

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

AB-9038

File: 20-285453 Reg: 08070106

7-ELEVEN, INC., and JANIZEH CORP., dba 7-Eleven 2133 13896
27761 Bouquet Canyon Road, Santa Clarita, CA 91350,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jonathon E. Logan

Appeals Board Hearing: December 2, 2010
Los Angeles, CA

ISSUED FEBRUARY 9, 2011

7-Eleven, Inc., doing business as 7-Eleven 2133 13896, and Janizeh Corp. (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, Trifon Penniman, selling an 18-can pack of Budweiser beer to Timothy Eaton, an 18-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Janizeh Corp., appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M.

¹The decision of the Department, dated April 29, 2009, is set forth in the appendix.

Casey.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 12, 1993. On December 4, 2008, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to Timothy Eaton, a person under the age of 21.

An administrative hearing was held on March 18, 2009, at which time documentary evidence was received and testimony concerning the violation charged was presented by Victoria Wood, a Department investigator, and Timothy Eaton, the minor. Trifon Penniman, the clerk, testified on behalf of appellants.

Investigator Wood testified that she observed Eaton speaking to someone sitting in a car next to her, and then speaking to Penniman, who was standing outside the store. Wood and her partner, Charlotte Clark, followed Eaton into the store, and Wood observed him select an 18-pack of Budweiser beer and a six-pack of Corona beer and take both to the counter. Penniman rang up the sale, and did not ask Eaton his age or for identification. Eaton did not have enough money, so the sale of the Corona beer was reversed. Penniman testified that Eaton was a regular customer and that he had previously been shown identification by Eaton showing him to be of legal age. Eaton denied ever possessing false identification, and he did not possess any when searched by the investigators.

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

Appellants filed a timely notice of appeal, and now renew their contention that

they established a defense under section 25660. They also contend that the introduction into evidence of the 18-can pack of beer allegedly purchased by the minor was improper because of a material break in the chain of custody.

DISCUSSION

I

Business and Professions Code section 25660 provides, in pertinent part:

(a) 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, that contains the name, date of birth, description, and picture of the person.

[¶]...[¶]

(c) 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 Section 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.

To establish a defense under section 25660, a licensee must establish that an identification which reasonably purported to be issued by a government agency had been displayed and that the clerk's reliance on that identification was reasonable.

(Dept. of Alcoholic Bev. Control v. Alcoholic Beverage Control Appeals Bd. (2004) 118 Cal.App.4th 1429 [13 Cal.Rptr.3d 826] (Masani).) The burden in such a case is on the party asserting the defense.

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, Inc. v. Department of Alcoholic Beverage Control (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820].)* 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 Properties, Inc. v. Alcoholic Beverage Control Appeals Board* (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734.]) *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 them 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].)

Considering the decision in light of these precedents and the record evidence, we are satisfied that the ALJ did not abuse his discretion in finding that appellants failed to establish a section 25660 defense. Without evidence of the nature and substance of the identification supposedly relied upon, there is no reliable way of testing whether the seller reasonably relied on what he claims he was shown. Appellants' argument is not helped by the fact that the minor, when searched, had no identification, false or legitimate.

It is well-settled that reliance must be reasonable if a defense under section 25660 is to be sustained. (*Masani, supra*, 118 Cal.App.4th at p. 1445.) It is equally well-settled that the question of reasonable reliance is a question of fact, and this Board may not go behind that finding:

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].)

(*Id.* at pp. 1445-1446.)

II

A "chain of custody" is a way of proving by oral and documentary evidence that evidence has not been tampered with between the time it was discovered or seized and the time it is offered in evidence at trial. Some kinds of evidence lend themselves to contamination or falsification if improperly maintained while in the possession of law enforcement. In this case, appellants contend there is an absence of evidence of how the carton of beer which was introduced into evidence was moved from a **temporary** evidence locker, where it had originally been placed by a Department investigator, to a **permanent** evidence locker from which it was taken on the day of the hearing by that investigator. In effect appellants are asserting, "how can anyone say for sure it was the same beer in both lockers?"

There is strong circumstantial evidence that it is the same beer, but even if not, the issue is not such as to affect the outcome.

An 18-can pack of beer was seized from the minor, who was photographed next to the beer. (Exhibit 4.) The red cardboard carton is plainly labeled "Budweiser." Budweiser is perhaps the most recognized beer in the United States.

The investigator placed the unopened carton and its contents in the trunk of her car, took it to the District Office, filled out and affixed to the carton an evidence label, and placed it in a temporary evidence locker. During the hearing, the investigator testified she had no knowledge of how it was moved from one locker to the other.

The ALJ overruled appellants' objection to the introduction into evidence of the carton and the beer it contained, commenting that "there's likewise enough evidence that this exhibit hasn't been tampered with from when the date it was seized and from the date it was brought into court." [RT 39.]

The testimony and photographs establishing that the product the minor purchased was an alcoholic beverage are further buttressed by the register entry (Exhibit 6) recording the entire transaction, including the sale of Budweiser beer and the reversal of the sale of the six-pack of Corona light beer.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ
SOPHIE C. WONG
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.