department and the appellant fell short in this case. The decoy was ill-prepared when he took the stand and relied almost entirely on the investigative report to refresh his recollection. Without Department counsel to shepherd him and the report to revive his memory, we doubt the decoy could have provided any useful testimony whatsoever. The fact that Department counsel did not even attempt to establish where the offense took place in her case in chief makes us wonder what her strategy was.

On the other hand, counsel for appellant passed up the opportunity to further cross-examine the decoy in an attempt to demonstrate that he was relying on what he was told rather than what he remembered, and chose instead to rely solely on a credibility argument. This left his refreshed memory unchallenged, and the void in the

Department's case filed.

That said, we have found no grounds to reverse this decision, or remand it to the Department.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Dissenting Opinion:

I respectfully dissent.

My colleagues acknowledge that the testimony of the minor decoy (upon which the ALJ based his decision) not only “lack[ed] credibility” but raised a serious question “of whose testimony it really was and on what it was based.” *Ante* at 10. Specifically, the majority states:

It is clear from the decoy's testimony that he recalled very little about the transaction, despite having been debriefed and shown some unidentified report [before] the hearing, and then again at the hearing. The record does not show who wrote the report or its content . . . [W]e must assume from the decoy's responses to Department counsel's suggestion, an address in Santa Monica that corresponded with a CVS pharmacy location. [¶] [T]here is a . . . question whether the decoy . . . may have simply been mouthing the words Department counsel wanted him to say, and actually had nothing in his recollection refreshed.

⁴This 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.

Ante at 10-11.

Despite the obvious paucity and inadequacy of evidence to support the Department's position, my colleagues are reluctant to reverse due to the "substantial evidence" standard, stating that we are "bound by the factual findings in the Department's decision as long as they are supported by substantial evidence." *Ante* at 3. But they are mistaken about the scope and application of the "substantial evidence" standard, the benchmark used for reviewing the factual record in most appeals from trial court and administrative agency determinations, and the one at play here. As *Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480 explains:

While it is commonly stated that our "power" begins and ends with a determination that there is substantial evidence, that does not mean that we must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal [and this Board] were "not created merely to echo the determination of the trial court [or the Administrative Law Judge]." A decision supported by a mere scintilla of evidence need not be affirmed on review. "[I]f the word 'substantial' is to mean anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable, credible, and of solid value."

198 Cal.App.4th at 492, internal cites omitted.

For these reasons, I would reverse the decision.

FRED J. HIESTAND, MEMBER