

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

AB-8208

File: 20-360766 Reg: 03055285

SIERRA MADRE OIL, INC. dba Sierra Madre Chevron
233 North Altadena Drive, Pasadena, CA 91107,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: September 2, 2004
Los Angeles, CA

ISSUED NOVEMBER 18, 2004

Sierra Madre Oil, Inc., doing business as Sierra Madre Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk, Maher Mansour, having sold a six-pack of Smirnoff Ice, an alcoholic beverage, to Kimberly Jones, an 18-year-old police decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Sierra Madre Oil, Inc., appearing through its 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

Appellant's off-sale beer and wine license was issued on January 14, 2000.

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

Thereafter, the Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage to a minor.

An administrative hearing was held on October 10, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction by Jones, the decoy, and by Richard Padilla, a Pasadena police officer who observed the transaction.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and no affirmative defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that Rules 141(a) and 141(b)(5) were violated as a result of an unduly suggestive identification.

DISCUSSION

Rule 141(a) authorizes police officers to conduct decoy operations only in a manner which promotes fairness. Rule 141(b)(5) requires the decoy to make a face to face identification of the seller following a completed sale, and before a citation is issued.

The administrative law judge (ALJ) made this finding (Finding of Fact V):

One of the police officers asked the decoy to identify the person who sold the Smirnoff Ice to her. The decoy identified Mansour as the seller. During the identification, Mansour was on the clerk's side of the counter, and the decoy was on the customer's side. Mansour knew that he was being identified as the seller.

Appellant does not take issue with any part of the finding. Instead, appellant argues that the identification was unduly suggestive because, instead of asking a neutral question, such as, "Who sold you the alcohol?", the police officer "posed a question

which was both leading and unduly suggestive - the decoy testified that she was asked 'to point to him and - they asked if he was the man and I said 'yes.'" Appellant says that, by asking the decoy if this was the man who sold her the beer, the officer "implicitly" indicated that he believed Mansour to be the seller and thus unduly pressured the decoy to agree with him.

It is useful to look at the decoy's testimony in context. She was asked:

Q. Sometime after the officer identified himself, were you asked to identify the clerk as the seller of that alcohol?

A. Yes, I was.

Q. Which officer asked you to conduct that identification?

A. I don't recall.

Q. Do you recall the manner in which you were asked to identify the clerk?

A. To point to him and – they asked if that was the man and I said, "yes."

Q. After you conducted – well, at the time you pointed to the clerk and identified him as the seller, were you on the customer side of the counter?

A. Yes.

Q. And was he on the employee's side of the counter?

A. Yes.

Q. When you identified the seller, was there any reaction that you had noted on the part of the clerk?

A. He immediately asked to see my identification after he had made the sale.

The transaction was recorded by a surveillance camera, and the recording was viewed during the hearing. The ALJ commented on what he saw on the tape:

We just spent the last five to ten minutes reviewing the videotape, and what I saw was that after the transaction, the bag of Smirnoff Ice did not leave the counter. I also did not see the decoy leave the counter, and I saw Officer Padilla approach the clerk and show his badge.

Then we watched some more and then saw Officer Padilla take the Smirnoff Ice out of the bag.

So it looks to me, like that the decoy did not leave the counter – actually, it looks like the decoy had not left the counter when Officer Padilla identified himself as an officer and informed the clerk that he had just sold to a minor.

We are simply not persuaded that a decoy who has just purchased an alcoholic beverage, who is still at the counter facing the clerk when asked if he is the person who sold to her, has been pressured to identify him as the seller.

In *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Keller* (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr. 3d 339], cited by appellant, an identification made after the clerk was taken outside the store before being identified was held not unduly suggestive. What took place in the present case was far more benign.

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.