ISSUED JULY 20, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

R.L. DILLMAN, INC. dba R.L. Dillman, Inc. 24800 Pico Canyon Road Newhall, CA 91381, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)))))))))))	AB-7166 File: 20-300319 Reg: 97041704 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: June 3, 1999 Los Angeles, CA

R.L. Dillman, Inc., doing business as R.L. Dillman, Inc. (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for its clerk, John Casey Schlabreck,[2] having sold an alcoholic beverage (a six-pack of Budweiser beer) to Nicole Marie Lloyd ("Lloyd"), who, at the time of the sale, was 18 years of age. Lloyd was acting as a decoy in a decoy operation being conducted by the Los Angeles Sheriff's Department. The sale was found to have been in violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant R.L. Dillman, Inc., appearing through

[1]The decision of the Department, dated May 28, 1998, is set forth in the appendix.

[2] The Department's decision refers to Schlabreck as "John Casey".

its counsel, Ralph Barat Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 13, 1994. Thereafter, the Department instituted an accusation against appellant charging the sale described above. An administrative hearing was held on March 20, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles County deputy sheriffs Bruce Sonnenblick and Harrison Houghleheuge, and Lloyd, about the purchase by Lloyd of a six-pack of Budweiser beer at appellant's store.

Subsequent to the hearing, the Department issued its decision which determined that the sale by appellant's clerk violated Business and Professions Code §25658, subdivision (a), and suspended appellant's license for 25 days.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department, by utilizing an erroneous standard, failed to comply with Rule 141(b)(2); and (2) in the absence of the product actually purchased by Lloyd, testimony about it should have been excluded.

DISCUSSION

I

Appellant contends that the Department failed to comply with Rule 141(b)(2), by utilizing a standard other than that required by the rule. Specifically, appellant argues that the Administrative Law Judge (ALJ) focused only on the physical appearance of the decoy, and ignored all other indicia of age.

The Appeals Board has visited this issue on previous occasions. In this case, as in the cases the Board has heard on earlier occasions, the ALJ made no factual findings to provide a basis for his conclusion and to indicate that, indeed, he considered

all aspects of the decoy's appearance in reaching his conclusion that the decoy would reasonably be under the age of 21.[3]

Admittedly, the ALJ described the decoy as having a "youthful appearance." However, that term is simply too imprecise, since many people older than 21 can be said to have a "youthful appearance."

The Board has said that it does not expect the Department to articulate every possible characteristic which led it to believe that the decoy presented the appearance which could generally be expected of a person under the age of 21. However, the Department is expected to articulate in its decisions enough of the many characteristics of appearance which could be considered, such as, without limitation, dress, poise, demeanor, and the like. This is not to say that it is improper to consider the physical appearance of the decoy. Indeed, a minor's physical appearance will certainly bear on the overall issue of appearance - it simply is not the only consideration. What we think is required is what will satisfy the Board, and the courts, that the Department has focused on the whole person as presented to the seller. We do not find that in this case.

II

Appellant argues that, because of the failure of the deputy sheriff to bring the six-pack of Budweiser to the hearing, the best evidence rule as manifested in Evidence Code §1500 should have precluded the introduction of any oral testimony regarding the beer. Evidence Code §1500 provides:

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[3] The Department has suggested to the Board that, because the clerk, by requesting identification, indicated a belief the decoy was under the age of 21, the question whether the requirements of Rule 141(b)(2) were met is no longer an issue. In this case, the testimony of the clerk who made the sale was that he requested identification from everyone, and that he thought the decoy was 21. Such precautionary activity should not deprive a licensee of a valid Rule 141 defense if otherwise justified.

> "Except as otherwise provided by statute, no evidence other than the original of a writing is admissible to prove the content of a writing. This section shall be known and may be cited as the best evidence rule."

The best evidence rule requires, in the absence of exceptional conditions, that the content of a writing must be proved by the original writing and not by testimony as to its content or a copy of the writing.

Appellant cites and relies upon People v. Bizieff (1991) 226 Cal.App.3d 1689 [277 Cal.Rptr. 678], where the "writing" in issue was a credit card which the defendant had allegedly stolen. Because the card was unavailable, a police officer was permitted to testify concerning the name he saw on a receipt imprinted from the card. The court pointed out that the appellant had not challenged the accuracy of the police officer's testimony regarding the name on the receipt: "The inscription 'Yvonne Verduzco' was simple, and there was little chance the officer read the name incorrectly." People v. Bizieff, supra, 226 Cal.App.3d at 1698.

Appellant also cites the Board's decision in Guadalupe Godoy (January, 1999) AB-6992, where the Board ruled that, in the absence of either the container or the label, there could be no presumption that the product was an alcoholic beverage. The Board's decision was premised on the absence of any evidence of a general understanding that the product was an alcoholic beverage.

This case is different. In this case, the decoy and the police officer testified that the product in question was a six-pack of Budweiser beer. That both the police officer and the decoy would have been mistaken as to what the decoy purchased is highly unlikely.[4] The name "Budweiser" on the carton, can or bottle is synonymous with an

[4] Appellant's counsel conceded that what was seized was a six-pack of Budweiser, but objected to any testimony to that effect because the beer itself had not

alcoholic beverage, and its generally prominent display would have been easily noticed.

As such, it would seem that the issue involves what the courts have referred to as "inscribed chattels."

This issue was discussed extensively in People v. Mastin (1981) 115 Cal.App.3d 978 [171 Cal.Rptr. 780], where photographs of stolen guns and a knife bearing the owner's initials were introduced over objection. Although, on the facts of that case, the court's discussion might be considered dicta, it is, nonetheless, instructive and helpful.

An "inscribed chattel" is an object bearing a mark or inscription; thus, it is both an object and a writing, and the trial judge (here, the ALJ) had discretion to treat it as one or the other. Since the inscriptions, consisting of the owner's initials, were simple, the photographs, had they depicted the initials, would have been reliable evidence, and admissible. The test advocated by the court is a balancing test, a weighing of the complexity of the inscription, the difficulty in its production, the degree to which the evidence is critical, and the importance of examining the original. (See generally, People v. Mastin, supra, 115 Cal.App.3d at 985; 2 Witkin, California Evidence, §926, p. 885 (3d ed.))

Appellant's best evidence objection lacks merit. However, because of the

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been brought to the hearing [RT 10]. This is of interest in light of a comment in the Bizieff case cited by appellant. Referring to an evidence treatise, that court stated:

> "According to McCormick, '... [W]hen an attack is made, on motion for new trial or on appeal, upon the judge's admission of secondary evidence, it seems that the reviewing tribunal should ordinarily make inquiry of the complaining counsel, 'Does the party whom you represent actually dispute the accuracy of the evidence received as to the material terms of the writing?' If the counsel cannot assure the court that such a good faith dispute exists, it seems clear that any departure from the regulations with respect to secondary evidence must be classed as harmless error." People v. Bizieff, supra, 226 Cal.App.3d at 1697-1698.

Department's non-compliance with Rule 141, its decision must be reversed.

ORDER

The decision of the Department is reversed.[5]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5] This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.