

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

AB-7818

File: 21-259344 Reg: 00049768

ROBY N. KONJA dba Keg N Bottle
3566 Mt. Acadia Boulevard, San Diego, CA 92111,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED MAY 10, 2002

Roby N. Konja, doing business as Keg N Bottle (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 25 days for his clerk having sold an alcoholic beverage to a minor, in violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Roby N. Konja, appearing through his counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 8, 1991. Thereafter, the Department instituted an accusation against appellant charging an unlawful sale to a minor.

¹The decision of the Department, dated May 3, 2001, is set forth in the appendix.

An administrative hearing was held on January 4 and March 14, 2001, at which time oral and documentary evidence was received. Dustin Freiburger, the minor, and Jennifer Hill, a Department investigator, testified in support of the accusation, while Roby Konja, the appellant/licensee, and Thomas Konja, the clerk, testified on behalf of appellant.

Subsequent to the hearing the Department entered an order sustaining the charge of the accusation, and imposed a suspension of 25 days.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant contends that the Administrative Law Judge (ALJ) unreasonably curtailed appellant's cross-examination of the minor on issues key to appellant's defense.

DISCUSSION

This appeal turns on a single issue; did the ALJ, by erring in evidentiary rulings,² so unreasonably curtail appellant's cross-examination as to prevent him from establishing a material lack of credibility of the minor with respect to facts key to appellant's defense under Business and Professions Code §25660?³ The sale is not

² Appellant asserts that "the administrative process was rife with intimidation resulting in a series of blatantly incorrect evidentiary rulings, which, effectively, eviscerated Appellant's hope to discredit a witness later found creditable by Judge Echeverria." (App. Br., at pages 1-2.)

³ Business and Professions Code §25660 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,

disputed, nor is the fact that the purchaser was a minor. Nor is it disputed that the minor was not asked for identification nor did he display any.

Appellant contends that the minor testified falsely, but, because the ALJ believed the minor, he was precluded from establishing a defense under §25660. Appellant contends that, had he been able to establish that the minor testified falsely, the ALJ might well have believed the clerk's testimony that the minor had previously shown him a California driver's license revealing the minor to be older than 21 years of age, and he relied on that in making the sale in question. Appellant concedes that issues of credibility are ordinarily within the province of the ALJ, but contends that the errors in this case are so egregious as to warrant an exception to the rule.⁴

Appellant contends that the ALJ ignored "admissions of perjury" by Freiburger and "inexplicably disallowed" appellant, during cross-examination of Freiburger, from inquiring into the factors and appearance of a "known false identification." (App. Br., at page 9.) Appellant has not specified what ruling it was by the ALJ that so limited him.

Based upon our own review of the record, it appears that appellant is complaining about the ALJ's ruling that, since the minor had denied that he ever used false identification at appellant's premises, the kind of false identification was irrelevant. (See RT 37-38.) Appellant's counsel argued:

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."

⁴ The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

“I think the issue in this case is going to be a prior reliance. And so I think it’s kind of relevant when a witness under penalty of perjury says he’s never possessed fake I.D. and then under penalty of perjury again in court says he has had fake I.D. There’s a little credibility issue, so certainly I have a right to explore what kind of fake I.D. it was.”

When he was apprehended, Freiburger was interrogated by investigator Hill, who read questions from the Department’s Minor Affidavit form to Freiburger, and entered Freiburger’s answers on the form. Question 24 read “I have (have never) possessed false identification.” Hill circled “have never” as Freiburger’s answer, and Freiburger signed the affidavit without reading it. Just prior to the ruling to which appellant now objects, Freiburger had explained his understanding that question 24 was in reference to appellant’s store.

Freiburger testified freely that he had used false identification (later described by him as an identification card issued by Colorado State University and found in a trash container in Pacific Beach) at other locations, and identified one of them as Quik Korner. In response to leading questions by appellant’s counsel, he said it had been confiscated during an attempt by him to use it at Quik Corner.

Thomas Konja testified that Freiburger had exhibited a California identification on the occasion of prior purchases that showed him to be of legal age, and also testified that he had overheard Freiburger tell friends outside the courtroom that he had successfully used it at Quik Corner, but when a friend then tried to use it, it was confiscated.

Appellant suggests that Judge Echeverria’s supposedly erroneous rulings were the result of intimidation, citing Board decisions which had criticized the Department for the content of certain pleadings directed at Judge Echeverria. (See 7-Eleven,

Inc./Burgess (2001) AB-7690 and 7-Eleven, Inc./O'Brien (2001) AB-7751.

We are not inclined to accept appellant's suggestion. Our review of the record indicates that Judge Echeverria was simply attempting to maintain an orderly flow of examination. A judge has wide discretion in ruling on objections, and we are not convinced his ruling abused that discretion.

Appellant's appeal has been cast as one in which erroneous evidentiary rulings prevented him from establishing a defense to the charge. As will appear, the defense was destined to fail on the merits, regardless of how the ALJ had ruled.

It appears to be appellant's position that, under the rule established in Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181, 186-187 [67 Cal.Rptr. 734], the clerk was entitled to the protection of §25660 when he made the sale, because he had been shown identification previously which showed Freiberger to be of legal age.

In Lacabanne Properties, Inc., two minors gained entry to an on-sale public premises by displaying what the hearing officer found was bona fide documentary evidence of majority under §25660. The administrative law judge so found, and dismissed counts of an accusation which had charged the licensee with having permitted the minors to enter and remain on the premises without lawful business thereon, in violation of Business and Professions Code §25665. The hearing officer refused to dismiss charges of sales of alcoholic beverages to the two minors, in violation of §25658, subdivision (a), and of permitting them to consume such beverages, in violation of §25658, subdivision (d). The Appeals Board reversed the counts applicable to one of the two minors, holding that the bartender who served that

minor had met the requirement of §25660 by confirming with the doorman that the minor had displayed bona fide documentary evidence of majority. The Board affirmed the two remaining counts applicable to the other minor because the bartender who served that minor had requested identification but had not followed up on his request after another customer vouched for the minor.

The appeals court reversed the Board as to the two counts the Board had sustained, holding that there was no duty to make a second demand for identification before serving the minor, because the licensee had the right to rely on the original determination by the doorman that the patron had shown bona fide documentary evidence of majority.

The Lacabanne Properties, Inc. decision does not control this case, for several reasons.

In that case, the court was strongly influenced by the fact that the sale occurred shortly after the minor “possessed, had shown, and could have again exhibited a driver’s license, which, although altered, was found to show he was over the age of 21 years.” (See Lacabanne Properties, Inc., *supra*, 67 Cal.Rptr. at 740.) The same thought is expressed on the following page (67 Cal.Rptr. at 741):

“It may well be that the licensee and his employees act at their peril in serving a minor, but it does not follow that they may not be relieved when the requirements for a defense were not only in fact complied with on entry, but, as in this case, were also present, although unexhibited at the time the minor was served.”

The court summed up its position in what can only be described as an extremely narrow holding:

“It is concluded that where the minor patron has exhibited to one employee on entry, and at all times thereafter has on his person, what is found to be bona fide

evidence of majority and identity, the licensee may assert reliance on the original demand and exhibition in selling, furnishing or permitting the consumption of an alcoholic beverage by that minor following that entry; and that such defense is not lost because a second employee pursued an inadequate inquiry before serving the minor. “ (Lacabanne Properties, Inc., 67 Cal.Rptr. at 742.)

It follows that the Lacabanne decision simply does not lend itself to a §25660 defense where the identification supposedly relied upon is nowhere to be found.

The only indication that any identification had ever been displayed is in the testimony of appellant and his clerk, a relative, that some form of California identification was shown on previous occasions. It certainly was not “present, although unexhibited at the time the minor was served,” the Lacabanne test.

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.)

Without the identification supposedly relied upon, there is simply no way to determine whether a licensee acted reasonably in accepting it as proof of legal age. Hence, the appeal must fail.

ORDER

The decision of the Department is affirmed.⁵

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

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.