

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

AB-9035

File: 20-398123 Reg: 08069858

7-ELEVEN, INC., JASVINDER VIRK, and MUNINDER VIRK, dba 7-Eleven
390 West Grand Avenue, Grover Beach, CA 93433,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 4, 2010
Los Angeles, CA

7-Eleven, Inc., Jasvinder Virk, and Muninder Virk, doing business as 7-Eleven (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for having sold alcoholic beverages to a non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Jasvinder Virk, and Muninder Virk, appearing through their counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated April 21, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 11, 2003. On October 21, 2008, the Department instituted an accusation against appellants charging the sale of alcoholic beverages to Matthew Fleming, a person under the age of 21.

At the administrative hearing held on March 11, 2009, documentary evidence was received and testimony concerning the violation charged was presented by Matthew Fleming, the minor, Nick Sartuche, the Department investigator who issued citations to Fleming and to appellant's clerk, Amarjidd Singh, who also testified.

The investigator's attention was drawn to Fleming by Fleming's youthful appearance. Sartuche followed Fleming into the store, and observed the transaction. Fleming was not asked his age or for identification. Sartuche stopped Fleming as he left appellant's store with the alcoholic beverages he had purchased (a 30-can pack of Coors Light beer and two 40-ounce bottles of Mickey's malt liquor), and asked him his age. Fleming told Investigator Sartuche he was 23, and showed him a California Identification Card showing the person to whom it had been issued to be 23 years of age. Investigator Sartuche told Fleming "That's not you," and that the card had expired. Fleming then admitted he was only 18.

The evidence was in conflict on whether Fleming had used the false ID in purchasing alcoholic beverages at appellants' store, the clerk insisting that Fleming had, and Fleming saying he had not or was not sure whether he had.

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

Appellants have filed a timely appeal, and argue that an affirmative defense was

established under Business and Professions Code section 25660.

DISCUSSION

Appellants contend that the clerk reasonably relied on the identification card shown to the Department investigator, and that they had established a defense pursuant to Business and Professions Code section 25660. 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, which 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 Sections 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.

The administrative law judge (ALJ) found that the defense had not been established (Findings of Fact 11 and 12, Conclusion of Law 7):

FF 11. Upon initially looking at Exhibit 3, the photographs of the false identification and the true identification of Fleming appear to be similar. However, the quality of the photograph on Exhibit 3 of Fleming's license is very poor. In person, Fleming does not resemble the person on the false identification. The physical description on the false identification (5-07, 135 pounds) does not match the physical description of Fleming (5-10, 165 pounds). Fleming is very youthful in appearance. It is not reasonable to view Fleming and assume that he is anywhere near the age of 23, which was indicated by the false identification.

FF 12. The false identification possessed by Fleming expired 18 months prior to this incident.

CL 7. Respondent failed to establish that there was reasonable reliance on bona fide evidence of majority. The physical description contained on Exhibit 2 does not match the physical description of Fleming. Exhibit 2 clearly indicates that it was expired for 18 months prior to this incident. These are "red flags" which

require additional inquiry by the seller before completing the sale of alcoholic beverages. Failure to do anything as clerk Singh did in this case constitutes a failure to act with reasonable reliance.

There are a number of discrepancies between the physical descriptions on the fake license and those on Fleming's license: color of hair (brown versus black); color of eyes (blue versus brown); height (5' 7" versus 5' 10") and weight (165 versus 135). It is conceivable that a diligent clerk might overlook one or more of these differences, but when the person tendering the false identification (if he did so)² is as much as five years younger than the age of the false identification, and youthful looking, a clerk who accepts such a questionable identification without further inquiry cannot be said to have acted reasonably.

It is well-settled that reliance must be reasonable if a defense under section 25660 is to be sustained. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2004) (*Masani*) 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826.]) 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.)

² There is a conflict in the testimony as to whether Fleming displayed the false identification to Amarjdid prior to the incident in question, but whether he did or did not is immaterial. Amarjdid's reliance on the false identification was not reasonable, as the ALJ found, or he did not rely at all. In either case, the defense fails.

We agree that appellants have failed to sustain a defense under section 25660.

ORDER

The decision of the Department is affirmed.³

SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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.