

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

AB-8200

File: 20-280092 Reg: 03054563

7-ELEVEN, INC., SURESH JAIN, and USHA JAIN dba 7-Eleven
5962 West Pico Boulevard, Los Angeles, CA 90035,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

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

ISSUED SEPTEMBER 17, 2004

7-Eleven, Inc., Suresh Jain, and Usha Jain, doing business as 7-Eleven (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, Baljit Singh, having sold a 24-ounce can of Budweiser beer to Sandra Ibanez, an 18-year-old minor police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Suresh Jain, and Usha Jain, 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.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 3, 1993.

¹The decision of the Department, dated September 25, 2003, is set forth in the appendix.

Thereafter, on February 21, 2003, the Department instituted an accusation against appellants charging an unlawful sale of an alcoholic beverage to a minor on October 10, 2002.

An administrative hearing was held on July 24, 2003, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Sandra Ibanez, who purchased the beer in her role as a police decoy, and Daniel Gersna, a Los Angeles police officer. Baljit Singh and Amrik Singh testified on behalf of appellants. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven, and no affirmative defense had been established.

Appellants thereafter filed a timely appeal in which they contend that Rules 141(a)² and 141(b)(5)³ were violated because the clerk's hands were cuffed behind his back when the decoy identified him as the seller. Citing *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Keller* (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr. 339], appellants assert that the identification was unduly suggestive, and thus unfair, because the handcuffing singled out the clerk in question from a second, similarly dressed clerk in the store. Appellants do not contend that the

² Rule 141(a) authorizes law enforcement agencies to use persons under the age of 21 to attempt to purchase alcoholic beverages to apprehend licensees who sell alcoholic beverages to minors and to reduce sales of alcoholic beverages "in a fashion that promotes fairness."

³ Rule 141(b)(5) states:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable effort to attempt to enter the licensed premises and have the minor decoy who purchased the alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

decoy was mistaken in her identification.

DISCUSSION

Administrative Law Judge Lo rejected the same arguments now made by appellants when they were made at the administrative hearing, stating:

The only disputed issue in this case is whether the face-to-face identification complied with the Department's Rule 141(b)(5), in light of the fact that Singh's hands were handcuffed behind his back during the identification. In deciding this issue, the Administrative Law Judge relies on four points made by the Court of appeal in Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (7-Eleven, Inc., et al. Real parties in Interest) (2003) 109 Cal.App.4th 1687, the most recent Court decision interpreting Rule 141(b)(5).

The four points are: 1) Single person show-ups are not inherently unfair. 2) An unduly suggestive one person show-up is impermissible. 3) Rule 141(b)(5) insures that the seller will be given an opportunity, soon after the sale, to come "face to face" with the decoy. 4) An identification which occurs outside the premises, resulting from a police officer escorting the seller outside, complies with Rule 141(b)(5).

There is no question that Ibanez's identification of Singh as the seller of the beer was a "single person show-up", or that Singh had the opportunity to come face-to-face with Ibanez. The ultimate issue, then, is whether the handcuffing of Singh was "unduly suggestive" to Ibanez that Singh was the seller. It was not.

First, there is no evidence that Ibanez knew Singh's hands were cuffed behind him. Even if she did, there is no evidence that the handcuffing of Singh suggested to Ibanez anything that she did not already know. Considering that Ibanez had just bought the beer from Singh, it is reasonable to conclude that she did not then forget Singh was the seller.

There is case law support for the ALJ's determination that the handcuffing of Singh did not taint the identification by Ibanez. (See, e.g., *In re Carlos* (1990) 220 Cal.App.3d 372, 386-387 [269 Cal.Rptr. 447] ("the mere presence of handcuffs on a detained suspect is not so unduly suggestive as to taint the identification.") The court in *In re Carlos* also pointed out that single person show-ups "for the purpose of in field identifications" are encouraged, because the suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the

witness's mind.

Ibanez's identification of Singh was an "in field" identification, and its reliability is not undercut by whether she knew Singh's hands were behind his back because he was handcuffed. Since she was not in the store when the handcuffs were placed on Singh, there is reason to think she may not have known. But, even if she did know, we do not see any indication that it influenced her actions. Her testimony about the face to face identification was subjected to only cursory cross-examination (see RT 14-15), with no attempt made to show it was in any way suspect.

Appellant asserts that the fact that Singh was handcuffed was plainly obvious: "The fact that [Singh] was restrained with his hands cuffed behind his back and was looking at Ibanez clearly indicates that the fact that [Singh] was restrained in handcuffs was obvious and visible to Ibanez." (App. Br. at page 7.)

Ibanez was not asked if she knew Singh's hands were cuffed. For all we know, appellants' counsel may have gambled that her answer - if she said no - would be damaging to their intended defense. We think it is worth pointing out that the photograph (Exhibit 4) taken *after* Ibanez had identified Singh, does show Singh with his hands behind his back. Yet nothing in his pose or posture, which would have been the way he would have appeared when Ibanez first identified him from across the counter, suggests that it was "obvious and visible to Ibanez" that Singh's hands are cuffed.

In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Keller, supra*, the decoy identified the clerk after he had been brought outside the store, and this was not considered unduly suggestive. The court there said that even though the identification of the seller is of obvious importance, the core

rationale of Rule 141(b)(5) was to ensure that the seller be given the opportunity to come face to face with the decoy. Appellants have made no contention that Singh was not given this opportunity.

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.