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

AB-7701
File: 20-192146 Reg: 00048141

CIRCLE K STORES, INC. dba Circle K
315 South Jackson Street, Red Bluff, CA 96080,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: August 3, 2001
San Francisco, CA

ISSUED OCTOBER 29, 2001

Circle K Stores, Inc., doing business as Circle K Store #1103 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for twenty-five days, with five days thereof stayed, conditioned upon one year of discipline-free operation, for its clerk having sold an alcoholic beverage to a minor, 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 appellant Circle K Stores, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

---

[1]The decision of the Department, dated September 7, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 3, 1986. Thereafter, the Department instituted an accusation against appellant charging that, on October 15, 1999, its clerk, Susan Rubalcava ("the clerk"), sold an alcoholic beverage (beer) to Rory Knudson ("the minor"), who was approximately 17 years of age at the time of the transaction.

An administrative hearing was held on May 9, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the minor, who testified that he was not asked for and did not display any identification when he purchased the beer, and that he had never displayed any false identification to the clerk on any prior occasion; by Beverly Kelley, the mother of a friend of the minor, who witnessed the transaction, advised the clerk that Knudson was a minor, and informed the minor's parents and the Red Bluff police about what she had seen; by Jerry Berenger, a Department investigator who interviewed the clerk approximately one month after the date of the transaction; by Dustin Musick, a friend of the minor, who testified he was unaware of any use of the minor's brother's identification by the minor; and by Allan Buresh, a district manager for Circle K, who testified about Circle K's program to prevent sales of alcoholic beverages to minors, and about his efforts to contact the clerk prior to the hearing.

Subsequent to the hearing, the Department issued its decision which determined that the transaction had occurred as alleged, that appellant had failed to establish any defense under Business and Professions Code §25660, and had failed to establish any other defense to the accusation.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) It established a valid defense under Business and Professions Code §25660; (2) the Administrative Law Judge erred in making credibility determinations; (3) the tape-recorded statement of the clerk was improperly excluded; and (4) appellant was entitled to attack collaterally an earlier decision which found a sale-to-minor violation. The first three issues raised by appellant all relate to whether or not any defense was established under §25660, and will be discussed together.

DISCUSSION

I

Appellant contends that it established a valid defense under Business and Professions Code §25660, based upon the minor's use of false identification when he made the purchase in question. That section 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 evidence established that the minor, on at least one prior occasion, had used, and the clerk had reasonably relied upon, identification of the type described in §25660 purporting to show him to be over the age of twenty-one. Appellant relies upon the recorded statement of the clerk to establish the prior use of such false identification, and contends the ALJ erred in excluding the statement as

hearsay. Appellant also argues that the clerk's statement became part of the record independently of the tape recording, and was not directly contradicted. Additionally, appellant contends that the ALJ erred in accepting as credible the testimony of the minor, in which the minor denied the use of false identification on any prior occasion.

The Department contends that the clerk's statements were properly found to be hearsay, were objected to in a timely manner, and cannot support a finding; and that, even if considered, the clerk's statements do not establish a defense under §25660 because, without proof of what it was which was allegedly presented to the clerk on the prior occasion, there is no way to establish whether the clerk's reliance was reasonable.

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. Where all he shows is good faith in relying upon evidence other than that within the ambit of section 25660, he has failed to meet his burden of proof."

(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 Lacabanne Properties, Inc., two minors gained entry to an on-sale public premises by displaying what the hearing officer found was bona fide documentary

evidence of majority under §25660. The administrative law judge so found, and dismissed counts of an accusation which had charged the licensee with having permitted the minors to enter and remain on the premises without lawful business thereon, in violation of Business and Professions Code §25665. The hearing officer refused to dismiss charges of sales of alcoholic beverages to the two minors, in violation of §25658, subdivision (a), and of permitting them to consume such beverages, in violation of §25658, subdivision (d). The Appeals Board reversed the counts applicable to one of the two minors, holding that the bartender who served that minor had met the requirement of §25660 by confirming with the doorman that the minor had displayed bona fide documentary evidence of majority. The Board affirmed the two remaining counts applicable to the other minor because the bartender who served that minor had requested identification but had not followed up on his request after another customer vouched for the minor.

The appeals court reversed the Board as to the two counts the Board had sustained, holding that there was no duty to make a second demand for identification before serving the minor, because the licensee had the right to rely on the original determination by the doorman that the patron had shown bona fide documentary evidence of majority.

Appellant gets no support from the Lacabanne Properties , Inc. decision, for several reasons.

In that case, the court was strongly influenced by the fact that the sale occurred shortly after the minor "possessed, had shown, and could have again exhibited a

driver's license, which, although altered, was found to show he was over the age of 21 years." (See Lacabanne Properties, Inc., supra, 67 Cal.Rptr. at 740.) The same thought is expressed on the following page (67 Cal.Rptr. at 741):

> "It may well be that the licensee and his employees act at their peril in serving a minor, but it does not follow that they may not be relieved when the requirements for a defense were not only in fact complied with on entry, but, as in this case, were also present, although unexhibited at the time the minor was served."

The court summed up its position in what can only be described as an extremely narrow holding:

> "It is concluded that where the minor patron has exhibited to one employee on entry, and at all times thereafter has on his person, what is found to be bona fide evidence of majority and identity, the licensee may assert reliance on the original demand and exhibition in selling, furnishing or permitting the consumption of an alcoholic beverage by that minor following that entry; and that such defense is not lost because a second employee pursued an inadequate inquiry before serving the minor. " (Lacabanne Properties, Inc., 67 Cal.Rptr. at 742.)

It follows that the Lacabanne decision simply does not lend itself to a §25660 defense where, as here, the identification supposedly relied upon is nowhere to be found.

The only indication that any identification purporting to show that the minor displayed the identification of a person over the age of 21 ever existed is in the hearsay statement testimony of appellant's clerk, that some form of California identification was shown to her on a prior occasion. What that identification supposedly was is a mystery. It certainly was not "present, although unexhibited at the time the minor was served," as was the case in Lacabanne Properties, Inc.

Hence, whether or not the ALJ should have considered the statement made to the Department investigator by the clerk is irrelevant. Since the purported identification

cannot be examined, there is no way appellant can establish that the clerk exercised due diligence when she accepted it as proof of majority.

For the same reasons, the question whether the ALJ erred in accepting the testimony of the minor over that of the clerk is also irrelevant. Appellant simply cannot meet its burden of establishing due diligence.

II

Appellant contends that it is entitled to demonstrate that the prior decision, which found that appellant had violated Business and Professions Code §25658, subdivision (a), was generated by a decoy operation which did not comply with Rule 141. Appellant further contends that the stipulation and waiver was executed without any explanation by the Department of its "nature and extent," or that it could impact future proceedings. Finally, appellant contends that it has a constitutional right to attack the prior decision on collateral grounds because the Department imposed a "standard penalty" for a second sale-to-minor violation.

The prior decision was entered pursuant to a stipulation. In that stipulation, appellant acknowledged the receipt of an accusation, and agreed, among other things, that disciplinary action could be taken on the basis of that accusation, and that it "waived all rights to a hearing, reconsideration and appeal, and any and all other rights which may be accorded pursuant to the Alcoholic Beverage Control Act or the Administrative Procedure Act."

For appellant now to contend that there was no compliance with Rule 141 in the decoy operation which resulted in the accusation flies in the teeth of the language of

the stipulation, and deserves to be rejected out of hand.

Further, appellant's reliance upon criminal case law for the proposition that there is a constitutional right to challenge the prior decision also misses the mark. A violation of Rule 141, even if one could be assumed, is not of constitutional dimension. Indeed, Rule 141 simply creates an affirmative defense, one appellant clearly waived.

ORDER

The decision of the Department is affirmed.[2]

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

---

[2] 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.