

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

AB-8116

File: 20-128336 Reg: 02053360

CIRCLE K STORES, INC. dba Circle K Store #1138
1396 Healdsburg Avenue, Healdsburg, CA 95448,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Mary-Margaret Anderson

Appeals Board Hearing: November 13, 2003
San Francisco, CA

ISSUED DECEMBER 23, 2003

Circle K Stores, Inc., doing business as Circle K Store #1138 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk, Patricia Maeder, having sold five 18-can cases of Coors beer to John Mark Lickey, a minor, 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 Barat Saltsman, Stephen Warren Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 9, 1993. Thereafter, the Department instituted an accusation against appellant charging the sale of beer to Lickey on May 23, 2002.

¹The decision of the Department, dated March 6, 2003, is set forth in the appendix.

An administrative hearing was held on January 28, 2003. Lickey testified that he had intended to purchase six cases of beer, but found he only had money for five. He also testified that he was 18 years of age at the time of the transaction, and had not been requested to display identification before making the purchase. Department investigator Bret Ajax testified that he observed the transaction after seeing Lickey enter the store, and that Lickey had not been asked for identification. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the administrative law judge (ALJ) improperly restricted appellant's cross-examination of the minor; and (2) the ALJ failed to make any findings or determination as to the availability of a defense under Business and Professions Code section 25660. The two issues are interrelated, and will be discussed together.

DISCUSSION

Appellant's argument on this issue is summed up in two sentences in its brief (App. Br., page 5):

Whether this minor produced false identification at this previously frequently visited location or not is significant. Secondly, actual testimony demonstrating prior use of false identification at some location at some time in the immediate past would have tended to demonstrate the probability or reasonable possibility of use of false identification at this location at some prior time.

Although the minor admitted having been in appellant's store on earlier occasions, he had never before seen or spoken to the clerk who sold him the beer. Mr. Eicher was permitted to ask the minor if he had ever possessed a "fake I.D.," - the minor said he had not, neither of his own or of anyone else - but was not permitted to ask him how many times he had purchased alcohol. [RT 23-25.]

The ALJ sustained objections to a number of questions posed by appellant's counsel, on relevance grounds, but permitted others. The only pattern we can discern from the questions objections to which were sustained appears to be an attempt by appellant to show that the minor had made purchases of alcohol at other locations on other occasions using false identification. If he had, appellant contends, it would be reasonable to infer that he had also displayed false identification at appellant's store on earlier occasions.

Appellant's argument is little more than conjecture. We think that whether the minor did or did not display false identification at other locations or at other times does not strike us as relevant or material on the issue of credibility.

Section 25660 provides a defense to a sale-to-minor charge when the licensee or its agent "demanded, was shown and acted in reliance upon ... bona fide evidence" that the person attempting to buy was at least 21 years of age. The statute defines "[b]ona fide evidence of majority and identity of the person" as

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.

There is an affirmative duty on a licensee to maintain and operate his or her premises in accordance with the law, and section 25660, as an exception to the general prohibition against sales to minors must be narrowly construed. The statute provides an affirmative defense, and "[t]he licensee has the burden of proving ... that evidence of majority and identity was demanded, shown and acted upon as prescribed by ... section 25660." (*Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734].)

“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 even though the document is altered, forged or otherwise spurious.” (*Kirby v. Alcoholic Bev. etc. Appeals Board* (1968) 267 Cal.App.2d 895, 897 [73 Cal.Rptr. 352].) To provide a defense, reliance on the document must be reasonable, that is, the exercise of due diligence. (See, e.g., *Lacabanne Properties, Inc., supra*; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820].)

Reasonable reliance or due diligence cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. (*5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control, supra*, 155 Cal.App.2d at pp. 753-754.) A licensee, or a licensee’s agent or employee, must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne Properties, Inc., supra*; *Farah v. Alcoholic Bev. Control Appeals Board* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, Inc. supra*, 155 Cal.App.2d at p. 753.)

There is no evidence that any clerk employed by appellant was ever shown false identification by the minor. Even if the minor had admitted that he possessed false identification, the absence of any evidence of what it might have been dooms appellant’s section 25660 defense. With no opportunity to view the supposed false identification, neither the ALJ nor this Board could make any assessment whatsoever as to whether a clerk may have reasonably relied upon it. (See *Lacabanne Properties,*

Inc., supra.)

Additionally, there is no evidence that the clerk who sold the beer to the minor had ever seen him before. She did not testify, so any claim that she might have relied upon false identification shown to her on an earlier occasion is purely conjectural.

Suppose we were to assume that the minor had displayed false identification at some other store, or to some other clerk at appellant's store. The evidence is undisputed that he did not show any identification to the clerk who sold him the beer, and there is no contention that, in the exercise of due diligence, she reasonably relied upon false identification shown to some other clerk at some other time.

Finally, we think it readily understandable that the ALJ did not mention section 25660 in his proposed decision. Appellant's counsel never called the ALJ's attention to section 25660, and his closing argument only hinted that such a defense was being asserted. Mr. Eicher's emphasis was on the claimed lack of credibility of the minor (see RT 71-73), and on that point, the ALJ obviously did not agree with him.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.