

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

AB-9764

File: 21-545496 Reg: 18086578

VIVI LU, INC.,
dba Fulton Food Shop
1801 Fulton Street,
San Francisco, CA 94117,
Appellant/Licensee

v.

**DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent**

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: June 6, 2019
Ontario, CA

ISSUED JUNE 21, 2019

Appearances: *Appellant:* Rick D. Warren, as counsel for Vivi Lu, Inc.,

Respondent: John Newton, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Vivi Lu, Inc., doing business as Fulton Food Shop (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days because appellant's clerk sold alcohol to an individual under the age of 21, in violation of Business and Professions Code section Business and Professions Code

¹The decision of the Department under Government Code section 11517, subdivision (c), dated November 21, 2018, is set forth in the appendix, as is the Proposed Decision of the administrative law judge (ALJ) dated June 1, 2018.

Section 11517, subdivision (c)(2)(E) permits the Department to reject a proposed decision—as it did here—and decide the case upon the record, including the transcript of the hearing.

section 25658(a).

FACTS AND PROCEDURAL HISTORY

Appellant's type-21 off-sale general license was issued on August 8, 2014. On February 27, 2018 the Department instituted an accusation against appellant charging that on March 3, 2017, appellant's clerk sold alcoholic beverages to an individual under the age of 21. There was evidence of one prior violation at the licensed premises which occurred on October 30, 2014.

At the administrative hearing held on May 22, 2018, documentary evidence was received, and testimony concerning the violation charged was presented by Department Agent Michelle Ott, Juliet Batturaro ("the minor"), appellant's manager, Abraham Dakla, and appellant's shareholder, Tony Arouk.

Testimony established that on March 3, 2017, during the evening hours, Department agents, including Agent Ott, were outside the licensed premises in an enforcement effort focused on youthful persons in or around the immediate area. At approximately 10:48 p.m., agents observed the minor² enter the licensed premises. Because the minor appeared 18 years old (or even younger), Agent Ott followed her inside.

Inside the licensed premises, Agent Ott observed the minor standing in line at the sales counter, and when it was her turn, the minor set down three single-serving sized bottles of New Amsterdam Apple Vodka. The minor then asked the sales clerk, Bayar Mohammed Omar Abdulla ("the clerk"), to obtain a bottle of Bacardi rum from the back shelf area. The clerk obtained the bottle of Bacardi and placed it on the counter

²The minor, Juliet Batturaro, was born on May 4, 1998, and was 18 years old on March 3, 2017.

near the vodka bottles. The clerk then asked to view the minor's identification.

The minor handed the clerk a false South Carolina driver's license and her credit card. The clerk inspected the minor's driver's license for approximately two seconds, then returned it to her. The clerk did not ask the minor to disclose her age, or otherwise ask the minor any questions about the identification. The minor then purchased the alcoholic beverages with her credit card.

As the minor made her purchase, she had a female friend standing next to her at the counter. The friend appeared to ask the clerk about some items on the shelves. However, the friend did not make any purchase from the clerk and left the sales counter area just prior to the minor actually paying for the alcohol. The clerk never inquired about the friend's age nor did he ask to inspect her identification.

After paying for the alcoholic beverages, the clerk put the bottles into a small black plastic bag and the minor left the store. As she exited, Department agents promptly detained her. Agent Ott asked the minor for her identification. The minor provided her false South Carolina driver's license. Agent Ott suspected that the driver's license was false, and asked the minor for her true identification. The minor provided her valid University of San Francisco identification card that indicated she was only 18 years old. Agents then issued the minor a citation.

Next, Department agents entered the licensed premises and detained the clerk. After identifying herself, Agent Ott told the clerk he sold an alcoholic beverage to an 18 year old. The clerk stated he checked the minor's identification. However, Agent Ott told the clerk that the minor looked very young and issued him a citation.

Subsequent to the hearing, the Department issued its decision sustaining the accusation and issuing a 25 day suspension. Appellant filed a timely appeal

contending that the Department abused its discretion by failing to find that appellant's clerk reasonably relied on a false identification.

DISCUSSION

Appellant contends the decision is not supported by substantial evidence because appellant reasonably relied on false identification — thereby establishing a complete defense under section 25660.

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.

Section 25660 applies to identifications actually issued by government agencies as well as fake identifications purporting to be issued by a government agency.

(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2004) 118 Cal.App.4th 1429, 1444-45 [13 Cal.Rptr.3d 826, 837] (Masani).) However, section 25660 must be narrowly construed. *(Lacabanne Properties, Inc. v. Alcoholic Beverage etc. Appeals Board (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (Lacabanne).)*

The burden of establishing a defense under section 25660 is on the party asserting the defense. In *Masani*, the court said:

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.)

The case law regarding section 25660 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 v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753-754 [318 P.2d 820] (*5501 Hollywood*).) A licensee, or a licensee's agent or employee, must exercise the caution that 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, supra*.) 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, supra*, at pp. 753-754.)

Further, whether or not a licensee has made a reasonable inspection of an ID to determine that it is bona fide is a question of fact (*Masani, supra*, at p. 1445; *5501 Hollywood, supra*, at pp. 753-754), and this Board may not go behind that factual finding. 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. [Citation.] 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.

(*Masani, supra*, at p. 1437.)

In the instant case, the Department found that appellant did not establish a defense under section 25660 because: 1) "the minor could not and did not appear as one who was or could have been at least 21 years old at the Licensed Premises on March 3, 2017" and; 2) the minor's fake South Carolina driver's license could be reasonably relied on by a seller "[w]ithout knowledge or training of what constitutes true government-issued identifications for the type presented to a clerk . . ." (Determination of Issues, ¶¶ 9-10.)

With regards to the minor's appearance, the Department found:

The minor was actually only 18 years old on March 3, 2017. She had a slight build at 5'4" tall and weighed approximately 115 pounds. She was casually dressed and wore minimal, if any, make-up at the Licensed Premises. The images of her on the store video, the image of her on the false identification, and her appearance and persona at the hearing reflected a very youthful person, well under 21 years of age. The false identification made the minor almost 22 years old rather than her true 18 years of age. She in no way appeared even close to 22 years of age. Therefore, although the minor presented a false identification to the sales clerk, because she could not and did not appear as a person who could have reasonably been at least 21 years old, but, in fact, appeared 18 years [sic] old, or younger, the clerk should have been on notice to be extra careful in examining her presented identification. [...]

(Determination of Issues, at ¶ 9.)

Based on the above, the Department's findings regarding the minor's appearance are supported by substantial evidence, since they were based upon both video evidence of the sale, the photograph on the false identification, as well as

observations of the minor's appearance and demeanor at the time of the hearing. The Board cannot simply second guess the Department and reach a different conclusion based upon its own observations of the evidence. Therefore, the Department's findings must stand.³

Further, appellant's contention that the Department erred by "substituting the Administrative Law Judge's subjective perception of the minor's age ... in place of the clerk's conclusion at the time and place of the transaction ..." is rejected. As the Department noted, the clerk did not testify. We cannot know what went through the clerk's mind in the course of the transaction, or whether he believed the minor appeared as over 21 years of age at the time of the sale. Appellant simply assumes, without evidence, that the clerk believed the minor appeared at least 21 years old. However, the only statement the clerk made to Agent Ott was that he "checked the minor's identification." (Findings of Fact, ¶ 10.) This statement says nothing about how old the clerk believed the minor to be.

The Board could affirm the Department's decision based on the above finding, alone. However, to the extent that it would be helpful, the Board will address appellant's contention that the Department erred by requiring evidence that the clerk had been trained on identifying South Carolina's driver's licenses.

In this regard, the Board is not willing to go so far as to mandate the necessity of

³Although there is substantial evidence supporting the Department's decision regarding the minor's appearance, the Board notes with some skepticism that the ALJ could conclude that "the minor could not and did not appear as one who was or could have been at least 21 years old ..." (Determination of Issues, ¶ 9.) Common experience indicates that age is extremely difficult to determine based on looks alone. Yet, in nearly every fake identification case, the Department is able to do just that. It's too bad clerks, bartenders, and waiters are not blessed with the same ability.

state-specific training on authentic identifications for an appellant to establish the "reasonableness" requirement under section 25660. However, the Board agrees with the Department that appellant has not established that its clerk was reasonable in this case.

The Department found that the clerk inspected the minor's driver's license for approximately two seconds, then returned it to her. (Findings of Fact, ¶ 7.) The clerk did not ask the minor to disclose her age, or otherwise ask the minor any questions about the identification. (*Ibid.*) Other than the driver's license itself, appellant did not offer any evidence that would indicate the clerk's inspection was reasonable, especially in light of the minor's youthful appearance (as noted above). As the Department stated, the clerk did not testify. We do not know if he even relied on the South Carolina driver's license as a basis for his decision to only look at it for two seconds and not ask any age-related questions. Without some type of evidence regarding the circumstances of the clerk's inspection (i.e. his basis for believing the license was authentic), appellant cannot establish a defense under section 25660.

ORDER

The decision of the Department is affirmed.⁴

MEGAN McGUINNESS, ACTING CHAIR
SUSAN A. BONILLA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.*