

ISSUED AUGUST 22, 2000

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

|                            |   |                          |
|----------------------------|---|--------------------------|
| KING STOP, INC.            | ) | AB-7520                  |
| dba Stop Rite Market       | ) |                          |
| 6363 Santa Fe Avenue       | ) | File: 21-107180          |
| Huntington Park, CA 90255, | ) | Reg: 99046746            |
| Appellant/Licensee,        | ) |                          |
|                            | ) | Administrative Law Judge |
| v.                         | ) | at the Dept. Hearing:    |
|                            | ) | Ronald M. Gruen          |
|                            | ) |                          |
| DEPARTMENT OF ALCOHOLIC    | ) | Date and Place of the    |
| BEVERAGE CONTROL,          | ) | Appeals Board Hearing:   |
| Respondent.                | ) | July 6, 2000             |
|                            | ) | Los Angeles, CA          |

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King Stop, Inc., doing business as Stop Rite Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its license for 30 days, with 10 days thereof stayed, conditioned upon a one-year period of discipline-free operation, for Victor M. Lopez, its stock boy, having sold an alcoholic beverage (a 40-ounce bottle of Miller Genuine Draft beer) to Sergio Martinez, a 17-year-old minor, being 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,

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<sup>1</sup>The decision of the Department, dated October 7, 1999, is set forth in the appendix.

subdivision (a).

Appearances on appeal include appellant King Stop, Inc., appearing through its counsel, Michele A. Douglass, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele Wong.

#### FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 28, 1981. Thereafter, the Department instituted an accusation against appellant charging an unlawful sale of an alcoholic beverage to a minor.

An administrative hearing was held on August 17, 1999, at which time oral and documentary evidence was received. Department investigator Salvador Savala testified that he observed a minor leaving appellant's store late in the evening, carrying a 40-ounce bottle of Miller Genuine Draft beer concealed in a brown paper sack. When he accosted the minor, Sergio Martinez, he was initially told that a clerk had sold him the beer. When Savala confronted the clerk, Gurmuhk Singh, Singh denied making the sale. After further questioning, Lopez admitted that he had sold Martinez the beer. Martinez testified that he persuaded Lopez, a school friend, to sell him the beer, and that the transaction was conducted in a manner intended to conceal its occurrence. Singh testified that Lopez's duties at the store did not include selling, and denied knowing of the sale until learning of it after he was confronted by the Department investigator. Lopez also testified, stating that, at Martinez's urging, he concealed the beer in his trash cart, left it outside the store in a prearranged place, and pocketed the \$5 Martinez had given him. Lopez acknowledged that, in doing so, he had stolen the beer and committed theft against his employer.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, rejecting appellant's contention that it should not be responsible for the criminal act of an employee which could not have been foreseen.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issue: the Department abused its discretion by imputing to appellant the action of the employee; the beer had been stolen, and was no longer in appellant's possession or control when it was transferred to the minor.

#### DISCUSSION

Appellant contends that it was an abuse of the Department to impute to appellant the action of the unfaithful stock clerk employee who sold to his friend, a minor, beer which he had stolen from his employer.

As the decision acknowledges, Lopez, a stock clerk and clean-up man with no selling responsibility or authority, at the request of his friend, agreed to sell him a 40-ounce bottle of beer for \$5.00. Lopez, who had been called outside the store by his friend, reentered the store, secreted the beer in a trash container, and removed the beer from the store to a prearranged location, from which his friend retrieved the beer. The decision also acknowledges that Lopez never advised the store clerk of the transaction, and converted the \$5.00 proceeds of the sale to his own use.

The Department cited Harris v. Alcoholic Beverage Control Appeals Board (1961) 179 Cal.App.2d 172 [17 Cal.Rptr. 15], for the proposition that a licensee cannot render himself immune from his responsibility under the license by claiming he did not have actual knowledge of the acts of his employee. We have no

disagreement with this general statement of law. There are countless cases which so hold.

Nonetheless, there are also cases where, because of unusual circumstances, the courts are reluctant to impute to an employer the consequences of an employee's conduct. A recent example is the case of Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523], relied upon by appellant,<sup>2</sup> where the court annulled a Department suspension imposed upon a licensee whose employee had surreptitiously made an illegal purchase of food stamps. Although it acknowledged the Department's "broad authority to act, even in the absence of fault on the licensee's part or actual knowledge of wrongdoing that might lead to suspension or revocation," the court also stated that "nonetheless, these rules have exceptions, and the ABC's discretion is not without bounds...":

"This is such a case. Under the general rules urged by the ABC below, the single criminal act of food stamp sales was sufficient to justify the suspension because Huerta's knowledge of her own criminal act was imputed to the Market. This reasoning and the result border on the Kafkaesque. Using the same reasoning, the Market's license would be suspended if Huerta had robbed or embezzled from it. Although protection of the public, not punishment, is the goal of constitutional and statutory provisions, the Market would suffer a de facto punishment for being a victim. The Market was not a direct victim of the food stamp sale, but it neither benefited in any way from the crime nor had any knowledge of the act. The Market took strong measures to prevent the act, and Huerta was terminated immediately after it occurred."

There are distinct parallels between Santa Ana Food Market and this case.

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<sup>2</sup> We think it appropriate to note that the Department did not have the benefit of the court's decision in Santa Ana Food Market, Inc. The court's decision was announced on November 29, 1999, the very day the Department would have picked up appellant's license, but for this appeal.

In each case a faithless employee engaged in a criminal act from which only the employee benefited. In neither case did the employer have knowledge of the wrongful conduct. Indeed, the case now before the Board is the hypothetical case posed by the Santa Ana Food Market court; 'Using the same reasoning [King Stop, Inc.'s] license would be suspended if [Lopez] had robbed it or embezzled it.'

Had Santa Ana Food Market been decided before the administrative hearing, it is conceivable the Administrative Law Judge might have recommended a different result. It is clear from his remarks at the hearing, after the close of the evidence, that he sympathized with the licensee's plight [RT 57-58]:

"You know the facts here are a rather bazaar [sic] set of facts. It's really atypical of the type of cases, things that I normally hear, and I have heard a substantial number of them.

"It appears to me that the most that can be said about the respondent is that he has a poor judgment in the help he hires. As to the deliberateness, I don't see any deliberate act on the part of respondent. I see that they have policies in place regarding minors. They have a gentleman who testified as the clerk who seems to be a responsible, mature individual.

"So, basically, they have taken steps to avoid a problem to sell to a minor. The only thing they haven't done is rescreen this one individual, who, in this case, is a stock boy, from doing the kind of thing he did, which, in fact, was stealing the beer.

"He's committed a number of violations here. He stole. He actually took the money from the minor for the sell, which is a violation in selling to a minor. He went and got the beer and pocketed the money, which is theft from his employer. So, basically, I'd say he's a pretty poor employee to have. And he's created a lot of problems for his employer. The employer is responsible for the acts of his employee in the ordinary course and scope of business. He might even say it's foreseeable that an employee would steal.

"But the fact of the matter is, I don't see any deliberateness or evil intent on the part of the employer or even through the person who is responsible, the clerk, for the sale of alcoholic beverages here. I would suspect that had Mr. Singh been involved in this sale, there would not have been a sale. There

would not have been a transfer of an alcoholic beverage.”

We believe the reasoning in Santa Ana Food Market has direct application here. The unusual circumstances of this case are such that it would be unfair to hold appellant responsible, particularly where, as the decision noted, appellant would be only a single sale to a minor away from the possibility of license revocation. Indeed, in some respects this case is even more compelling than Santa Ana Food Market. Here, appellant was the victim of the unlawful act of the employee. We do not believe the welfare and morals of the people of California would be enhanced by penalizing appellant for what occurred in this case. The Department's order exceeds the bounds of its discretion.

#### ORDER

The decision of the Department is reversed.<sup>3</sup>

TED HUNT, CHAIRMAN  
E. LYNN BROWN, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

Board Member Ray T. Blair, Jr., did not participate in the deliberation of this appeal.

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<sup>3</sup> 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.