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

AB-9661
File: 21-503481 Reg: 16084854

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store #9823
1350 Florin Road,
Sacramento, CA 95822,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: November 1, 2018
Ontario, CA

ISSUED NOVEMBER 29, 2018

Appearances: *Appellants*: Donna Hooper, of Solomon Saltsman & Jamieson, as counsel for Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store #9823.

Respondent: Matthew Gaughan as counsel for the Department of Alcoholic Beverage Control.

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store #9823 (appellant), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated July 25, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on May 4, 2012. On October 24, 2016, the Department filed an accusation charging that appellants' clerk, Erick Kenichi Kitagawa (the clerk), sold an alcoholic beverage to 18-year-old Casey Brown on August 12, 2016. Although not noted in the accusation, Brown was working as a minor decoy in a joint operation between the Sacramento Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on May 9, 2017, documentary evidence was received and testimony concerning the sale was presented by Brown (the decoy) and by Officers Ken Napper and Yul Alameda of the Sacramento Police Department. Appellants presented no witnesses.

Testimony established that on the date of the operation, prior to entering the licensed premises, the decoy was advised to be truthful and if asked if she was under 21, to say yes. The decoy entered the licensed premises. She looked for the coolers with beer since she was unfamiliar with the licensed premises. After finding them, she selected a six-pack of Coors Light beer. She then took her selection to the clerk and waited to have the purchase rung up. The decoy presented the six pack of Coors Light beer she had selected to the clerk for purchase. It was not busy at the time of this transaction.

This clerk was the same person in the photo that was later taken of the decoy standing next to the clerk that served her. The clerk asked for the decoy's identification as he started the transaction for the beer. The decoy produced her license for the clerk.

The decoy's identification was the California driver's license portrait type that had a red bar under the date of birth that specifically said she would not be 21 until 2018.

Despite the information on the license, no questions were asked of the decoy about her age at any point during the transaction. The clerk returned the decoy's identification, rang up the beer, and told the decoy the cost. The clerk completed the transaction for the beer after the decoy gave him cash to pay for the six pack of Coors Light beer. The decoy was given change by the clerk, along with the beer purchase.

Because the decoy was wearing a recording device that captured the conversation between her and the clerk, the Department moved the recording into evidence. The entirety of the conversation between the decoy and the clerk was as follows:

The clerk: "Do you have your ID with you?

The clerk: "$7.91."

The clerk: "Do you need a bag?"

The decoy: "Uh, yes."

The clerk: "Have a good day."

The decoy: "Thank you."

The decoy then exited the licensed premises with the six pack of Coors Light beer and immediately went to the vehicle where the law enforcement officers were waiting. This vehicle was in the parking lot just to the side of the entrance to the licensed premises. The decoy confirmed what had just occurred. During the conversation, the decoy pointed out that the clerk who served her was walking past the front of the police vehicle and appeared to be leaving. Officer Napper stepped out of the vehicle and detained the clerk. Officer Napper informed the clerk of why they were there and that he had sold

alcohol to a minor. The clerk spontaneously stated "Oh, it was the white girl." After this occurred, Officer Alameda accompanied the decoy as she stepped out of the law enforcement vehicle and approached where the clerk was standing with Officer Napper. Officer Alameda confirmed with the decoy if the detained clerk sold her the beer. While facing the clerk from about five feet away, the decoy said "Yes." The clerk was looking at the decoy when she identified him.

After the hearing, the Department issued a decision determining the violation charged was proved and no defense was established.

Appellants then filed this appeal contending the evidence does not support the ALJ's factual finding that a face-to-face identification took place as required by rule 141(b)(5).

DISCUSSION

Appellant contends the record lacks evidence to support the ALJ's factual findings that the decoy was facing the clerk, and the clerk was looking at the decoy, when the decoy identified the clerk to officers. (App.Br., at p. 6, citing Findings of Fact, ¶ 12.) Appellant argues "there was no evidence that the clerk was facing or paying attention to [the decoy] when she identified him." (App.Br., at p. 6.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable,

> result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code, § 23804; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) "Substantial evidence" is relevant evidence which reasonable minds would accept as support for a conclusion. (*Universal Camera Corp. v. Labor Bd*. (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct*. (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Rule 141, subdivision (b)(5), provides,

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

(Code Regs., tit. 4, § 141(b)(5).) Each subdivision of rule 141 provides an affirmative defense, and the burden of proof lies with the party asserting it. (See *Chevron Stations, Inc*. (2015) AB-9445, at pp. 3-16 [defense raised under subdivision (b)(2)]; *7-Eleven, Inc./Lo* (2006) AB-8384, at pp. 8-11 [defense raised under subdivision (b)(5)].)

Appellants largely rely on *Acapulco*, which supplied the oft-cited language that rule 141 "means what it says" and requires "strict adherence" to its provisions. (*Acapulco Restaurants v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126].) In *Acapulco*, however, it was undisputed that no face-to-face identification took place. (*Id*., at p. 578.) The Department decision held that no face-to-face identification was necessary since an officer was seated nearby and witnessed the sale. (*Ibid*.) This Board affirmed the Department's decision, and wrote:

> There is something to be said for an interpretation of a statute or rule which takes into account reality. And the reality of this case . . . is that there is no need for the requirement of identification when the peace officer is already within the premises and is an eyewitness to the transaction. In that sense, the interaction between the minor and the seller is itself a face-to-face identification.

(*Acapulco Restaurants, Inc*. (1998) AB-6895, at p. 9, reversed by *Acapulco*, *supra*.)

The court of appeals roundly rejected this Board's holding. It wrote,

> The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection of the licensees, the public and the decoys themselves. If the rules are inadequate, the Department has the right and the ability to seek changes. It does not have the right to ignore a duly adopted rule.[fn.]
>
> We hold that rule 141, subdivision (b)(5) means what it says and that, "[f]ollowing any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages." A "[f]ailure to comply with [rule 141(b)(5)] shall be a defense to any action brought pursuant to . . . [s]ection 25658." (Rule 141, subd. (c).)
>
> Since it is undisputed that no attempt (reasonable or otherwise) was made to reenter Acapulco's premises (or remain on those premises) so that the decoy who purchased the beer could make a face-to-face identification of the bartender, and since it is undisputed that subdivision (c) of rule 141 provides a defense when there is a failure to comply with the requirements of rule 141, it follows that Acapulco's suspension cannot stand.[fn.]

(*Acapulco*, *supra*, 67 Cal.App.4th at pp. 581-582.)

Of the essence in the *Acapulco* decision was the undisputed failure to conduct *any* face-to-face identification. (See *ibid*.) Because of that, the *Acapulco* court did not engage in semantic hair-splitting over what, precisely, constitutes a "face-to-face identification."

More recently, in *Garfield Beach CVS*, the court of appeals reversed this Board and found, based on the totality of the circumstances, that a "face-to-face identification" had indeed taken place. (*Dept. of Alcoholic Bev. Control. v. Alcoholic Bev. Control Appeals Bd.* (2017) 18 Cal.App.5th 541, 547 [226 Cal.Rptr.3d 527].) The court did not focus on one specific instant during which the identification took place; instead, it examined the sequence of events following the sale and wrote:

> [T]he decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. [The clerk] had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation. The identification here meets the letter and the spirit of Rule 141.
>
> [¶ . . . ¶]
>
> [W]e conclude that the identification made in her physical presence followed by a confirming implied identification at even closer range satisfied the rule.

(*Ibid*.)

In the past, this Board has held that for a face-to-face identification to comply with rule 141(b)(5), there must be evidence that the clerk knew, or should have known, he was being identified as the seller at the moment the decoy identified him to officers. (See, e.g., *Chun* (1999) AB-7287, at p. 5 ["The phrase 'face to face' means that the two,

the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification."]; but see *Greer* (2000) AB-7403, at p. 4 ["The minor decoy must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to be actually aware that the identification is taking place."].) *Garfield Beach CVS* overrules that holding insofar as the clerk need only be aware he is being identified *at some point* during his interactions with the decoy and officers. (See *Garfield Beach CVS*, *supra*, at p. 547.) The clerk's awareness need not occur at the precise moment of the decoy's identification. (*Ibid*.) According to the *Garfield Beach CVS* court, what matters is that, under the totality of the circumstances, the clerk be given "ample opportunity to observe the minor and to object to any perceived misidentification." (*Ibid*.)

In this case, the ALJ made the following relevant findings of fact:

> 12. [The decoy] . . . exited the Licensed Premises with the six-pack of Coors Light beer and immediately went to the vehicle where the law enforcement officers were waiting. . . . During the conversation, [the decoy] pointed out that the clerk who served her was walking past the front of the police vehicle and appeared to be leaving. SPD Officer Ken Napper (Napper) stepped out of the vehicle and detained the clerk. Napper informed the clerk of why they were there and that he had sold alcohol to a minor. The clerk spontaneously stated "Oh, it was the white girl." After this occurred, SPD Officer Yul Alameda (Alameda) accompanied [the decoy] as she stepped out of the law enforcement vehicle and approached where the clerk was standing with Napper. Alameda confirmed with [the decoy] if the detained clerk sold her the beer. While facing the clerk from about 5 feet away, [the decoy] said "Yes". The clerk was looking at [the decoy] when she identified him.

(Findings of Fact, ¶ 12.) Based on these findings, he reached the following legal conclusion:

> 6. [T]here is no credible evidence supporting these assertions by the Respondent that there was a failure to comply with the requirements of . . . rule 141. [The decoy] spontaneously pointed out the clerk in this matter, without prompting by the SPD officers, as he was walking by, so her

> identification was not tainted by any form of suggestion. [The decoy] then stood approximately 5 feet from the clerk and confirmed her earlier identification in the clerk's presence and with his knowledge. (Finding of Fact ¶ 12.) Neither the clerk nor any other witnesses for the Respondent testified to rebut the credible evidence presented by the Department that this was a fully compliant identification.

(Conlusions of Law, ¶ 6.)

Appellants' appeal turns on the finding that the "[t]he clerk was looking at [the decoy] when she identified him." (See App.Br., at p. 8, citing Findings of Fact, ¶ 12.) Appellants argue there is nothing in the record to support this finding. (App.Br., at p. 8.) They insist that:

> [w]ithout this clear compliance with the face to face identification, under [*Garfield Beach*] *CVS*, the ALJ was required to establish that under the over all [*sic*] circumstances and the interaction between the clerk, the decoy and the officers that the face to face occurred and occurred before any citation was issued.

(*Ibid*.)

First, appellants fundamentally misconstrue the burden of proof. The ALJ is not "required to establish" compliance. (*Ibid.*) Rule 141(b)(5) provides an affirmative defense. Compliance is presumed, and the burden falls on the licensee to prove a violation. (See *Chevron Stations, Inc*., *supra*, at pp. 3-16*; 7-Eleven, Inc./Lo*, *supra*, at pp. 8-11.) Under *Garfield Beach CVS*, appellants cannot prove a violation based solely on whether the clerk was looking at the decoy at the precise moment the decoy identified the clerk to officers. (See *Garfield Beach CVS*, *supra*, at p. 547.)

Instead, appellants must contend with the totality of the circumstances. (*Ibid*.) Other facts establish that the clerk undoubtedly knew, or should have known, that he had been pointed out as the seller. Upon being notified by Officer Napper that he had sold alcohol to a minor, the clerk spontaneously exclaimed, "Oh, it was the white girl."

(Findings of Fact, at ¶ 11; RT at pp. 56-57, 58-59, 78.) After the identification, a photograph was taken of the clerk and the decoy standing close together, while the decoy held her driver's license and the six pack of Coors Light beer. (Findings of Fact, ¶ 15; Exh. D-3; RT at pp. 31, 33.) Under these facts, there can be no question whatsoever that the clerk "had ample opportunity to observe the minor and to object to any perceived misidentification." (See *Garfield Beach CVS*, *supra*, at p. 547.) Appellants have failed to prove otherwise.

Second, although appellants are correct that no witness explicitly stated that the clerk was facing the minor at the moment she identified him to officers, it was not unreasonable for the ALJ to infer that fact based on the testimony. As the Department points out:

> The decoy was asked by Officer Alameda to approach the clerk and was asked, "Is this the person that sold you the alcohol"? The decoy confirmed it was. (RT 58.) Officer Napper was standing next to the clerk at this time and was able to observe the identification and estimate that the decoy stood approximately five feet away from the clerk. (RT 58.) Officer Napper would not have been able to determine how far away Casey was during the identification if he wasn't facing her with the clerk.

(Dept. Reply Br., at p. 4.) The Department is correct. This Board may ask only whether the ALJ's inference was reasonable. In light of the testimony of Officer Napper cited by the Department, the ALJ's inference that the clerk was facing the decoy was indeed reasonable.

In any event, as discussed above, the question of whether the clerk was facing the decoy at the moment she identified him to officers is far from dispositive. It is one of many facts in this case that establish, under the totality of the circumstances, that a face-to-face identification took place as required by the rule. Appellants have failed to prove their affirmative defense, and we therefore affirm.

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

2. This 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.