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

AB-7764

File: 20-216693 Reg: 00048480

PRESTIGE STATIONS, INC. dba Arco AM/PM
3830 McKinley, Home Gardens, CA 91719,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: September 6, 2001
Los Angeles, CA

ISSUED NOVEMBER 14, 2001

Prestige Stations, Inc., doing business as Arco AM/PM (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk having sold an alcoholic beverage to a minor, a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Prestige Stations, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 5, 1989. Thereafter, the Department instituted an accusation against appellant charging that appellant's clerk, Linda Couch ("the clerk"), sold an alcoholic beverage (beer) to Kevin

[1]The decision of the Department, dated January 11, 2001, made pursuant to Government Code §11517, subdivision (c), is set forth in the appendix.

Lamb ("the minor"), who was then approximately 19 years of age. Although not stated in the accusation, Lamb was acting as a decoy for the Riverside County Sheriff's Department.

An administrative hearing was held on July 7, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the minor and Riverside deputy sheriff Ricardo Fuentes in support of the accusation, and by Loliga Taylan, a clerk, and Mary Delgadillo, the manager of the premises where the sale took place.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision in which he rejected all but one of the various defenses asserted by appellant, but determined that there had been no compliance with Rule 141(b)(5), in that the Department failed to prove that the clerk was aware she was being identified by the minor as the seller of the alcoholic beverage, and ordered the accusation dismissed. The ALJ stated, in part (Finding of Fact V and Determination of Issues I):

> "The decoy later reentered the store for the purpose of identifying the person who had sold him the beer. When he did reenter the store, at least three Sheriff's Deputies were already inside and had engaged clerk Couch in conversation. From a distance of 6 to 10 feet, decoy Lamb pointed Couch out as the one who had sold him the beer. As he did this, Couch was behind the sales counter talking to three Sheriff's Deputies who were not involved in the identification process. It was not established that clerk Couch was aware decoy Lamb had reentered the store. Neither was it established that she was aware or should have been aware that an identification was occurring.
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> "...
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> "In accordance with Findings of Fact, paragraph V, there was a failure to establish compliance with Rule 141(b)(5). It was not established that there was reasonable proximity between the decoy and the clerk at the time of the identification. It was not established that the two acknowledged the presence of each other, as all who were present agreed that other Sheriff's Deputies had

> clerk Couch engaged in other conversation at the exact time the decoy was identifying her as the seller. There was no "face-to-face identification."

The Department rejected the proposed decision, pursuant to Government Code §11517, subdivision (c), and entered its own decision. In its decision, the Department agreed in large part with the findings and determinations of the ALJ except with reference to his finding that there had been no compliance with Rule 141(b)(5). In that respect, the Department stated as follows:

> "Respondent argued at the hearing that Rule 141(b)(5) was violated, contending that the attention of the clerk was not directed at the decoy during the identification process. According to the Rule, the minor must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to be actually aware that the identification is taking place. (*Greer* (2000) AB-7403). In addition, the clerk did not testify, so we have no way of knowing whether or not she would assert that she was even unaware of the identification. (*Circle K Stores, Inc.* (2000) AB-7337)."

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there was no effective face-to-face identification; and (2) a videotape was improperly excluded from evidence.

DISCUSSION

I

Appellant contends that there was no compliance with Rule 141(b)(5) because the clerk who sold to the minor did not see him identify her as the seller. Hence, appellant argues, there was no face-to-face identification.

California Code of Regulations, title 4, §141(b)(5) states:

> "Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages to make a face to face identification of the alleged seller of the alcoholic beverages."

In Chun (1999) AB-7287, this Board defined "face-to-face":

> "The phrase 'face to face' means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller."

There is no question that the decoy actually made the identification while within reasonable proximity to the clerk. Her awareness, only minutes earlier, that she had made an unlawful sale, followed by the appearance of the decoy to within six feet of her, is probably sufficient, given her proximity to the decoy, to satisfy both the rule and the Board's interpretation of "face-to-face" in Chun. There is nothing in the evidence to indicate that, although she was engaged in conversation with other deputies, the clerk could not have been aware of the renewed presence of the decoy and his significance to what she was being told by the deputies, that she made a sale of alcohol to a minor.

Having said that, we must acknowledge that the Board has never been entirely comfortable with this mode of analysis, however, since so much depends upon speculation concerning the clerk's awareness or lack thereof. It may well be that the rule's failure to address this aspect of the identification process with any specificity is because of the inherent difficulty in ascertaining what the clerk knew or did not know about the identification process.

In any event, it is accurate to say that no appellate court has yet passed on the question whether there can be an effective face-to-face identification under the rule when the decoy identifies the seller, but the seller has not identified the decoy.

The Board has very rarely found that Rule 141(b)(5) was violated. When it has found a violation, it has been fairly clear that no identification was really made at all or it

was done from so far away, it could not reasonably be considered face-to-face.

In cases where the Board has held that someone reasonably should have been aware that he or she was being pointed out as the seller, the Board has considered the following: the proximity of the decoy to the seller; how the identification was accomplished (pointing, verbally, answering question); what the clerk was doing at the time of the identification (where his or her attention was focused); whether the seller had been informed by the officer that he or she had sold to a minor; and the clerk's immediate reaction.

Proximity: This was well within the range the Board has found to be reasonable. (See, e.g., Southland & Meng (1/4/00) AB-7158a [5-8']; Southland & Anthony (11/14/00) AB-7292 [8-10']; Circle K Stores, Inc. (4/26/01) AB-7641 [8-9'].)

Manner of identification: The Board has noted that the rule does not specify how the identification is done and rejected the contention that the decoy's failure to point to the seller would, in every case, prevent the clerk from becoming aware he or she was being identified. (Southland & Anthony (11/14/00) AB-7292.) In AB-7292, the Board found that the lack of pointing at the seller was irrelevant because it was clear from the circumstances that the clerk heard both the officer's question to the decoy about the identity of the seller and the decoy's answer affirming that the clerk was indeed the seller. (See also Southland & Meng (1/4/00) AB-7158a.)

Focus of seller's attention: In Greer (5/4/00) AB-7403, the Board affirmed the decision of the Department which found that "The entire face-to-face identification process took place within a distance of six feet of the clerk and within a compact period of time. The minor was facing the clerk and clerk had a fair opportunity to observe the minor." In response to the appellant's contention on appeal that it was not established "that the clerk was facing the minor and was observing this so-called pointing out," the Board said: "Appellants' argument turns the requirement of the rule on its head. The minor decoy must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to be actually aware that the identification is taking place." All that is necessary is a reasonable opportunity for the clerk to become aware that he or she is being pointed out.

Seller's knowledge of violation: In Southland & Meng AB-7158a, supra,

and Southland & Anthony AB-7292, supra, the identification was made just after the officer in each case had informed the seller that he or she had sold to a minor, so the seller was acutely aware that the identification was being made. In Tang & Tran (10/19/00) AB-7454, the appellants argued that the clerk could not reasonably have been aware that he was being identified as the seller because the identification was made while the clerk was attending to another customer, and before the officer had identified himself as a law enforcement officer. The evidence showed that the clerk was looking at the decoy when the decoy pointed to the clerk and orally stated to the officer that the clerk was the seller, and within seconds after the identification was made, the officer identified himself and told the clerk that he had sold to a minor. The Board found that the identification process was proper in spite of the timing of the officer's information to the clerk, because "the combination of circumstances gave [the clerk] all he could reasonably expect in the way of knowing he had been accused and by whom."

Clerk's immediate reaction: In Circle K Stores, Inc. (4/26/01) AB-7641, the clerk said "Oh, my God," immediately after the decoy identified her and the officer informed her that she had sold to a minor. The Board stated that her immediate reaction indicated clearly that she was aware the decoy was identifying her.

It is clear that the Board believes the focus must be on the decoy's identification of the seller. That approach reduces to an absolute minimum the possibility that an innocent clerk, one who had no involvement in the transaction, will be falsely accused. And, since the practical requirement of the identification process is to return the decoy to the store shortly after his or her purchase, the likelihood that his or her renewed presence, accompanied by police officers, will go unnoticed by the selling clerk is virtually nonexistent.

Consequently, we believe the statement of the Board in Greer (2000) AB-7403 applies equally to this case:

> "Appellant's argument turns the rule on its head. The minor decoy must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to be actually aware that the identification is taking place."

II

Appellant sought to introduce a videotape purporting to show the sales transaction and events after the transaction. (App.Br., at page 10). Department counsel, conceding that it depicted the decoy, nevertheless objected to admission of the tape on the ground there was no showing of when it was produced, who retrieved it, or who had custody of it. The ALJ excluded the tape on the ground it lacked authenticity: "I find that there is a lack of authenticity. I don't know that this is a tape of the transaction in question. The chain of custody has not been satisfied."[2]

Appellant now contends the ALJ erred in using a chain of custody theory as the basis for excluding the tape, arguing instead that Evidence Code §1533 authorized its admission. The Department argues that in addition to its exclusion on chain of custody grounds, the tape did not qualify under §1533 because appellants sought its introduction for its audio content.

Evidence Code §1533 became operative on January 1, 1999. It provides:

> "A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party producing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and contents of the images that it purports to represent."

The Department offered no evidence to show that either the audio or visual portions of the tape were inaccurate or unreliable. Department counsel conceded that the tape depicted the decoy, and appellant's store manager verified that the tape

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[2] RT 99.

showed the interior of the store.

However, §1533 applies to "printed representation of images." Appellant did not offer printed representation of images on the tape. Instead, appellant's counsel simply offered the tape itself.

We read §1533 as contemplating the offer of the equivalent of a photo, consisting of a printed reproduction of a visual segment of a video recording. Whether the Evidence Code section would also extend to a printed representation of an audio portion of a video recording is a question we do not have to answer, since appellant made no attempt to introduce a transcript of the tape.

As the Department tells the Board in its brief, appellant had the burden, taking into account all of the circumstances, including the ease or difficulty with which the tape could have been altered, of showing there had been no alteration of the tape between the time it was made and the time of the hearing. Appellant showed only that the tape was removed from the machine and mailed to someone at the corporate office.

The recording is typical of a kind made in a video surveillance system, in that it displays four quadrants, each reflecting the image seen by one of multiple video cameras. To our lay mind, the difficulty in editing a tape made in this manner to show something different from what was originally recorded would seem to require extensive skill and expense, at a level disproportionate with what was at stake in the case. This suggests that the ALJ may have been overly cautious in questioning the chain of custody.

Be that as it may, appellant has not given the Board any explanation of how the exclusion of the tape prejudiced it, other than to say it "cost Appellant an opportunity to

present further evidence on its behalf." (App.Br., at pages 14-15). Since we do not know what evidence appellant has in mind, and are unwilling to speculate, we can only conclude that, even if the ALJ may have erred in his caution, appellant has demonstrated no prejudice flowing from his ruling.

ORDER

The decision of the Department is affirmed.[3]

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

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[3] 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.