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

AB-8335
File: 21-351251 Reg: 03056388

CHIN CHA CHANG and JI WOOK CHANG, dba Crest Jr. Market Liquor
11127 Venice Boulevard # 10, Los Angeles, CA 90034,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED JULY 12, 2005

Chin Cha Chang and Ji Wook Chang, doing business as Crest Jr. Market Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Chin Cha Chang and Ji Wook Chang, appearing through their counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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[1]The decision of the Department, dated August 12, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on March 26, 1999. Thereafter, the Department instituted an accusation against appellants charging that, on September 11, 2003, appellants' clerk, Rafael Jesus Gonzalez (the clerk), sold an alcoholic beverage to 19-year-old Guadalupe Tapia. Although not noted in the accusation, Tapia was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on June 29, 2004, documentary evidence was received, and testimony concerning the sale was presented by Tapia (the decoy), by Robin Richards, a Los Angeles police officer, and by co-appellant Ji Wook Chang.

The Department's decision determined that the unlawful sale had occurred as charged and that no defense was established. Appellants filed an appeal making the following contentions: (1) The decision is not supported by the findings and the findings are not supported by substantial evidence; (2) Business and Professions Code section 24210 is unconstitutional; and (3) the penalty is excessive.

DISCUSSION

I

Appellants contend that the decision is not supported by the findings and the findings are not supported by substantial evidence. More specifically, they contend that the decoy operation violated rule 141(b)(2)[2]; that the Department intentionally failed to retain and produce the item purchased and the money used to purchase the item; and the Department failed to carry its burden of proof because it did not prove that the

[2]References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

beverage purchased was an alcoholic beverage. In addition, appellants raise the defenses of outrageous police conduct and entrapment.

Rule 141(b)(2) requires that the decoy's appearance when he or she is purchasing alcoholic beverages, be that which could generally be expected of a person under the age of 21. Appellants assert that the photograph of the decoy shows that her appearance violated rule 141(b)(2), and that "irrefutable proof" of that is found in the fact that she was able to purchase alcoholic beverages in three out of the nine[3] licensed premises she visited that evening. We find this totally unpersuasive.

In *7-Eleven & Jain* (2004) AB-8082, the decoy was sold alcoholic beverages in 80 percent of the licensed premises he visited, and in none of them was he asked for identification. In rejecting this "success rate" as proof the decoy violated 141(b)(2), the Board said:

> Although an 80 percent purchase rate during a decoy operation raises questions in reasonable minds as to the fairness of the decoy operation, that by itself is not enough to show that rule 141(a) or rule 141(b)(2) were violated. Such a per se rule would be inappropriate, since the sales could be attributable to a number of reasons other than a belief that the decoy appeared to be over the age of 21.

This Board has often said that, in the absence of very unusual circumstances, it will not disturb the determination of an administrative law judge (ALJ) with regard to compliance with rule 141(b)(2), and we certainly have no reason to do so in this case. The ALJ had the benefit of observing the decoy at the hearing, an opportunity this Board did not have. The Appeals Board has only the cold record and a copy of a

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[3]Appellants state that the decoy was able to purchase in 40 percent of the premises visited, but this is based on a document showing an additional location where the decoy participated in a "shoulder tap" operation. In that instance, the decoy did not buy the beer herself, but asked an adult to purchase it for her. She made direct purchases at 30 percent of the premises where she attempted to purchase beer herself.

photograph to look at, and we are not in a position to second-guess the trier of fact. Based on the photograph of the decoy taken the day of the decoy operation, however, we would not hesitate to agree with the ALJ's assessment.

Appellants argue that under *People v. Hitch* (1974) 12 Cal.3d 641 [117 Cal.Rptr. 9], the Department's failure to retain and produce the item purchased and the money used to purchase the item should result in excluding any reference to that evidence. However, *People v. Hitch* was declared to be superceded 15 years ago and is no longer good law in California. The California Supreme Court explained:

> *Hitch* established that the prosecution's due process duty to disclose material evidence creates a corresponding obligation to preserve such evidence. (*Id*. at pp. 650, 652-653.) The rule in *Hitch* has been superseded in California by the principles enunciated in [*California v.*] *Trombetta* [(1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413] (*Trombetta*)] and [*Arizona v.*] *Youngblood* [(1988) 488 U.S. 51 [109 S.Ct. 333, 102 L.Ed.2d 281] *(Youngblood)*]. (*People v. Cooper* (1991) 53 Cal.3d 771, 810-811 [281 Cal.Rptr. 90, 809 P.2d 865] (*Cooper*); *People v. Johnson* (1989) 47 Cal.3d 1194, 1233-1234 [255 Cal.Rptr. 569, 767 P.2d 1047]). Under these federal decisions, a defendant claiming a due process violation based on the failure to preserve evidence must show the exculpatory value of the evidence at issue was apparent before it was destroyed, and that the defendant could not obtain comparable evidence by other reasonable means. (*Trombetta*, *supra*, 467 U.S. at p. 489 [104 S.Ct. at p. 2534].) The defendant must also show bad faith on the part of the police in failing to preserve potentially useful evidence. (*Youngblood*, *supra*, 488 U.S. at p. 58 [109 S.Ct. at pp. 337-338].) "The presence or absence of bad faith by the police . . . must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Id*. at p. 57, fn. * [109 S.Ct. at p. 337].)

(People v. Frye (1998) 18 Cal.4th 894, 942-943 [959 P.2d 183; 77 Cal.Rptr.2d 25].) Appellants do not argue that they have met the more restrictive test of *Trombetta*, *supra*, and we see no way that *Trombetta* could be satisfied in this case. To name just one deficiency, the can of beer clearly would not be exculpatory evidence for appellants.

Appellants also argue that the Department failed to carry its burden of proof because it did not prove that the beverage purchased was an alcoholic beverage. This is easily disposed of. The decoy testified that she bought a 24-ounce Bud Light beer and the officer testified that he booked into evidence a sealed 24-ounce Bud Light beer in connection with this investigation. This evidence and the lack of any evidence that the can contained anything other than Bud Light beer, is sufficient to prove that the decoy purchased beer, an alcoholic beverage. (See, e.g., *Molina v. Munro* (1956) 145 Cal.App.2d 601, 604-605 [302 P.2d 818]; *Berberian Enterprises, Inc*. (1999) AB-7256.)

Counsel has raised the contentions of outrageous police conduct and entrapment in many of the sale-to-minor cases he has handled, and the Board has routinely rejected them. In *CMPB Friends, Inc.* (2003) AB-8012, the Board's language was right on point for the present appeal:

> Appellant premises its argument that there was misconduct and entrapment by the Department on its assumption that there was a violation of Rule 141.
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> As the discussion in part I indicates, we are of the view that there was no violation of Rule 141.
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> Although appellant has cited a number of cases addressing the issues of police misconduct and entrapment, it has offered no coherent discussion of facts which might support either of the two theories. Consequently, no useful purpose would be served by addressing the cases cited by appellant.

(See also, e.g., *RTDD, Inc*. (2003) AB-8063; *Tesfayohanes* (2000) AB-7321; *Berberian Enterprises, Inc*. (1999) AB-7256; *TBD Ent., Inc*. (1999) AB-7253; *Fourth Avenue Restaurant, Inc.* (1999) AB-7135; *Mi Place Ltd*. (1998) AB-6908; *Martin* (1997) AB-6698.)

II

Appellants contend they were denied due process because the ALJ who presided over the hearing was an employee of the Department. Appellants assert that Business and Professions Code section 24210, the code section which authorizes the Department to appoint its own ALJ's, is unconstitutional. That section states:

> The department may delegate the power to hear and decide to an administrative law judge appointed by the director. Any hearing before an administrative law judge shall be pursuant to the procedures, rules, and limitations prescribed in Chapter 5 (commencing with section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

This is another issue counsel has raised time and time again, and which the Board has rejected every time. *RTDD, Inc.*, *supra*, explains why the Board consistently rejects this contention:

> The Appeals Board, as with other state agencies, lacks the power to declare a statute unconstitutional unless an appellate court has made such a determination. (Cal. Const., art. 3, §3.5.) None has. To the contrary, two courts of appeal have rejected constitutional challenges to the Department's employment of its own ALJ's. *(*See *CMPB Friends, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1250 [122 Cal.Rptr.2d 914] and *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 880 [121 Cal.Rptr.2d 753].)
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> The Board itself has rejected numerous challenges to the Department's use of its own ALJ's that were based on grounds other than the alleged [in]validity of section 24210. (See, e.g., *7-Eleven, Inc./Veera* (2003) AB-7890; *El Torito Restaurants, Inc.* (2003) AB-7891.)

III

Appellants contend the 25-day suspension imposed, or any suspension at all, is unfair, unreasonable, and "cruel and unusual punishment" in light of the official misconduct in this case and the evidence of appellants' substantial efforts to preclude such violations.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

Since there was no official misconduct, appellants' contention fails automatically. This was appellants' second sale-to-minor violation in 36 months, and we can find no evidence in the record of any "substantial efforts to preclude such violations."

It is difficult to believe appellants are serious in their characterization of the penalty. There is nothing cruel, unusual, or excessive about the penalty in this matter.

ORDER

The decision of the Department is affirmed.[4]

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.