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

AB-7772
File: 20-241043 Reg: 00049876

7-ELEVEN, INC., and SALEEM T. CHAUDRY dba 7-Eleven #27659
3185-A Midway Drive, San Diego, CA 92110,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: October 4, 2001
Los Angeles, CA

ISSUED NOVEMBER 29, 2001

7-Eleven, Inc., and Saleem T. Chaudry, doing business as 7-Eleven #27659 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their clerk having sold an alcoholic beverage to 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 appellant 7-Eleven, Inc., and Saleem T. Chaudry, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Kim.

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[1]The decision of the Department, dated February 22, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 14, 1990. Thereafter, the Department instituted an accusation against them charging that, on or about July 28, 2000, their clerk, Aurangzeb Shaheen ("the clerk"), sold an alcoholic beverage (beer) to Damien Wieland ("Wieland"), a person who was then approximately 19 years of age.

An administrative hearing was held on January 19, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Wieland and by Detective Daniel Albright, a San Diego police officer.

Wieland testified that he purchased an 18-can pack of Bud Light beer after displaying to the clerk a check cashing card marked "California Identification" which contained a false date for his birthday. Wieland testified that he obtained the card at a check cashing place in Temecula, California. He testified further that the clerk initially questioned whether he should accept the identification, but then did accept it after Wieland told him the card had been issued by the DMV. Wieland testified that the identification card contained his photo, name, address, height, weight, eye color, and signature.

Detective Albright testified that he followed Wieland's truck to appellants' store, and saw appellant purchase the 18-can pack of beer. He and a fellow officer apprehended Wieland as he was leaving in his truck, confirmed that he had bought the beer, and that he was a minor. Albright issued a citation to the clerk.

Appellants' counsel argued to the Administrative Law Judge (ALJ) that it was incumbent upon the Department to present expert testimony that the identification relied

upon by the clerk was “not good enough to provide a defense.”

Subsequent to the hearing, the Department issued its decision which determined that appellants had failed to establish any defense to the charge of the accusation, and ordered their license suspended for ten days.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the decision is based upon an illegal decoy operation; (2) appellants established a defense under Business and Professions Code §25660; and (3) the decision fails to explain its basis for making findings of credibility.

DISCUSSION

I

Appellants contend that, because detective Albright had reason to believe that Wieland might be a minor and intended to attempt to purchase alcohol, he (Albright) “clearly utilized Wieland” as a “de facto decoy,” and, as a consequence, was obligated to comply with Rule 141. Further, say appellants, there was no compliance with Rule 141 because Wieland, the “de facto” decoy, violated Rule 141(b)(3) and (b)(4) by lying to the clerk and by presenting false identification.

Aside from the fact that this contention was not made at the administrative hearing, appellants have cited no authority for the proposition that the mere suspicion on the part of a police officer that someone possibly a minor may attempt to purchase an alcoholic beverage invokes the minor decoy requirements set forth in Rule 141.

There is no suggestion that detective Albright had any contact with Wieland prior to seeing and following Wieland’s truck on its way to appellants’ store. Rule 141 contemplates that a decoy will be acting under the direction of a police officer. (See

141(b)(4). Wieland could not be said to have been acting under anyone's direction but his own.

Appellants assert that detective Albright "targeted" their store because he knew Wieland intended to purchase beer. However, even if Albright knew Wieland's intentions, there is nothing in the record to indicate he knew where Wieland was going. At best, it could be said that Albright had reason to believe Wieland was about to commit a crime - it is a misdemeanor for a minor to purchase, possess, or consume an alcoholic beverage - and it was mere chance that Wieland chose appellants' store.

To suggest that what occurred was a law enforcement-initiated decoy operation borders on the absurd.

II

Section 25660 provides that "bona fide evidence of majority and identity of the person is a document issued by a federal, state, 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 a licensee, or his agent, "demanded, was shown, and acted in reliance upon such bona fide evidence in any transaction ... forbidden by Section ... 25658 ... shall be a defense to any ... proceedings for the suspension or revocation of any license based thereon."

Appellants contend that the display by Wieland of an admittedly false, non-governmentally issued identification card entitles them to a defense under §25660 because the clerk reasonably relied upon that as proof that Wieland was of legal age.

Appellants rely upon a 1952 appellate court decision in Conti v. State Board of Equalization (1952) 113 Cal.App.2d 465 [248 P.2d 31] which sustained such a defense

under the predecessor statute to §25660 where the seller had relied upon an out-of-state driver's license which belonged to the purchaser's friend. The court ruled that the statute then under consideration did not require the licensee at its peril to determine whether the driver's license in question belonged to the party presenting it.

Conti is factually distinguishable because the license there involved was, in fact, a governmentally-issued document. Here, the identification card displayed by Wieland stated on its face that it was not a governmentally-issued identification. Moreover, although Conti has not been overruled, modern case law compels a different result.

Appellants contend that there is a presumption that the license which was presented was that of the minor, citing cases which it says have suggested that to be the rule. (See Conti v. State Board of Equalization (1952) 113 Cal.App.2d 465 [248 P.2d 31] and Keane v. Reilly (1955) 130 Cal.App.2d 407 [279 P.2d 152].)

The clerk did not testify. All that the record shows with regard to what he may have thought or believed is that he looked at the identification, questioned it, but then accepted Wieland's explanation that it had been issued by the DMV. Given that the identification was such as to raise a question in the clerk's mind, we cannot believe he acted reasonably when he accepted the word of Wieland that the identification came from the DMV when the document itself announced it was not a governmentally-issued document."

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].)

III

Appellants contend that the ALJ failed to make a credibility determination when considering the testimony of Detective Albright and Wieland, citing Holohan v. Massaneri (2001) 246 F.3d 1195(9th Cir.).

This contention has been raised routinely by the attorneys representing appellants, and just as routinely rejected by the Board. See, e.g., 7-Eleven, Inc. and Huh (2001) AB-7680, where the Board stated:

> "We have reviewed the decision in that case, and the court decisions cited in support of that portion of the court's holding, and are satisfied that the view expressed by the court is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California. While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed."

There is nothing in this case to warrant any different approach.

It is a well-known fact that percipient witnesses will not always agree on every detail of what they saw. Whatever discrepancies there might have been between Albright's testimony and that of Wieland were for the ALJ to resolve. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807,

812]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

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.