

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

AB-8638

File: 21-190752 Reg: 06062223

FULTON & FULTON, INC. dba Orcutt Liquor
105 East Clark Avenue, Orcutt, CA 93455,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: November 1, 2007
Los Angeles, CA

ISSUED JANUARY 17, 2008

Fulton & Fulton, Inc., doing business as Orcutt Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk, Daniel Brown, having sold a bottle of Bacardi rum to Benjamin Halop, a 17-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Fulton & Fulton, Inc., appearing through its counsel, H. William Servey, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 5, 2003. Thereafter, the Department instituted an accusation against appellant charging that Daniel Brown

¹The decision of the Department, dated October 5, 2006, is set forth in the appendix.

("Brown") sold an alcoholic beverage to Benjamin Halop ("Halop"), a minor, on December 9, 2005. An administrative hearing was held on July 21, 2006, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued a decision which determined that the violation had occurred as alleged, and appellant had failed to establish a defense under Business and Profession Code section 25660.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that Brown reasonably relied upon a California driver's license displayed to him on prior occasions, albeit not on the night in question, entitling it to a defense under Business and Professions Code section 25660.

DISCUSSION

The principal, and controlling issue in this case is whether the Department's determination that appellant's clerk did not act reasonably in relying on a purported California driver's license displayed to him (and other clerks) on prior occasions, but not on the night in question, precluded appellant 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.

A substantial body of law has been developed dealing with this defense.

"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 licensee.

The evidence established that Halop had no identification on his person when apprehended by the Department investigator, but that he had displayed identification at the premises on prior occasions. Appellant argues that the testimony of Brown and Howard Washington, another of appellant's clerks, that they and two other clerks had at other times examined the driver's license presented by Halop and all concluded that he was the person whose photograph was on the license is sufficient to establish the defense. Appellant asserts that the fact that Brown asked for identification is itself proof he acted reasonably after having had reservations whether Halop was of legal age.

Despite appellant's arguments, we have little difficulty concluding that the

evidence supports the findings and determination of the ALJ. Without any physical evidence, there is no way appellant can demonstrate that what was purportedly a California driver's license was in fact a genuine license issued by the State of California and was not fake, or whether the photograph and physical description described on the license sufficiently matched Halop's appearance and physical description such as to lead a reasonable and prudent person to believe Halop and the person owning the license were one and the same.² This fact weighed heavily in the Department's decision (Conclusions of Law 9 and 10):

CL 9. It is unclear that the ID the minor used on occasions prior to the subject violation, was genuine or fake. The ID was not made part of the record and there is scant evidence upon which to make a determination whether there was on the part of the clerk, a reasonable inspection of the document and whether there was good faith reliance on the license. In this regard, testimony of a facial resemblance between the license photograph and the minor is by itself not enough for a successful defense. This is the strongest part of the licensee's case.

² The ALJ noted that "the clerk's description of the purported driver's license used by the minor is general and sketchy in nature and of little probative value." (Finding of Fact 9). Whether the license was genuine or a fake could not be established. It strikes us that it would be highly unlikely that a minor might "find" a genuine license, the photograph on which would closely resemble the minor. As the Department points out, the document supposedly displayed by Halop could have been a fabrication, raising further questions as to the reasonableness of the reliance. This Board has seen too many cases where even a cursory examination of the identification displayed by a minor would have prevented a sale.

In *Circle K Stores, Inc.* (2007) AB-8579, the Board noted:

When a non-decoy minor purchases an alcoholic beverage without being asked for identification, the defenses to a licensee are few and narrow. The seller can claim reliance on a false governmentally issued identification purporting to show that the minor is of legal age (Bus. & Prof. Code §25660) previously displayed to the seller. The seller may claim he or she acted reasonably in relying on the document, but unless he has it or a copy, it is unlikely his claim will be sustained.

CL 10. Further as required in *5501 Hollywood* (supra), there is no evidence that the clerk made his own appraisal of the physical appearance of the minor prior to the sale. Had he done so, a reasonable conclusion would have been that the minor appeared to look seventeen or possibly eighteen years of age and no older. The evidence failed to establish that the clerk exercised the caution of a reasonable and prudent person in the same or similar circumstances. The licensee failed to carry its burden of proof in establishing a defense under 25660.

We do not agree with appellant that the decision in *5501 Hollywood, supra*, has lost its vitality because of the passage of time and the addition of the driver's photograph to the California driver's license. A California driver's license sets forth information other than the photograph, one obvious purpose of which, we must assume, is to offer additional information to anyone attempting to determine if the person presenting the license is its true owner. In this case, we are bound by the ALJ's finding that Halop could not have appeared older than 18, regardless of the age stated on the license, so could not reasonably have been thought to be its owner.

For all these reasons, we are satisfied that the decision of the Department should stand.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.