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

AB-7802
File: 20-343679 Reg: 00049839

PRESTIGE STATIONS, INC. dba AM/PM #6195
9320 Mira Mesa Boulevard, San Diego, CA 92126,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 7, 2002
Los Angeles, CA

ISSUED APRIL 18, 2002

Prestige Stations, Inc., doing business as AM/PM #6195 (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, in violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Prestige Stations, Inc., appearing through its counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and Stephen Allen Jamieson, 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 July 28, 1998. Thereafter, the Department instituted an accusation against appellant charging the sale

[1]The decision of the Department, dated April 12, 2001, is set forth in the appendix.

of an alcoholic beverage by appellant's clerk, Rosa M. Perianes, to David A. West, an 18-year-old minor. Although not stated in the accusation, West was acting as a police decoy for the San Diego Police Department.

An administrative hearing was held on February 27, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by West, the decoy, and by Ronald D. Glass, a San Diego police officer, concerning the circumstances of the sale.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and rejected appellant's contention that Rule 141 had been violated in multiple respects.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Rule 141(b)(3) was violated; and (2) Rule 141(b)(2) was violated.

DISCUSSION

I

Department Rule 141(b)(3) (Title 4 Cal. Code Regs. §141(b)(3)) provides:

> "A decoy shall either carry his or her own identification showing the decoy's date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages."

Appellant contends that this rule was violated when, unable to remove his identification from his wallet, the decoy instead presented his wallet to the clerk. Appellant asserts, both in its brief (App. Br., at page 7) and at the hearing that there is "absolutely no indication" that the decoy's identification was positioned in his wallet in such manner that the sales clerk could have examined it. Appellant further contends

that neither the decoy nor Officer Glass were able to see whether the identification was positioned such that the sales clerk could view it. This belies the record.

The decoy testified that when the clerk initially observed his difficulty in removing his identification from his wallet, she said "That's okay."[2] He then testified that he pushed the identification back into the wallet, and held the wallet up for the clerk to see [RT 22-23]:

> "Q. And what did you do with the identification that was in your wallet at that time?
>
> "A. I pushed it back in so that it was visible with my date and the red and blue line on the identification was visible.
>
> "Q. And what did you – what did you do with the wallet?
>
> "A. After I pushed it in, I held it up where she could see it.
>
> "Q. And how did you hold it up, sir? What are you referring to?
>
> "A. I held it up by the wallet and showed her.
>
> "Q. You held it open?
>
> "A. Yes.
>
> "Q. And how far was it from the clerk when you held it up?
>
> "A. Maybe a foot-and-a-half, two feet.
>
> Q. All right. And after you held up your wallet with your license – your license was exposed when you held it up?

[2] Although we do not think it essential to the result, we disagree with appellant's contention that the clerk's statement, made in her capacity as an agent of appellant, was inadmissible hearsay.

"A. Yes."[3]

Appellant contends that the rule does not permit identification to be displayed in this manner, citing Acapulco Restaurants, Inc. v. Alcoholic Beverage Control appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126]. It argues that the rule would become meaningless if decoys could simply display their wallets with their identification located somewhere inside, not fully or completely visible.

It well might. But that is not the case here. In this case, there is unrefuted testimony that the identification was restored to a state where the critical information was readily apparent.

It is not uncommon for personal identification to be carried, and displayed, in a wallet or billfold encased in a clear plastic pocket. In the absence of any evidence that the identification was purposely concealed, or that a more complete inspection was denied, we doubt that the rule was intended to require more. A seller is always free to insist that he or she be handed the identification, and to refuse to sell if the request is not honored.

II

Appellant contends that the decoy lacked the appearance required by Rule 141(b)(2), i.e., that "which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller... ."

The Administrative Law Judge (ALJ) found as follows, with respect to the decoy's

[3] Officer Glass testified that when the decoy held up his wallet for the clerk to check his identification, the clerk reached up, and either held it or took the wallet for a short time. [RT 35.]

appearance (Finding of Fact II-D):

> "D. The decoy's overall appearance including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of an eighteen year old and his appearance at the time of the hearing was substantially the same as his appearance on the day of the decoy operation. On the date of the sale, the decoy was six feet in height, he weighed approximately one hundred thirty-five pounds, he was clean-shaven and he was wearing the same clothes that he was wearing at the hearing. His clothes consisted of khaki pants and a stripped [sic] polo shirt. The photographs depicted in Exhibits 3-A and 3-B indicate how the decoy appeared on the night of the sale. The decoy testified that he started participating in decoy operations in May of 2000, that he was not sure how many decoy operations he had participated in prior to May 27, 2000, that he always had his driver's license in his wallet, that he was almost always asked for identification, that he had been a police cadet since January 2000, that he had worked special events directing traffic as a cadet and that he felt confident and that he was not nervous during the decoy operation. After considering the photographs (Exhibits 3-A and 3-B), the decoy's overall appearance when he testified, his experience as a decoy and as a cadet as well as the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense."

Appellant, citing some of the same factors listed by the ALJ, claims that the overwhelming weight of the evidence indicates that the decoy had the looks and demeanor of one over 20 years of age.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he possessed the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance

required by the rule, and an equally partisan response to the contrary.

We do feel compelled to address specifically the contention that the decoy's prior experience disqualifies him from acting as a decoy. A decoy's role is to bring an alcoholic beverage to a seller, wait to be asked for identification and/or proof of age, pay for the purchase, and leave the store. It would seem that there is little room for variation on this theme, no matter how many times the decoy has done it. It is difficult to understand how, other than, perhaps, to eliminate nervousness, experience changes the appearance that is presented to the seller. Nervousness, or lack thereof, is only one consideration, to be balanced against such other considerations as overall appearance, demeanor, manner of dress, manner of speaking, physical movements, and the like. And, while facial appearance alone is not determinative, it is certainly an important consideration.

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age, or even older.

We think it worth noting that we hear many appeals where, despite the supposed existence of such a policy, the evidence reveals that the seller made the

sale in the supposed belief that the minor was in his or her early or mid-20's, and for that reason did not ask for identification and proof of age. It is in such cases, and in those where there is a completed sale even though the buyer - not always a decoy - displayed identification which clearly showed that he or she was younger than 21 years of age, that engenders the belief on the part of the members of this Board that many sellers, or their employees, do not take sufficiently seriously their obligations and responsibilities under the Alcoholic Beverage Control Act.[4]

By the same token, we appreciate the fact that, on occasion, police have used decoys whose appearance, because of large physical stature, facial hair, or other feature of appearance, is such that a conscientious seller may be unfairly induced to sell an alcoholic beverage to that person. Within the limits that apply to this Board as a reviewing tribunal, we have attempted to deter such practices, either by outright reversal, or by stressing the importance of compliance with Rule 141. If licensees feel more is necessary, their resort must be to another body.

ORDER

The decision of the Department is affirmed.[5]

---

[4] Although the clerk's perception of the decoy's age is not controlling under Rule 141(b)(2), it is worth noting that, in this case, the clerk told the police officer she thought West to be eighteen years old. [RT 40.]

[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

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

---

§23090 et seq.