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

AB-9327
File: 21-477580 Reg: 12076752

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC
dba CVS Pharmacy #9873
1300 Madonna Road, San Luis Obispo, CA 93405-6503,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 7, 2013
Los Angeles, CA

ISSUED DECEMBER 20, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9873 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for selling alcohol to a minor, 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 Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

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[1]The decision of the Department, dated October 22, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On March 28, 2012, the Department instituted a two-count accusation against appellants charging that their assistant manager, while conducting the duties of a clerk, sold alcoholic beverages to two minors in violation of section 25658(a).

At the administrative hearing held on August 15, 2012, documentary evidence was received and testimony concerning the violation charged was presented by Department Supervising Agent Robert Olshaskie; by Matthew Parry and Michael J. Labdon, the minors in question; and by Kevin Katsuda, the assistant manager who conducted the transaction.

Testimony established that on November 4, 2011, Labdon and Parry — both 19 years of age at the time — entered the licensed premises together. They proceeded to the alcoholic beverage section, where they selected a 1.75 liter bottle of UV vodka, a 1.75 liter bottle of Gran Legacy vodka, a 24-oz. bottle of Heineken beer, a 30-pack of Keystone Light in 12-oz. cans, and a 12-pack of Rolling Rock beer in 12-oz. bottles. They split the alcohol between them and carried it to the counter. Labdon carried the Keystone Light, one bottle of vodka, and the Heineken; Parry carried the Rolling Rock and the other bottle of vodka.

Katsuda was at the register when Labdon and Parry approached. Labdon and Parry set the alcohol down in front of Katsuda. Parry immediately took a few steps back, while Labdon remained at the counter.

Katsuda asked for Labdon's identification. Labdon provided a fake Pennsylvania driver's license. The identification had been manufactured for Labdon, and bore his photograph and an accurate description of his height and eye color. Labdon testified

that he had previously used the fake ID at the premises.

Katsuda examined the identification, entered something in the register, and proceeded with the transaction. As he rang each item up, he set it on the counter.

During the transaction, Parry paced back and forth behind Labdon and pretended to look at his phone. He finally stopped pacing and stood near Labdon's right shoulder. Parry was at all times visible to Katsuda.

When the transaction was complete, Labdon picked up the two cases of beer, and Parry picked up both bottles of vodka along with the Heineken. They left the premises together.

Outside, Parry and Labdon were stopped by Agent Olshaskie, who asked to see their identification. Both provided their actual California identification. Agent Olshaskie also located Labdon's fake Pennsylvania identification.

Agent Olshaskie entered the premises and spoke with Katsuda. They viewed the security video of the sale. Katsuda gave Agent Olshaskie a copy of the video.

Subsequent to the hearing, the Department issued its decision which determined that appellants had established a defense to the sale to Labdon under section 25660(b).[2] Accordingly, that count was dismissed. With regards to the sale to Parry, however, the ALJ held that a violation of section 25658(a) had been proven and no defense had been established.

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[2]Business and Professions code section 25660(b) states:

> Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 25658, 25663, or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

Appellants have filed an appeal contending that the evidence was insufficient to support the conclusion that Katsuda sold or furnished alcohol to Parry.

DISCUSSION

Appellants contend the evidence is insufficient to support the finding that the clerk furnished alcohol to Parry as contemplated in section 25658(a). In particular, appellants argue that only Labdon purchased alcohol, and that Parry was in no way involved in the transaction, and that the clerk therefore had no reason to ask for Parry's identification. Additionally, appellants assert that the clerk took no affirmative action to furnish alcohol to Parry.

Section 25658(a) states, "Except as otherwise provided in subdivision (c), every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." Section 25660(b) establishes an affirmative defense where the clerk relied on convincing false identification, and that statute led to the dismissal of the count involving Labdon.

The ALJ, however, found that the evidence also established a violation of 25658(a) with regard to the sale to Parry. He reached the following conclusions, based on detailed findings of fact:

> 7. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that, on November 4, 2011, Kevin Katsuda, inside the Licensed Premises, sold alcoholic beverages to Matt Parry, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11.)
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> 8. Parry was plainly visible when he walked up to the counter, when he set the alcohol down, when he paced back and forth behind Labdon during the sale (particularly toward the end of the transaction when he stood just off Labdon's shoulder), and when he picked some of the

> alcohol up off the counter. Although Katsuda testified that he did not see Parry, that is apparently because he did not look. Under the circumstances, Katsuda should have been aware that Parry was involved in the sale.

(Conclusions of Law, ¶¶ 7-8.) In making his findings and reaching his conclusions, the ALJ relied not only on testimony, but on a surveillance video of the transaction entered into evidence. (State's Exhibit 7.)

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. V. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29

Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

The ALJ found that Labdon and Parry entered the premises together, selected the alcohol together, and split it between them. (Findings of Fact ¶ 5.) They took it to the counter and set it in front of Katsuda together. (*Ibid.*) While Parry did step back and pretend to look at his phone, he ultimately stopped just off Labdon's right shoulder. (Findings of Fact ¶¶ 6, 9.) Most importantly, the ALJ found that Parry was visible to Katsuda at all times during the course of the transaction. (Findings of Fact ¶ 9.) After the transaction was complete, Parry picked up two bottles of vodka and a 24-oz. bottle of Heineken from the counter and left the store with Labdon. (Findings of Fact ¶ 10.)

Together, these findings unquestionably provide evidence sufficient to support the ALJ's conclusion that Katsuda furnished alcohol to Parry in violation of section 25658(a). It was not unreasonable or arbitrary for the ALJ to conclude, based on these findings, that Katsuda ought to have noticed that Parry and Labdon were together, and asked for Parry's identification as well. As this Board has observed,

> The clerk is the person in control of the sale. He or she must be alert to the substance of the transaction, and cannot ignore circumstances that ought to raise questions in the mind of a reasonably prudent person. When the transaction is in the nature of a group purchase, as the one in this case appeared to be, a clerk must establish that each of those who are involved in the transaction are 21 or over. It is not enough that the person who assembled the various selections and pays for them is 21. A clerk may not close his or her eyes to the reality of what is taking place. The critical fact in this case is not the mere presence of minors, it is their participation in the transaction, all of which took place in front of the clerk.

(*Circle K Stores, Inc.* (2004) AB-8029.) While the facts of that case were somewhat different from those presently on appeal, they provide appropriate guidance. Katsuda was put on sufficient notice that Parry was part of the transaction, and ought to have requested his identification.

Finally, appellants contend that Katsuda took no affirmative action to furnish alcohol to Parry. Appellants rely on two negligence cases for authority. They first held that university administrators did not furnish alcohol to minors who consumed alcohol on campus. (*Baldwin v. Zoradi* (1981) 123 Cal.App.3d 275, 290 [176 Cal.Rptr. 809].) That decision turned largely on policy concerns: the court observed that "it would be difficult to so police a modern university campus as to eradicate alcoholic ingestion." (*Ibid.*) The university administrators — far removed from the party where underage drinking took place — could therefore not be held liable for furnishing alcohol to minors simply because they failed to eradicate all underage drinking from the campus.

The second case held that where a minor caused injury after drinking to excess, another minor who contributed several dollars for the purchase of alcohol and consumed alcohol at the same party did not furnish the alcohol under the meaning of section 25658 and could not be held liable. (*Bennet v. Letterly* (1977) 74 Cal.App.3d 901, 905-906 [141 Cal.Rptr. 682].) While the court did discuss possible interpretations and implications of the word "furnish," it also explicitly refused to provide a definition: "We shall make no effort to state definitively the meaning of the word 'furnishes' used in section 25658, sudivision (a)." (*Id.* at 904.) Ultimately, the court concluded that no furnishing took place, as there was no evidence that the minor "exercised any control over, or even handled, the bottle of whiskey" that ultimately led to injury. (*Id.* at 905.)

Appellants would have us extend this reasoning to the present case — specifically, appellants argue that "[i]f any furnishing of an alcoholic beverage took place in this case, it would be from Mr. Labdon to Mr. Parry as Mr. Labdon was the individual who purchased the alcohol and then gave the alcohol to Mr. Parry." (App.Br. at p. 8.)

We find this position untenable, if not ridiculous, when applied to the present facts. Katsuda, as assistant manager and clerk, directly controlled the both the transaction and the alcohol involved. He was obligated to comply with all applicable alcoholic beverage laws, including section 25658. He accepted the alcohol Parry set on the counter, scanned it, bagged it, and returned it to the counter for Parry to pick up. Katsuda's actions were unquestionably affirmative; he cannot escape liability by arguing that he merely stood by, passive and oblivious. We see no reason to reconsider the decision below.

ORDER

The decision of the Department is affirmed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.