

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

AB-9176

File: 21-477637 Reg: 10073949

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC, dba
CVS Pharmacy Store #9251 4225 Rosewood Drive, Pleasanton, CA 94588-3001,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: July 12, 2012
Sacramento, CA

ISSUED AUGUST 10, 2012

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing
business as CVS Pharmacy Store #9251 (appellants), appeal from a decision of the
Department of Alcoholic Beverage Control¹ which suspended their license for 15 days
for their clerk having sold an alcoholic beverage to a person under the age of 21, a
violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Garfield Beach CVS, LLC and Longs
Drug Stores California, LLC, appearing through their counsel, Ralph Barat Saltzman
and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing

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The decision of the Department, dated May 23, 2011, is set forth in the
appendix.

through its counsel, Kelly Vent.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On December 16, 2010, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to 18-year-old Elizabeth Ann Lommerin. Although not stated in the accusation, Lommerin was acting as a decoy for the Pleasanton Police Department.

At the administrative hearing held on March 16, 2011, documentary evidence was received and testimony concerning the violation charged was presented by Lommerin, the decoy. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven, and no affirmative defense under Rule 141(c) had been established.

Appellants have filed a timely appeal making the following contentions: (1) the Department failed to establish that the beverage referred to by the decoy as "a Bartles & Jaymes Wine Cooler Malt Beverage" was, in fact, an alcoholic beverage and (2) the decoy did not present the appearance of a person under 21 years of age.

DISCUSSION

I

The decoy testified that when she entered appellants' store, she went to the alcoholic beverage section and "picked out a B&J Wine Cooler Malt Beverage." [RT 10.] Appellants objected to referring to this beverage as an alcoholic beverage, as lacking in foundation, and the objection was overruled. In this appeal, appellants again

assert that there is not sufficient competent evidence that the product the decoy purchased was an alcoholic beverage. They argue that the only evidence that the beverage contained alcohol is the decoy's testimony that she purchased a "B&J Wine Cooler Malt Beverage" and "an unhelpful photograph" that shows a four-pack in a box labeled "B&J." (App. Br., p.4.)

Exhibit 2 is a photo of a portion of the carton containing the beverages purchased by the decoy. The visible portions of the carton and the bottles each bear a circular logo with the words "Bartles" and "Jaymes" surrounding the initials "B&J," and the words "exotic berry," denoting the flavor of the beverage. Neither the carton nor the bottles it contained are in evidence, and the photograph does not show what they state with respect to any alcoholic content.

Appellants argue that the only evidence in the record that the product purchased by the decoy is an alcoholic beverage is her testimony that, as instructed by the police officers conducting the decoy operation, she went to the alcoholic beverage section of the store and "picked out a B&J Wine Cooler Malt Beverage." [RT 10.] She was the only witness. Neither the carton nor the bottles nor their labels were placed in evidence.

Appellants rely on the Board's decision in *Gudoy* (1999) AB-6992, which reversed a Department decision which held that the sale of a bottle of "Olde English 800" to a minor violated section 25658. The Board said in that case:

There is no direct testimony that Olde English 800 is an alcoholic beverage. Nor is there any testimony that the label states anything regarding alcoholic content. The bottle and the label were never introduced into evidence.

In *The Southland Corp./Nat* (2000) AB-7391 the Board addressed, not for the

first time, the issue of the Bartles and Jaymes products as an alcoholic beverage.²

As the Board noted in that case,

It is quite apparent that the accusation was prepared under a misapprehension that the Bartles and Jaymes coolers were, as the product had once been, a wine-based product, one so popular that the term "wine coolers" became virtually generic.

In fact, sometime in 1997 or 1998, as earlier cases before the Board revealed, the makers of the product switched from a wine base to a malt beverage base. Labels were revised to reflect this change, but there was a period of time when both wine-based and malt beverage-based coolers were being sold. As might be expected, this led to some confusion in several Department proceedings.

Some of that confusion persists to this day, and in this case, primarily because the persons in charge of the decoy operation did not document the evidence as well as they might have. That said, we think the fact that the Bartles & Jaymes product was contained in the alcoholic beverage section of the store, the fact that the Bartles & Jaymes name is virtually synonymous with wine-based or malt beverage-based coolers, the fact that the decoy followed the officers' instructions to select an alcoholic beverage,³ and the absence of any contrary evidence, are enough to compel us to

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The Board heard a flurry of "wine cooler" appeals, some of them concerning Bartles & Jaymes coolers, soon after Rule 141 became law. (See, e.g., *7-Eleven, Inc./De Jesus* (2003) AB-8029; *The Southland Corporation/Kim* (2000) AB-7267; *The Southland Corporation/Ali* (1997) AB-6800; *Fines Food Company* (1997) AB-6772; *Adjoy, Inc.* (1997) AB-6724; *Martin* (1997) AB-6698; *Gardy* (1997) AB-6665; *Dangdo* (1997) AB-6631.)

³ Q. (Ms. Vent: ... When you went to the alcoholic beverage section, you said you picked out an alcoholic beverage. Can you explain what you picked out?

A. (The decoy): I picked out a B&J Wine Cooler Malt Beverage.

[RT 10.]

affirm a decision in what, with better attention paid to the events at hand, would have been a much stronger case for the Department

II

Appellants contend that the decoy did not display the appearance required by Department Rule 141(b)(2). The rule requires that a decoy "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." Appellants argue that the decoy "was dressed so as to make herself appear older and mature; she was dressed as a young professional in her mid- to late-20s, wearing high heels, makeup and jewelry, and carrying a medium-sized purse." Coupled with her "law enforcement" training (the decoy had been a police Explorer for two years) and lack of nervousness, assert appellants, her confidence contributed to her overall appearance as an individual over the age of 21.

The contention that the decoy did not display the appearance required by rule 141(b)(2) essentially pits the less than neutral opinion of appellants' counsel against the factual determination made by a neutral administrative law judge (ALJ). The Board has, with rare exception, declined to substitute its views for those of the ALJ, and it declines to do so in this case.

The ALJ's findings with respect to the appearance of the decoy are factual in nature, and his opportunity to hear and view the decoy as she testified, as well as view a photo of the decoy made on the day of the decoy operation (Exhibit 2) are ample evidence to support those findings

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, MEMBER ALCOHOLIC
BEVERAGE CONTROL APPEALS
BOARD

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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.