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

AB-9148
File: 20-421753 Reg: 10073350

7-ELEVEN, INC., and CN CORPORATION, dba 7-Eleven Store #2171-13984E
7410 Wells Avenue, Riverside, CA 92503,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Eccheverria

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

ISSUED DECEMBER 7, 2011

7-Eleven, Inc., and CN Corporation, doing business as 7-Eleven Store #2171-13984E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale beer and wine license for 12 days for their clerk, Leo Guzman, having sold a six-pack of Bud Light beer, an alcoholic beverage, to Taylor La Point, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and CN Corporation, appearing through their counsel, Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated December 24, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued in April 2005. On July 26, 2010, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a person under the age of 21.

At the administrative hearing held on November 2, 2010, documentary evidence was received and testimony concerning the violation charged was presented by Taylor La Point, the decoy, and James Barrette, a Riverside police officer. Appellants' clerk, Leo Guzman, and store owner, Janki Patel, testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the violation had taken place as alleged, and that there had been compliance with rules 141(b)(2) and 141(b)(5).

Appellants have filed an appeal making the following contentions: (1) There was no compliance with rule 141(b)(5); and (2) there was no compliance with rule 141(b)(2).

DISCUSSION

I

Rule 141(b)(5) requires that, "[f]ollowing 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."

Appellants assert that this rule was violated in two respects: they allege the identification did not comply with the rule because it took place outside the store, and that the citation was issued before the face to face identification was conducted.

It appears to be appellants' position that the decision in *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126] (*Acapulco*) mandates that the identification must take place inside the store, and that the Appeals Board agrees, based on its decision in *7-Eleven, Inc./Keller* (200) AB-7848, a case in which the clerk was brought face to face with the decoy outside the store. The Board saw this as a "one-man lineup" inconsistent with the teachings of *Acapulco*.

Appellants overlook the fact that the Board's *Keller* decision was overturned on review by the Court of Appeal. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339] (*Keller*).) The court there concluded that the rule "does not require the identification to take place inside the premises where the sale was made." (*Keller, supra*, 109 Cal.App.4th at p. 1695.) "For reasons left to the sound discretion of the peace officer alone or in conjunction with the business owner ... [rule 141(b)(5)] does not require the identification be done on the premises where the sale occurred." (*Id*. at p. 1698.) In light of this holding, the *Acapulco* decision is of no help to appellants.

The court also rejected the notion that conducting the face to face identification outside the premises was an unduly suggestive show-up.

> 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."

(*Keller, supra*, 109 Cal.App.4th at p. 1698.)

In re Carlos M., cited in *Keller*, *supra*, concerned an identification of a handcuffed suspect by the hospitalized victim. The court sustained this one-person show-up, explaining that it is not inherently unfair, the burden is on the defendant to demonstrate unfairness in the manner in which it was conducted, and unfairness must be shown as a demonstrative reality, not just speculation. *(In re Carlos M., supra*.) Appellants did not meet that burden.

Appellants' further contend there was no proper face to face identification, and that the issuance of the citation preceded what supposedly was the face to face identification. These were disputed factual issues addressed by the administrative law judge (ALJ) in his findings (Finding of Fact II-C):

> II-C There was a conflict in the evidence as to whether the decoy made a proper face to face identification of the clerk and as to whether a citation was issued to the clerk before or after the face to face identification had taken place. After evaluating the credibility the witnesses pursuant to the factors set forth in Evidence Code Section 780 including the demeanor and manner of the witnesses, the existence of bias or other motive and the evidence of other statements of the witnesses which were consistent or inconsistent with the testimony, greater weight was given to the testimony of the decoy and Officer Barrette than to that of the Respondents' clerk. Although the testimony of the decoy and the testimony of Officer Barrette differed somewhat as far as some minor details are concerned, their testimony on all material matters was essentially the same. Furthermore, the clerk made at least one statement at the hearing that was inconsistent with a prior statement he had made to his employer and he made at least one statement at the hearing that was inconsistent with the photographic evidence.[2]
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> [2] Although the clerk testified at the hearing that he did not look at the decoy's face because he was too busy, he had previously told his employer, Janki Patel, that he did look at the decoy and that he then used the visual identification button on the register in order to complete the sale of the beer to the decoy. Additionally, although the clerk testified that the decoy never pointed at him, the clerk admitted that the decoy is pointing to him in the photograph depicted in Exhibit 3.
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> II-C.1 The preponderance of the evidence established that a face to face identification of the seller of the beer did in fact take place and that this identification complied with the Department's Rule 141.

II-C.2 The decoy was outside the premises when he was asked to identify the person who had sold him the beer. When the decoy and the clerk were standing outside the premises and in close proximity to each other, Officer Barrette asked the decoy to identify the person who had sold him the beer. The decoy then pointed to the clerk. Exhibit 3 is a photograph that shows the decoy holding the six-pack of beer that he purchased at the premises and he is standing next to the clerk who sold him the beer. This photograph also shows that the decoy is pointing to said clerk.

II-C.3 Leo Guzman, the clerk who sold the beer to the decoy, testified at the hearing that he recalls when the photograph depicted in Exhibit 3 was taken and that this photograph does show that the decoy is pointing at him.

Appellants' arguments that the identification was flawed are premised on their version of disputed facts and their acceptance of the clerk's tortured version of events.[2] We have reviewed the entire hearing transcript, and while the evidence could have been more precise, there is sufficient substantial evidence to support the ALJ's findings. In such circumstances, our hands are tied.

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends,*[*Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for

[2] During oral argument, appellants' counsel argued that the clerk was unaware he was being identified as the seller, contending that the manner in which the decoy pointed was concealed from the clerk. This issue was not briefed, and we could, and do, decline to address it, other than to say the testimony concerning the identification process, viewed as a whole, leaves no doubt the clerk knew or should have known he was being identified as the seller by the decoy.

> consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*).)

II

Rule 141(b)(2) (4 Cal. Code Regs., §141(b)(2)) requires that the decoy "display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense."

In this case, appellants assert that the decoy, because of his police Explorer experience and training and his physical appearance did not present that appearance. The decoy had been an Explorer five years, at the time of the decoy operation was in charge of ten Explorers, had gone on approximately 15 ride-alongs, had attended weekly meetings and training sessions, and even interviewed members of the public. Appellants add: "Naturally, the decoy's goal was to become a police officer and was undergoing the necessary training from a young age." (App. Br., p. 10).

Appellants' counsel touched on these points in closing argument at the administrative hearing:

> But, more specifically, I believe that the decoy operation was in violation of Rule 141. Most particular, 141(b)(2). The decoy in this operation has a lot of police training, education in that he goes on - - he has gone on at least 50 ride-alongs up to this point. He wore a uniform.
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> If you saw him in the way he presented himself today, that's very

reminiscent of what a trained officer would look like on the stand. He had the maturity level that was older than someone of 19 years of age.

In addition, I think it could be argued that his physical appearance does - - someone that looks a little bit older than 21. He does look like an almost a full grown male.

[RT 106].

The administrative law judge (ALJ) reached a contrary conclusion, which he explained at length in his findings (Findings of Fact II D 1-5):

D. The overall appearance of the decoy including his demeanor, his poise, his size, his mannerisms and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation.

1. The decoy is a youthful looking male who is five feet nine inches in height and who weighs one hundred seventy pounds. On the day of the sale, he was clean-shaven and his clothing consisted of blue jeans, a black T-shirt and a gray hooded sweatshirt.

2. The decoy had participated in approximately three prior decoy operations and he had been an Explorer with the Riverside Police Department for about five years. He had reached the rank of sergeant with the Explorer program and he had his own squad which consisted of a corporal and about ten other Explorers. As an Explorer, he attended meetings and he went on ride-alongs with police officers.

3. The photograph depicted in Exhibit 2 was taken at the police station on the day of the sale before going out on the decoy operation and the photograph depicted in Exhibit 3 was taken outside the premises on the day of the sale. Both of these photographs depict how the decoy appeared and what he was wearing on the day of the sale except that the decoy is not wearing the gray sweatshirt in Exhibit 2. Because the decoy's hair was very shortly cropped on the day of the sale, he appears to have a slightly receding hairline in the photographs depicted in Exhibits 2 and 3. However, the decoy actually looked younger in person than he did in his photographs.

4. There was nothing remarkable about the decoy's nonphysical appearance. He was soft spoken, he provided straight forward answers and there was nothing about the decoy's speech, his mannerisms or his demeanor that made him appear older than his actual age.

5. After considering the photographs depicted in Exhibits 2 and 3, the decoy's overall appearance when he testified and the way he conducted

> himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

These findings reflect the common sense awareness that a decoy's police Explorer's experience no more makes him or her appear older than his or her true age than does the experience of a youthful looking 17, 18, or 19-year-old high school or college athlete, military recruit or construction worker, who has trained to excel in what he or she does.

Once again, we must defer to the trier of fact, who saw and heard the decoy as he testified, while we have only a cold record and conflicting arguments of opposing counsel. We must reject appellants' contention.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.