

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

AB-8498

File: 20-277064 Reg: 05059559

7-ELEVEN, INC., SURINDER S. UPPAL and MARIE S. UPPAL
dba 7-Eleven Store #2231-18019
124 Petaluma Boulevard, Petaluma, CA 94952,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Arnold Greenberg

Appeals Board Hearing: July 6, 2006
San Francisco, CA

ISSUED OCTOBER 6, 2006

7-Eleven, Inc., Surinder S. Uppal, and Marie S. Uppal, doing business as 7-Eleven Store #2231-18019 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk, Avtar Singh, having sold two 40-ounce bottles of Mickey malt liquor and a 24-can carton of Budweiser beer to Stephen Powell, a 19-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Surinder S. Uppal, and Marie S. Uppal, appearing through their counsel, Barry Strike, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

¹ The decision of the Department, dated December 22, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 16, 1992. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on February 5, 2005.

An administrative hearing was held on September 1, 2005, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Stephen Powell (the minor) on behalf of the Department, and by Marie Uppal and Irminder Brar on behalf of appellants. Avtar Singh, the clerk involved in the transaction, did not testify.

The evidence established that Powell, whose date of birth is August 20, 1985, presented two documents (Exhibits 3A and 3B) to the clerk in response to the clerk's request for identification. Exhibit 3B, Powell's California driver's license, had been visibly altered in several respects in the areas containing information bearing on Powell's age. The last digit of Powell's year of birth was obscured, as was the last digit of the year contained in the red stripe found on licenses issued to minors, stating the year the license-holder reaches majority. The data in the blue stripe, indicating the license status as provisional until a specified year, had also been rendered illegible. The bar code on the back of the license had also suffered a number of scratches, presumably to prevent it from being read by a scanning device. Powell testified that he had scratched out the pertinent information relating to his age for the purpose of using it to purchase alcohol. The license expiration date on the face of the license, August 20, 2004, had not been altered, so the license showed that it had expired five and one-half months prior to the date of the transaction at issue. Powell testified that he had altered the license to make it appear it had been chewed by a dog, and that he told the clerk

his dog was responsible for the damage to the license.

Exhibit 3A was what purported to be an interim license issued by DMV in November of 2003, stating Powell's date of birth to be August 20, 1980, stating "AGE 21 IN 2001," and containing a physical description of Powell but no photograph. Powell testified that he had prepared Exhibit 3A on his computer, using a genuine interim license which he said had been issued to him after he reported to DMV that his driver's license had been lost, and altering it to show false information bearing on his age.

Powell testified that the clerk examined the two documents for 30 to 40 seconds before ringing the sale. When Powell left the store, he was confronted by Department investigators, and admitted he had altered the driver's license and fabricated the purported interim license.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and which rejected appellants' claim of a defense under Business and Professions Code section 25660.

Appellants thereafter filed a timely appeal, contending that the Department's determination that appellant failed to establish an affirmative defense under Business and Professions Code section 25660 is not supported by substantial evidence.

DISCUSSION

The principal, and controlling issue in this case is whether the Department's determination that the clerk did not act reasonably in relying on the documents presented to him precluded appellants from establishing a defense under Business and Professions Code section 25660. 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.

"It is well established that reliance in good faith upon a document issued by one of the governmental entities enumerated in section 25660 constitutes a defense to a license suspension proceeding even though the document is altered, forged or otherwise spurious." (*Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1968) 267 Cal.App.2d 895, 897 [73 Cal.Rptr. 352].) However, to provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne Properties, Inc. v. Alcoholic Beverage etc. Appeals Board* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*); *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820] (*5501 Hollywood*).)

Reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. (*5501 Hollywood, supra*, 155 Cal.App.2d at pp. 753-754.) A licensee, or a licensee's agent or employee, must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne, supra*; *Farah v. Alcoholic Bev. Control Appeals Bd.* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, supra*, 155 Cal.App.2d at p. 753.)

Although section 25660 was designed "to relieve vendors of alcoholic beverages

from having in all events to determine at their peril the age of the purchaser," by allowing vendors to rely on certain documentary evidence of majority and identity, "the bona fides of such documents must be ascertained if the lack of it would be disclosed by reasonable inspection, the circumstances considered." (*Dethlefsen v. State Bd. of Equalization* (1956) 145 Cal.App.2d 561, 567 [303 P.2d 7].)

The licensee or his agent must act in good faith and with due diligence in relying on an apparently valid but actually fraudulent ID:

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 person in possession of it is not the person described on such card.

(*Keane v. Reilly* (1955) 130 Cal.App.2d 407, 409-410 [279 P.2d 152].)

Section 25660 requires that the seller of alcoholic beverages "demanded, was shown, and acted in reliance upon" a government-issued document containing the prospective purchaser's name, date of birth, description, and picture in order to maintain a defense under the section. Case law has established that a fake ID, purporting to be government-issued, may qualify for the defense, but reasonable reliance upon that identification must be demonstrated. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429 [13 Cal.Rptr.3d 826].) The burden for establishing such a defense rests with the licensees.

The Department relies on *Masani, supra*, the most recent in a line of appellate court decisions addressing a licensee's burden in establishing an affirmative defense under section 25660. The "ultimate question" in that case was whether the licensees reasonably relied on a fake identification. Resolving that question against the

licensees, the court stated (*id.* at pp. 1445-1446):

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. (*Hollywood, supra*, 155 Cal.App.2d at pp. 753-754.) As we noted at the outset, the ALJ found that Salazar 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. (See *People v. Buttles* (1990) 223 Cal.App.3d 1631, 1639-1640 [273 Cal.Rptr. 397].)

The ALJ found that Salazar could not see the wording on the ID that purported to convey government issuance. The ALJ found four obvious areas of observable defects in the forgery. Salazar did not remove the ID for closer inspection. Since the licensee bears the burden of proving the defense (*Lacabanne, supra*, 261 Cal.App.2d at p. 189), Salazar's absence from the administrative hearing was a material failure of proof of the defense of reasonable reliance on a seemingly bona fide government document.

The Department reads this language as holding that, without the clerk's testimony, an affirmative defense under section 25660 cannot be established. We believe the Department reads the court's language too broadly, since such an interpretation would preclude the defense even in a case where a false identification was so perfectly constructed as to have deceived even the most diligent seller. It is common knowledge that licensees routinely terminate clerks who have made a sale to a minor, and it cannot be assumed that the clerk will be available at the time of the administrative hearing, and willing to cooperate with a licensee who has terminated his employment.

Nonetheless, we have little difficulty concluding that the evidence supports in all material aspects the findings and determination of the ALJ.

Appellants argue that the clerk could have reasonably believed that Powell's dog had chewed the license, accounting for its condition when presented to him. The ALJ explained why this did not persuade him (Finding of Fact V):

The two pieces of identification (Exhibits 3A and 3B) presented to the Respondents' clerk have had interesting adventures. The Driver's License (Exhibit 3B) was contained in the minor's wallet that he told Singh had been lost. The minor later recovered the wallet and license, but during their disappearance they had served as a meal for the minor's dog. That canine culprit had a very selective appetite. The license was chipped, presumably by the dog's teeth. The dog, however, had little taste for the issuer of the license, the license number, the license class status, the license expiration date, the licensee's name and address, as well as the licensee's identifying characteristics: male, brown hair, green eyes, height of 6 feet 2 inches tall and weight of 280 pounds at that time. Additionally, except for chips in the minor's forehead and hair within the minor's picture on the license, the minor's facial characteristics had been preserved. However, the dog found the following tidbits irresistible: all information contained in the blue stripe as to the license being conditional (until blank), as well as information contained in the red stripe. The red stripe showing the year when the minor would be 21 was selectively masticated by the dog so as to delete precisely the very last numeral when the minor would be 21. It is to be noted that the line describing the date when the minor would attain age 18 was not merely bitten but appeared to be dug out and obliterated by means of [a] continuous scratch mark. Further, the date of birth was selectively destroyed so as to delete the particular year in the decade of the 1980's when the minor was born.

The damage to the license was only one of the features that would have prompted a reasonably diligent seller to question what he was shown. Additionally, there was the fact that the driver's license itself had expired months earlier; the interim license had been issued 15 months earlier, when in the ordinary course one would expect a replacement license to have issued. Coupled with the youthful appearance displayed by Powell, these factors indeed were the equivalent of the "red flag" believed by the ALJ to have been "waving vigorously."

Appellants quarrel with certain aspects of the ALJ's findings, but we do not believe that any of the findings suffer from error sufficient to confuse the ALJ as to what he saw in the evidence. For example, appellants find fault with the ALJ's use of the term "obliterated." Appellants' brief does not tell us the dictionary source from which it derives its definition of the term. We think the preferred definition of the word

“obliterate” contained in Webster’s Third New International Dictionary (1981) more closely describes what the ALJ had in mind and what Powell had attempted: “1. to remove from significance and bring to nothingness: as a: to make undecipherable or imperceptible by obscuring, covering, wearing or chipping away.”

We have considered the remaining arguments presented by appellants regarding errors in the findings, and find none of sufficient significance with respect to the result as to warrant any relief.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, 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.