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

AB-8966
File: 41-444108 Reg: 08068411

HARD HATS SPORTS GRILL, INC., dba Hard Hats Sports Grill
27713 Jefferson Avenue, Suite 101, Temecula, CA 92590,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: February 3, 2011
Los Angeles, CA

ISSUED APRIL 1, 2011

Hard Hats Sports Grill, Inc., doing business as Hard Hats Sports Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its 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 appellant Hard Hats Sports Grill, Inc., appearing through its counsel, Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated October 22, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on October 11, 2006. On April 15, 2008, the Department filed an accusation charging that appellant's clerk, Shasta Reynolds (the clerk), sold an alcoholic beverage to 17-year-old Brittany Young on March 12, 2008. Although not noted in the accusation, Young was working as a minor decoy for the Department and the Riverside Sheriff's Department at the time.

At the administrative hearing held on September 10, 2008, documentary evidence was received, and testimony concerning the sale was presented by Young (the decoy) and by Steven Geertman, a Riverside Sheriff's Department deputy. Appellant presented no witnesses or other evidence.

The testimony established that the decoy sat down at the fixed bar in appellant's premises, a bartender asked her what she wanted, and the decoy ordered a Budweiser beer. The bartender asked the decoy if she wanted to "run a tab," and the decoy said "No." The bartender brought the decoy a bottle of Budweiser, the decoy paid for it, and the bartender gave the decoy change. The bartender did not ask the decoy her age or for identification. The transaction was observed by Officer Geertman from a distance of about 10 feet.

Following the sale, Geertman identified himself as a peace officer and told the bartender she had sold an alcoholic beverage to a minor. The bartender was then taken to a small office area away from the fixed bar where the decoy identified the bartender as the person who had sold her the Budweiser.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant filed

an appeal contending: (1) Rule 141(b)(5)[2] was violated by an unduly suggestive identification of the seller, and (2) the fairness requirement of rule 141(a) was violated.

DISCUSSION

I

Appellant contends that the identification of the seller by the decoy was overly suggestive and violated rule 141(b)(5)[3] because it took place in a back office where only the officers, the bartender, and the decoy were present. Appellant calls this "an illicit suggestion by the investigator to the minor decoy" (App. Opening Br. at p. 7) that was "overly suggestive in the same way that an unconstitutional one-man line up is overly suggestive" (*Id*. at p. 8).

The ALJ, presented with the same argument, concluded that the face-to-face identification was not unduly suggestive, but "was in full compliance with rule 141(b)(5)," citing *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339] (*Keller*). In that case, the Department imposed discipline for selling an alcoholic beverage to a police minor decoy, but the Appeals Board reversed the decision for failure to comply with rule 141(b)(5) where the officer had the face-to-face identification take place outside the premises instead of inside, where the sale occurred. The Court of Appeal reversed,

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[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.

[3]Rule 141(b)(5) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

holding that rule 141(b)(5) did not prohibit conducting the face-to-face identification outside the premises. The court said:

> *The literal terms of the section leave the location of the identification to the discretion of the peace officer. Given the variety of circumstances surrounding the sale of alcohol, such discretion is necessary.* For example, an officer might conclude for his or her own safety or the safety of the decoy that the decoy should not reenter the premises. An officer might also defer to an owner's request that patrons not witness a public accusation.
>
> [¶] . . . [¶]
>
> There is nothing in the language of the Regulations section 141, subdivision (b)(5), in the history of section 25658, subdivision (f), or in the arguments advanced by ABC that suggest the section was written to require any particular kind of identification procedure except that it be face to face. . . .
>
> 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.

(*Id*. at pp. 1697-1698 [italics added].)

As shown by the language quoted above from *Keller*, appellant's contention is patently wrong. In *Keller*, the court rejected the claim of undue suggestion even though the clerk had been taken outside the store to be confronted by the decoy. Taking the bartender to the office area is certainly no more suggestive than the removal of the clerk from the premises itself.

The court in *Keller* anticipated, and approved, a situation very similar to the present case. The court said unequivocally that the "terms of [rule 141(b)(5)] leave the location of the identification to the discretion of the peace officer." One of the examples the court gave of an appropriate exercise of the officer's discretion was deferring "to an

owner's request that patrons not witness a public accusation," that is, conducting the face-to-face identification away from the public area where the violation occurred, such as the premises office.

It makes no difference that, in this case, it was the officer rather than the owner who initiated the move to a less public area of the premises for the identification. The location is at the discretion of the officer.

While an "unduly suggestive" identification might be impermissible, appellant presented no evidence that the identification was unduly suggestive. The court in *Keller* also noted that it is not "inherently unfair" to conduct an identification where there is only one person presented to identify, citing *In re Carlos M.*, *supra*, 220 Cal.App.3d 372 (*Carlos M.*), in which an alleged assailant was transported to a hospital to be identified by the victim. The court in *Carlos M*. 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*.)

This case involves conduct far less suggestive than that in *Carlos M*. and no more suggestive than in *Keller*. Appellant has not met its burden of showing that this identification was unduly suggestive.

II

Appellant contends that the fairness requirement of rule 141(a)[4] was violated during this decoy operation because 1) it was conducted when the bartender was distracted by unruly patrons, and 2) the decoy was a trained police Explorer.

Appellant argued at the hearing that the bartender was distracted by unruly patrons, an issue the ALJ addressed in Conclusions of Law 5:

> Respondent argued that the accusation should be dismissed because the bartender was distracted by other customers who were loud and boisterous, thereby making the decoy operation unfair. This argument is rejected. Respondent did not present any evidence to substantiate such a claim. The argument is based upon pure speculation.

During cross-examination, appellant's counsel managed to get the officer to agree that the bartender was focused "[a]t some point" [RT 38] on a group of two or three male patrons who "were being a little loud" [RT 33]. The officer testified that, after she had served the decoy, the bartender "diverted her attention to" a "verbal altercation" involving those male patrons [RT 39-40]. The "altercation" in no way involved the decoy, and the officer did not mention it in his report because he did not feel it was relevant to the decoy operation [RT 40].

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[4]Rule 141(a) provides:

> (a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

The ALJ clearly got it right: There simply was no evidence to substantiate appellant's claim; it was based entirely on speculation.

As for the decoy's experience and training in the police Explorer program, the Board has many times rejected this as a legitimate ground for arguing that a decoy appeared older than 21 or that it made the decoy operation unfair. Appellant has presented no reason that would cause the Board to treat this case any differently.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5]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.