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

AB-8893
File: 20-436824 Reg: 08067771

7-ELEVEN, INC., and JAY DHILLON, dba 7-Eleven Store No. 15923-2111
1501 North Santa Fe Avenue, Vista, CA 92084,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 3, 2009
Los Angeles, CA

ISSUED APRIL 1, 2010

7-Eleven, Inc., and Jay Dhillon, doing business as 7-Eleven Store No. 15923-2111 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage to a law enforcement minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Jay Dhillon, appearing through their counsel, Ralph B. Saltsman and Jonathan R. Ota, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

---

[1]The decision of the Department, dated May 21, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 1, 2006. Subsequently, the Department filed an accusation charging that appellants' clerk sold an alcoholic beverage to 17-year-old Sarah Raifsnider on July 11, 2007. Although not noted in the accusation, Raifsnider was working as a minor decoy for the San Diego County Sheriff's Department at the time.

At the administrative hearing held on April 4, 2008, documentary evidence was received and testimony concerning the sale was presented by Raifsnider (the decoy) and by San Diego County Sheriff's Deputy Litwin.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants then filed an appeal contending the Department failed to proceed in the manner required by law when the administrative law judge (ALJ) did not explain why he rejected appellants' argument that the face-to-face identification was tainted through undue suggestion.

DISCUSSION

Appellants contend that the decision must be reversed because the ALJ rejected their argument that the face-to-face identification was tainted without explaining why he did so. They assert that the ALJ is required to provide an explanation before rejecting an argument raised by a party. Their assertion is based on language in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*), which states that an agency "must set forth findings to bridge the analytical gap between the raw evidence and ultimate decision or order." (11 Cal.3d at p. 515.)

Appellants' reliance on *Topanga* is misplaced. The Board has repeatedly rejected the argument that *Topanga*, *supra*, requires explanations of the reasoning behind the ALJ's determinations and conclusions. In *7-Eleven, Inc./Cheema* (2004) AB-8181, in response to a similar argument, the Board explained that *Topanga* "does not hold that findings must be explained, only that findings must be made." The Board went on to say:

> Appellants' demand that the ALJ "explain how [the conflict in testimony] was resolved" (App. Br. at p. 2) is little more than a demand for the reasoning process of the ALJ. The California Supreme Court made clear in *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543], that, as long as findings are made, a party is not entitled to attempt to delve into the reasoning process of the administrative adjudicator:
>
> > As we stated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836, 522 P.2d 12]: "implicit in [Code of Civil Procedure] section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."
> >
> > In short, in a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan* [(1941)] 313 U.S. 409, 422 [85 L.Ed. 1429, 1435 [61 S.Ct. 999]] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators.

More recently, the Board restated the same idea: "The thrust of the decision is on the need for findings, and not at all with the agency's rationale in relating the findings to the ultimate decision." (*7-Eleven, Inc./ Parstabar* (2008) AB-8614.)

Appellants argue here, as they did before the ALJ, that the face-to-face identification was unduly suggestive because the officer singled out one of the two clerks before the decoy made the identification. They support their conclusion by what they purport to be a quote from *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal. App. 4th 1687, 1698 [1 Cal.Rptr.3d 339]

(Keller): "a suggestive line-up with only one person is impermissible under Rule 141(b)(5)."

The language appellants "quote" does not appear in *Keller*, *supra*, on page 1698 or anywhere else in the opinion. There is language on page 1698 that is somewhat similar, but its import is considerably different:

> We note that single-person show-ups are not inherently unfair. (*In re Carlos M*. (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].) While an unduly suggestive one-person show-up is impermissible (*ibid*.), in the context of a decoy buy operations [*sic*], there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

While *Keller*, *supra*, did say that an *unduly suggestive* one-person line-up is impermissible, the court also noted that it is not "inherently unfair" to conduct an identification where there is only one person presented to identify. The court cited the decision in *In re Carlos M*. (1990) 220 Cal.App.3d 372 [269 Cal.Rptr. 447] (*Carlos M*.), where an alleged assailant was transported to a hospital to be identified by the victim. The court in that case rejected the contention that the identification was unduly suggestive, stating:

> A single-person show-up is not inherently unfair. (*People v. Floyd* (1970) 1 Cal.3d 694, 714 [83 Cal.Rptr. 608, 464 P.2d 64].) The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted, i.e., to demonstrate that the circumstances were unduly suggestive. (*People v. Hunt* (1977) 19 Cal.3d 888, 893-894 [140 Cal.Rptr. 651, 568 P.2d 376].) Appellant must show unfairness as a demonstrable reality, not just speculation. (*People v. Perkins* (1986) 184 Cal.App.3d 583, 589 [229 Cal.Rptr. 219].)

(Id. at p. 386.)

The person shown to the victim in *Carlos M*. was wearing handcuffs, but the court held that even that circumstance did not make the identification process unduly suggestive:

> While appellant claims the handcuffs influenced the victim to believe appellant was involved, the mere presence of handcuffs on a detained suspect is not so unduly suggestive as to taint the identification. (See *In re Richard W*. (1979) 91 Cal.App.3d 960, 969-971 [155 Cal.Rptr. 11].)

(*Carlos M*., *supra*.)

Similarly, *Keller*, *supra*, upheld a decoy identification even though the clerk was brought out from the store before the decoy was asked to identify him.

This case involves conduct far less suggestive than that in *Keller* or *Carlos M*. Appellants have not met their burden of showing that this identification was unduly suggestive nor have they provided any authority requiring the ALJ to explain why he rejected their argument.

ORDER

The decision of the Department is affirmed.[2]

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

---

[2]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.