

ISSUED MARCH 5, 2001

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

7-ELEVEN, INC., and DIANE M.	)	AB-7573
PEARCE)	
dba 7-Eleven #23818	)	File: 20-337389
24156 Lake Drive	)	Reg: 99046980
Crestline, CA 92325,)	
Appellant s/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	John P. McCarthy
)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	December 12, 2000
Respondent.	)	Los Angeles, CA
)	

7-Eleven, Inc., and Diane M. Pearce, doing business as 7-Eleven #23818 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, with 10 days thereof stayed for a one-year probationary period, for their clerk, Lori English, having sold an alcoholic beverage (two quart bottles of Miller High Life beer) to Joshua Arciniega,

¹The decision of the Department, dated January 6, 2000, is set forth in the appendix.

a minor, 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).

Appearances on appeal include appellants 7-Eleven, Inc., and Diane M. Pearce, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 1, 1997. Thereafter, the Department instituted an accusation against them charging the sale of an alcoholic beverage to a minor on June 18, 1999.

An administrative hearing was held on November 10, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the circumstances of the sale.

Joshua Arciniega testified that he was sold the beer after displaying an expired California driver's license originally issued to his brother. Department investigator Gerald Ackley witnessed the transaction, and confronted Arciniega after he had exited the store with the beer.² At that time, Arciniega admitted that he was only 17 years of age, and that the license he had displayed was his brother's. Lori English testified that she made the sale in the reasonable belief that Arciniega was the person whose picture and description was on the license which

² Although the ALJ found that Arciniega had purchased only two bottles of beer, both Arciniega and Ackley testified he bought three.

had been presented to her. Diane Pearce, the licensee, testified that she and her former husband had held the license since 1984, without any prior discipline. The former husband was eliminated as a co-licensee in 1997.

Subsequent to the hearing, the Department issued its decision which determined that appellants had failed to establish a defense under Business and Professions Code §25660 because English did not act reasonably in relying on the license which had been presented to her. The Administrative Law Judge (ALJ) concluded that her initial uncertainty whether Arciniega was the person whose photograph was on the license, in combination with the fact that the license was expired, gave her "more than enough reason" to ask more questions or refuse the sale.

Appellants thereafter filed a timely notice of appeal, and contend that a defense was established under Business and Professions Code §25660.

DISCUSSION

Section 25660 of the Business and Professions Code provides:

"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 or an identification card issued to a member of the Armed Forces, which contains the name, date of birth, description, and picture of the person. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 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."

Appellant contends that the clerk's reliance upon the California driver's license which was presented by Arciniega entitles it to the defense created by

§25660, despite the fact that the license was that of Arciniega's older brother, and despite the fact that the license had expired two years earlier. Appellant asserts that the clerk did all that the statute requires when, after examining the license, she asked Arciniega if the license was his, and was told it was.

The Department contends the clerk did not act reasonably. It points to the ALJ's finding (Finding of fact VII) that Arciniega bore "very little resemblance in facial features" to that of the brother whose license he had presented, and to the expiration of the license two years earlier.

Both parties cite the Board's decision in Nourollahi (1977) AB-6649, and its pronouncement that the fact that a driver's license which has been presented as proof of legal age has expired is a "red flag" to a seller. The Board said, in that case, that, while "there can be no per se rule, ... the longer a license has been expired, the higher the level of diligence which should be required for a successful defense under §25660." Addressing the Department's argument that the time which has passed since the license in question expired is a factor to be weighed in determining whether reliance was reasonable and in good faith, the Board said:

"It is one thing for a person to offer their expired license as identification a few days after its expiration, when they may not have yet received its replacement. It is another for someone to carry a license outdated for more than two years. When the document's expiration is added to the fact that the person presenting the identification is youthful enough to put the seller on notice of inquiry in the first instance, it seems fair to say that the seller was derelict in not seeking further proof of age and identity. A driver's license which expired as long ago as the license in this case should be a 'red flag' to any potential seller."

Appellant argues that Nourollahi stands for the proposition that expiration is

only a consideration, and not a disqualification. Appellant argues that the clerk acted reasonably, because Arciniega's general appearance matched the physical characteristics on the license, and because she took the extra step of asking Arciniega to confirm that the license was really his.

The Department contends that the ALJ correctly ruled that the clerk's reliance was unreasonable, because Arciniega's facial features did not resemble those of his brother; because although uncertain as to his age, she did not ask for further identification; and because the license had expired two years earlier.

Appellant cites S.S. Schooners (1999) AB-7039, where the Board ruled that the Department had erred in rejecting a defense based upon §25660. In that case, a female patron had presented to appellant's doorman a passport issued ten years earlier, and a resident alien card that had been issued three years earlier, neither of which were hers. The Board's decision was based upon its belief that the ALJ, in concluding there was no resemblance between the minor and the person depicted on the passport and registration card, failed to take into account the passage of time since the photographs on the passport and registration card had been taken. In addition, the Board was impressed by the fact that a second identification had been requested by the doorman, and that it took police detectives 20 minutes to satisfy themselves the minor was not the true owner of the documents, leading it to conclude that the Department had held the licensee to an unreasonable standard.

Appellant also cites Young v. State Board of Equalization (1949) 90 Cal.App.2d 256 [202 P.2d 587], and Conti v. State Board of Equalization (1952) 113 Cal.App.2d 465 [248 P.2d 31], both of which sustained lower court reversals

of Board of Equalization decisions rejecting defenses under §25660.

A licensee has a dual burden under §25660: “[N]ot only must he show that he acted in good faith, free from an intent to violate the law ... but he must demonstrate that he also exercised such good faith in reliance upon a document delineated by §25660.” (Kirby v. Alcoholic Beverage Control Appeals Board (1968) 267 Cal.App.2d 895 [73 Cal.Rptr. 352, 355].)

As the cases contemporaneous with and prior to Kirby have made clear, that reliance must be reasonable, that is, the result of an exercise of due diligence. (See, e.g., Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 739]; 5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control (1957) 155 Cal.App.2d 748 [318 P.2d 820, 823].)

In Gurbachan Singh Sandhu (May 25, 2000) AB-7280, the Board rejected the notion that reliance upon an expired driver’s license issued to a person other than the minor, containing a description which differs materially from that of the person displaying it, could ever be said to be reasonable.

In 22000, Inc. (August 22, 2000), the Board affirmed a decision of the Department which had rejected a §25660 defense based upon a driver’s license which had expired three years earlier, in spite of the close similarity between the photo and description on the license and the appearance of the person presenting it. In so doing, the Board stated:

“Read literally, it would seem that §25660 is not available when the identification proffered by a minor is that of a person other than the minor.
“Bona fide evidence of majority and identity of the person is a document ...

including, but not limited to, a motor vehicle operator's license ... which contains the name, date of birth, description, and picture of the person." ... However, the Board need not go this far to sustain the Department in this case.

"The fact that the driver's license had expired nearly three years earlier cannot be ignored. The current validity of a document offered to prove identity is always a material factor to be considered in according the proper deference to the document. The likelihood that a licensed driver will present a license that is long expired, to prove his or her identity, is so unlikely that its acceptance cannot be said to have been reasonable."

In Alejandro and Remigia Loresco (2000) AB-7310, a school identification card was held insufficient to sustain a §25660 defense, its expiration two years earlier cited as one of the grounds for its rejection.

There are several factors here which lead us to believe the defense was properly rejected in this case. First, the license, on its face, revealed that it had expired two years earlier.³ Second, the ALJ concluded that there was little facial resemblance between Arciniega and that of the brother pictured on the license, a view shared by Department investigator Ackley. Third, where there is doubt that the person presenting an identification document is its true owner, as was the case here, we do not think a seller acts reasonably when he or she does no more than ask if it belongs to that person. Such a question will almost certainly produce an affirmative response, and the seller has really done little to negate any initial suspicion or uncertainty. Had a second identification been requested in this case, for example, Arciniega's artifice would have been discovered, or, at least, frustrated. He would have had to choose between saying he did not have a second

³ The license expired two years and three months before the sale in question. The date of expiration appears on the license directly above the photograph.

form of identification, or tendering another license, with a different name.

These three factors in combination support the result reached by the Department. This does not mean, contrary to Young and Conti, that a licensee acts at his or her peril. The issue is whether the clerk's reliance was reasonable. Here, the ALJ concluded on the facts before him that it was not.

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.