

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

AB-9222

File: 21-380285 Reg: 11074764

7-ELEVEN, INC., HYUNG JOO KWON, and JUN AN KWON,
dba 7-Eleven #2133-32829
23701 Vanowen Street, Canoga Park, CA 91307,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: September 6, 2012
Los Angeles, CA

ISSUED OCTOBER 23, 2012

7-Eleven, Inc., Hyung Joo Kwon, and Jun An Kwon, doing business as 7-Eleven #2133-32829 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 20 days for their clerk, Nishant Varadachari, having sold alcoholic beverages (malt liquor and beer) to Sacha Barnes, an 18-year-old non-decoy minor, and their clerk, Ravinder Singh, having sold Corona beer and Joose, an alcoholic beverage, to Tucker Padgette, also a person under the

¹The decision of the Department, dated December 15, 2011, is set forth in the appendix.

age of 21, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Hyung Joo Kwon, and Jun An Kwon, appearing through their counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on January 7, 2002. On April 5, 2011, the Department instituted a two-count accusation against appellants charging that, on October 1, 2010, appellant's clerk, Nishant Varadachari, sold alcoholic beverages (malt liquor and beer) to Sacha Barnes, a person under the age of 21 (count 1), and on October 15, 2010, appellant's clerk, Ravinder Singh, sold alcoholic beverages (Corona Extra beer and Joose) to Tucker Padgette, also a person under the age of 21 (count 2).

At the administrative hearing held on August 25, 2011, documentary evidence was received and testimony concerning the violation charged was presented by Department investigators Esmeralda Reynoso and Charlotte Clark, and minor decoys Sacha Barnes and Tucker Padgette. Nishant Varadachari, Ravinder Singh, and Jun An Kwon testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the charges in both counts of the accusation had been proved, and in neither count had appellants established a defense under Business and Professions Code section 25660.

Appellants have filed a timely appeal, and contend they established a defense under Business and Professions Code section 25660 with respect to each transaction.

DISCUSSION

The sole issue in this case is whether the Department erred in determining that appellant failed to establish an affirmative defense under Business and Professions Code section 25660 with respect to each of the transactions charged in the accusation.

Section 25660 provides:

(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, an identification card issued to a member of the Armed Forces that contains the name, date of birth, description, and picture of the person, or a valid passport issued by the United States or by a foreign government.

[¶] . . . [¶]

(c) Proof that the defendant-licensee, or his or her employee or agent, demanded, was shown, and acted in reliance upon bona fide evidence in any transaction, employment, use, or permission forbidden by Section 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 burden in such a case is on the party asserting the defense.

The real issue when a seemingly bona fide ID is presented is the same as when actual governmental ID's are presented: reasonable reliance which includes careful scrutiny by the licensee. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1445 [13 Cal.Rptr.3d 826] (*Masani*).)²

²Although *Masani* involved a counterfeit ID, the principle that for reasonable reliance there must be careful scrutiny is equally applicable to a genuine government document issued to some other person.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.³

The Sacha Barnes transaction (Findings of Fact 4 through 9):

FF 4. Sacha Barnes was born on May 5, 1992. On October 1, 2010, she was 18 years old.

FF 5. On October 1, 2010, Barnes entered the Licensed Premises. She went to the alcohol section and grabbed three 23.5-oz. cans of Four Loko and one 24-oz. can of Bud Light beer. (Exhibit 3.) Barnes took all of these items to the front counter. The clerk, Nishant Varadachari, rang up the sale. Although Varadachari did not ask to see any identification in connection with this transaction, Barnes had previously shown a fake identification to him.

FF 6. Barnes testified that the fake ID in question was a California driver license issued to Narine Khachakyan. Barnes was two inches shorter and a few pounds lighter than indicated by Khachakyan's identification. She did not resemble the picture on Khachakyan's identification. Khachakyan's identification indicated that the bearer was 26 years old. Barnes appeared her age, 18, and could not possibly pass for 26. Finally, Khachakyan's identification had expired over one year before. (Exhibit 2.)

FF 7. Varadachari denied that Barnes had ever used Khachakyan's

³The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

identification. Instead, he testified that she had shown him a different ID, the description and photo of which matched Barnes. He assumed that the identification shown to him was not expired because, when he swiped the ID, the machine accepted it.

FF 8. Barnes paid for the alcoholic beverages, then left the premises. She drove to the parking lot of a nearby Vons to meet some friends. Barnes and one of her friends opened the trunk of her vehicle, revealing four cans of Four Loko, one bottle of Coors Light beer, and the can of Bud Light. (Exhibit 5.)

FF 9. A team of Department investigators were parked in the lot and, seeing Barnes with the alcohol, contacted her. They asked to see her identification, which she provided. Barnes also handed over the fake identification. (Exhibit 2.) The investigators seized it, the alcohol, and the receipt (Exhibit 3) which accompanied the alcohol.²

2. The source of the bottles of Coors Light and the fourth can of our Loko was not established. When questioned by investigators that night again in her testimony at the hearing, Barnes stated that she purchased all six items at the Licensed Premises. However, only four alcoholic beverages (3 cans of Four Loko and the Bud Light) appear on the receipt.

Choosing to accept Barnes' testimony over that of Varadachari, the ALJ

concluded that the Khachakyan license did not meet the requirements of section 25660: Barnes did not resemble the photo on the Khachakyan license, she did not appear to be anywhere near 26 years of age, the age on the Khachakyan license, and the license itself had expired even earlier than the time Barnes stated she had actually used the license with Varadachari.

We find no reason to question the ALJ's credibility determination. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

We find the arguments in appellants' brief with respect to the Barnes transaction somewhat bewildering. Appellants assert (App. Br., p.4) that their "employee acted in good faith, relying on the ID's presented by Barnes on October 1, 2010" But neither

Barnes nor appellants' clerk testified that any ID was displayed in connection with the October 1, 2010, transaction.

We might think that appellants meant to refer to Varadachari's claim that Barnes presented some other identification to him on numerous occasions prior to October 1, 2010.⁴ But their brief does not even argue that point - instead, we are told that it is understandable that a clerk may not be alert to differences in height and weight. They repeat their contention that there was reliance on the identifications presented to the clerks, and cite the Board's decision in *S.S. Schooners, Inc.* (1999) AB-7039, a case where the Board found reasonable reliance on a photo in a ten-year-old passport and a second photo on a three-year-old resident alien card:

Although in *S.S. Schooners* the ALJ found that the minor did not look like the photos on the identifications presented, that did not prevent this Appeals Board from finding reasonable reliance on the ID's presented. In *S.S. Schooners* this Board held: The licensee may assume the holder of the identification is its owner, unless the appearance of the holder indicates "above mere suspicion" that he or she is not the legal owner. [Citations.] That was not the case here. The only differences were perhaps the height of the individuals on the id's [sic] versus the actual height of the minors. However, given the time of the issuance of the id's [sic] and the age of the minors, it is reasonable to believe that the minors [sic] differences in their current appearance as opposed to description on

⁴ Q. Prior to October 1, 2010, had you seen that particular customer before?

A. Yeah, she was a regular customer.

Q. And when you say regular customer, what does that mean?

A. It means she used to come in like two, three times a week. Mostly for alcohol.

Q. And was she able to purchase alcohol on those previous occasions?

A. Yes.

[RT 63.]

the identifications would be different in height and weight.

(App. Br., pp. 4-5.)

We can only guess what appellants may be attempting to argue. Our best reading of their brief is that they have abandoned their contention that their clerk relied on some ID other than the Khachakyan license, thus conceding that clerk Varadachari could not provide sufficient detail of what he might have relied on to demonstrate that his reliance was reasonable, and seizing on the Khachakyan license in desperation.

The arguments in the final three paragraphs of appellants' brief, although addressing both of the transactions at issue, confirm our belief that this is what appellants have done. They tell us in those paragraphs, that, unlike the ALJ, the clerk did not have the luxury of unlimited time, an absence of pressure, or a bright light to dissect and pour over any differences in appearance. Indeed, appellants seem to forget that there is no claim by anyone that any identification was displayed in the transaction involving Sacha Barnes.

That said, at oral argument appellants' counsel renewed appellants' claim of reliance on some unknown, unidentified, document said to have been relied upon when making the sale in question. Needless to say, this added nothing but further confusion to appellants' case on appeal.

The Tucker Padgett transaction

Tucker Padgett was born on March 16, 1991. He was 19 years of age on October 15, 2010, when he entered appellants' store, selected two 24-oz cans of Corona beer and a 23.5-oz. can of Joose, an alcoholic beverage, and took them to the counter. The clerk (and store manager), Ravinder Singh, asked for identification. Padgett showed Singh a California identification card in the name of Lawrence Klein.

The ID indicated that Klein was 5 feet 3 inches tall and weighed 134 pounds. Padgette was 6 feet 2 inches tall and weighed 170 pounds. Singh testified that he asked for identification, saw a date of birth, entered that into the register, saw that he could make the sale, and returned the ID to Padgette.

Appellants argued at the hearing that the clerk reasonably relied on the Klein ID, explaining the sizeable differences in height and weight on a growth spurt occurring during the three-year period between the time the ID was issued and the date of the transaction, but do not discuss the Padgette transaction in any detail in their brief beyond the general comments about the luxuries of unlimited time, the absence of pressure, and changes in height and weight

Rejecting appellants' 25660 defense, the ALJ found that Padgette did not resemble the photo on the Klein ID (Exhibit 7) (Conclusion of Law 8):

First, Padgette did not resemble the picture on the Klein ID. Second, Padgette was 11 inches taller than indicated by the Klein ID and weighed approximately 35 pounds more.

Appellants have offered us no persuasive reason why we should question this finding. Appellants speculate that the difference in height and weight could be attributed to a "growth spurt," but offered nothing to explain the lack of resemblance between the Klein ID and Padgette, other than they were of the same ethnicity. (See RT-78.)

The ALJ was able to examine the Klein ID and observe Padgette. There is substantial evidence to support his finding, and we may not go behind it to reweigh the evidence or substitute our judgment for his.

ORDER

The decision of the Department is affirmed.⁵

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, 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.