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

AB-9183

File: 21-436057 Reg: 10073556

RAJESH KUMAR DANG and ROBERT DANG, dba Tuxedo Liquor
5347 Arlington Avenue, Riverside, CA 92504,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 3, 2012
Los Angeles, CA

ISSUED JUNE 12, 2012

Rajesh Kumar Dang and Robert Dang, doing business as Tuxedo Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their clerk, Katherine Metzger, having sold a 6-pack of Bud Light beer to Taylor Lapoint, a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Rajesh Kumar Dang and Robert Dang, appearing through their counsel, Ralph B. Saltsman and Saba Zafar, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

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[1]The decision of the Department, dated August 2, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on March 27, 2006. On May 12, 2010, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a person under 21 years of age.

At the administrative hearing held on May 24, 2011, documentary evidence was received and testimony concerning the violation charged was presented by Taylor Lapoint, the decoy, and James Barrette, a Riverside police officer. The evidence established that the decoy was asked for his identification both before and after the clerk rang up the sale. The decoy presented his California driver's license bearing his true date of birth, a red stripe with lettering stating "AGE 21 IN 2012," and a blue stripe with lettering stating "PROVISIONAL UNTIL AGE 18 IN 2009." The decoy was not asked his age or his date of birth.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and appellants had failed to establish an affirmative defense under Rule 141(b)(2).

Appellants have filed an appeal making the following contentions: (1) the decision is not supported by substantial evidence; (2) the decoy did not display the appearance required by Rule 141(b)(2); and (3) the Department proceeding is barred by the doctrine of laches.

DISCUSSION

Appellants assert that the Department did not provide sufficient and credible evidence for the administrative law judge (ALJ) to arrive at his decision. They argue that the decoy could not remember many details from the night of the decoy operation, such as how many stores he visited or the number of clerks at the register. These

memory lapses, appellants contend, cast doubt on the rest of his testimony.

When findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

The examples of supposed memory lapses raised in this appeal do not detract from the decoy's testimony about the facts of the transaction giving rise to the accusation. We find it unimpressive that he could not remember the number of stores he visited *before* the premises in question, and appellant is mistaken that the decoy could not remember the number of clerks at the register (see RT 26; and see *infra*, part III.)

The findings set forth in Findings of Fact II, paragraphs A through D, are amply sufficient to establish that the violation occurred. To the extent appellants' argument questions the decoy's testimony, it is enough that the ALJ believed him. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42

Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

In any event, the combined testimony of the decoy and the Riverside police officer who accompanied him establish beyond question a sale-to-minor violation at appellants' premises on the night in question.

II

Appellants argue that the combination of three factors, consisting of the decoy's receding hairline, his large stature (5' 9" and 165-170 pounds), and a high level of confidence acquired as a result of his experience and training while an Explorer, resulted in an overall appearance of a person older than 21 years of age, and violative of Rule 141(b)(2).[2] Appellants argue that the ALJ failed to consider these factors in his findings. The contention lacks merit.

The ALJ wrote a detailed finding (Finding of Fact II-F) regarding the decoy's appearance, a finding which refutes appellants' arguments:

II- F The decoy is a youthful looking male whose overall appearance including his demeanor, his poise, his mannerisms, his maturity, his size and his physical appearance were consistent with that of a person under the age of twenty-one. Furthermore, his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he was one to two inches taller on the day of the hearing.

1. On the day of the sale, the decoy was approximately five feet nine inches in height and he weighed between one hundred sixty-five and one hundred seventy pounds. On that day, the decoy was clean-shaven, his hair was very short and his clothing consisted of blue jeans, a black T-shirt and a gray hooded sweatshirt. The photograph depicted in Exhibit 3 was taken on the day of the sale before going out on the decoy operation and the photograph in Exhibit 5 was taken at the premises. Both of these

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[2] Rule 141(b)(2) (4 Cal. Code Regs., §141, subd. (b)(2)) requires that a minor decoy display the appearance which could generally be expected of a person under the age of 21 under the actual circumstances of the transaction.

photographs depict what the decoy looked like when he was at the premises.

2. Because the decoy has very short hair, you can see what appears to be a slightly receding hairline. However, the decoy has a very young face and a pimply complexion. Furthermore, the decoy looks younger in person than he does in his photographs.

3. There was nothing remarkable about the decoy's nonphysical appearance.

4. The decoy testified that he had participated in one or two prior decoy operations and that he had been an Explorer with the Riverside Police Department for approximately two years. As an Explorer, he attended an Explorer academy when he was sixteen or seventeen years old. The decoy also attended weekly meetings and went on multiple ride-alongs.

5. After considering the photographs depicted in Exhibits 3 and 5, 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.

We have said many times that the ALJ is in a far better position than are we to make the factual determination whether the decoy's appearance is that required by rule 141(b)(2). There is nothing in appellants' argument that persuades us that this case requires a departure from the position long held by the Board. The ALJ is the finder of fact, his finding in this case is one of fact, and we are not permitted to go behind it where it is supported, as here, by substantial evidence.

III

Appellants assert that the Department proceeding was barred by the doctrine of laches.

A defendant must demonstrate three elements to successfully assert a laches defense: (1) delay in asserting a right or a claim; (2) the delay was not reasonable or excusable; and (3) prejudice to the party injured by the delay. (*Magic Kitchen LLC v.*

Good Things Internat., Ltd. (2007) 153 Cal.App.4th 1144, 1157 [63 Cal.Rptr.3d 713]; see also *Miller v. Glenn Miller Productions, Inc*. (9th Cir. 2006) 454 F.3d 975, 997.)

Appellants argue that since the sale in question took place on January 21, 2010, and the hearing did not take place until May 24, 2011, the delay is inexcusable.

There are many things to be done between the time of an unlawful sale to a minor and the time a hearing on the charge ensues, some by the Department, some by a licensee. Appellant has blithely skipped over all of them.

The decoy operation was conducted by the Riverside Police Department. When the incident is reported to the Department, the Department must examine the facts of the case and review the police report to ensure a proceeding is warranted; notify the licensee that an accusation is forthcoming; meet with the licensee and/or the licensee's representative to determine whether the matter can be settled; file an accusation if necessary; await the return of a notice of defense and request for discovery; and schedule a hearing.

The record in this case does not disclose whether any undue delay occurred while the events described in the preceding paragraph unfolded, so this Board has great difficulty in determining whether the overall delay, if any, was undue. The mere passage of time does not necessarily translate into delay. Appellants have not provided us with a copy of the Department's docket sheet, or their own, or any equivalent record of steps in the proceeding or other evidence of what might have caused the passage of time between the sale transaction and the hearing. For these reasons alone, there is a failure of proof.

Moreover, the case appellants make for prejudice flowing from delay is extremely weak. They argue that they lost their right to conduct a meaningful cross-examination

of the decoy. They assert, incorrectly, that the decoy testified there was a female clerk at the register, and later testified there were two clerks at the registers. In fact, the decoy did testify accurately that his transaction was conducted with a female clerk:

Q. When you got up to the counter, was there a clerk there?

A. Yes.

Q. Was it a man or a woman?

A. Female.

[RT 11.]

Fifteen pages later in the transcript, during cross-examination, appellants' counsel asked:

Q. Do you remember how many registers there were?

A. Two.

Q. And do you - - do you know how many other clerks were working at the time of this transaction?

A. One.

Q. So a total of 2 clerks working the registers?

A. That I recall, that I remember seeing.

It ill behooves appellants to premise their argument - or any argument - on a distortion of the factual record, as these excerpts from the transcript highlight. The suggestion that the decoy suffered memory failure as a result of the 14-month passage of time is without merit.

The notion that the decoy may have confused appellants' location with some other location he visited is as fanciful as the rest of appellants' arguments, as evidenced by a complete absence of any suggestion at the hearing that the clerk, identified by the

Riverside police officer [RT 35], and photographed by him (Ex. 5), was not an employee of appellants.

For all these reasons, we believe appellants' laches defense must be rejected.

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.