

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

AB-8241

File: 21-341193 Reg: 03055090

JAMES CHARLES BICE and SYLVIA BRYAN BICE
dba Baycrest Spirits and Wine Shop
333 East 17th Street, Costa Mesa, CA 92627,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: November 4, 2004
Los Angeles, CA

ISSUED JANUARY 10, 2005

James Charles Bice and Sylvia Bryan Bice, doing business as Baycrest Spirits and Wine Shop (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, Cameron Phillips, having sold a 12-pack² of Rolling Rock beer, in bottles, and an 18-pack of Coors Light beer, to Trevor Prins, a 17-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants James Charles Bice and Sylvia Bryan Bice, appearing through their counsel, James Brustman, and the Department of

¹The decision of the Department, dated January 8, 2004, is set forth in the appendix.

² There is some confusion in the record as to the quantity of Rolling Rock beer purchased by Prins. He described it as a 12-pack, counsel for the Department referred to a 12-pack, without identifying the brand, and the investigator who testified described it as a "case." Of course, the amount he actually purchased is not material, so long as it was an alcoholic beverage.

Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on May 29, 1998. The Department instituted an accusation against appellants on June 11, 2003, charging the unlawful sale of an alcoholic beverage to a minor. An administrative hearing was held on October 29, 2003. Subsequent to the hearing, the Department issued its decision which determined that the violation charged in the accusation had been established, and that appellants had not established a defense under Business and Professions Code section 25660. Appellants have filed a timely appeal, and assert that they did establish a defense under section 25660.

The evidence established that the minor displayed a fake New Jersey driver's license he fabricated using an Internet-derived template and home laminating equipment. The document bore a strong resemblance to an authentic New Jersey license, but the lamination was cracked and had been taped over. The clerk had Prins remove the "license" from his wallet, looked at both sides to see if it had been tampered with, looked to see if the age had been altered, and for any cutting or pasting of the photograph. He testified that he spent more time examining the document because it was from out of state, but failed to notice that the lamination was becoming undone. The administrative law judge (ALJ) made a specific finding that the clerk had not knowingly sold to a minor.

Nonetheless, the ALJ concluded that the clerk's reliance upon it was unreasonable, stating (Conclusion of Law 7):

While *Kirby v. ABC Appeals Board [Boyajian]* (1968) 267 Cal.App.2d 895, 897-98, 73 Cal.Rptr. 352, and cases cited therein suggest that certain "altered, forged or otherwise spurious" documents may qualify under the statutory defense

provided by Section 25660, it still must be shown that the selling clerk acted reasonably and prudently under the circumstances. It cannot be said here that the clerk Phillips acted reasonably or prudently in accepting the Exhibit 2 ID presented him on February 14, 2003, by Trevor Prins. The combination of the very youthful appearance of Prins and the flimsy, tape covered ID presented should have been enough for him to refuse the sale. Phillips' testimony indicated that he made a careful check, but his failure to notice and act on the obviously amateurish lamination and tape-over, coupled with his admitted determination that Prins looked under 21 years of age make his reliance on the ID unreasonable and imprudent.³

DISCUSSION

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. (Cal. Cons., art. XX, § 22; Bus. & Prof. Code, §§ 23084 and 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]: “[T]he reviewing court is not entitled to exercise its independent judgment on the effect or weight of the evidence, but is simply called upon to determine whether the findings are supported by substantial evidence in light of the whole record.”)

The cases interpreting section 25660⁴ have said uniformly that a licensee or a

³ Although the ALJ included these comments in a section of the decision denominated “Conclusions of Law,” we think they necessarily involve a factual determination of the kind the courts have said must be left to the trier of fact. (See text, *infra*.)

⁴ Business and Professions Code section 25660 provides:

Bona fide evidence of majority and identity of the person is a document issued
(continued...)

licensee's agent must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances, and licensees are protected if they can show they exercised due diligence in inspecting the document tendered as proof of majority and identity. (See, e.g., *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd./Masani* (2004) 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826] ("*Masani*"); *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr.734]; *Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820].)

In *5501 Hollywood, Inc.*, *supra*, the 18-year old minor had displayed a driver's license she had found. The person to whom the license was issued was 21 on the day in question. A superior court had reversed the decision of the Department, and was, in turn, reversed by the district court of appeal. The court wrote:

The statute now demands documentary evidence of majority and identity which is intrinsically bona fide and the mere fact of production of a vehicle operator's license does not make a case. "Under this last quoted section a licensee does not establish an absolute defense by evidence that the minor produced an identification card purporting to show that the person in possession of the card is 21. The defense must be asserted in good faith, that is, the licensee or the agent of the licensee must act as a reasonable and prudent [person] would have acted under the circumstances. Obviously, the appearance of the one producing the card, or the description on the card, or its nature, may well indicate that the

⁴(...continued)

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.

person in possession of it is not the person described on the card. In such a case the defense permitted by section 61.2(b) [now section 25660] could not be successfully urged.” *Keane v. Reilly*, 130 Cal.App.2d 407, 410, 279 P.2d 152-154.

...

It is essential to a successful defense that the operator’s license or other evidence of majority be presented by one whose appearance indicates that he or she could be 21 years of age, and a reasonable inspection of the document must be made by the licensee or his agent. “Obviously, to protect a vendor, such evidence of majority and identity would have to be presented by a person whose appearance was such as to make it doubtful on which side of the line dividing minority from majority the purchaser was. When a doubt as to that would arise in good faith, it was intended that the vendor could rely upon documentary evidence of majority and identity such as motor vehicle operator’s licenses and draft board certificates, but the bona fides of such documents must be ascertained if the lack of it would be disclosed by reasonable inspection, the circumstances considered.” (Citation) *That process must do more than raise a mere suspicion (citation); but whether it does so ordinarily is a question of fact for the [Department] to determine.* (Emphasis supplied.)

(*5501 Hollywood, Inc., supra*, 155 Cal.App.2d at 753-754.)

In *Masani, supra*, the Department had found that the licensee had not reasonably relied upon a fake identification card. The Board reversed the Department, concluding that the clerk accepted the ID in good faith, believing it to be genuine, and finding nothing in the record to show that her reliance was unreasonable. The court in *Masani* reversed the Board, stating:

[T]he Department ALJ found, as a question of fact, there was no reasonable reliance on the particular ID in this case. In reaching the contrary conclusion the Board impermissibly reweighed the evidence and substituted its independent judgment for the Department’s. We will therefore vacate the decision of the Board and affirm the Department.

(*Masani, supra*, 118 Cal.App. 4th at 1437.)

...

The ultimate question is not whether the section 25660 defense is categorically unavailable to the licensees in this case. Rather, the question is whether the

licensees reasonably relied on Johnson's fake ID.

Whether or not a licensee has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact. [Citation.] As we noted at the outset, the ALJ found that [the clerk] did not reasonably rely on the ID. The ALJ viewed the ID as it had been placed in the wallet, and made factual findings based on his observations. We are not only bound by those findings, as we noted above, but we must assume the ALJ's observations of physical evidence support his findings.

(*Id.* at 1446.)

The "license" (Exhibit 2), but for its crude lamination and tape-over, characterized by the ALJ as "amateurish," bears a strong resemblance to an authentic New Jersey driver's license. It is an example of the Internet's contribution to the art of fabricating false documents.

In a way, the ALJ second-guessed the clerk. However, the Board is hard put to conclude that he acted unreasonably in doing so. The clerk admitted that he thought Prins looked under 21, and that, in combination with the questionable appearance of the "license," was enough to create a level of suspicion requiring further inquiry.

Appellants reproduce in their brief the decision in *Dethlefsen v. State Board of Equalization* (1956) 145 Cal.App.2d 561 [303 P.2d 7], a case involving a minor's use of an age-altered Selective Service Registration card. Appellants refer to the court's description of the card as "show[ing] the discoloration and scuffing which might be expected on a card the owner is required to have in his possession at all times," and argue that the same could explain the condition of the "license" in this case.

This is an argument that could have been made to the trier of fact, but was not. Appellants' counsel argued that the "license" looked "perfectly okay," and looked like a sample New Jersey license depicted in a book of sample licenses consulted at the hearing. The ALJ did not find the argument persuasive.

Appellants' brief complains of the ALJ's "subjective" finding that Prins did not appear to be 21 years of age, stressing his height (6' 3") and weight (160 pounds). It strikes us that the ratio of height to weight is not atypical of a male Prins's age. And, we cannot ignore the clerk's admission that he thought Prins to be under 21, the reason he asked for identification.

We think this is a case where the findings and determinations of the Department should be affirmed. It is a case remarkably similar to *Masani, supra*, and the court's opinion in that case cannot be ignored.

ORDER

The decision of the Department is affirmed.⁵

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ 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.