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

AB-9772
File: 21-535454 Reg: 18086996

Pomona Wine Cellar, Inc.,
dba Pomona Wine Cellar #2
1146 West Mission Boulevard,
Pomona, CA 91766-1342,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 25, 2019

Los Angeles, CA

ISSUED AUGUST 12, 2019

Appearances: *Appellant:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as counsel for Pomona Wine Cellar, Inc.,

Respondent: Joseph J. Scoleri III, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Pomona Wine Cellar, Inc., doing business as Pomona Wine Cellar #2 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 15 days because its clerk sold an alcoholic beverage to a minor in a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's type 21 off-sale general license was issued on August 26, 2013. On May 29, 2018, the Department filed an accusation charging that appellant's clerk,

[1]The decision of the Department, dated November 21, 2018, is set forth in the appendix.

Fernando Arias Sanchez (the clerk), sold an alcoholic beverage to 18-year-old Jesus Morales (the minor) on March 23, 2018.

At the administrative hearing held on August 29, 2018, documentary evidence was received, and testimony concerning the sale was presented by the minor and Department Agent Esmerelda Reynoso. Appellant's owner, Nazih Khaddour (the owner), testified on behalf of appellant.

Testimony established that, on March 23, 2018, the minor went to the licensed premises and purchased an 18-pack of Coors beer. The clerk did not ask to see any identification, nor did he inquire as to the minor's age. The minor then left the store, got into a friend's truck, and drove away. Agent Reynoso and her partners were outside in the parking lot. When the vehicle drove away, they followed and stopped it.

Agent Reynoso approached the truck and noticed that the minor was sitting in the middle of the front seat (between the driver and another passenger) with the beer next to him. Agent Reynoso asked the minor how old he was and he told her that he was 18. The minor also told Agent Reynoso that he did not have any identification with him. The agents seized the beer and cited him.

At the hearing, the owner testified that the clerk had been employed at the licensed premises for five years. For the three years before that, the clerk worked for him at another location. Although the clerk did not testify, Khaddour stated that the minor showed the clerk a Mexican identification in the past. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed a timely appeal contending that the ALJ improperly excluded relevant evidence to establish an affirmative defense under section 25660, that the clerk acted in reliance upon a fake identification.

DISCUSSION

Appellant contends that the ALJ prevented it from "eliciting highly probative testimony" regarding whether the minor "possessed a foreign ID, whether he was born in California, or whether he had ever purchased beer before." (AOB at p. 2.) Appellant contends that this testimony would have been relevant to its asserted defense under section 25660 (reliance on a fake ID). (*Id*. at p. 6.)

The Board is authorized to review a decision of the Department to determine "[w]hether there is relevant evidence ... 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].)

Generally, evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Relevance cannot be established by speculative inferences. (See, e.g., *People v. Babbitt* (1988) 45 Cal.3d 660, 681 [248 Cal. Rptr. 69]; *People v. Brady* (2006) 129 Cal.App.4th 1314, 1337-1338 [29 Cal.Rptr.3d 286].)

Relevant evidence may nonetheless be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Stated another way, relevant evidence may be excluded "where, though material, it would have been merely cumulative or corroborative of evidence properly in the record." (9 Witkin, Cal.

Procedure (5th ed. 2008) Appeal, § 431, at pp 486-487, citing *Silvey v. Harm* (1932) 120 Cal.App. 561 [8 P.2d 570] [excluding cross-examination regarding witness' sobriety, while error, was not prejudicial, since witness' testimony was corroborated by other witnesses whose sobriety was unquestioned].)

The Government Code substantially relaxes the rules of evidence for purposes of administrative proceedings:

> The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any 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).) Nevertheless, the trier of fact in an administrative hearing "is vested with wide discretion in deciding relevancy, and its determination will not be disturbed on appeal unless there is a clear showing of abuse." (*McCoy v. Bd. of Retirement* (1986) 183 Cal.App.3d 1044, 1054 [228 Cal.Rptr. 567].)

Finally, the California Constitution provides:

> 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, emphasis added.) Thus "even where a trial court improperly excludes evidence, the error does not require reversal of the judgment unless such error resulted in a miscarriage of justice." (*Poniktera v. Seiler* (2010) 181 Cal.App.4th 121, 142 [104 Cal.Rptr.3d 291].) The burden falls on the complaining party "to demonstrate it is reasonably probable a more favorable result would have been

reached absent the error." (*Ibid.*, citing *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431–1432 [77 Cal.Rptr.2d 574]; see also *Estate of Thottham* (2008) 165 Cal.App.4th 1331, 1341-1342 [81 Cal.Rptr.3d 856] ["Error in excluding evidence is a ground for reversing a judgment only if the error resulted in a miscarriage of justice, and that a different result would have been probable if the error had not occurred."].)

First, appellant contends that the ALJ wrongfully sustained a relevant objection to its question whether the minor was born in California. (AOB at p. 6.) Appellant asserts that this question is a "necessary predicate question to determining whether Mr. Morales would have had a Mexican ID" and "directly relevant to Appellant's asserted defense under section 26550." (*Ibid*.) The ALJ stated "[we] are not going to get into anything that smacks of immigration ... and you don't have to be born here to have a [California] license, and many people who are born here do not have licenses; so there is really no other purpose that I can see for that question." (RT at pp. 34:23-35:3.)

The Board agrees with the ALJ's reasoning. Appellant has not articulated why being born in California would make it more or less likely that the minor would have a fake identification from Mexico. Further, the Board fails to see how the minor's birthplace has any bearing on whether he used a fake identification at the licensed premises on or before March 23, 2018. Surely, appellant is not suggesting that national origin is a prerequisite to obtaining a false identification. On these grounds, appellant's argument is rejected, and the ALJ's ruling as to the minor's birthplace is affirmed.

Next, appellant contends the ALJ erred in sustaining a relevancy objection to its question whether the minor "had ever purchased beer before." (AOB at p. 6.) Appellant contends this would establish "a necessary element of any reliance defense."

(*Ibid*.) Again, appellant cannot show that the ALJ abused his discretion in excluding its question.

The Board fails to see how the minor's entire history of prior beer purchases has any tendency in reason to establish that appellant's clerk reasonably relied on a false identification when he made the sale to the minor on March 23, 2018. Appellant is correct when stating that a clerk's reasonable reliance on an identification is critical to a defense under section 25660. However, appellant's question does not elicit any information regarding any use of an identification, interactions with the clerk in question, or even the purchase of alcohol at the licensed premises. Any combination of these subject areas might have made the question relevant. Yet, as asked, the question was not relevant to the issue of a section 25660 defense.

Finally, appellant argues that the ALJ wrongfully excluded its question as to whether the minor has "an identification from any other country." (AOB at p. 6.) Although appellant did not articulate the relevance of this question, the Board assumes it is because having a fake identification from Mexico could corroborate the clerk's statement to appellant's owner that, on a prior occasion, the clerk "saw [the minor's] Mexican ID, and he was over 21 years old." (RT at p. 57:2-3.) Such a question would be relevant inasmuch as having an identification from another country would make it more likely that the minor showed the clerk a Mexican identification on a prior occasion.

In its Reply Brief, the Department states that the question was not relevant because, at the point in the hearing when it was asked, there was nothing in the record regarding the false Mexican identification. (RRB at p. 7.) However, that defect, if any, would not be a relevancy issue, but rather, an objection for lack of foundation or facts in

evidence. The ALJ seemed to agree, as he told appellant's attorney that, if she wanted, she could "call the clerk to establish that."

The Board rejects the Department's argument that the question was not relevant just because it had not been established in the hearing up to that point. Appellant undoubtedly knew that the clerk told the owner that he had seen the minor's Mexican identification at a prior date. Although not the best approach, appellant attempted to establish the false identification through the minor instead of its own clerk. There is no requirement that appellant establish a foundation through a specific witness. Besides, foundation was not the objection to the question, relevancy was. Since the question was relevant, it should not have been excluded.

Although the Board finds that the ALJ erred in excluding a relevant question, appellant must still show that the error resulted in a miscarriage of justice, and that a "different result would have been probable if the error had not occurred." (*Estate of Thottham*, *supra*.) Stated another way, appellant must show that, if the ALJ allowed the question regarding the identification, appellant would have likely established a defense under section 25660. Here, appellant has failed to meet its burden and the decision must stand.[2]

Section 25660 provides:

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[2]Likewise, the Board rejects appellant's arguments regarding the use of the minor's answers to impeach his credibility. Although any of its questions could conceivably yield material used to impeach the minor, appellant has not offered any evidence of what that material is (or could be) and how it would be used to impeach him. Without as much, appellant cannot show how the decision would have been any different.

Further, allowing questions based upon the mere possibility that the answers might yield impeachable material would make any question relevant. This is not the standard.

> (a) Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, an identification card issued to a member of the Armed Forces that contains the name, date of birth, description, and picture of the person, or a valid passport issued by the United States or by a foreign government.
>
> [¶ . . . ¶]
>
> (c) 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.

Section 25660 applies to identifications actually issued by government agencies as well as fake identifications purporting to be issued by a government agency. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1444-45 [13 Cal.Rptr.3d 826, 837] *(Masani)*.) However, section 25660 must be narrowly construed. (*Lacabanne Properties, Inc. v. Alcoholic Beverage etc. Appeals Board* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*).)

The burden of establishing a defense under section 25660 is on the party asserting the defense. In *Masani*, the court said:

> The licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted. A brilliant forgery should not ipso facto lead to licensee sanctions. In other words, fake government ID's cannot be categorically excluded from the purview of section 25660. The real issue when a seemingly bona fide ID is presented is the same as when actual governmental ID's are presented: reasonable reliance that includes careful scrutiny by the licensee.

(*Masani*, *supra* at p. 1445.)

The case law regarding section 25660 makes clear that to provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne*, *supra*; *5501 Hollywood v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (*5501 Hollywood*).) A licensee, or a licensee's agent or employee, must exercise the caution that would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne*, *supra*; *Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, supra*.) Reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. *(5501 Hollywood, supra*, at pp. 753-754.)

With regards to appellant's section 25660 defense, the ALJ found:

> 7. In the present case, the Respondent argued that Sanchez's statement to Nazih Khaddour that Morales had presented a Mexican [ID] in the past was sufficient to establish a[] defense under section 25660. This argument is rejected.
>
> First, Sanchez's statement is hearsay and is unsupported by any other testimony or evidence. Accordingly, it cannot serve as the basis for a finding under Government Code section 11513(d). Second, the record is devoid of any evidence about the nature of the ID (e.g., whether it contained any physical descriptors, whether it contained a photo of the bearer, whether it contained the bearer's date of birth), making it impossible to determine if the alleged ID complied with the provisions of section 25660. Third, there is no evidence that Morales' appearance matched the description on the ID. In short, the Respondent has failed to meet its burden of proof.

(Conclusions of Law, ¶ 7.)

Here, even if the ALJ allowed appellant's question, and assuming *arguendo* that the minor admitted he had a false Mexican identification, appellant still has not established a defense under section 25660, for all the reasons the ALJ articulated in

Conclusions of Law, paragraph 7. Additionally, appellant has offered *no evidence* regarding its clerk's inspection of the identification, and thus, cannot establish that the inspection was reasonable. For these reasons, appellant has not shown that the result would have likely been different had the ALJ admitted its question, and the decision must stand.

ORDER

The decision of the Department is affirmed.[3]

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, 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.