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

AB-8171
File: 20-197434 Reg: 03054762

CIRCLE K STORES, INC. dba Circle K
1161 East Valley Parkway, Escondido, CA 92025,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 5, 2004
Los Angeles, CA

ISSUED SEPTEMBER 17, 2004

Circle K Stores, Inc., doing business as Circle K (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, all of which were conditionally stayed, subject to one year of discipline-free operation, for its clerk, John D. Casale, having sold a six-pack of Budweiser beer to Nancy Duran, a 19-year-old minor police 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 Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

---

[1]The decision of the Department, dated July 17, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 23, 1988. Thereafter, on March 28, 2003, the Department instituted an accusation against appellant charging the unlawful sale of beer to Nancy Duran, a minor.

An administrative hearing was held on June 17, 2003, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Nancy Duran, a police decoy, Carlos Perez, a second police decoy, and Palomar College police officer Ryan Banks. Jeff Sadrieh, appellant's store manager, testified on behalf of appellant.

Decoy Duran testified that she removed a six-pack of Budweiser beer from the cooler and took it to the counter, where a male clerk asked for her identification. She gave him her California driver's license which showed her true date of birth and a red stripe with white letters stating "21 in 2003." He "swiped" the license through a "little machine" and handed it back to her. Duran paid for the beer, the clerk placed it in a bag, and she left the store. She then reentered the store and identified the clerk who had sold her the beer. The clerk, whose employment was terminated by appellant following the incident, did not testify.

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.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the administrative law judge (ALJ) engaged in judicial misconduct; and (2) the ALJ failed to make findings regarding the apparent age of the second decoy.

DISCUSSION

I

Appellant contends (App. Br. at page 6) that the ALJ became an advocate for the Department instead of an unbiased and impartial hearing officer when, early in the testimony of decoy Duran, he interrupted her testimony with the following remark:

> Let me just interrupt you for a minute, because I realize there's two of you, and you're using "we." It's important that we know exactly what you are doing if they ask you what you were doing. And if they ask you what Carlos was doing, you can tell us that.

Appellant asserts that, at that point and thereafter, the decoy began testifying in the first person singular, "notwithstanding the established fact that there were two decoys and that whatever Duran did, Perez did as well (except for the actual sales transaction itself.)" Appellants say that, absent cross-examination, "it would certainly appear that the second decoy (Perez) disappeared" (App. Br. at page 6), and that Judge Echeverria was "attempting to redirect the decoy's testimony away from the fact that there were two decoys in tandem participation." (App .Br. at page 8). Continuing (App. Br. at page 10), appellant asserts that "although the intervention is brief, the clear intent and the effect are both potentially devastating":

> The question raised by Judge Echeverria's short but directed intervention is whether or not Judge Echeverria became an advocate in that instance. The answer is that he was an advocate since the presence of the second decoy was at issue. The Administrative Law Judge dealt with the issue inadequately in the proposed decision. However, by dealing with the issue at all there is that acknowledgment by the Administrative Law Judge of an awareness of the existence of the issue.

We reject appellant's attack on the ALJ. To assert that an instruction to a witness to be specific as to whose actions she is relating converts an impartial trier of fact into an advocate for the opposing party strikes us as both unwarranted and based

on faulty logic.

There is nothing in the record that would indicate, at the point where Judge Echeverria interrupted the witness's testimony, that the conduct or behavior of the second decoy would be an issue. Decoy Duran had only begun to testify and it had already become apparent that she was answering for both decoys rather than just herself. The ALJ's cautionary instruction to Duran to answer only for herself unless asked otherwise was perfectly proper.

Appellant's flawed logic is exposed in the paragraph from its brief quoted above. Appellant implies that the ALJ became an advocate for the Department because he knew the presence of the second decoy was an issue, and he knew that because he addressed the issue in his proposed decision. Of course, the ALJ was aware, after the hearing and when he wrote his proposed decision, that the presence of the second decoy had become an issue. It does not follow that what he wrote after the hearing is proof that he had an improper motive at the outset of the hearing.

Appellant cites two cases, neither of which support of its position. In *People v. Perkins* (2003) 109 Cal.App.4th 1562 [1 Cal.Rptr.3d 271], the trial judge in a criminal jury trial had demonstrated intemperance in his examination of the defendant, and in four specific instances prejudicially interfered with his defense and conducted himself as though he sided with the prosecution. The facts of the case are so different from the facts of this case as to make it totally unpersuasive as a precedent.

People v. Rigney (1961) 55 Cal.2d 236 [10 Cal.Rptr. 625] is cited by appellant for its statement of the general rule, with which we have no quarrel, that it is "the right and duty of a judge to conduct a trial in such a manner that the truth will be established in accordance wit the rules of evidence," and that a trial judge must not become an

advocate for either party.

We have reviewed the transcript of the hearing, and have found not a scintilla of evidence of impartiality on the part of Judge Echeverria. Appellant's contention that he became an advocate for the Department is without basis.

II

Appellant contends that, because the decoy who purchased the beer was accompanied by a second, non-purchasing decoy, the ALJ improperly failed to consider the appearance of the second decoy under Rule 141(b)(2), that is, whether he displayed the appearance required by Rule 141(b)(2).[2] Appellant relies on earlier Board decisions in *Hurtado* (2000) AB-7246, and *The Southland Corporation/R.A.N., Inc.* (1998).

Appellant argues that the two decoys acted in tandem, accompanying each other as they entered the store, selected the beer, and stood at the counter while the transaction was conducted. It is not disputed that Duran purchased the beer, and that Perez, the second decoy, although standing next to, or slightly behind Duran, did not participate in the transaction.

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, as here, the clerk did not testify, the Board found no evidence or claim that the clerk was distracted.

---

[2] Rule 141(b)(2) requires that a decoy "shall display 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 at the time of the alleged offense."

In *Hurtado, supra*, a 27-year-old plain clothed police officer sat at a small table with a minor decoy, and each ordered a beer. The Appeals Board reversed the decision of the Department, quoting dicta from its earlier decision in *The Southland Corporation/R.A.N., Inc*. (1998) AB-6967, that "such an apparent loose practice [an 18-year-old female accompanied the 19-year old decoy who made the purchase of an alcoholic beverage] may cause confusion at the time of the sale, which may be contrary to the Rule's demands for 'fairness.'" The Board said in *Hurtado*:

> Here consideration of the effect of another person is essential for disposition. Certainly, if the officer ordered the beers, that would completely taint the decoy operation. Even if he did not order the beer for the minor, we find the officer's active participation in the decoy operation to be highly likely to affect how the decoy appeared and to mislead the seller.

Unlike *Hurtado*, Perez cannot be said to have actively participated in the decoy operation. True, he accompanied the decoy in the store, and stood nearby when the transaction took place. But there is no evidence that he said or did anything that might have influenced the clerk's perception of Duran. It would be pure speculation to assume that the clerk was distracted or confused merely because another person was standing near Duran or had been near her while in the store. Since the clerk did not testify, there is nothing to indicate that he was confused, distracted, or misled.[3]

This case is more like *Janizeh*, and we reach the same result here.

---

[3] When the clerk swiped Duran's license a second time, after having been accused of selling beer to a minor, he said, according to Duran, "See, 19." This suggests, as Department counsel argued, that the clerk mistakenly assumed the buyer needed only to be 19, an obvious mistake. It would be the rankest speculation to assume the mistake was caused by 17-year-old Perez's presence.

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 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.