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

AB-9088
File: 47-424195 Reg: 09071559

MR. PEABODY'S LLC, dba Mr. Peabody's
134 -136 Encinitas Boulevard, Encinitas, CA 92024,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 2, 2010
Los Angeles, CA

ISSUED FEBRUARY 11, 2011

Mr. Peabody's LLC, doing business as Mr. Peabody's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, with five days thereof conditionally stayed for a one-year probationary period, for appellant's bartender, Kristen Bliss, selling, furnishing, or giving a 12-ounce bottle of Bud Light beer, an alcoholic beverage, to Adam Aguilar, a minor decoy working with the San Diego County Sheriff's Department, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Mr. Peabody's LLC, appearing through its counsel, Jesse Mallinger, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

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[1]The decision of the Department, dated January 5, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on December 9, 2005. On July 20, 2009, the Department filed an accusation against appellant charging that, on April 10, 2009, appellant's bartender, Kristen Bliss (the bartender), sold, furnished, or gave an alcoholic beverage to Adam Aguilar, a person under the age of 21.

At the administrative hearing held on November 12, 2009, documentary evidence was received, and testimony concerning the sale was presented by Aguilar (the decoy) and by Tim Matzkiw, a San Diego County Sheriff's deputy. The administrative law judge (ALJ) found, on the basis of their testimony (Findings of Fact 6 and 7):

> FF 6. Aguilar entered the Licensed Premises by himself and sat on a stool at the fixed bar. Aguilar ordered a Bud Light beer from the bartender who was subsequently identified as Kristen Bliss. Bliss obtained a 12 ounce bottle of Bud Light beer from the cooler, opened it, and placed it on the fixed bar in front of Aguilar. Exhibit 3 shows Aguilar holding the bottle of Bud Light beer that he was served. Beer is an alcoholic beverage. Deputy Tim Matzkiw had entered the premises separately from Aguilar. Deputy Matzkiw was seated at a table about 15 to 20 feet away from Aguilar and witnessed these activities.
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> FF 7. At no time did bartender Bliss request identification from Aguilar nor did she ask Aguilar any age related questions.

Brie Cardosa, the managing member of appellant LLC, testified in appellant's defense. Ms. Cardosa testified that employees who serve alcohol, including Ms. Bliss, are trained monthly, and that appellant had never been cited for or warned about any sale or furnishing of an alcoholic beverage to a minor since 2001 (the year the business was first licensed.)

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

proposed decision addressed appellant's argument that appellant's bartender had been entrapped (Conclusion of Law 6):

> Respondent also argued entrapment as a defense to the accusation. The test for entrapment has been stated in the California Supreme Court case of People v. Barraza (1979) 23 Cal.3d 675, 153 Cal.Rptr. 459, as follows:
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> > "We hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purpose of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime."
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> There is no evidence in this matter to even remotely suggest that there was any pressure, badgering, cajoling, importuning, or other affirmative acts placed upon the bartender by either the decoy or by the deputies. This argument is also rejected.

Appellant has filed a timely appeal, and raises the following issues: appellant's bartender was entrapped; appellant's counsel was prevented from obtaining critical testimony on the issue of entrapment; and the use of a decoy is impermissible in the absence of any evidence of predisposition to commit the offense.

DISCUSSION

I

The use of decoys in the enforcement of alcoholic beverage laws regarding the sale of an alcoholic beverage to persons under the age of 21 gained the approval of the California Supreme Court in 1994 in *Provigo Corp. v. Alcoholic Beverage Control Appeals Board* (1994) 7 Cal.4th 561 [28 Cal.Rptr.2d 638]. In that case, one or more California police departments had engaged minors to purchase alcoholic beverages as

part of their enforcement of the laws prohibiting sales of alcoholic beverages to minors. The Court rejected claims that the practice violated due process, citing *People v. Barraza (1979* 23 Cal.3d 675 [153 Cal.Rptr. 459]:

> Because the seller cannot avoid liability by relying solely on the appearance of the buyer, it is not unfairly entrapped by the use of mature-looking decoys. Such a practice would not rise to the level of "overbearing" conduct needed to constitute entrapment under *Barraza*. Here, the decoys simply bought beer and wine, without attempting to pressure or encourage the sales in any way.

Provigo Corp., supra, 7 Cal. 4th at 569.

The uncontested finding in the present case that "[t]here is no evidence in this matter to even remotely suggest that there was any pressure, badgering, cajoling, importuning, or other affirmative acts placed upon the bartender by either the decoy or by the deputies" places this case squarely within the authority of *Barraza* and *Provigo*.[2]

II

Appellant complains that its counsel was improperly prevented from obtaining critical testimony concerning the decoy operation. It asserts that the ALJ erred by refusing to permit questioning challenging the decoy operation itself as entrapment.

The questioning and colloquy giving rise to appellant's complaint began with Department counsel's objection to a question by appellant's counsel, directed to one of the deputies involved in the decoy operation [RT 23-24]:

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[2] Subsequent to *Provigo*, Business and Professions Code section 25658 was amended by the addition of subdivision (f), which permitted the use of persons under the age of 21 in the enforcement of that section, and which immunized from prosecution any minor who purchases or attempts to purchase an alcoholic beverage while under the direction of a peace officer. The amendment also directed the Department to adopt guidelines with respect to the use of decoys in accordance with the rule-making provisions of the Administrative Procedure Act. The Department did so, with the adoption of Rule 141. (4 Cal. Code Regs., §141.) Although not citing Rule 141, appellant claims it was unfair to use a "nineteen-year-old with a high forehead" in an effort to trick appellant into providing a beer to an underage person. (App. Br., p.2.) We shall address this issue in part III, *infra*.

Q. (Mr. Mallinger): What, in your mind, is the difference between a law-abiding person being entrapped and a person engaged in criminal practice being exposed by a decoy?

Ms. Wortham: Objection. It calls for speculation, it calls for a legal conclusion.

Judge Lewis: Sustained.

Ms. Wortham: And it's not relevant.

Mr. Mallinger: It's not relevant?

Judge Lewis: Calls for a legal conclusion. Sustained.

Q. (Mr. Mallinger): Do you believe it's legal to institute and conceive of a crime and consummate that crime with someone who had no predisposition and would not have otherwise consummated that crime?

Ms. Wortham: Objection. Relevance, lacks foundation.

Judge Lewis: Mr. Mallinger, if you're attacking the use of decoys, underage decoys involving ABC-licensed businesses within the state of California, the law is well settled on that, sir. Okay? It's permissible. These agencies are allowed to do it.

Mr. Mallinger: It is permissible. Using decoys is permissible. There is, I believe, a good basis in the law - - and that is why I am pursuing this line. There is a basis in the law for it to be possible to entrap someone using a decoy, despite the fact that use of a decoy is entirely legal.

Judge Lewis: Well, you can take that up with the District Court of Appeals.

Mr. Mallinger: Okay. I have no further questions.

Not until his closing argument [RT 72-75] did appellant's counsel clarify the points he was attempting to make, that is, there was no evidence of any predisposition on the part of appellant or its staff to sell an alcoholic beverage to a minor, and the decoy's appearance was such as to induce the bartender to believe he was of legal age. Presumably, appellant expected to develop testimony to show appellants were well trained and not predisposed to sell to minors.

There is no authority of which we are aware that requires a showing of

predisposition to commit the offense of selling or furnishing an alcoholic beverage to a minor. In *Nickola v. Munro* (1958) 162 Cal.App.2d 449, 447 [328 P.2d 271] a violation was sustained where a minor had ordered a soft drink, but was served cognac:

> The mere fact that the minor testified he ordered Calso and was served a cognac through a misunderstanding is no defense. The waitress placed the drink on the table and it was handed to the minor. That is sufficient. The pertinent statute specifies that it is an offense to cause an alcoholic beverage to be furnished or given to a minor. That statute was here violated.

"Predisposition" is a red herring when the issue involves selling an alcoholic beverage to a minor. Appellant's bartender, by definition, is predisposed to sell and serve alcoholic beverages. When a patron orders a drink, a bartender necessarily decides whether to make the sale or not, in part by sizing up the customer with respect to apparent age, state of sobriety, or other considerations. Nothing compels a sale. When a sale is made that was not preceded by a request for identification or age related questions, and there is, as in this case, no conduct of the kind warned against in *Barazza*, it is fair to say that the bartender was not induced to do anything she was not otherwise predisposed to do. As the Court in *Provigo*, *supra*, stated, a "seller cannot avoid liability by relying solely on the appearance of the buyer.'

A seller of alcoholic beverages is under a duty to operate a lawful business; he or she has an affirmative duty to avoid selling to minors. Sellers do not act at their peril, since they are afforded the Business and Professions Code section 25660 defense of reliance upon a government-issued document bearing the name, photo and description of the customer showing the customer is of legal age. A predisposition to serve an alcoholic beverage to a customer without asking for proof of majority is all the

predisposition that is required in a minor decoy operation.[3]

The cases cited by appellant (*People v. Backus* (1979) 23 Cal.3d 360 [152 Cal.Rptr. 710], and *Rodriguez v. Panayiotou* (9th Cir. 2002) 414 F.3d 979), are concerned with police immunity from prosecution issues, and are of no assistance to us in this appeal.

III

Appellant does not expressly invoke Department Rule 141, but it does suggest that the decoy's appearance was such that his use as a decoy was improper. (App. Br., p. 2.) We will construe that suggestion as a claim Rule 141(b)(2) was violated, but conclude that it is without basis.[4]

Appellant's only reference to the decoy's appearance concerned his "high forehead." The decoy was 19 years of age on the day of the decoy operation. His size, weight, and manner of dress (see Finding of Fact 5) were not unusual for one of his age. The decoy was clean shaven (*ibid*.), but beyond that there is no evidence of his facial appearance, mannerisms, demeanor, level of maturity, or any other indicia of age. The bartender did not testify, so the record lacks even her assessment of the decoy's apparent age.

On the record before us, we cannot find a violation of Rule 141 or any of its sub-

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[3] There is no evidence that appellant's business was singled out by the deputies. The decoy testified that he visited approximately eight businesses on the night in question. [RT 43.]

[4] Rule 141(b)(2) provides: "The decoy shall 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." Rule 141 (c) provides that the failure to comply with the rule gives rise to a defense to any action brought pursuant to Business and Professions Code section 25658.

parts. Appellant has not borne its burden of establishing the affirmative defense afforded by the rule.

ORDER

The decision of the Department is affirmed.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5] 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.