

ISSUED MARCH 24, 1997

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

CLARE MARTIN	)	AB-6698
dba Convenient Mart)	
30651 Thousand Oaks Blvd., # A	)	File: 20-290259
Agoura Hills, California 91301,	)	Reg: 96035399
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	February 5, 1997
	)	Los Angeles, CA
)	

Clare Martin, doing business as Convenient Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered her off-sale beer and wine license suspended for 15 days, with 5 days of the suspension stayed for a probationary period of one year, for having sold alcoholic beverages to an 18-year-old minor-decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

¹The decision of the Department dated July 18, 1996, is set forth in the appendix.

Appearances on appeal include appellant Clare Martin, appearing through her counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control, appearing through its counsel Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on December 13, 1993. Thereafter, the Department instituted an accusation alleging that on November 4, 1995, appellant's clerk sold a four-pack of Seagram's wine coolers to an 18-year-old minor. An administrative hearing was held on June 20, 1996, at which time testimony and other evidence was presented establishing that an 18-year-old minor decoy purchased a four-pack of wine coolers after presenting to the store clerk a valid California driver's license which showed her true age as 18 and her true birth date as April 24, 1977.

Thereafter, the Administrative Law Judge (ALJ) issued his proposed decision in which he found that the sale violated Business and Professions Code §25658, subdivision (a), and recommended that appellant's license be suspended for 15 days, with 5 days of the suspension stayed for one year. The Department adopted the decision on July 18, 1996. Appellant filed a timely notice of appeal.

Appellant raises the following issues: (1) Appellant's efforts at compliance were frustrated as a result of lack of compliance with decoy-operation guidelines; (2) appellant was entrapped; (3) appellant was denied due process as a result of the unconstitutionality of Business and Professions Code §24210; and (4) the penalty was excessive.

DISCUSSION

I

Appellant raises as a multi-part issue that there is not substantial evidence in the record upon which to support the findings and the decision, that the record demonstrates gross misconduct, and that appellant was entrapped.²

Appellant contends that, despite her efforts at compliance, the violation resulted from the failure of the Los Angeles Sheriff's Department to follow the guidelines issued by the Department relative to the decoy program. Appellant complains that, contrary to the guidelines, no notice was given that a decoy program was in operation; the minor-decoy wore makeup and jewelry; the operation was conducted during rush hour; the decoy was not under the constant surveillance of the law enforcement officer supervising the operation; and no attempt was made to determine whether the minor had ever previously attempted to purchase alcohol.

Appellant argues that this was misconduct which caused a crime to be committed which would not otherwise have been committed. Appellant differentiates this defense from the defense of entrapment, arguing that while entrapment presents a question of fact, this defense presents solely a question of law. Appellant cites a series of cases where the holdings are to the effect that outrageous conduct of law enforcement officials can be a bar to prosecution.

² Appellant, in passing, suggests that the Department failed to prove an essential element of its case because the evidence fails to show that the beverage allegedly purchased contained more than ½ of 1% of alcohol. This contention is factually incorrect. The product in question was identified as Seagram's wine coolers, and the Department is entitled to presume that the container contains what its label says it does.

Appellant's argument as to the lack of substantial evidence and misconduct is sapped of any persuasive force by the facts of the case. The evidence is undisputed that appellant's clerk, prompted by appellant who was standing next to the minor-decoy, asked the minor for identification and proof of age. The evidence is also undisputed that the minor produced a valid California driver's license showing her true age as 18, her true date of birth as April 24, 1977, and containing the legend "not 21 until 1998."

We find nothing in the record to sustain the claim that the Sheriff's Department unfairly prevented appellant from complying with the law. That appellant may have had a policy of asking for identification from anyone appearing to be under the age of 30 means little if no one bothers to read the identification when it is proffered. The only reasonable conclusion to be drawn from the record is that the clerk was careless in looking at the identification.

Appellant also contends that the failure of the law enforcement officers to follow the Department's guidelines constitutes entrapment. Appellant cites and relies upon the case of People v. Barraza (1979) 23 Cal.3d 675, 686 [153 Cal.Rptr. 459]. Barraza holds that the appropriate test for entrapment is whether the conduct of the public agent was such that a normally law-abiding person would be induced to commit the prohibited act. Official conduct that does no more than offer an opportunity to act unlawfully is permissible:

"... We hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally

resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime."

People v. Barraza, 23 Cal.3d at 689-690 (fn. omitted)

In this case, we cannot say the conduct of the minor-decoy amounted to "badgering, cajoling, importuning" or the equivalent of any of those terms. To the contrary, the minor produced identification which, had appellant's clerk been nominally vigilant, should have resulted in a refusal to make a sale.

II

Appellant challenges the constitutionality of Business and Professions Code §24210, contending that the combined operation of that section and Government Code §§11512 and 11517 creates an enforcement scheme that denies appellant due process.

The Appeals Board is barred by the California Constitution, article 3, §3.5, from holding unconstitutional, or refusing to enforce, any statute which has not previously been held unconstitutional by an appellate court. There being no such ruling, we decline to address this issue.

III

Appellant argues that the penalty is excessive, in that it is out of proportion to the offense charged. Appellant seems to contend that, even if there was a violation proven, any suspension would be inappropriate.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

As noted in the Department's brief on this appeal, the penalty imposed, a 15-day suspension with 5 days of the suspension stayed for a period of one year, was lenient, in light of the fact that this was appellant's second sale to a minor within a one-year period. The stay of five days of the suspension reflected the Department's acknowledgment that appellant had directed the clerk to check the purchaser's age, so her liability was strictly vicarious. Since it appears to this Board that the Department exercised its discretion reasonably, we will not disturb the penalty.

The decision of the Department is affirmed.³

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

³ This final order is filed as provided in Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.