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

AB-9569
File: 21-477719 Reg: 15082671

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9376
3471 Lake Tahoe Boulevard, South Lake Tahoe, CA 96150-8948,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: October 6, 2016
Sacramento, CA

ISSUED NOVEMBER 18, 2016

Appearances: *Appellants*: Jennifer L. Oden and Saranya Kalai, of Solomon Saltsman & Jamieson, as counsel for appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC.
Respondent: Jacob L. Rambo and Sean Klein as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9376 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for ten days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

[1] The decision of the Department, dated January 20, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On June 27, 2015, the Department filed an accusation against appellants charging that, on May 2, 2015, appellants' clerk sold an alcoholic beverage to 18-year-old Christian Ivan Bernal-Ruiz. Although not noted in the accusation, Bernal-Ruiz was working as a minor decoy for the South Lake Tahoe Police Department at the time.

On July 17, 2015, appellants filed and served on the Department a Request for Discovery pursuant to Government Code section 11507.6 demanding, inter alia, the names and addresses of all witnesses. On August 24, 2015, the Department responded by providing the address of the South Lake Tahoe Police Department in lieu of the decoy's home address. On September 2, 2015, appellants sent a letter to the Department demanding that it furnish the decoy's contact information by September 8, 2015. On September 8, 2015, appellants received a response from the Department asserting that the contact information for the South Lake Tahoe Police Department was sufficient.

On September 11, 2015, appellants filed a Motion to Compel Discovery. On September 22, 2015, the Department responded and opposed the motion.

On September 30, 2015, the ALJ denied appellants' motion, arguing that the statute requires only an "address" and not necessarily a home address, and further, that this Board's decision in *Mauri Restaurant Group* (1999) AB-7276 was on point and mandated denial of the motion.

The administrative hearing proceeded on December 15, 2015. Documentary evidence was received and testimony concerning the sale was presented by Bernal-Ruiz (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and proceeded to the coolers in the alcoholic beverage section, located in the back, left-hand side of the store. The decoy was familiar with the licensed premises because he had patronized the store three to five times in the past. Once he reached the alcoholic beverage coolers, the decoy retrieved a can of Coors Light beer. The decoy took the beer to the cash register section. There were two female clerks on duty. As the decoy approached the sales counter, a customer was just leaving. The decoy placed the beer on the sales counter. One of the female cashiers said "hello" to the decoy and asked for his date of birth. The decoy provided his correct date of birth: November 27, 1996. The clerk appeared to punch the date into the cash register. The clerk never asked for the decoy's identification. The decoy paid for the beer and exited the premises.

The decoy then proceeded to the automobile where law enforcement officers were waiting. The decoy told them he purchased beer in the store.

The decoy was escorted back inside the store to conduct a face-to-face identification of the seller. He could not recall which officers took him back inside the store. As they entered the store, the decoy pointed to the clerk who sold him the beer. The decoy was about ten feet away from the clerk at this time. The other female clerk was behind the sales counter, but she was not near the selling clerk. The decoy could

not recall specifically if the clerk that sold him the beer was waiting on a customer at the time he identified her to the officers. However, he did testify that it appeared a customer might have just finished a transaction and the clerk was "alone." The law enforcement officials proceeded to the sales counter and identified themselves to the clerk. One of the officers showed the clerk his badge and told her she had sold alcohol to a minor. The decoy was standing next to the officers at the time. The clerk "freaked out" a bit and said she was "sorry." The officers escorted the clerk and the decoy to the front door area and took a picture of them standing together.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed an appeal contending (1) the ALJ abused his discretion by denying appellants' motion to compel discovery of the decoy's home address, and (2) the face-to-face identification did not comply with rule 141(b)(5).

DISCUSSION

I

Appellants contend the ALJ abused his discretion by denying their motion to compel discovery of the address of the minor decoy to the extent known by the Department. (App.Br. at p. 5.) Appellants argue that "only information which is 'privileged from disclosure by law or otherwise made confidential' is disqualified from disclosure" under Government Code section 11507.6. (App.Br. at p. 7.) They insist "no statute or rule" protects a decoy's personal contact information from disclosure. (*Ibid.*) They reject this Board's conclusion, reached in several factually indistinguishable cases,

that a decoy's personal information is protected under section 832.7 of the Penal Code because, according to appellants, "minor decoy are never identified as peace officers in the statutory scheme that identifies the class of persons whose personnel records are made confidential" by that provision of law. (*Ibid.*, rejecting by implication this Board's interpretation of the law in *7-Eleven, Inc./Joe* (2016) AB-9544.) Appellants contend that, because the Department failed to abide by the discovery standards of the Administrative Procedure Act, they were "prejudiced in preparing for the hearing and defending [themselves]." (App.Br. at pp. 7-8.)

This Board has recently addressed a number of cases raising this purely legal issue. In *7-Eleven, Inc./Joe*, *supra*, we held that the decoy's personal address is protected under section 832.7 of the Penal Code. (*Id.* at pp. 6-10.)

While appellants do not cite *Joe*, they do object to the reasoning therein, arguing that a decoy does not qualify as peace officer as defined by the Penal Code. (App.Br. at p. 7; see also Pen. Code, § 830 et seq.)

In another recent case, *7-Eleven, Inc./Dhillon* (2016) AB-9556, we addressed the same objections raised during oral argument. We analyzed the specific language of section 830, and reiterated our conclusion that the decoy "qualifies as a peace officer, by delegation of limited powers, under section 830.6(c)" and is therefore "protected from disclosure of her personal information, including home address, by section 832.7 of the Penal Code." (*Id.* at p. 9.) We also rejected the appellants' assertion that this interpretation of the law granted the decoy all the privileges typically afforded a trained law enforcement officer. (*Id.* at p. 7.) We wrote:

> The language [of section 830.6(c)] expressly restricts the "powers of a peace officer" to those "expressly delegated . . . by the summoning officer." The grant of authority is quite limited and entrusted to the judgment of the summoning officer. Contrary to appellants' claim, it does not permit an untrained minor decoy to wield a loaded sidearm or careen an ambulance willy-nilly through the city streets.

(*Ibid.*) We refer appellants to that case for a full discussion of the law.

As we emphasized in both *Joe* and *Dhillon*, however, this holding

> does not excuse the Department from providing a valid address. In *7-Eleven, Inc./Nagra* (2016) AB-9551, we emphasized that the decoy must *actually be reachable* at the address provided. (*Id.* at p. 5, citing *7-Eleven, Inc./Joe*, *supra*, at p. 11.) We noted that "the Department is accountable for the validity of the addresses it provides." (*Id.* at p. 7.) "It is not enough to provide a Department District Office address if the District Office is unable or unwilling to forward communications to the decoy." (*Id.* at p. 6.) This Board will offer relief in the form of reversal if "we are presented with a well-established record showing that a decoy was legitimately unreachable at the address the Department provided during discovery, and the Department took no steps to provide an address at which the decoy could actually be reached." (*Id.* at p. 8.)

(*7-Eleven, Inc./Dhillon*, *supra*, at p. 9; see also *7-Eleven, Inc./Joe*, *supra*, at pp. 11-12.) The same reasoning applies where, as here, the contact information provided belongs to a law enforcement agency rather a Department District Office.

Appellants, however, have presented no evidence that they attempted to reach the decoy through the South Lake Tahoe Police Department, let alone that their attempts failed. We therefore follow our decisions in *Joe* and *Dhillon*, and find appellants' contentions meritless.

II

Appellants contend that the face-to-face identification did not comply with rule 141(b)(5) because the clerk neither knew nor could reasonably have known that she

was being pointed out as the seller. (App.Br. at pp. 8-11.) Appellants argue that, according to the decoy's testimony, he was asked to identify the clerk upon reentering the store—at which point the clerk was ten feet away and preoccupied with other customers. (App.Br. at pp. 9-10.) When the decoy approached the counter with law enforcement, an officer identified himself to the clerk, but the decoy neither identified the clerk nor engaged in any conversation with her. (App.Br. at p. 10.) Appellants further argue that a photograph of the clerk and the decoy together does not cure shortcomings in the face-to-face identification process. (*Ibid.*)

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.

The rule provides an affirmative defense. The burden of proof is therefore on the appellants to show noncompliance.

In *Acapulco Restaurants*, a decoy took a seat at a bar, and the bartender served the decoy a beer without requesting identification. (*Acapulco Restaurants v. Alcoholic Bev. Control App. Bd.* (1998) 67 Cal.App.4th 575, 577 [79 Cal.Rptr.2d 126].) An officer seated at a nearby table witnessed the transaction. (*Ibid.*) The officer approached the bartender, informed her that she had sold alcohol to a minor, and identified the minor decoy. (*Ibid.*) It was undisputed that no face-to-face identification took place. (*Ibid.*) Nevertheless, an ALJ sustained the charge, finding only that "[a]fter the transaction was completed, the police officer identified the decoy to the bartender and informed her that

she had sold beer to a minor," and based on that finding, concluding that "[t]he officer's actions meet the requirement of the Department's Rule 141(b)(5)." (Dept. Decision, reprinted in Appendix, *Acapulco Restaurants, Inc.* (1998) AB-6895, at p. 13.) The Appeals Board affirmed, declining to find "anything unfair in dispensing with a meaningless identification ritual when, in any realistic assessment, the peace officer was already a participant, so to speak, in the transaction." (*Acapulco Restaurants, Inc.* (1998) AB-6895, at p. 13, reversed by *Acapulco Restaurants*, *supra*.)

The court of appeal, however, reversed the Department's decision. It rejected the Appeals Board's holding that where the supervising officer witnessed the sale firsthand, no face-to-face identification was necessary:

> The Board refused to give rule 141, subdivision (c) a "rigid and literal interpretation" because the police officer had been sitting only a few feet away at the time of the sale. According to the Board, the rule must "take[ ] into account reality," and the "reality of this case" is that "there is no need for the requirement of identification when the peace officer is already within the premises and is an eyewitness to the transaction."

(*Acapulco Restaurants v. Alcoholic Bev. Control App. Bd.* (1998) 67 Cal.App.4th 575, 577-578 [79 Cal.Rptr.2d 126].) According to the court, the plain language of the rule required a face-to-face identification, and it was undisputed that none took place—therefore, the defense was established as a matter of law. (*Id.* at p. 579.) From this set of facts emerged the oft-quoted passage, "that rule 141, subdivision (b)(5) means what it says." (*Id.* at p. 581.)

In a later case, the court of appeal held that the rule does not prescribe a specific "location or manner" for the face-to-face identification, and instead leaves "the location of the identification to the discretion of the peace officer." (*Dept. of Alcoholic Bev.*

Control v. Alcoholic Bev. Control App. Bd. (*7-Eleven, Inc.*) (2003) 109 Cal.App.4th 1687, 1697 [1 Cal.Rptr.3d 339].) The court therefore found no violation where the face-to-face identification consisted of a so-called "single person show-up" held outside the licensed premises. (*Id*. at p. 1698.) The court observed, "There is nothing in the language of the Regulations section 141, subdivision (b)(5) . . . that suggests the section was written to require any particular kind of identification procedure *except that it be face-to-face*." (*Ibid*., emphasis added.) Thus, while the court permitted the face-to-face identification to be made at a location to be determined by the supervising officer, it did *not* dispense with the requirement that the identification be face-to-face, as required by the rule. (See generally *ibid.*)

Notably, the *7-Eleven* court also rejected the contention that rule 141(b)(5) was intended to prevent misidentification of sellers: "There is no suggestion the section was promulgated to correct identification procedures which resulted in a history of misidentification of sellers. Indeed, there is no suggestion that correct identification of sellers by decoys presented any problem whatsoever." (*Ibid.*)

In *Chun*, the Appeals Board determined that the Department's factual findings "[did] not suggest a face to face identification, but only allude[d] to a pointing out of the seller from somewhere within the premises." (*Chun* (1999) AB-7287, at p. 5.) 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.

(*Ibid.*) In later cases, this Board has clarified that the decoy need not be the first person to make contact with the clerk, provided the face-to-face identification still takes place:

> *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.

(*7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, at pp. 7-8, emphasis added.)

To summarize the law, then, variations in the location of the identification, the number of individuals present, or whether officers first approach the clerk generally do not affect compliance with the rule—provided a face-to-face identification did in fact take place.

In this case, the ALJ made the following relevant findings of fact:

> [The decoy] was escorted back inside the store to conduct a face-to-face identification of the seller. He could not recall which officers took him back inside the store. As they entered the store, [the decoy] pointed to the clerk that sold him the beer. The decoy was about 10 feet away from the clerk at this time. The other female clerk was behind the sales counter, but she was not near the selling clerk. The decoy could not recall specifically if the clerk that sold him the beer was waiting on a customer at the time he identified her to the officers. However, he did testify that it appeared a customer might have just finished a transaction and the clerk was "alone." The law enforcement officials proceeded to the sales counter and identified themselves to the clerk. One of the officers showed the clerk his badge and told her she had sold alcohol to a minor. [The decoy] was standing next to the officers at the time. The clerk "freaked out" a bit and said she was "sorry." The officers escorted the clerk and the decoy to the front door area and took a picture of them standing together.

(Findings of Fact, ¶ C.) According to the only witness—the decoy—the clerk was ten feet away and possibly preoccupied with another patron when he reentered the premises and "identified her to the officers." (*Ibid.*) This may be an identification, but

there is nothing in these findings to indicate it was face-to-face. Ten feet is a relatively substantial distance; it is certainly not close enough that "the peace officer directing the decoy" could be sure the clerk either knew or ought to have known she was being pointed out as the seller. (See *Chun*, *supra*, at p. 5.)

Nevertheless, the ALJ rejected appellants' rule 141(b)(5) defense:

> Respondents also contend that the Department failed to prove there was "strict adherence" with Rule 141, subsection (b) (5). They assert the clerk was not aware she was being identified because the identification was made to the officers[,] not the clerk, and there was no conversation between the decoy and the clerk. Further, they contend the photograph of the decoy and the seller was taken after the agents directed them to stand together. Presumably, the Respondents are contending this was too suggestive. These arguments ignore the dispositive facts surrounding the face-to-face identification. The decoy was approximately ten (10) feet away from the clerk when he identified her as the seller. When the officers advised the clerk of the sale to a minor she said she was "sorry." The clerk then emerged from behind the counter to have her photograph taken with the decoy. The decoy was holding the Coors Light beer she sold to him while they were standing next to one another. (State's Exhibit 5) There was no evidence the decoy "mis-identified" the selling clerk. The clerk never claimed she did not sell beer to the minor decoy. The clerk had ample opportunity to come "face-to-face" with the decoy. The clerk knew, or ought to have known, she was being identified as the seller. [Citations.]
>
> The Department complied with Rule 141 (b) (5).

(Determination of Issues III.) The ALJ's reasoning is too similar to the arguments rejected by the court of appeals in *Acapulco Restaurants*. It excuses the Department from strict compliance based on irrelevant facts—the clerk's apology and failure to object, the photograph, the lack of evidence of a misidentification. Phrased differently, it relies on the "reality of th[e] case" rather than "a rigid and literal" plain-language

interpretation of the rule—a position soundly rejected in *Acapulco Restaurants.* (*Acapulco Restaurants*, *supra*, at p. 578.)

As the court noted, rule 141(b)(5) "means what it says." (*Id.* at p. 581.) It is not enough that the clerk eventually had face-to-face contact with the decoy *after* the identification took place from ten feet away. According to the plain language of the rule, the *identification itself* must be face-to-face. That did not happen here.

ORDER

The decision of the Department is reversed.[2]

FRED HIESTAND, ACTING CHAIRMAN
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[2] 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.