

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

AB-9422

File: 20-230911 Reg: 13079337

7-ELEVEN, INC. and M.S. KAMBOJ,
dba 7-Eleven Store #2175-17497
1910 Colorado Boulevard, Los Angeles, CA 90041,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 6, 2014
San Diego, CA

ISSUED DECEMBER 5, 2014

7-Eleven, Inc. and M.S. Kamboj, doing business as 7-Eleven Store #2175-17497 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, all stayed, 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 M.S. Kamboj, appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated March 7, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 24, 1989. On October 10, 2013, the Department filed an accusation against appellants charging that, on May 9, 2013, appellants' clerk, Yesenia Pena (the clerk), sold an alcoholic beverage to 18-year-old Clayton Vison. Although not noted in the accusation, Vison was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on January 15, 2014, documentary evidence was received and testimony concerning the sale was presented by Vison (the decoy) and by Patrick Bullock and Kimberly Johnson, Department agents. Appellants' general manager Aman Kamboj testified on their behalf.

Testimony established that on the date of the operation, the decoy entered the premises, walked straight to the beer coolers, selected a can of Bud Light beer, approached the registers, and placed the beer on the sales counter.

The clerk asked the decoy for his identification. The decoy handed the clerk his California driver's license, which bore his correct date of birth as well as a red stripe reading "AGE 21 IN 2016." The clerk briefly looked at the identification, slid it through the cash register, and returned the identification to the decoy. The clerk then stated the price, and the decoy paid with five dollars. The clerk handed the decoy some change and bagged the beer. After paying, the decoy took the beer, exited the premises, and met up with Department agents.

Agent Bullock and one or two other agents returned to the premises and proceeded to the sales counter. Bullock contacted the clerk, identified himself, advised her that she had sold an alcoholic beverage to a minor, and pulled her to the side of the counter.

The decoy was then escorted back into the premises and taken to the area where Agent Bullock waited with the clerk. One of the agents asked the decoy to identify the person who sold him the beer. The decoy pointed at the clerk and stated that she had sold him the beer. At the time of this identification, the clerk and the decoy were standing in close proximity and were facing each other. A photograph was taken of the clerk and the decoy together. In it, the clerk is holding the can of Bud Light beer and is standing beside the clerk.

The decoy's identification was later scanned through the register — it triggered a red screen indicating that the holder of the identification was under 21.

The Department's decision determined that the violation charged was proved and no defense was established. In light of mitigating evidence, the Department assigned a penalty of 10 days' suspension, all stayed on the condition that no cause for disciplinary action occur in the following year.

Appellants then filed an appeal contending: (1) the ALJ ignored appellants' arguments and evidence under rule 141(b)(2), and (2) the face-to-face identification did not comply with rule 141(b)(5).

DISCUSSION

I

Appellants contend that the ALJ "failed to fully and adequately consider" their evidence and arguments showing that the decoy's appearance did not comply with rule 141(b)(2). (App.Br. at p. 5.) Appellants argue that evidence of appearance must be considered cumulatively. In particular, appellants insist that the decoy's experience and confidence, considered in conjunction with his physical appearance, made him appear older than his actual age.

This Board is bound by the factual findings in the Department's decision if supported by substantial evidence. The standard of review is as follows:

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 an appellate 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 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.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004)

118 Cal.App.4th 1439, 1437 [13 Cal.Rptr.3d 826].)

Rule 141, subdivision (b)(2), restricts the use of decoys based on appearance:

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 beverage at the time of the alleged offense.

A review of the decision below shows that the ALJ did not disregard appellant's 141(b)(2) arguments. He made the following findings of fact:

C. The overall appearance of the decoy including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that his hair was a little shorter and he was fifteen pounds heavier on the day of the hearing.

1. The decoy is a very youthful looking male with acne on his face who was clean-shaven on the day of the sale. He was five feet five inches in height, he weighed one hundred sixty-five pounds and his clothing consisted of blue jeans, a light blue T-shirt and white sneakers. The photograph depicted in Exhibit 4 was taken at the premises and the photographs depicted in Exhibits 2 and 3 were taken on the day of the sale prior to the decoy operation. All three of these photographs show how the decoy looked and what he was wearing on the day of the sale.

2. The decoy testified that he had participated in maybe four prior decoy operations, that he has not participated in any Explorer program, that he was less nervous on decoy operations after the first operation, that he visited four licensed locations on May 9, 2013 and that two locations sold beer to him.

3. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about the decoy's speech, his mannerisms or his demeanor that made him appear older than his actual age.

4. The clerk who sold beer to the decoy did not testify at the hearing.

5. After considering the photographs depicted in Exhibits 2, 3 and 4, the overall appearance of the decoy when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

(Findings of Fact ¶¶ C.1-5.) Based on these findings, he rejected appellants' rule 141(b)(2) defense.

Appellants' statement that the ALJ did not fully or adequately address the decoy's appearance, his experience, or his relative confidence ignores his decision and the record. The ALJ provided an unusually detailed assessment of all these factors and concluded that, cumulatively, the decoy appeared under 21 years of age. Appellants are, in essence, asking this Board to consider the same set of facts and reach the opposite conclusion — something this Board cannot do.

II

Appellants contend that the face-to-face identification did not comply with rule 141(b)(5). In particular, appellants claim that Department agents, rather than the decoy, conducted the identification, and that the clerk was "quarantined and secluded" in a back room so that the decoy had no other choice but to confirm the agents' identification. (App.Br. at p. 7.) The identification, they insist, was therefore unduly

suggestive.

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

As appellants correctly point out, the rule requires “strict adherence.” (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the clerk].)

In *Chun* (1999) AB-7287, this Board observed:

The phrase “face to face” means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other’s presence, by the decoy’s identification, and the seller’s presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.) In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, we clarified application of the rule in cases where, as here, an officer initiates contact with the clerk following the sale:

As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer’s contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept.*

of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (2003) 109 Cal.App.4th 1687 [3 Cal.Rptr.3d 339] (*Keller*.) As the court noted:

[S]ingle 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 show-up is impermissible (*ibid.*), in the context of a decoy buy operation, there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

The court concluded that “[t]he literal terms of [rule 141(b)(5)] leave the location of the identification to the discretion of the peace officer.” (*Id.* at p. 1697.)

In *Carlos M.*, *supra*, the court said:

The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted, i.e., to demonstrate 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].)

In this case, appellants do not contend that the clerk was in fact misidentified.

They simply contend that officers “quarantined and secluded” the clerk in the back room, leaving the decoy no other choice but to identify the isolated clerk as the seller.

First, there is no evidence that officers either quarantined or secluded the clerk, or even that they escorted her into a back room. The findings below note only that Agent Bullock “pulled [the clerk] to the side of the counter.” (Findings of Fact ¶ II.B.1.) Agent Bullock testified that the identification “occurred right outside the cash register area, kind of in the back of the store, but very close . . . to the cash register area.” (RT at p. 17.) Agent Johnson described the location as “[b]ehind the counter in a back area, close to an office and a storage room.” (RT at p. 55.) The decoy confirmed that the identification took place “behind and to the back of the counter but not where the register was.” (RT at p. 48.) Finally, the photograph of the decoy and clerk together

shows stocked shelves in the background, suggesting that the identification took place in a public section of the store. (Exhibit 4.) Appellants misrepresent the facts: there is no evidence whatsoever that the clerk was “quarantined,” “secluded,” or even escorted into a back room.

Second, appellants overlook the fact that even if the clerk had been fully isolated, there was nothing to prevent the decoy from simply pointing out to officers that they’d initiated contact with the wrong clerk. Nothing in the record suggests that the identification was erroneous, or that the decoy was in any way pressured to misidentify the seller. The face-to-face identification fully complies with rule 141(b)(5).

ORDER

The decision of the Department is affirmed.²

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

²This 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.