

ISSUED JANUARY 9, 2001

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

| | | |
|--------------------------------|---|--------------------------|
| THE SOUTHLAND CORPORATION |) | AB-7462 |
| and MARIA S. and SURINDER S. |) | |
| UPPAL |) | File: 20-320386 |
| dba 7-Eleven Store 2231 14137D |) | Reg: 99045746 |
| 430 Washington Street |) | |
| Petaluma, CA 94952, |) | Administrative Law Judge |
| Appellants/Licensees, |) | at the Dept. Hearing: |
| |) | Jeevan S. Ahuja |
| v. |) | |
| |) | Date and Place of the |
| |) | Appeals Board Hearing: |
| DEPARTMENT OF ALCOHOLIC |) | September 21, 2000 |
| BEVERAGE CONTROL, |) | San Francisco, CA |
| Respondent. |) | |
| _____ |) | |

The Southland Corporation and Marie S. and Surinder S. Uppal, doing business as 7-Eleven (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 20 days for their clerk having sold an alcoholic beverage to a 16-year-old minor, contrary to the universal and generic public welfare and morals provisions of the California

¹The decision of the Department, dated July 22, 1999, is set forth in the appendix.

Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants The Southland Corporation and Marie S. and Surinder S. Uppal, appearing through their counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 5, 1996. On February 24, 1999, the Department instituted an accusation against appellants charging that, on October 23, 1998, appellants' employee, Travis D. Hayes, sold an alcoholic beverage (beer) to Christopher Fiscalini, then approximately 16 years of age.

An administrative hearing was held on May 26, 1999. Testimony was presented by Jason Cvitanov, the Department investigator who apprehended the minor, Christopher Fiscalini, after his purchase of a 12-pack of Corona beer; by Fiscalini, about his use of a false identification card purportedly issued by the State of New Hampshire and about his purchases at appellants' store; by Marie Uppal, who testified generally about appellants' training program and specifically about their clerk's training; by Surinder Uppal, who denied having sold to Fiscalini on other occasions; and by Travis Hayes, appellants' clerk, who testified that, after having examined the identification presented by Fiscalini and having determined it was authentic, he sold him the beer.

Appellants did not dispute the fact that the identification presented by

Fiscalini was false, and not one issued by the State of New Hampshire. Instead, they contended that the identification card appeared to be authentic, so much so that even the Department investigator could not determine it was fake without comparing it to an actual New Hampshire identification card. Thus, they argued, their clerk's reliance upon the card was reasonable, entitling them to a defense under Business and Professions Code §25660.²

Subsequent to the hearing, the Department issued its decision which rejected appellant's claim of a defense under §25660, and sustained the charge of the accusation. The proposed decision, which the Department adopted, concluded that the clerk's reliance upon the false identification was unreasonable. Fiscalini's youthful appearance, and the clerk's lack of familiarity with identification cards issued by the State of New Hampshire, together raised sufficient suspicion to warrant further inquiry, which the clerk failed to make.

Appellant thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the Department applied the wrong legal standard in evaluating whether the clerk had a duty to check the New Hampshire

² Business and Professions Code §25660, in its present form, provides:

"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 or an identification card issued to a member of the Armed Forces, which contains the name, date of birth, description, and picture of the person. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 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."

identification against a booklet of out-of-state ID's; (2) the Department's findings do not support the decision; (3) the Department's decision is not supported by substantial evidence; and (4) the Department has exceeded its authority in requiring licensees and their clerks to consult a privately published out-of-state ID booklet as a condition of establishing a defense under §25660.

Although these contentions are to a degree independent of each other, they will be discussed together. Our reasons for doing so will be apparent from the discussion which follows.

DISCUSSION

The facts of this case are relatively uncomplicated. Appellants' clerk sold a 12-pack of Corona beer to a 16-year-old minor who presented him with an identification purportedly issued by the State of New Hampshire and purporting to show the minor to be 22 years of age. The clerk examined both sides of the card and concluded it was legitimate.³ Although there was an identification guide book in the store which, had the clerk consulted it, would have exposed the identification as false, the clerk failed to consult it, giving as his reason the press of time and the desire not to irritate other customers.

It was Fiscalini's youthful appearance, coupled with the clerk's failure to consult the identification guide book, that led the Department to conclude that his reliance upon the false identification was unreasonable. It is this conclusion, appellants contend, that underlies their various challenges to the decision.

³ Content aside, the physical appearance of the card, appearing to have been professionally printed and laminated, is a cut above the typical false identification.

Citing Dethlefsen v. State Board of Equalization (1956) 145 Cal.App.2d 561 [303 P.2d 7], and Conti v. State Board of Equalization (1952) 113 Cal.App.2d 748 [248 P.2d 31], appellants argue that more than mere suspicion the purchaser may be under 21 years of age was required before the clerk had to do any more than rely upon what appeared to be bona fide proof of identification.

In 7-Eleven, Inc. and Kulbinder and Satinder Gill (AB-7534), we said the Board did not have to address appellant's hypothetical case of a perfect forgery of a government-issued identification. The identification in that case was clearly not that. In the present case, appellants vigorously contend, the identification appeared to be legitimate, so much so that even the Department investigator needed the assistance of the identification guide book to confirm its falsity. Even so, under controlling case law, the same result must follow.

Kirby v. Alcoholic Beverage Control Appeals Board (1968) 267 Cal.App.2d 895 [73 Cal.Rptr. 352], was decided after §25660 had been amended by the Legislature to its present form. In that case, a minor had obtained employment after presenting to the licensee a birth certificate, which was her sister's, and an identification card with her photograph, which she created herself and then signed before a notary. The Appeals Board decision had sustained a defense based upon §25660. The court reversed, stating (73 Cal.Rptr. at 354):

“It is well-established that reliance in good faith upon a document issued by one of the governmental entities enumerated in section 25660 constitutes a defense to a license suspension proceeding even though the document is altered, forged or otherwise spurious. (Dethlefsen v. State Bd. of Equalization, 145 Cal.App.2d 561, 303 P.2d 7.)

“Thus the question narrows to whether reliance in good faith upon

evidence of identity and majority other than a document emanating from sources specified in section 25660 serves to relieve a licensee from the consequences of committing acts forbidden by sections 25658, 25663, or 25665. The Department concluded that it does not; the Appeals Board ruled that it does. We agree with the Department.”

Describing the Appeals Board’s decision as having established a “non-statutory defense,” the court cited and quoted language from Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr.735] to the effect that, as an exception to the statute prohibiting sales to minors, §25660 must be narrowly construed.

“Thus a licensee charged with violating sections 25658, 25663, or 25665 has to meet a dual burden; not only must he show that he acted in good faith, free from an intent to violate the law, as the licensee did here, but he must demonstrate that he also exercised such good faith in reliance upon a document delineated by section 25660. Where all he shows is good faith in relying upon evidence other than that within the ambit of section 25660, he has failed to meet his burden of proof.”

Kirby v. Alcoholic Beverage Control Appeals, *supra*, 73 Cal.Rptr. at 355.

Since Kirby v. Alcoholic Beverage Control Appeals was decided after the decisions in Dethlefsen v. State Board of Equalization and Conti v. Board of Equalization, *supra*, as well as after §25660 was amended by the Legislature, it is obviously the most persuasive precedent. Indeed, appellants are now asking the Appeals Board to accept the very same line of reasoning that led to the Board’s being reversed in the Kirby case. Given the directness of the language in Kirby, not to heed it would be unwise.

The Appeals Board has previously rejected the argument that the identification relied upon may be something other than a government-issued document. (See The Circle K Corporation (2000) AB-7187.) In Mokhles and

Nagiba Athanasious (1999) AB-7052, the Appeals Board ruled similarly in a case involving a so-called “Texas identification card,” the display of which induced a clerk to sell an alcoholic beverage to a minor.

In keeping with the admonition that an exception to a statute must be narrowly construed, it would seem that §25660, read literally, is not available when the identification proffered by a minor is that of a person other than the minor - “ Bona fide evidence of majority and identity of the person is a document ... including, but not limited to, a motor vehicle operator's license ... which contains the name, date of birth, description, and picture of the person.” (Emphasis added.) However, the Board need not go this far to sustain the Department in this case.

Whether the Department applied an incorrect legal standard is really irrelevant in light of the above. Reference to an identification guide book will not provide a defense where none is available - where the identification is not governmentally-issued. It will, however, improve the chances that the sale will not occur, and, for that reason, licensees will do well to consult such references on those occasions where there is some doubt, even if some customers might become irritated at the delay engendered.

Under the strict rule established in Kirby, whether the clerk's reliance was reasonable is relevant only if the document offered as proof of age and identification was issued by a governmental entity.⁴

⁴ We are not confronted here with a fraudulent, non-governmentally-issued, identification so perfectly constructed and so well matched to its holder as to deceive most anyone into believing it to be genuine. Under such circumstances, it is conceivable that, even under Kirby, a licensee could be entitled to a defense

ORDER

The decision of the Department is affirmed.⁵

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

under §25660. That is a case for another day.

⁵ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.