

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

AB-9319

File: 21-477402 Reg: 12076568

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9858
25880 McBean Parkway, Santa Clarita, CA 91355,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 5, 2013
Los Angeles, CA

ISSUED OCTOBER 1, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store #9858 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for its clerk, Amanda Chakur, having sold two mini-kegs of beer to Michael P., a non-decoy minor, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated September 28, 2012, is set forth in the appendix.

Appearances on appeal include appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On February 28, 2012, the Department instituted an accusation against appellants charging that appellants' clerk, Amanda Chakur (the clerk), sold an alcoholic beverage to 17-year old Michael P. (the minor) on January 14, 2012.

At the administrative hearing held on July 26, 2012, documentary evidence was received and testimony concerning the violation charged was presented by the minor and by David Duran, an ABC agent.

Testimony established that on January 14, 2012, the minor entered the licensed premises, went to the alcohol section, and selected two mini-kegs of Heineken beer, each of which contained five liters of beer. The minor took the mini-kegs to the counter, where the clerk rang up the sale without asking for identification or asking any age-related questions. Outside the premises, ABC agent Duran stopped the minor, asked him how old he was, and asked for his identification. The minor did not answer, but gave the agent the identification of another individual, Justin Clark, which had expired in September of 2010. The minor was handcuffed when he became agitated, and the agent seized the beer and receipt. The false ID was not placed into evidence, but the minor testified that the height, weight, hair color, and eye color indicated on it were close to his. He also testified that he had obtained the false ID about a month prior to the incident, and that he had used it at least one other time to purchase alcohol at the

licensed premises, although from a different clerk.

Subsequent to the hearing, the Department issued its decision which determined that the charge in the accusation had been proved, and that no defense had been established.

Appellants filed a timely appeal contending that the administrative law judge (ALJ) erred in finding that a defense had not been established under Business and Professions Code section 25660.

DISCUSSION

Appellants contend that a defense to the charge of the accusation was established under Business and Professions Code section 25660 which 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.

Section 25660 provides a defense to the charge of selling alcohol to minors if the licensee demanded and relied upon bona fide documentary evidence of majority and identity issued by a governmental agency. (*Dept. of Alcohol Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1438 [13 Cal.Rptr.3d 826] (*Masani*).) Even a fake or spurious identification can support a defense under this section if the apparent authenticity of the identification is such that reliance upon it can

be said to be reasonable. (*Id.* at p. 1445.)

The licensee should not be penalized for accepting a credible fake that has been reasonably examined for authenticity and compared with the person depicted. A brilliant forgery should not ipso facto lead to licensee sanctions. In other words, fake Government ID's cannot be categorically excluded from the purview of section 25660. The real issue when a seemingly bona fide ID is presented is the same as when actual governmental ID's are presented: reasonable reliance that includes careful scrutiny by the licensee. (*Masani, supra* at p. 1445.)

Appellants maintain that reasonable reliance was established in this case because the minor had been to the premises numerous times, and had purchased alcohol there twice – using another person's identification at least one of those times. (App.Br. at pp. 1-2.) Appellants also contend that the identification used was an actual, albeit expired, California Driver's license, and that the description on it resembled the minor's appearance in regards to height, weight, hair color, and eye color. (App.Br. at p. 4.)

However, there is more to establishing a section 25660 defense than simply comparing the person with the picture. Section 25660, as an exception to the general prohibition against sales to minors, must be narrowly construed. (*Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*)). The statute provides an affirmative defense, and "[t]he licensee has the burden of proving . . . that evidence of majority and identity was demanded, shown and acted on as prescribed by . . . section 25660." (*Ibid.*)

The case law regarding that section makes clear that to provide a defense, reliance on the document must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne, supra*; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820].) Reasonable reliance

cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. (*5501 Hollywood, Inc.*, *supra*, at pp. 753-754.)

A licensee, or a licensee's agent or employee, must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne*, *supra*; *Farah v. Alcoholic Bev. Control Appeals Bd* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control*, *supra*, p. 753.)

The defense must be asserted in good faith, that is, the licensee or the agent of the licensee must act as a reasonable and prudent [person] would have acted under the circumstances. Obviously, the appearance of the one producing the card, or the description on the card, or its nature, may well indicate that the person in possession of it is not the person described on such card.

(*Keane v. Reilly* (1955) 130 Cal.App.2d 407, 409-410 [279 P.2d 152].)

While it may have been reasonable for the clerk who sold alcohol to this minor on a prior occasion to compare him with the picture on the fake ID and conclude that they were probably the same person, it was not reasonable for that clerk to ignore the expiration date or the apparent age of the person presenting the license. It is well-settled that reliance must be reasonable if a defense under section 25660 is to be sustained. (*Masani*, *supra*, at p. 1445.)

In *22000, Inc.* (2000) AB-7543, the licensee argued that a clerk used due diligence by simply comparing the picture on the proffered identification with the customer presenting it. The Board responded:

[T]here is no basis for the implication that the clerk was entitled to focus only on the photograph on the license. Common sense dictates that he is required to give appropriate weight to each item of information on the license which tends to show that it is the property of the person tendering

it, and that the person is 21 years of age or older.

In *Thrifty Payless, Inc.* (2004) AB-8125, the Board made an extensive review of appeals it has heard involving the use by minors of expired identification cards to purchase alcoholic beverages. In these cases, the Board has consistently found that a reasonable and prudent seller cannot simply ignore the expiration date on a document offered as proof of age and identity. In *Nourollahi* (1997) AB-6649, the Board said that "there can be no per se rule, but the longer a license has been expired, the higher the level of diligence which should be required for a successful defense under §25660."

The ALJ made extensive findings on this issue, and came to the following conclusion about reasonable reliance in Conclusions of Law ¶¶ 6-7:

CL ¶ 6. The Respondents did not establish a defense under section 25660. First, [Michael P.] did not show any ID to Chakur in connection with the sale on January 14, 2012. Second, Chakur was not involved in either of the prior sales and, therefore, had not previously seen the Clark ID. Third, there was no evidence that the clerk who saw the Clark ID communicated that fact — much less the specific details of the Clark ID — to Chakur. (Findings of Fact ¶¶ 7-8.)

Importantly, the Respondents did not introduce the Clark ID into evidence and they did not elicit any detailed testimony about it. Although the evidence established that the hair color and eye color on the Clark ID were the same as [Michael P.]'s, the height and weight were described as being approximately the same as [Michael P.]'s. There was no evidence concerning the photo on the ID, such as whether it resembled [Michael P.] and, if so, how much. There also was no evidence of the date of birth listed on the Clark ID. Since [Michael P.] appeared his actual age, an ID which indicated he was substantially older should have been automatically suspect (as opposed to an ID which made him out to be 21, for example). In short it is impossible to determine if the Clark ID would have been sufficient under section 25660.

CL ¶ 7. Finally, it is important to note that the Clark ID had expired 16 months before the sale at issue here and 15 months before it was shown to someone at the Licensed Premises. (Finding of Fact ¶ 7.) The Appeals Board has consistently held that a long-expired ID "should be a 'red flag' to any potential seller."⁶ "[T]he longer a license has been expired, the higher the level of diligence which should be required for a

successful defense under Section 25660."⁷ "Case law has required reasonable reliance and due diligence. A reasonable and prudent person would at least make inquiry if an expired driver's license is used for identification, especially when, as here, the appearance of the person presenting the license makes it unlikely that he is 21."⁸

⁶*In re Nourollahi*, AB-6649 at 6 (1997).

⁷*Id.* at 5. See also, *In re Circle K Stores, Inc.*, AB-7923 at 5-7 (2003) (ID expired 15 months); *In re Aramark Sports and Entertainment Services, Inc.*, AB-7586 at 2-3 & 8-12 (2000) (ID expired 17 months); *In re Loresco*, AB-7310 at 5-6 (2000) (ID expired two years); *Nourollahi*, AB-6649 at 6 (ID expired two and one-half years); and *In re 22000, Inc.*, AB-7543 at 4-5 (2000) (ID expired three years).

⁸*In re Atwal*, AB-8351 at 8 (2005).

The Respondents did not present any evidence that any inquiry was made into the validity of the Clark ID when [Michael P.] used it despite the fact that it had been expired for 15 months. The circumstances under which [Michael P.] showed the Clark ID have been left entirely to the imagination, which falls far short of the level of proof required to establish a section 25660 defense.

We agree with the ALJ's analysis, and his conclusion that reasonable reliance was not established in this case. Without the Clark ID in evidence, it is impossible to determine whether the minor resembled the description on the false ID; and even if he did, the ALJ found that the minor appeared his true age — 17. It was not reasonable for the previous clerk to have relied on the Clark ID when the minor did not appear to be over 21 and the license was expired; therefore a 25660 defense must fail.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
 FRED HIESTAND, MEMBER
 PETER J. RODDY, MEMBER
 ALCOHOLIC BEVERAGE CONTROL
 APPEALS BOARD

²This 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.