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

AB-8153
File: 20-377555 Reg: 02054246

CHEVRON STATIONS, INC. dba Chevron
1900 Rose Avenue, Oxnard, CA 93033,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: June 10, 2004
Los Angeles, CA

ISSUED JULY 29, 2004

Chevron Stations, Inc., doing business as Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Gary D. Labin, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 23, 2001. Thereafter, the Department instituted an accusation against appellant charging that, on

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[1]The decision of the Department, dated June 12, 2003, is set forth in the appendix.

August 14, 2002, appellant's clerk, Kyle Renouf, sold a can of Budweiser beer to Irene Hernandez, an 18-year old minor who was acting as a decoy for the Oxnard Police Department.

An administrative hearing was held on May 13, 2003, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged in the accusation, and ordered the suspension from which this timely appeal has been taken.

Appellant raises the following issues in its brief: (1) there was no compliance with Rule 141(b)(2); (2) Part IV of the Findings of Fact fails to address an irreconcilable conflict in the testimony of the decoy and one of the police officers; and (3) the ALJ's failure to disqualify himself in response to appellant's peremptory challenge violated the equal protection clauses of the California and United States Constitutions.[2]

DISCUSSION

I

Appellants contend that the Department was obligated to present evidence regarding the appearance of a second decoy who accompanied the decoy who actually purchased the alcoholic beverage, and its failure to do resulted in a violation of Rule 141(b)(2).

The evidence shows that a second decoy, Aubrey, accompanied decoy Hernandez into the store and remained at her side until the two left the store. There is

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[2] A letter from David W. Sakamoto, counsel for the Department, to the Appeals Board and to Ralph Saltsman, counsel for appellant, refers to a communication with Mr. Saltsman, and recites that the issue involving peremptory challenge has been withdrawn. This was confirmed at the hearing.

nothing in the record regarding Aubrey's age or appearance.

Appellant cites the Board's decision in *Hurtado* (2000) AB-7246, where the Board held that the presence of a 27-year-old plain-clothed police officer affected the appearance which the decoy presented to the seller. In *Hurtado*, the police officer and the decoy sat together at a small table, and each ordered a beer. The Board was persuaded that the fact that the officer actively participated in the operation rendered the operation unfair.

In this case, the only evidence concerning Aubrey is that she accompanied Hernandez, conversed with her while at the cooler, and stood next to her when she made the purchase. There is no evidence of any action on her part that might reasonably have distracted, confused or misled the clerk.

In *7-Eleven, Inc./Janizeh* (2002) AB-7790, the Board said that the "real question" to be asked is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law. Noting that the clerk did not testify, the Board found no evidence or claim that the clerk was distracted. Nor did the clerk testify in the present case.

It appears that Aubrey was present on the morning of the hearing, and appellant's counsel was aware of that presence. [RT 52.] Yet, no attempt was made to place in evidence any description of the second decoy, and all we have found is the purchasing decoy's reference to her as a "young girl." [RT 43.]

Appellant's contention lacks merit.

II

Appellant contends that the testimony of Oxnard police officer Rand Latimer and that of decoy Hernandez regarding the face to face identification which Rule 141(b)(5) requires is in such conflict that the failure of the administrative law judge (ALJ) to reconcile the conflict amounts to reversible error.

Officer Latimer testified that he heard fellow Oxnard police officer Gomez ask the decoy if, referring to the clerk, he was the person who sold her the beer. Decoy Hernandez testified that Officer Gomez asked her who sold her the beer.

Focusing on Officer Latimer’s description of what happened, appellant claims that Officer Gomez’s question was both leading and unduly suggestive by identifying a specific person. Appellant claims this was a “single person show-up,” citing *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].

In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*, *supra*, the court held that a single person line-up was not inherently unfair, and upheld a face to face identification made where the clerk had been brought out from the store to face the minor. The court cited the decision in *In re Carlos M*. (1990) 220 Cal.App.3d 372 [269 Cal.Rptr. 447], where an alleged assailant was transported to a hospital to be identified by the victim. The court in that case rejected the contention that the identification was unduly suggestive, stating:

> A single person show-up is not inherently unfair. [Citation.] The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted, i.e., to demonstrate that the circumstances were unduly suggestive. [Citation.] Appellant must show unfairness as a demonstrable reality, not just speculation.

In re Carlos, supra, 220 Cal.App.3d at 386.

The court soundly rejected the contention that a compelling reason had to be shown before a one-person show-up could be conducted*:*

> Appellant contends, incorrectly, that single-person show-ups are impermissible absent a compelling reason. To the contrary, single-person show-ups *for purposes of in-field identifications* are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended. [Citation.] The law permits the use of in-field identifications arising from single-person show-ups so long as the procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. [Citation.]

In re Carlos, supra, 220 Cal.App.3d at 387.

Rule 141(b)(5), by its terms, requires, in effect, an in-field identification. In this case, the identification was conducted shortly after the sale, when the events were fresh in the decoy's mind. It is doubtful to the extreme that the decoy would have identified a person other than the actual seller simply from the way the question was asked.

We find nothing in officer Gomez's questioning, as described by Officer Latimer that can fairly be described as unduly suggestive or unfairly leading. The decoy was under no pressure to identify the wrong person, and there has never been a claim that Renouf, the clerk, was not the person who sold her the beer.

In our view, the conflict in testimony has been exaggerated. We doubt that either witness recalled the precise words used or heard, and the so-called conflict is simply one where two witnesses who observed the same event described it in slightly different ways. The fact that the ALJ did not bother to address such conflict as there

might have been, one we think inconsequential, does not strike us as error.

ORDER

The decision of the Department is affirmed.[3]

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

[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.