

ISSUED JANUARY 12, 1999

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

|                          |   |                          |
|--------------------------|---|--------------------------|
| VIPAN E. BHANOT, PARVEEN | ) | AB-6993                  |
| SHUKLA and RENU SHUKLA   | ) |                          |
| dba Liquor & Food        | ) | File: 21-223027          |
| 390 East Gobbi Street    | ) | Reg: 97040076            |
| Ukiah, California 95482, | ) |                          |
| Appellants/Licensees,    | ) | Administrative Law Judge |
|                          | ) | at the Dept. Hearing:    |
| v.                       | ) | Michael B. Dorais        |
|                          | ) |                          |
|                          | ) | Date and Place of the    |
| DEPARTMENT OF ALCOHOLIC  | ) | Appeals Board Hearing:   |
| BEVERAGE CONTROL,        | ) | September 2, 1998        |
| Respondent.              | ) | San Francisco, CA        |
|                          | ) |                          |

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Vipan E. Bhanot, Parveen Shukla and Renu Shukla, doing business as Liquor & Food (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which revoked their off-sale general license for their clerk having sold an alcoholic beverage (beer) to a minor, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

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<sup>1</sup>The decision of the Department, dated November 26, 1997, is set forth in the appendix.

Appearances on appeal include appellants Vipin E. Bhanot, Parveen Shukla and Renu Shukla, appearing through their counsel, John A. Hinman and Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

#### FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on November 9, 1988. An accusation was filed against appellants on May 30, 1997, charging that, on January 24, 1997, appellants' clerk, Ashok Mohan, sold an alcoholic beverage (beer) to Ryan Cooley, a minor then approximately 19 years of age, in violation of Business and Professions Code §25658, subdivision (a). The accusation also alleged prior violations of §25658, subdivision (a), on January 24, 1997, and June 15, 1995.<sup>2</sup>

Although the Department's decision does not comment expressly upon the fact that the sale-to-minor violation was appellants' third within a 36-month period, Department counsel pointed out in his closing argument at the administrative hearing that this was not only a third strike case, it was a third violation by the same clerk, and the order of revocation strongly implies that both the Administrative Law Judge (ALJ) and the Department viewed it as a third strike

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<sup>2</sup> These dates are the dates the accusations were filed. The first violation occurred on March 31, 1995, and was resolved via a decision entered pursuant to stipulation and waiver on July 13, 1995 (Registration No. 95033050). The second violation consisted of sales to two minors on August 24, 1996, and was also resolved via a decision entered pursuant to stipulation and waiver on February 27, 1997 (Registration No. 97038794).

case. Appellants have not raised the question of whether revocation is an appropriate penalty, although their brief does mention the fact that this is a third strike case. Instead, they have asserted other grounds in support of their appeal, asserting that the decoy operation violated Department Rule 141(b)(4) (4 Cal.Code Regs. §141(b)(4)). That rule requires that a decoy shall answer truthfully any questions about his or her age.

An administrative hearing was held on October 7, 1997. Four witnesses testified at the hearing: Sergeant John McCutcheon, a police officer who was directing a decoy program being conducted by the Ukiah Police Department; Ryan Cooley, a decoy, who was 19 years of age at the time of the sale; Ashok Mohan, the clerk; and Parveen Shukla, one of the licensees.

McCutcheon testified on direct examination that he watched Cooley enter the store,<sup>3</sup> go to the cold cases and return to the counter with what appeared to be a six-pack of Budweiser beer, the product he had been instructed to attempt to purchase. McCutcheon testified further that he was able to hear the conversation between Cooley and the clerk, by means of a remote transmitter concealed on Cooley's upper body.

According to McCutcheon, Cooley was asked if he was 21, and replied "no" [RT 11-12]. Cooley spoke only this one word [RT 12]. Cooley was carrying his valid California driver's license, but was not asked for identification, and did not

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<sup>3</sup> McCutcheon testified that in excess of 90 percent of the front of the store is glass-paneled, exposing the entire interior of the store to view [RT 10].

display any. The clerk then rang up the purchase and Cooley left the store with change and the beer, which was in a sack. The sack contained a six-pack of Budweiser beer [RT 12-13].

McCutcheon testified that when he then entered the store and approached the counter, and before he could say anything, the clerk, who knew him from prior decoy operations, said "oh, shit" [RT 14]. After McCutcheon identified himself as a police officer, and retrieved the \$5 bill with which the purchase was made, Cooley was brought back into the store. McCutcheon explained that a sale to a minor had just taken place, to which the clerk responded "'I knew I should have asked him,'" stating that he should have asked for identification, and then asserting "But I did ask him if he was 21" [RT 15]. According to McCutcheon, the clerk nodded his head when McCutcheon told him he, McCutcheon, had heard Cooley reply "no" [RT 15].

On cross-examination, McCutcheon acknowledged that Cooley was 6'2" and weighed 210 at the time of the transaction. He reconfirmed his earlier testimony regarding his ability to hear the conversation that took place between the decoy and the clerk [RT 29], but admitted that, although the receiving device had recording capability, it was not their practice at that time to use the recording feature [RT 28-29]. He said he was able to hear the clerk's question and Cooley's response clearly.

McCutcheon was asked, variously, whether the clerk might have been confused, whether he was familiar with an ABC program to train licensees

concerning alcoholic beverage laws, whether he was familiar with the criteria used by the Department to help licensees identify minors, and a number of questions directed at Cooley's appearance, such as whether he had pimples or acne, whether he shaved, the pitch of his voice, and other, similar questions.<sup>4</sup>

Officer McCutcheon was recalled after Ryan Cooley's testimony, which will be summarized next. He stated that he perceived the clerk's nodding of his head to be an affirmation that the decoy had replied in the negative as to whether he was 21, but he conceded the clerk had made no verbal statement to that effect.

Ryan Cooley, the decoy, testified that he was instructed to carry his California driver's license with him, produce it upon request, and answer all questions truthfully. If asked his age, he was told to tell the truth. He described what he did when he purchased the beer, but could not recall whether he was asked any questions by the clerk. He did recall that he did not have occasion to produce his identification.

On cross-examination, Cooley described himself as being 6'2" and weighing 205 pounds, with a little more acne at the time of the sale than those pimples now apparent on his chin and near his eye. He confirmed his direct testimony that he did not recall any conversation with the clerk, and could not recall whether the

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<sup>4</sup> McCutcheon also described a decoy operation which he referred to as a "shoulder tap", in which the decoy stands outside the establishment and attempts to persuade customers to make purchases on his or her behalf. While such an operation was being conducted in front of appellants' store, a patron known to the police on the basis of previous contacts not to be 21 was observed making a purchase from the same clerk [RT 46].

clerk might have said something he did not understand. He disclaimed any memory one way or the other whether he was asked his age. He acknowledged that he had been asked his age at several of the ten or more places where he attempted to make a purchase, and, when he answered truthfully in those instances, as he had been instructed, there was no sale [RT 56]. Nevertheless, he did not recall, with respect to the instant sale, any feeling of being surprised at being able to buy the beer despite his supposedly having disclosed he was not 21 [RT 56]. Although Cooley had read the police report, in which he was said to have been asked about his age, his recollection was not refreshed [RT 55]. He did recall, however, that at a briefing later on the night in question, there were remarks about his having been asked his age, replying that he was under 21, and a sale made anyway, but he could not recall in which store that might have occurred.

Ashok "Andy" Mohan, the clerk, testified that he had an earlier citation for a sale to a minor in which he was fined \$500. "It was the same deal; I got caught in the sting" [RT 86]. In addition, he described an instance that his lawyer "took care of"<sup>5</sup> where, he testified, he was shown identification two days earlier, but not the day he made the sale. As it turned out, the customer on that occasion was a minor, and the Ukiah police happened to be outside the store conducting a "shoulder tap" decoy operation.

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<sup>5</sup> Mohan explained, during cross-examination, that he had pleaded no contest, and again paid a \$500 fine [RT 106]. He was fired after this violation, and rehired four weeks later.

Mohan also described training he received at a Department class, and the things he was taught to look for in identifying a minor. He said that when he faced Cooley, Cooley was calm, made direct eye contact with him, and did not display the usual nervousness shown by younger buyers. After observing Cooley's body weight, and the fact that Cooley was clean cut and well-dressed, Mohan concluded that Cooley was old enough to buy; nevertheless, Mohan asked "are you 21?" [RT 92], and, he claimed, got no response. As to what he did next, he explained [RT 92]:

"I completed the sale as I already predetermined he was 21, I was just doing that as a buffer from the class that I learned, that they taught us in class. And I'd already concluded that he was old enough by the way he looked and he acted, so I just completed the sale."

According to Mohan, the police then came in the store and told him he had just sold to a minor. Mohan testified that when he told the officer that he had asked Cooley if he was 21, Cooley stated that "he mumbled something, but I didn't hear him" [RT 93].

At that point, according to Mohan, the police officer told him he should have asked for identification. After it appeared to him that the police did not believe that he asked Cooley if he was 21 and got no response, he shook his head and looked down, apparently because he then knew he could not convince them otherwise. He initially denied hearing the police officers making the statement that they heard the conversation with the decoy [RT 95], but later admitted having been told by the officers that they heard the decoy answer "no" [RT 101-102]. Mohan also

admitted making the comments attributed to him when the officers first entered the store.<sup>6</sup>

On cross-examination, Mohan conceded that although he had been taught to ask if the customer was old enough to buy alcohol, and that a decoy would have to answer truthfully, he went ahead with the sale despite having received no response from Cooley. He did this, he explained, because “Well, by looking at Mr. Cooley, I had already determined this guy’s a big guy here” [RT 98].

On re-direct examination, Mohan concluded his testimony by describing the store’s policy with regard to asking for identification [RT 109-110]:

“[I]f you saw this guy and you actually looked at him and you knew he was not 21, you’d ask him for his ID, whomever the customer may be. ... That if somebody came into the store, brought up some beer to the counter, and that person does not look 21 or older or of age to buy the alcohol, you would ask him for his ID.”<sup>7</sup>

Appellant Parveen Shukla, a co-licensee, also testified. He said that, after Mohan’s two previous sales to minors, he and Mohan attended a training class at which ABC and Lake County representatives explained ways of avoiding sales to minors [RT 115]:

“Well, first you look his appearance, how he look, how he enter the store or how he come to the counter. Then make eye contact and take your judgment and look at his whole reaction, how customer doing it or how decoy doing it. And then you ask for ID if you are not sure or whatever you

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<sup>6</sup> See text, supra, page 4.

<sup>7</sup> It would appear obvious that such a policy, at least as described by Mohan, is fraught with risk, given the fact that he has been cited three different times for selling to a minor.



supposed to do; if you're not sure, just ask ID. And if it's decoy program or something related to any department, police department, ABC, they said they have to tell the truth."

Shukla also explained that he rehired Mohan after other employees hired in the interim proved to be unreliable, and Shukla and his wife were not able to run their three or four stores without his help. Shukla said he stressed to Mohan the importance of being more careful, and, that if Mohan was unsure, he should ask the person his age [RT 118, 125].

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and ordered appellants' license revoked. In its decision, the Department rejected appellants' contentions that Rule 141(b)(2) was violated by the Department's use of a decoy having the appearance of a person over 21, and Rule 141(b)(4) by the minor's failure to respond to the clerk's question about his age. The ALJ made specific findings that, despite his height and weight, the decoy presented the appearance of a person under the age of 21 years, and that the testimony of Sergeant McCutcheon, that he heard the minor answer "no" to Mohan's question, was more credible than Mohan's denial that there was any response.

Appellants thereafter filed a timely notice of appeal, raising a single, but multi-faceted issue, claiming that a defense was established under Rule 141(b)(4) because the admissible evidence showed that the decoy failed to answer truthfully, or at all, the clerk's question about his age; therefore, appellants contend, the accusation should have been dismissed. The decision, say appellants, rests on

inadmissible evidence, in that the testimony of the police officer that the decoy answered the clerk's question "no" was hearsay, insufficient to support a finding.

#### DISCUSSION

The issue which appellants raise has several facets. First, was the police officer's testimony, that he heard the minor answer "no" to the question "Are you 21", inadmissible as hearsay? Alternatively, if hearsay, and inadmissible, does the absence of any evidence of a reply by the decoy to the clerk's question nevertheless mandate dismissal? Or, must appellants demonstrate an affirmatively false response to the question about age, rather than a mere non-response, before the Rule 141(b)(4) defense becomes viable?

Appellants assert that the ALJ missed the point when he weighed police officer McCutcheon's testimony against that of the clerk, arguing that the issue was not credibility, but admissibility. That is, even though McCutcheon may have heard the minor say "no," the minor's statement was hearsay.

A hearsay statement is an out-of-court statement offered to prove the truth of the content of the statement. In this case, Cooley's answer would be hearsay only if it were being offered to prove he was not 21. That is not this case. That Cooley was not 21 was shown by other evidence - his own testimony [RT 59]. The answer was offered simply to show that appellants' clerk was on notice that he was talking to someone who said he was not 21. Confronted with such information, the clerk was clearly placed on notice that a sale to that person might

well be a sale to a minor. Without further investigation, he accepted that risk at his peril.

The fact that the police officer only heard the answer as a result of its having been transmitted via a radio transmitter and heard over a receiver, is irrelevant. The issue is whether the word was spoken.

In a letter brief filed following the Appeals Board hearing, counsel for appellants has called to the Board's attention a statement from a Department publication entitled "Decoy Program Guidelines" which is furnished to law enforcement officers to assist them in the operation of a decoy enforcement program. In the section entitled "Instructions to Decoy," the following statement appears:

"Under no circumstances may the decoy lie to induce a sale. A decoy may not remain silent when asked questions about his or her age. A decoy must answer truthfully any questions about his or her age."

Appellants argue that the decoy's alleged failure to respond to the clerk's question about his age should be equated with an affirmatively false answer. They stress the requirement of Rule 141(b)(4) that "a decoy shall answer truthfully any questions about his age," placing equal emphasis upon the word "answer" as upon the word "truthfully." Thus, as appellants read the rule, a failure to answer entitles them to a defense just as much as an affirmatively false answer would. Were the facts of the case as appellant casts them, we would be compelled to agree with them. The recent court of appeal decision in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79

Cal.Rptr.2d 126], has made it clear that Rule 141 must be complied with strictly, and the Department, in documents cited in appellants' supplemental brief, has acknowledged the import of the court of appeals decision. Since the rule requires an answer to a question about age, the decoy may not remain silent.

That is not this case, however. The ALJ has found that the decoy answered, based upon the police officer's testimony. This finding, we think, controls the outcome of this case. We must accept the ALJ's findings that the decoy did answer the question even if the decoy himself could not recall whether he had or had not.

Much of the testimony of appellants' witnesses was directed as much as at how they had learned to spot decoys as at how to avoid sales to minors generally. It may well be true that asking the prospective buyer if he or she is 21 will ferret out a decoy, who must answer truthfully when asked. For any other minor willing to lie in order to make a purchase, this technique is of little value. Only if the clerk or licensee is prepared to follow up with a demand for identification can he or she be assured the buyer is of legal age.

Since it is possible that the person of indeterminate age attempting to purchase an alcoholic beverage will be a minor, any seller who interprets a failure to reply to a question about age as an affirmative statement that the prospective customer is 21 years of age or older is acting in a careless manner. The Rule 141 defense affords a seller only limited protection, since the rule applies only to decoy operations.

Although appellants made an issue at the administrative hearing of the decoy's size and appearance, they have not raised that issue in their appeal. Without any photographs of the decoy - and both sides can be faulted for this, since either is capable of generating a Polaroid photo of the minor when, or just before or after, he testifies at the administrative hearing - the Board is not in any position to question the ALJ's determination that the decoy presented the appearance which could generally be expected of a person under 21 years of age.

We note, however, that although appellants have been afforded the opportunity, following the decision in Acapulco Restaurants, Inc., *supra*, to file a supplemental brief addressing any Rule 141 issues they feel appropriate in light of that decision, they have limited their additional arguments to the issue involving the requirement of an affirmative response to a question about age, and have not questioned whether the minor decoy made the requisite identification of the seller mandated by Rule 141(b)(5). Ordinarily, we would defer to the judgment of counsel as to whether other questions might have been raised. The temptation to do so in this case is great, especially since we think there is testimony relevant to the identification process from which the Department might possibly have drawn an inference that the face to face identification required by the rule had taken place.

Although Ryan Cooley, the decoy, was brought back into the store after the sale took place, and was present during the police officer's discussion with the clerk, Department counsel did not ask him whether he identified the clerk. On

cross-examination, appellants' counsel (who are also appellants' counsel on appeal) asked him the following questions, and got these responses [RT 50, 57-58]:

Q. Once you exited the store, what happened?

A. Sergeant McCutcheon and Corporal Breitchamp came across the street and I handed them the bag and they went inside the store. ... Shortly after they went into the store they waved me in, and I went inside.

Q. You went inside, and did you see the clerk that had sold you the beer?

A. Yes.

Q. Did you hear him deny selling you the beer?

A. No.

...

Q. You -- after you bought the beer, you walked out of the store, right?

A. Yes.

Q. -- right? And then they signaled to you to come back in?

A. Yes.

Q. And you do that to make a positive identification for the police officers who the clerk was that sold you the beer, right?

A. Yes.

Q. Okay. And when you did that, didn't the clerk explain to the police officers then, 'but I asked him his age and he didn't say anything,' and then you said something like, 'Well, the clerk said something, but I couldn't make out what he said.'

A. I don't recall. I remember going back inside and showing my ID card so they could make a positive ID that I was under 21, and then I remember exiting the building."

Q. And you had no conversation when you reentered the store.

A. Not that I remember.”

In addition, the clerk, Ashok Mohan, testified [RT 93]:

Q. Did you recognize the police officers as police officers?

A. Yeah.

...

Q. Okay.

A. So they came into the store. They explained to me I just sold to a minor. At that point I told the police officer -- I said, “I asked him if he was 21 or not, and he did not give me an answer”” And his answer to the police officer was --

Q. “His” meaning who?

A. The decoy’s. The decoys words were that “He mumbled something, but I didn’t hear him.” Then they cited me and that was it.”

Finally, the police officer, Sergeant John McCutcheon, testified [RT 14]:

Q. All right. Now at some point did Mr. Cooley come back in?

A. Yes, we brought Mr. Cooley back in?

Q. And what happened after he came back in?

A. We brought him in, and I explained that we were there because he had just sold alcohol to a minor. And he made a spontaneous statement to me. He said, “I knew I should have asked him.”

While there is no explicit statement that the minor identified the clerk as the seller, the context certainly suggests that all of the parties to the interchange all knew who the others were, and that it had been made clear to the police officer who made the sale.

Nevertheless, in deference to the importance attached by the court of appeal in Acapulco Restaurants, Inc., *supra*, to the issue of compliance with Rule 141(b)(5), and because we believe it is the Department's function in the first instance to determine whether an inference is to be drawn, we remand this case to the Department so that it can make a determination whether there was such compliance with the rule.

#### ORDER

The decision of the Department with respect to the contention that the decoy did not comply with the requirement of Rule 141(b)(2) that he answer truthfully any question to him about age is affirmed; the case is remanded to the Department for it to determine whether there was compliance with Rule 141(b)(5) in accordance with the teachings of Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board.<sup>8</sup>

RAY T. BLAIR, JR., CHAIRMAN  
JOHN B. TSU, MEMBER  
BEN DAVIDIAN, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>8</sup> This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of its filing, as provided by §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, in accordance with Business and Professions Code §23090 et seq.