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

AB-8110
File: 20-276461 Reg: 02053918

7-ELEVEN, INC., ANNA PATTAPHONGSE, and SOMSAK PATTAPHONGSE
dba 7-Eleven #2172-13799
16791 McFadden, Tustin, CA 92780,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED FEBRUARY 11, 2004

7-Eleven, Inc., Anna Pattaphongse, and Somsak Pattaphongse, doing business as 7-Eleven #2172-13799 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, 10 of which were conditionally stayed for one year, for their clerk, Alice Chan, having sold a 12-pack of Bud Light beer to Tiffany Benincosa, a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Anna Pattaphongse, and Somsak Pattaphongse, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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[1]The decision of the Department, dated February 27, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 6, 1994. On October 28, 2002, the Department instituted an accusation against appellants charging that their agent, employee, or servant, Alice Chan, sold an alcoholic beverage (beer) to Tiffany Benincosa, a person approximately 19 years of age.

An administrative hearing was held on January 17, 2003. Benincosa and Todd Bullock, a Tustin police officer who witnessed the transaction, testified that the clerk requested identification, examined the driver's license presented by the decoy, and went ahead with the sale. Both also testified that Benincosa identified Chan as the seller. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and that no affirmative defense had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(b)(2) was violated; (2) Rule 141(b)(5) was violated; and (3) the decoy operation violated the fairness requirement of Rule 141(a).

DISCUSSION

I

Appellants contend that Rule 141(b)(2) was violated because the decoy wore makeup and jewelry, and presented a "confident demeanor, giving her the general appearance of someone over age twenty-one." (App.Br. 6.)

When appellants' counsel made these same arguments to the administrative law judge (ALJ), he said [RT 67]:

> And certainly I think that this person, by the photo, looked a lot older than she did sitting in the chair, by how she was made up and her appearance that night with the clothing and shoes and the other items I mentioned.

The decoy testified that, on the night in question, she wore mascara, eyeliner, and light eye shadow. At the hearing, when observed by the administrative law judge, she also wore eye shadow, eyeliner, and mascara. [RT 37.]

The decoy also wore several items of silver jewelry on the night in question. She testified that a necklace she was wearing was a "really, really thin chain with a star with a diamond in the middle. She wore a single silver stud on each ear, and silver rings on her left thumb and "middle or right ring finger." She described one of the rings as a plain silver band. The decoy wore a "Guess" brand watch, and a black jean jacket over a black top which had rhinestones around the neck. The only jewelry which can be seen in the photograph of the decoy taken in the store is a ring on her left hand; the rhinestones on the black top are visible, and appear to be nothing other than decorative. There is no evidence the clerk noticed any of the jewelry the decoy was wearing.[2]

The ALJ was not impressed by appellants' arguments, nor are we. The ALJ disposed of them this way:

> Respondent argued that the decoy attempted to enhance her apparent age by "dressing up," referring to the rhinestones on the top she wore, her makeup, her boots and her various items of jewelry. That argument is rejected. The decoy, even if she appeared an inch taller than her 5 feet 3 inches, wearing the light makeup shown in Exhibits 3 and 6, and the jewelry, appears her age, under 21 years of age. (Findings of Fact , ¶15.) The Doc Martens and the wearing of lots of silver rings, earrings, thin chains, etc., is typical teenage dress for females these days.

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[2] The court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339] did not, contrary to the suggestion in appellants' brief, say that a female decoy should not use make-up or wear jewelry. The court was simply referring to the admonitions in the Department guidelines which antedated Rule 141, and was not passing judgment one way or the other on the propriety of the practice.

As this Board has said on many occasions, the administrative law judge (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.

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 did not have the appearance required by the rule, and an equally partisan response that she did.

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 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.

II

The decoy testified [RT 35] that she was "a couple of feet on the other side of the register" when she identified the clerk as the seller. Both the decoy and the officer who accompanied her into the store testified that the decoy pointed to the clerk when making the identification. Despite such record testimony, appellants assert that there is no evidence of a face to face identification because there is no evidence the clerk acknowledged that she had been identified.

When the decoy identified the clerk as the seller, the two were only a few feet apart. It strikes us, as it did the ALJ, that the clerk "surely" knew what was going on. The clerk had just been advised by a police officer that she had sold an alcoholic beverage to a minor, and, moments later, the person to whom the sale had been made was facing her from a few feet away and pointing a finger at her in response to a question while, or shortly before, a photograph was taken of the decoy pointing at her.

Chun (1999) AB-7287 does not require a formal acknowledgment by the clerk. It is enough that "the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller."

While the decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board, supra,* fn.*2,* made it clear that the face-to-face identification was not required to be done on the premises where the sale occurred, it did not say that the identification must be formally acknowledged by the clerk.

We are satisfied that there was compliance with Rule 141(b)(5).

III

Appellants contend that the police should have aborted the decoy operation once the officers became aware that the clerk was busy cleaning a spill on the floor when the decoy entered the premises. Appellants also assert that there were five or six customers in the store when the decoy entered.

The evidence reveals that the clerk finished cleaning the spill and placed a warning sign where it had been, and had then returned to the register. The clerk waited on two other customers ahead of the decoy. There is no evidence of any behavior by any of the customers which might have created a sense of urgency.

Without testimony from the clerk, there is nothing but conjecture that the clerk was distracted. She had finished with the spill, and had waited on two customers before the decoy. She knew to ask the decoy for identification, read the year of birth correctly, and thought that meant the decoy was 21. The clerk simply made a mistake.

ORDER

The decision of the Department is affirmed.[3]

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