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

AB-9028
File: 20-255290 Reg: 08069310

7-ELEVEN, INC., dba 7-Eleven #2133-27478
530 New Los Angeles Avenue #1A,
Moorpark, CA 93021,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rudolfo Echeverria

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

ISSUED MARCH 30, 2011

7-Eleven, Inc.[1], doing business as 7-Eleven #2133-27478 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[2] which suspended its license for 10 days, all stayed on the condition that appellant complete one year of discipline-free operation, for its clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant 7-Eleven, Inc., appearing through its counsel, Autumn Renshaw, and the Department of Alcoholic Beverage Control,

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[1]Co-licensee Qassimali A. Jairazbhoy is not an appellant, and was not named in the Accusation, but he is named in the caption of the transcript of the administrative hearing, on the exhibits, and in the Department's Reply Brief.

[2]The decision of the Department, dated April 16, 2009, is set forth in the appendix.

appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 7, 1991. On July 23, 2008, the Department filed an accusation charging that appellant's clerk, Elia Bernal Diaz (the clerk), sold an alcoholic beverage to 18-year-old John Michael Koman on March 7, 2008. Although not noted in the accusation, Koman was working as a minor decoy for the Ventura County Sheriff's Department at the time.

At the administrative hearing held on February 25, 2009, documentary evidence was received, and testimony concerning the sale was presented by Koman (the decoy) and by Chris Love, an officer with the Ventura County Sheriff's Department.

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

Appellant filed an appeal contending: (1) Rule 141(b)(2)[3] was violated, (2) the face-to-face identification of the clerk was unduly suggestive, in violation of rule 141(b)(5) and rule 141(a), and (3) the Department failed to bridge the analytical gap between the facts and ultimate conclusion that the decoy displayed the appearance which could generally be expected of a person under the age of 21 years.

DISCUSSION

I

Appellant first contends that the decoy failed to display the appearance which could generally be expected of a person under 21 years of age, and therefore violated the requirement of rule 141(b)(2) which is: "The decoy shall display the appearance

[3]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.

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."

The administrative law judge (ALJ) made the following factual finding about the decoy's appearance (FF II-D-4):

> After considering the photographs depicted in Exhibits 3, 4 and 7, 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.

Appellant maintains that the decoy's physical appearance (at six feet and 175 pounds) coupled with his experience as a police Explorer, caused him to appear older than 21 to the clerk, and to display a confident demeanor, uncharacteristic of a person under the age of 21. Further, appellant contends that no substantial evidence supports the Department's decision. (AOB at p. 5.)

We can dispose of this latter point quickly. We simply do not agree that an administrative law judge who must determine the apparent age of a decoy, and actually sees the decoy in person, lacks substantial evidence to make such a determination. The Board's concern has always been whether, in doing so, the administrative law judge has applied the correct standard under the rule.

As this Board has said on many occasions, the ALJ is the trier of fact and has the opportunity, which this Board does not, of observing the decoy as he testifies and making the determination whether the decoy's appearance met the requirement of rule 141 that he possessed 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. The ALJ has made that finding here, and we are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

We do feel compelled to address specifically, however, the contention that the decoy's prior experience disqualifies him from acting as a decoy. As we said in *Azzam* (2001) AB-7631:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

We see no evidence that this decoy's experience as an Explorer resulted in him displaying the appearance of a person 21 years old or older.

II

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.

And rule 141(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 (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Appellant maintains that these rules were violated because the face-to-face identification of the clerk was unduly suggestive and therefore not conducted in a fashion that promotes fairness.

The ALJ made the following finding regarding the face-to-face identification of the clerk (FF II-C-2):

> When Love asked the decoy to identify the person who had sold him the can of Sparks, the decoy pointed to Diaz and identified Diaz as the person who had sold him the can of Sparks. At the time of this identification, Diaz and the decoy were standing in close proximity. Exhibit 7 is a photograph that was taken at the premises and this photograph shows the decoy holding the can of Sparks Malt Beverage that he purchased at the premises and the decoy is standing next to Diaz, the clerk that sold him the can of Sparks.

Appellant first contends that the identification was not face-to-face, but rather side-by-side, and that the identification is faulty because "there is no evidence that the clerk acknowledged the decoy's presence as required by *Chun.*" (AOB 6)

The crux of appellant's first argument is that the identification was not done face-to-face, but side-by-side as shown in the photograph of the decoy and the clerk. In *Chun* (1999) AB-7287, the Board defined "face-to-face" to mean:

> the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

The Board's discussion of the identification process in *7-Eleven/Kim* (2004) AB-8188, a case where similar claims of non-compliance with the rule were asserted, is instructive:

> The clerk did not testify, so we do not know if he was aware.

> However, in this case, it is unrealistic to assert that the clerk was not aware that the decoy was identifying him as the seller. The photograph shows the two standing with only the width of the counter separating them, the six-pack of Coors Light beer that the decoy purchased minutes before is on the counter, still partly in the bag, in front of the clerk; and the decoy, her arm outstretched, is pointing at the clerk, while holding her California driver's license in her other hand. We find it difficult to believe that the clerk might not be aware of what the decoy was doing or saying. Nor does it follow that, because the clerk may have been looking elsewhere at the moment when this photograph was being taken, he was unaware of the identification process.
>
> At the very least, the clerk reasonably ought to have been aware that the decoy was identifying him, and that is all that is required. We are satisfied that there was compliance with Rule 141(b)(5).

Strict adherence to rule 141(b)(5) does not require, as appellant seems to suggest, an "eyeball to eyeball" confrontation. We do not find it surprising that a seller may avert his or her eyes away from a person pointing to her moments after being apprised she has made an illegal sale. By no means does that suggest any unawareness of what is happening and why.

The important question is whether the seller knew or should have known that she was being identified as such. Substantial evidence exists in the present appeal to support the conclusion that the clerk was aware she was being identified as the seller of the alcohol in this instance. The uncontroverted testimony of the decoy established that the requisite face-to-face identification was made, as found by the ALJ.

Appellant's argument turns the requirement of the rule on its head. The minor decoy must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to affirm in a specific way that the identification is taking place.

Appellant's second contention, that *Chun* imposed a requirement that the clerk somehow acknowledge the decoy, is without merit. The case law merely requires that

the identification be done in sufficient proximity that the clerk reasonably should be aware that he or she is being identified.

Appellant further contends that the identification was unduly suggestive, and therefore not conducted in a fashion that promotes fairness, because the decoy answered "yes" when asked by the deputy if this was the person who sold him the alcohol, rather than being asked "who sold you the alcohol?"

The following testimony was given by the decoy during the administrative hearing (RT 16-17):

> Q And when you went back in the store, where did you go?
> A I went back to the clerk where Deputy Love was.
> Q So Deputy Love was standing at the counter by the clerk who had sold you the alcohol?
> A Yes.
> Q When you returned to the store, were you asked to identify the person who sold you the alcohol?
> A Yes.
> Q How did the identification take place?
> A They asked me if this was the clerk that sold it to me and I said, yes.
> [¶]
> Q Did you point at her or anything like that?
> [¶]
> A Yes. I did point to her.
> Q Were you standing side by side or was she behind the counter, do you recall?
> A Side by side.
> Q When you pointed at her, did you say anything?
> A No.

Appellant argues that this face-to-face identification was unduly suggestive, and supports its conclusion with reference to *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339] *(Keller).* Presumably, it refers to the following passage:

> 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.

While *Keller*, *supra*, did say that an *unduly suggestive* one-person line-up is impermissible, the court also noted that it is not "inherently unfair" to conduct an identification where only one person is presented to be identified. In *Keller*, the clerk had been taken outside the store and brought to where the decoy was waiting with other officers. The court found that unobjectionable. As the facts of that case make clear, far more is necessary to establish that an identification was unduly suggestive than the law enforcement officer asking the clerk to stand in a certain place before the decoy was brought back into the store.

Keller, *supra*, cites the decision in *In re Carlos M*. (1990) 220 Cal.App.3d 372 [269 Cal.Rptr. 447] (*Carlos M*.), where an alleged assailant was transported to a hospital to be identified by the victim. The court in that case 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 did not consider even that circumstance to 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 *Keller* or *Carlos M*. Appellant did not convince the ALJ that this identification was unduly suggestive and it has not convinced us either.

III

Appellant contends finally that the Department failed to bridge the analytical gap between the facts and ultimate conclusion that the decoy displayed the appearance which could generally be expected of a person under the age of 21 years, and assert that the ALJ did not comply with the California Supreme Court's holding in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] (*Topanga*), that the agency's decision must set forth findings to "bridge the analytic gap between the raw evidence and ultimate decision or order."

This Board has addressed a similar contention in prior appeals:

> Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.)
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> In *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], the court quoted with approval, and added italics to, the comment regarding *Topanga* made in *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909]: " 'The holding in Topanga was, thus, that *in the total absence of findings in any form on the issues supporting the existence of conditions justifying a variance*, the granting of such variance could not be

> sustained.' " In the present appeal, there was no "total absence of findings" that would invoke the holding in *Topanga*.

(*7-Eleven, Inc. & Swanson* (2005) AB-8276, quoting from *7-Eleven, Inc. & Cheema* (2004) AB-8181.)

Appellant would have us believe that the Department's decision does not contain any factual basis for finding the decoy's appearance met the requirements of rule 141(b)(2). (AOB 6-7.)

As discussed in section I, the ALJ made factual findings about the decoy's appearance (FF II-D-4). He also concluded in Determination of Issues II:

> There was compliance with Rule 141(b)(2) and Rule 141(b)(5) of Chapter 1, Title 4, California Code of Regulations as well as with Rule 141 in general as set forth in Finding II and the preponderance of the evidence did not establish that the decoy operation was conducted in an unfair manner.

Simply because the ALJ did not explain his analytical process does not invalidate his decision.

ORDER

The decision of the Department is affirmed.[4]

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

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[4]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.