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

AB-7984
File: 21-268393 Reg: 01050803

THE VONS COMPANIES, INC., dba Pavilions
8010 E. Santa Ana Canyon Rd., Anaheim, CA 92808,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 13, 2003
Los Angeles, CA

ISSUED APRIL 3, 2003

The Vons Companies, Inc., doing business as Pavilions (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for five days for appellant's clerk selling an alcoholic beverage to a minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant, The Vons Companies, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 27, 1992. Thereafter, the Department instituted an accusation against appellant charging that, on December 27,

[1]The decision of the Department, dated May 16, 2002, is set forth in the appendix.

2000, appellant's clerk, Nancy Thomas (the clerk), sold an alcoholic beverage to 18-year-old Derek Marsden. Marsden was acting as a decoy for the Anaheim Police Department at the time of the sale.

An administrative hearing was held on April 29, 2001, at which time documentary evidence was received and testimony concerning the transaction was presented by officer Joseph Tocco of the Anaheim Police Department and by Marsden (the decoy).

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and determined that no defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that both Rule 141(b)(5) and Rule 141(b)(2) were violated.

DISCUSSION

I

Appellant contends that there was not compliance with Rule 141(b)(5), which requires, after a sale to a minor decoy, that the "officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages.

The ALJ made the following finding with regard to the face-to-face identification (Finding V):

> A. After decoy Marsden left the sales counter, Investigator Tocco identified himself to clerk Thomas as a police officer and advised her that she had sold beer to a "minor." Investigator Tocco retrieved the $10 bill Marsden had used to pay for the beer. In a few minutes, decoy Marsden, who had been escorted back into the store by Anaheim Police Investigator Kelly Jung, joined Tocco and Thomas. Tocco asked Marsden who had sold him the beer and, while standing adjacent to clerk Thomas, Marsden identified Thomas as the one who had sold him the beer. (*See* Exhibit 2B, a re-enactment.) Marsden and Thomas were within 3 feet of each other at the time of the identification. A citation was issued to clerk Thomas after the decoy identified her as the seller.

> B. Marsden identified clerk Thomas as the one who had sold him the beer in the immediate vicinity of the checkstand where the sale had been made. It was done after Investigator Tocco had ceased business operation at the checkstand, detained clerk Thomas, and retrieved the photocopied currency. There were no other employees of [appellant] in the immediate vicinity when the identification was done. No lineup of employees was conducted so that the decoy had to choose the seller from a group.

In the last paragraph of Determination of Issues I, the ALJ discussed appellant's argument made at the hearing, similar to that made on appeal, that the face-to-face identification was not properly conducted:

> [Appellant] contends that the face-to-face identification required by Rule 141(b)(5) was not done properly in that Investigator Tocco had already detained clerk Thomas making the identification his and not that of the decoy. This contention is rejected. The rule does not require the identification to be made from a lineup. Further, no one coerced decoy Marsden into identifying the wrong person. He pointed at Thomas and said she is the one who sold to him on his own. If Tocco had the wrong person, Marsden could easily have said so.

We believe the ALJ properly analyzed this issue. The rule imposes two separate duties on the officer - to attempt to reenter,[2] and to conduct a face-to-face identification. In this case, both duties were performed.

Appellant contends "This type of identification has been frowned upon" by this Board, citing *Keller* (2002) AB-7848.[3] Appellant is in error; the Board reversed the Department in *Keller* based on the particular factual situation. In *Keller*, the decoy made a face-to-face identification only after the police brought the clerk out from the store where the decoy had remained since leaving the store.

---

[2] Although the rule uses the term “reenter,” in many cases the officer has observed the transaction from outside the premises, so can only attempt to “enter.” The Board has always considered this to comply with the rule.

[3] A writ of review was granted in *Keller* on November 27, 2002, and the case is pending on appeal. Case No. D040790, Court of Appeal, Fourth Appellate District, Division One.

This case is different. Here, the decoy re-entered the store with one of the officers, where the clerk was still at the sales counter. When asked who had sold the alcoholic beverage to him, the decoy pointed to the clerk and said that she had. These facts are not in dispute and they fully satisfy the requirements of Rule 141.

Appellants argue that the officer's detention of the clerk, made before the decoy's identification of her as the seller, created a biased identification process.

This Board has approved the apparently common practice of law enforcement officers first identifying themselves to and informing the clerk that he or she had made a sale to a minor, before having the decoy make the required face-to-face identification. Indeed, this practice has been seen as evidence indicating that the clerk knew or should have known that he or she was being identified as the seller of alcoholic beverages. (See, e.g., *Southland & Anthony* (2000) AB-7292; *Southland & Meng* (2000) AB-7158a.) The rule requires that the decoy make a face-to-face identification of the seller of alcoholic beverages; it contains no prohibition against the officer also identifying the seller. Appellant has pointed out no actual bias that was created in this instance, and we do not see such inherent bias in the practice generally as to cause the kind of unfairness we saw present in *Keller*.

Appellants quote from *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126], but the language about "strict adherence" to the rule does not support their argument about a "biased identification process." The face-to-face identification in the present case strictly adhered to the requirements of the rule. In addition, *Acapulco* was factually very different from the present case. There, the decoy did not identify the seller at all; the identification was made by the police officer who had witnessed the transaction.

II

Appellant contends that the decoy's prior experience as a police Explorer would have given the decoy added confidence during the decoy operation, and the ALJ did not adequately consider the effect of such experience in determining that the decoy met the requirement of Rule 141(b)(2) that he display to the seller of alcoholic beverages the appearance generally to be expected of a person under the age of 21.

The ALJ discussed the decoy's appearance in Finding VI, as follows:

> A. On December 27, 2000, Derek Marsden stood approximately 6 feet tall and weighed between 140 and 145 pounds. He wore blue jeans and a light gray T-shirt with the "FILA" name over the left breast. (Exhibits 2B, 2C and 2D.) His dark brown hair was unremarkable and he was clean-shaven. (*Id.)* His appearance on the afternoon of December 27, 2000, was as is shown in the photographs, Exhibits 2B, 2C and 2D.
>
> B. Based on the photographs, Exhibits 2B, 2C and 2D, and Marsden's testimony, decoy Marsden looked substantially the same on the day of the decoy operation as he did at the hearing. He had gained between five and ten pounds and was within a couple of months of his 20th birthday at the time of the hearing. He dressed nearly the same as he was dressed on December 27, 2000. Based on physical appearance alone, that is, as he appeared before clerk Thomas and as he appeared at the hearing, Marsden displayed the appearance generally expected of a person his age, under 21 years.
>
> C. December 27, 2000, was the first date Derek Marsden worked as a decoy for sale of alcoholic beverages. He volunteered to be a decoy, having learned of the operation due to his participation as a police Explorer. He had worked one time earlier as a 16 year-old on a tobacco sting.
>
> D. The court has observed the decoy's overall appearance, considering his physical appearance, his dress, his poise, demeanor, maturity and mannerisms as shown at the hearing. The court has considered the photographs, Exhibits 2B, 2C and 2D, and the other evidence concerning Marsden's overall appearance and his conduct at [appellant's] store on December 27, 2000. In the court's informed judgment, decoy Marsden gave the appearance at the hearing and before [appellant's] clerk that could generally be expected of a person under the age of 21 years.

The ALJ clearly considered the decoy's experience and found that it did not cause him to appear older than his actual age at the time he purchased the beer. Nothing indicates that his determination in this regard was inadequate.

We have said many times that we are not inclined to substitute our judgment for that of the ALJ on the question of the decoy's apparent age, absent very unusual circumstances, none of which are present here. In the appeal of *Idrees* (2001) AB-7611, we said:

> 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 or she testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he or she 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.
>
> This Board is 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 did not have the appearance required by the rule, and an equally partisan response that she did.

Similarly, this Board has previously addressed appellant's contention that the decoy's experience necessarily made him appear to be over the age of 21. The Board rejected this type of contention in *Azzam* (2001) AB-7631:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

Appellant cites the language from *Azzam*, *supra*, but only the first two sentences quoted above. It ignores the language after that which makes clear that there must be evidence presented that the decoy's experience actually made the decoy appear to be 21 years of age or older. The ALJ saw no evidence of this at the hearing and, although appellant asserts that the evidence at the hearing contradicts the ALJ's finding, it has pointed out no such evidence.

ORDER

The decision of the Department is affirmed.[4]

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

[4]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

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