

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

AB-9659

File: 20-433922 Reg: 16084307

7-ELEVEN, INC., JASWINDER KAUR SEKHON, and PUSHPINDER SINGH SEKHON,
dba 7-Eleven #2171-39013A
14502 Goldenwest Street,
Westminster, CA 92683,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: June 7, 2018
Los Angeles, CA

ISSUED JULY 16, 2018

Appearances: *Appellants:* Ralph Barat Saltsman and Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc., Jaswinder Kaur Sekhon, and Pushpinder Singh Sekhon, doing business as 7-Eleven #2171-39013A.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Jaswinder Kaur Sekhon, and Pushpinder Singh Sekhon, doing business as 7-Eleven #2171-39013A (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 10 days, all conditionally stayed, because their clerk sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated July 12, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 3, 2006. On June 13, 2016, the Department filed an accusation charging that appellants' clerk, Balwinder Singh (the clerk), sold an alcoholic beverage to 19-year-old Juan Carlos Ramirez on February 13, 2016. Although not noted in the accusation, Ramirez was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on May 2, 2017, documentary evidence was received and testimony concerning the sale was presented by Ramirez (the decoy) and by Agent Eric Silva of the Department of Alcoholic Beverage Control.

Testimony established that on the date of the operation, Agent Silva entered the licensed premises in a plainclothes capacity, and shortly thereafter the decoy entered. The decoy went straight to the alcoholic beverage cooler and selected a 24-ounce can of Bud Light beer, an alcoholic beverage. The decoy took the can of beer to the front sales area and waited behind a customer, who was being helped by the male clerk at the cash register. Agent Silva stood in line two feet behind and to the right of the decoy.

At the counter, the decoy set the Bud Light beer can on the counter. The clerk spoke in English and asked the decoy for his identification. The decoy handed his California driver's license to the clerk. The clerk took the identification and looked at it for a few seconds. The decoy's California driver's license has a vertical orientation, shows his correct date of birth, and includes a red stripe that reads "Age 21 in 2017." The clerk did not swipe or scan the identification on the register. The clerk handed the identification back to the decoy. The clerk then told the decoy the cost of the beer. The decoy gave money to the clerk, who then gave the decoy change. The clerk placed the

beer in a bag. The decoy then exited the store with the change and bagged can of Bud Light beer. There is no evidence the clerk asked the decoy his age. Agent Silva was inside the licensed premises during this entire time posing as a customer and witnessed these events with an unobstructed view. Agent Silva purchased a drink and remained in the store after the decoy exited.

Agent Silva approached the clerk, who was still behind the cash register. He identified himself as a police officer to the clerk and advised him of the violation. The clerk replied, "No, he's 21, I checked his ID." Both Agent Silva and the clerk spoke in English to each other. The clerk understood English. At some point in their conversation, the clerk stopped speaking English. Agent Silva saw another employee stocking shelves. Agent Silva approached the other employee, advised him of the violation, and asked if he would translate between himself and the clerk. The other employee translated for them between English and Punjabi. The clerk said he stopped speaking English because he was concerned Agent Silva would report him to immigration. Agent Silva advised that he would not report the clerk to immigration and immediately the clerk began speaking English again.

The decoy reentered the licensed premises with another agent and approached Agent Silva and the clerk, both of whom were standing at the east end of the counter, in an open customer area, near the chips and soda fountain. Agent Silva asked the decoy if the clerk was the person who sold him the beer. The decoy responded, "Yes." The decoy and the clerk were standing three feet apart and facing each other at the time of this identification. Agent Silva asked the decoy his age, to which the decoy replied, "19." A photo of the clerk and the decoy was taken after the face-to-face identification. In that

photo, the decoy held his identification and the 24-ounce can of Bud Light beer he purchased, and stood to the left of the clerk.

Agent Silva then asked the decoy for his California driver's license, which the decoy handed to Agent Silva. Agent Silva showed the identification to both the clerk and the other employee, who was standing with Agent Silva and the clerk. Agent Silva pointed out the bright red stripe on the decoy's identification, which stated he would be "Age 21 in 2017." The other employee replied, in front of the clerk, "He's not 21."

Additionally, appellants presented video evidence of the transaction at the hearing. The ALJ allowed the video to be shown. (RT at 39-40.) The Department, however, objected to admission of the video into evidence, arguing lack of foundation. (RT at p. 41.) After some discussion, the ALJ sustained the Department's objection and excluded the video from evidence. (RT at pp. 41-45.)

After the hearing, the Department issued a decision determining the violation charged was proved and no defense was established.

Appellants then filed this appeal contending the ALJ abused her discretion by excluding relevant video evidence, and thereby prejudiced appellants' defense.

DISCUSSION

Appellants argue that the events shown on the video were relevant to their rule 141(b)(2) defense because the video "showed how [the decoy] looked and behaved in the presence of the clerk." (App.Br., at p. 6; see also Code Regs., tit. 4, § 141(b)(2).) They contend the exclusion of the video prejudiced their defense.

Appellants direct this Board to the Government Code, which provides, in relevant part, that an administrative hearing "need not be conducted according to technical rules relating to evidence and witnesses," and that

[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Gov. Code, § 11513(c).)

Rather than seeking remand for consideration of the excluded evidence, appellants ask this Board to reverse. (App.Br., at p. 10.)

The Board is authorized to review a decision of the Department to determine "[w]hether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department." (Bus. & Prof. Code, § 23084; see also Cal. Const. art. XX, § 22 [providing remand as remedy in such cases].)

"Photographs and video recordings with imprinted data are writings as defined by the Evidence Code." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266 [172 Cal.Rptr.3d 637], citing Evid. Code, § 250.) "A videotape is the equivalent of a writing under the Evidence Code and thus must comply with the requirements of Evidence Code sections 1400 and 1401." (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 991 [70 Cal.Rptr.3d 519]; *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440, fn. 5 [24 Cal.Rptr.2d 528].) "Authentication of a writing is required before it may be received in evidence." (Evid. Code, § 1401(a).) "Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the

evidence claims it is or (b) the establishment of such facts by any other means provided by law." (Evid. Code, § 1400.)

As the California Supreme Court recently held,

A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. [Citations.] This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. [Citations.] It may be supplied by other witness testimony, circumstantial evidence, content and location. [Citations.]

(*Goldsmith, supra*, at pp. 267-268.) Even within the realm of criminal law, "[i]t is well settled that the testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is a legally sufficient foundation for its admission into evidence." (*People v. Bowley* (1963) 59 Cal.2d 855, 859 [31 Cal.Rptr. 471].)

In this case, the testimony of the decoy was sufficient to authenticate the video recording in question. Immediately after showing the video, counsel for appellants questioned the decoy:

[BY MS. HOOPER:] Mr. Ramirez, did you recognize that video?

[THE DECOY:] Yes.

Q. And what was depicted in that video?

A. Myself buying the beer.

Q. Okay. And you came in, looked at the clerk, and nodded your head, then walked towards the refrigerator compartment, I assume wasn't in the video, the refrigerator compartment; is that accurate?

A. Yes.

Q. Okay. And then you came back and stood in line—

A. Yes.

(RT at p. 39.) Department counsel then objected on foundational grounds, and counsel for appellants responded, "I believe the witness authenticated the video as him—depicting him during the incident at issue." (RT at p. 41.) Department counsel, however, argued the decoy's testimony was insufficient and additional authentication was required:

Your Honor, while the witness has identified himself in the video, there has been no foundation as to where this video came from, who is it prepared by, was the equipment used to record such video was working at the time that—or working correctly, or if it's even the day in question that we're talking about.

(RT at p. 41.) The Department insisted there was "no way that this witness can lay down the foundation for this video" because he "did not prepare this video for the court today, nor does he know how the system works or make this copy." (RT at p. 42.) Counsel for appellants then questioned the decoy again about the video recording:

[BY MS. HOOPER:] Mr. Ramirez, you got a chance to look at the video on normal speed; correct?

[THE DECOY:] Yes.

Q. And does it accurately depict you in the video and what happened on that day?

A. Kind of hard to see. There was a guy in the way, but I can tell—I can see from the video that I walked up and the cashier was there, but I—from seeing it I wouldn't be able to say I saw what happened from the video.

Q. I'm not so much concerned about you seeing every interaction between you and the clerk. I'm concerned—what I'm asking is if it is an accurate depiction of you in general coming into the 7-Eleven and purchasing the Bud, the Budweiser?

A. Yes.

(RT at pp. 44-45.)

Pursuant to case law addressing the treatment of videorecordings under the Evidence Code, the decoy's testimony—offered twice—was sufficient to authenticate the videorecording. (See *Goldsmith, supra*, at pp. 267-268; *Bowley, supra*, at p. 859.) Nevertheless, the ALJ excluded it for lack of foundation. (RT at p. 45.) This was error.

However, a finding of error does not end our inquiry. As the Department points out, in order for this Board to grant relief, appellants must show prejudice:

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.

(Cal. Const., art. VI, § 13.) "Under this standard, the appellant bears the burden to show it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred." (*Citizens for Open Gov. v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 [250 Cal.Rptr.3d 459]; see also *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)

In this case, appellants claim the exclusion of the video "prejudiced [them] in [their] ability to present material evidence for their defense" under rule 141(b)(2). (App.Br., at p. 6; see also Code Regs., tit. 4, § 141(b)(2) [requiring a minor decoy "display the appearance which could generally be expected of a person under 21 years of age"].) They argue "[t]he appearance of the decoy at the time of the sale, including his behavior and demeanor, was relevant" and "necessary to evaluate the merit [of] Appellants' defense." (App.Br., at p. 8.)

Appellants, however, do not explain how admission of the videorecording could have resulted in a more favorable result. Multiple still photographs were admitted into

evidence showing the decoy's appearance on the day of the operation, including one photograph with the selling clerk. (Exhs. 2, 3, 4A, 4B.) Moreover, the decoy testified, giving the ALJ firsthand knowledge of his behavior and demeanor. (See generally RT.)

Based on this evidence, the ALJ reached the following conclusions of law:

Respondents argued decoy Ramirez did not have the appearance generally expected of an individual under the age of 21 because of certain factors, including: Respondents' counsel's opinion decoy Ramirez is a "very well-developed young man," with a confident demeanor, and straight posture like a police officer or a military person. Other factors argued included decoy Ramirez' success in purchasing alcoholic beverages at three of the 10 establishments he visited on February 13, 2016, that he participates in wrestling and works out every other day, his Police Explorer experience, and his acknowledgement that the Police Explorer Program gave him confidence, discipline and "taught him to be a responsible citizen."

This rule 141(b)(2) argument is rejected. The Respondents presented no evidence that any of these factors resulted in decoy Ramirez appearing 21 or older to clerk Singh. There was nothing about decoy Ramirez' demeanor, posture, wrestling, work-out regimen, alcohol purchase success rate, or his experience as a Police Explorer which made him appear older than his actual age. Decoy Ramirez looks his age; he looks youthful like a teenager. In other words, decoy Ramirez had the appearance generally expected of a person under the age of 21.

(Conclusions of Law, ¶ 6.)

Appellants do not explain how the decoy's appearance in the videorecording would have differed materially from his appearance in the photographs or at the hearing. While they allege the exclusion of the videorecording prejudiced their defense, they do not discuss how the contents of the videorecording, if admitted, would have led the ALJ to reach a more favorable conclusion regarding their rule 141(b)(2) defense. Appellants have failed to show prejudice, and we therefore offer no relief.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, 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.