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

AB-8102
File: 20-144642 Reg: 02053657

CIRCLE K STORES, INC., dba Circle K Store 1232
4381 El Camino Real, Atascadero, CA 93422,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED FEBRUARY 11, 2004

Circle K Stores, Inc., doing business as Circle K Store 1232 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, 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, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 15, 1983. On August 29, 2002, the Department filed an accusation against appellant charging that, on July 18, 2002, appellant's clerk, Robert Wren (the clerk), sold an alcoholic beverage

[1]The decision of the Department, dated February 13, 2003, is set forth in the appendix.

to 18-year-old Wyatt Kasfeldt.[2] Although not noted in the accusation, Kasfeldt was working as a minor decoy for the Atascadero Police Department at the time.

At the administrative hearing held on January 9, 2003, documentary evidence was received, and testimony concerning the sale was presented by the clerk, by Kasfeldt (the decoy), and by Terrence O'Farrell, an Atascadero police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellant has filed a timely appeal making the following contention: Finding of Fact II states that no evidence was produced showing the product purchased by the decoy was an alcoholic beverage and erroneously states that no evidence needed to be produced.

DISCUSSION

Finding of Fact II states:

> On July 18, 2002, Robert Wren, while working as a clerk in Respondent['s] store, sold a six-pack of Bud Light beer to Wyatt Kasfeldt (formerly Wyatt Brown), an eighteen year old decoy working with the Atascadero Police Department. The sale is imputed to Respondent, Wren's employer. [The Department did not present any evidence that the six-pack of Bud Light was in fact beer. However, the Alcoholic Beverage Control Appeals Board has suggested that such proof is not necessary, since Bud Light "is so well-known and heavily advertised as a beer". Patel (2000) Alcoholic Beverage Control Appeals Board Case Number AB-7449, at page 6.]

(Bracketed material in original.)

Appellant contends that this finding does not state that the product purchased by the decoy was an alcoholic beverage, nor does any other finding, and, therefore, the

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[2]At the time of the sale, the decoy's last name was Brown, but before the date of the hearing, his name had been legally changed to Kasfeldt. We will refer to him as Kasfeldt in this decision.

Department had no basis for determining that appellant violated section 25658, subdivision (a). To establish that the Bud Light was an alcoholic beverage, appellant argues, the Department must either produce "actual 'evidence'" at the hearing, take official notice of the fact in accordance with the provisions of section 11515 of the Government Code, or establish the fact based on its expertise. It contends that the Department did none of these things and has failed to prove an essential element of the violation charged.

The Department relies on the Appeals Board decision of *Patel* (2000) AB-7449, but appellant asserts that the Board's decision in *Godoy* (1999) AB-6992, more accurately reflects what the Department must show to sustain an accusation.

In *Godoy*, *supra*, the Board reversed the Department's decision, concluding that there was insufficient evidence in the record to support a finding that "Olde English 800" was an alcoholic beverage and rejecting the Department's argument that Olde English 800 was "universally known" to be an alcoholic beverage. The Board explained:

> The Department also suggests in its brief . . . that Old English 800 is universally known to be an alcoholic beverage, comparing it with Budweiser, and asserting . . . "That Olde English 800 is an alcoholic beverage is a fact of generalized knowledge requiring nothing more than the application of average intelligence."
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> It may well be true, as the Department argues, that a fact known among persons of reasonable and average intelligence will satisfy the "universally known" requirement. However, what evidence is there to establish the foundational premise - that Old English is known among persons of reasonable and average intelligence to be an alcoholic beverage? We are inclined to agree with appellant that the Department . . . is injecting its own knowledge into the record in lieu of evidence taken at the hearing.
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> If what the Department is saying is that everyone knows or should know that Olde English 800 is an alcoholic beverage, then this Board is compelled to disagree. Assuredly, Budweiser, Miller Lite, and certain other brands of beer which are widely advertised in newspapers,

> magazines and on national television, may enjoy such fame. Old (or Olde) English 800, at least in the experience of this Board, does not enjoy that degree of notoriety.

In *Patel*, *supra*, the Board affirmed the decision of the Department even though the six-pack of Bud Lite purchased by a police decoy had been inadvertently destroyed before the hearing. The appellant argued there was no affirmative evidence that the police officer, who testified that beer was purchased, knew Bud Lite was beer and an alcoholic beverage. The Board agreed that affirmative evidence of the officer's knowledge was lacking, but concluded that the officer's statement that the cans he saw contained beer could not be discounted "when the product is so well-known and heavily advertised as a beer as is Bud Lite." It also agreed with the Department that it could take official notice and rely on its expertise in finding that Bud Light is an alcoholic beverage.

We find that both *Godoy* and *Patel* support the idea that Bud Light is so "universally known" to be beer and an alcoholic beverage, that it was sufficient for the Department to prove that Bud Light was sold.

There was sufficient evidence presented that Bud Light beer was purchased. Although the six-pack itself was not brought to the hearing, evidence was presented at the hearing on the subject. "Evidence" is defined in Evidence Code section 140 as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or non-existence of a fact." In the record we find:

- Exhibit 2, admitted without objection, is a photograph of the decoy pointing to the clerk who made the sale and holding what is readily identifiable as a six-pack of cans of Bud Light beer;
- The clerk stated that the product sold to the decoy was a six-pack of Bud Light;
- The decoy testified that he went to the beer cooler in the store and selected "a six-pack of Bud Light cans"

This uncontradicted evidence is sufficient to support a finding that a six-pack of Bud Light beer was purchased. Finding II does just that, saying, "Robert Wren . . . sold a six-pack of Bud Light beer to Wyatt Kasfeldt." This finding is sufficient to support the determination that appellant's clerk violated section 25658, subdivision (a), by selling an alcoholic beverage to the decoy.

Appellant attempts to turn this appeal into a generalized inquiry as to whether the Department is or is not required to present proof as to each and every element of the allegation. The answer, of course, is yes, at least as to every material element. However, appellant appears to misapprehend the quantum of evidence necessary.

In the present case, the testimony and the photograph presented at the hearing were certainly sufficient to meet the Department's initial burden of going forward with the evidence to make a prima facie showing that the decoy purchased Bud Light beer. At that point, the burden of producing evidence shifted to appellant. Appellant made no attempt at the hearing to object to the evidence presented and never suggested any defense other than vague allegations that rules 141(b)(2) and 141(b)(5) were violated during the decoy operation. No objection was made when the Bud Light was referred to eight times as "beer" and 10 times as "alcohol."[3] If appellant believed that the product sold was not Bud Light beer, or that Bud Light beer was not an alcoholic beverage, it was incumbent on it to produce some evidence at that point. Without such evidence, the ALJ was entitled to rely on the universally known fact that Bud Light beer is an alcoholic beverage. If there was any failure of proof here, it was appellant's.

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[3]We note that at least five of the references to the Bud Light as "alcohol" were made by appellant's counsel. (See RT 22, 24, 25, 53.)

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, 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.