

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

AB-8212

File: 20-284708 Reg: 03055091

CIRCLE K STORES, INC. dba Circle K Store # 2966
12906 Pomerado Road, Poway, CA 92064,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED DECEMBER 8, 2004

Circle K Stores, Inc., doing business as Circle K Store #2966 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerk, Adam Sur, having sold a 20-pack of Budweiser beer and a six-pack of Smirnoff Ice to Joshua Bolin, a 17-year-old 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 B. Saltsman and Stephen W. 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 December 9, 1993. Thereafter, the Department instituted an accusation against appellant charging the

¹The decision of the Department, dated November 20, 2003, is set forth in the appendix.

unlawful sale of an alcoholic beverage to a minor. An administrative hearing was held on September 26, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Joshua Bolin, the minor, and by Peter Tyndall, a Department investigator who observed Bolin leaving the store with a 20-pack of Budweiser beer and a six-pack of Smirnoff Ice, a malt beverage. No one testified on behalf of appellant.

Bolin testified that he initially purchased a 12-pack of Budweiser beer, and was not asked for his age or for identification. He took the beer to his car, then called friends. After discussions with the friends who had come to the store, Bolin reentered the store and purchased the 20-pack of Budweiser beer and the Smirnoff Ice. Again, Bolin was not asked his age or for identification. On cross-examination, Bolin said he was carrying, but did not display, his valid California driver's license, and denied possessing any false identification. When confronted by the police, Bolin's pockets were searched, and he was patted down. His car was also searched.

Investigator Tyndall testified that he was accompanied by San Diego State University police officer Mike Johnson on the night in question. He saw Bolin leaving the store with alcoholic beverages, and, because of Bolin's youthful appearance, decided to question him. When asked his age, Bolin said "17." Tyndall searched Bolin for false identification, but found only Bolin's valid California driver's license. Tyndall's search included Bolin's car and its glove compartment, but Tyndall did not require Bolin to empty his pockets. Bolin was taken into the store, and identified Sur as the person who had sold to him. Sur stated to Tyndall that he had not asked Bolin for

identification.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged and ordered the 10-day suspension from which this timely appeal has been taken.

Appellant contends that the decision misstates appellant's obligation concerning its burden of proof with respect to its claim of an affirmative defense under Business and Professions Code section 25660.²

DISCUSSION

Appellant asserts that the decision is flawed for two reasons: it seems to conclude that, absent appellant's calling witnesses, a defense under section 25660 cannot be established, and it concludes without factual analysis that Bolin's testimony was credible.

Appellant's argument is rich in optimism but lacking in persuasive content. First, we do not read the decision as saying appellant, in all cases, must present witnesses in order to establish a defense under section 25660. It simply says that there is no evidence from either side to support such a defense.

² Business and Professions Code section 25660 provides:

Bona fide evidence of majority and identity of the person is 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. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

Bolin denied possessing or using false identification. None was found when he was searched. The clerk did not testify, but admitted to Department investigator Tyndall that he had not asked Bolin for identification. There is not a scintilla of evidence that Bolin used false identification, or, indeed, any identification at all.

The weakness in appellant's contention is best exemplified by the interchange at the hearing between Judge Echeverria and appellant's counsel [RT 34-35]:

Judge Echeverria: Aren't there certain requirements that you have to establish in order to establish a defense under that section, 25660 of the Business and Professions Code?

Ms. Brown: Yes, Your Honor. You have to establish reasonable reliance on a bona fide identification.

Judge Echeverria: Do you feel that you've met all those requirements?

Ms. Brown: There is an inference that there was an identification used.

Judge Echeverria: Assuming that there was an identification used, do we have any evidence whatsoever that it was a bona fide form of identification?

Ms. Brown: No, Your Honor, we don't.

In effect, appellant would have the Board infer that some kind of false identification was displayed that would pass muster under section 25660, even though none was discovered during a search of the minor and his vehicle, and in the face of uncontradicted testimony of the minor that no identification was requested, as well as that of the Department investigator who testified that the clerk admitted he had not requested any identification.

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.