

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

AB-9334

File: 20-485209 Reg: 12077105

CIRCLE K STORES, INC.,
dba Circle K Store #348
5687 Adobe Road, 29 Palms, CA 92277-1813,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 5, 2013
Los Angeles, CA

ISSUED JANUARY 31, 2014

Circle K Stores, Inc., doing business as Circle K Store #348 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for selling alcohol to a minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph Barat Saltsman and Erica Woodruff, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated December 5, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 15, 2009. On June 19, 2012, the Department instituted an accusation against appellant charging that its clerk, Shane Feldman, sold alcohol to a non-decoy minor in violation of section 25658(a). The sale, however, was unique in that Perossier purchased the alcohol at the request of two minor decoys in the course of a shoulder-tap operation² conducted by the San Bernardino Sheriff's Department.

At the administrative hearing held on October 24, 2012, documentary evidence was received and testimony concerning the violation charged was presented by Sergeant James Porter and Deputy Erik Smoot of the San Bernardino Sheriff's Department; by Adam Falossi, one of two minor decoys participating in the shoulder-tap operation; and by Michael Perossier, the minor who purchased the alcohol. Appellant presented no witnesses.

Testimony established that on the date of the shoulder-tap operation, the decoys, Falossi and Matthew Summers, took up a position outside the premises. Perossier, who was not involved in the operation, arrived at the store by vehicle. As Perossier approached the front door of the premises, Falossi asked him, "Can you get me and my buddy two tall boy Bud Lights?" Perossier agreed. Falossi gave him \$10.

²The Department decision accurately describes the format of a shoulder-tap decoy operation:

A "shoulder tap" operation involves minor decoy(s) standing outside convenience stores who ask customers who are going into the store to purchase alcoholic beverages for them. If the customer does purchase alcoholic beverages for the minor decoy then the customer is arrested and charged with violating 25658(a) of the Business & Professions Code.

(Findings of Fact ¶ 5.)

Perossier then entered the store. Falossi and Summers remained outside and moved to a nearby bus bench.

Perossier went to the coolers and selected two 24-ounce cans of Bud Light, along with a 40-ounce bottle of Bud Light beer and a case of Budweiser beer in 12-ounce bottles. Perossier set the beer on the counter. The clerk asked Perossier for his identification. Perossier handed the clerk his valid California driver's license, which showed his actual date of birth, December 18, 1991. The clerk examined the license, then returned it to Perossier. Perossier paid for the beer, exited the store, and went to his vehicle. He put the case of beer and one 24-ounce bottle in the car, and took the other 24-ounce bottle and the 40-ounce bottle to Falossi and Summers. Falossi thanked Perossier and told him to keep the change. Perossier then returned to his vehicle.

Falossi and Summers signaled the Sheriff's deputies, who had been monitoring the operation from a parking lot across the street. The deputies detained Perossier, and discovered that he was, in fact, only 19 years old. Sergeant Porter searched Perossier and discovered no false identification. Perossier possessed only his true California driver's license.

Sergeant Porter brought the clerk outside the premises. He pointed to Perossier and asked the clerk if he had sold him beer. The clerk said that he had. Later, the clerk said the store was busy, and that he had looked at Perossier's identification, but hadn't scanned it.

Both Perossier and the clerk were cited.

Subsequent to the hearing, the Department issued its decision which determined that the charge had been proven and no defense was established. In particular, the

ALJ rejected the argument that rule 141 applied to the sale.

Appellant filed a timely appeal raising the following issues: (1) The Department must adhere to rule 141 when a minor decoy asks another minor to purchase alcohol, and (2) there was no face-to-face identification, as required by rule 141.

DISCUSSION

Appellant contends that rule 141 must apply to a shoulder-tap operation in which the decoys ask youthful-looking individuals to purchase alcohol. Appellant argues that failing to do so would allow law enforcement to sidestep fairness requirements by enlisting minors to purchase alcohol, thus creating de facto decoys who are exempt from rule 141.

Rule 141, subdivision (a), states:

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 . . . and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

(Cal. Code Regs., tit. 4, § 141.) Subdivision (b) then begins by stating: “The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged *that a minor decoy* has purchased an alcoholic beverage. . . .” (Emphasis added.)

The statute then outlines restrictions on the use of decoys — all of which assume that law enforcement officers are supervising and coordinating the decoy’s actions. Rule 141(b)(5), for example — which appellant argues ought to apply here — explicitly assumes law enforcement control:

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.

(Emphasis added.)

Business and Professions Code section 25658(a) imposes a misdemeanor criminal penalty on “every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years.” There is no exception where the person furnishing the alcohol is also a minor. Moreover, subdivision (b) prescribes yet another misdemeanor penalty for “any person under the age of 21 years who purchases alcoholic beverages.” Subdivision (f) does grant immunity to minor decoys, but again, the provision is limited to instances in which law enforcement supervises the transaction: “Notwithstanding subdivision (b), any person under the age of 21 years who purchases or attempts to purchase any alcoholic beverage *while under the direction of a peace officer* is immune from prosecution for that purchase or attempt to purchase an alcoholic beverage.” (Emphasis added.)

It is undisputed that Falossi and Summer did not know Perossier. [RT at pp. 37, 65.] It is undisputed that Perossier, when he agreed to purchase the alcohol, assumed the decoys were minors. [RT at p. 18.] It is also undisputed that he broke the law by purchasing alcohol for the decoys and for himself, that he did so of his own free will and without instruction from law enforcement, and that he was cited for it. [RT at pp. 8, 14, 18, 37-38.] In fact, the very purpose of the shoulder-tap operation was to prevent precisely the sort of criminal activity Perossier carried out.

Given that Perossier independently and voluntarily committed a crime, it defies reason to apply the strictures of rule 141 — which assumes law enforcement control and supervision — to his actions. As a matter of law, rule 141 cannot apply where, as

here, the minor in question is outside the control of law enforcement.

Because rule 141 does not apply, the alleged lack of a face-to-face identification provides no defense. We see no reason to disturb the decision below.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.