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

AB-7784
File: 20-215116 Reg: 00048886

7-ELEVEN, INC., HOSI H. AMROLI, and PERVIN H. AMROLI
dba 7-Eleven Store #26640
20103 West Saticoy Street, Canoga Park, CA 91306,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 6, 2001
Los Angeles, CA

ISSUED FEBRUARY 22, 2002

7-Eleven, Inc., Hosi H. Amroli, and Pervin H. Amroli, doing business as 7-Eleven Store #26640 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, all 15 days stayed for a probationary period of one year, for appellant's clerk selling an alcoholic beverage to a 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).

Appearances on appeal include appellants 7-Eleven, Inc., Hosi H. Amroli, and Pervin H. Amroli, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated March 8, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellants charging that, on March 17, 2000, appellants' clerk sold a six-pack of Budweiser beer to 19-year-old Crystal Bychek. Bychek was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time of the sale.

An administrative hearing was held on January 3, 2001, at which time documentary evidence was received and testimony was presented concerning the sale. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged and no defense was established.

Appellants thereafter filed a timely appeal in which they raise the following issues: 1) the Department is collaterally estopped from asserting that the decoy's appearance was in compliance with Rule 141(b)(2), and 2) the decoy's appearance was not in compliance with Rule 141(b)(2).

DISCUSSION

I

Appellants contend the Department is collaterally estopped from asserting that the decoy's appearance complied with Rule 141(b)(2) because the Department has certified a decision in another case, Albertson's, Inc., dba Sav-on Drugs (Reg. No. 00049144, File No. 20-357304) [hereinafter "Albertson's"], in which an ALJ found that this decoy's appearance did not comply with Rule 141(b)(2). We rejected this argument when it was made in the appeal of O'Brien (2001) AB-7751, and we do so again here.

Albertson's involved not only the same decoy as in the present appeal, but also the same decoy operation on the same day. That is, on March 17, 2000, 19-year-old Crystal Bychek, acting as a minor decoy for the LAPD, was able to purchase alcoholic beverages in Canoga Park at Sav-On Drugs and at 7-Eleven.

ALJ Lo, in the present matter, after briefly describing the decoy's physical appearance, her work experience, and her demeanor, and noting his observations of her at the hearing, in Finding VI-D found that Crystal Bychek,

> "displayed the appearance, both physical and nonphysical, which could generally be expected of a person under 21 years of age, under the actual circumstances presented to [appellants'] clerk at the time of the sale of the beer. This appearance is in compliance with the Department's Rule 141."

However, in Albertson's, "[a]fter considering the photographs . . . , the overall appearance of the decoy when she testified, the way she conducted herself at the hearing including her serious and confident demeanor as well as her background and experience," ALJ Echeverria found that Crystal Bychek did not comply with Rule 141(b)(2). (Finding II-E.)

Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue already determined in a prior proceeding. There are three basic requirements for application of the doctrine of collateral estoppel: "(1) the issue decided in the prior action is identical to the one presented in the action in which the defense is asserted; (2) a final judgment has been entered in the prior action on the merits; and (3) the party against whom the defense is asserted was a party to the prior adjudication." (Takahashi v. Board of Education (1988) 202 Cal.App.3d 1464, 1477 [249 Cal.Rptr.2d

578].) Appellants assert that all three requirements are met here and therefore the decision in the present matter must be reversed.

There is no dispute that the last two requirements listed are met: the decision in Albertson's is a final decision of the Department and the Department was a party to the Albertson's proceeding. The Department asserts, however, that the first requirement is not met – that the issue decided in Albertson's is not identical to the issue decided in the present case – and, therefore, the Department is not collaterally estopped.

Appellants argue that the issue in both cases is whether Crystal Bychek displayed the appearance which could generally be expected of a person under the age of 21. The Department contends appellants ignore the final part of the requirement of Rule 141(b)(2): "under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged sale," and that with this specification the issue cannot be the same in the present case as it was in Albertson's.

While we find the factual situation and some of appellants' arguments compelling, we believe that strict adherence to the rule, as prescribed by Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126], requires the conclusion that collateral estoppel is not applicable because the issue in this case is not identical to that in Albertson's. In Albertson's, ALJ Echeverria had to determine whether Bychek displayed the appearance of a person under the age of 21 under the actual circumstances presented to clerk Natalie Kandeh in a Canoga Park drugstore. In the present case, ALJ Lo had to determine whether Bychek displayed the appearance of a person under the age of 21 under the actual circumstances presented to clerk Tikam Wadhwani in a Canoga

Park convenience store. These issues are different, that difference being dictated by the terms of Rule 141. The ALJ does not determine the apparent age of the decoy in a vacuum, but in the context of the particular factual setting existing when the clerk sold an alcoholic beverage to the decoy. Each transaction, premises, and clerk is different, even when the same decoy is involved and, therefore, the issue of the decoy's appearance will be different in every case.

II

Appellants contend the decoy did not display the appearance that could generally be expected of a person under 21 years of age. They assert that the decoy in this case "is very mature." They note her work experience and classroom training in law enforcement and conclude that this is "not the normal experience of an average 21 year old, nor do most 21 year olds have the drive or maturity to accept such responsibility."

The ALJ made a reasonable evaluation of the decoy's overall appearance and this Board, not having seen her in person as has the ALJ, is not in a position to second-guess the ALJ in his finding that her appearance complied with Rule 141(b)(2).

We rejected the contention that a decoy's experience and training made her appear to be over 21 when it was made in Azzam (2001) AB-7631:

> "Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience

violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older."

There is no reason to decide differently in the present appeal.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.