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

AB-7811
File: 20-291217 Reg: 00049939

7-ELEVEN, INC. and YOUNG S. SUH dba 7-Eleven #13649
5746 Amaya Drive, La Mesa, CA 91942,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 7, 2002
Los Angeles, CA

ISSUED APRIL 18, 2002

7-Eleven, Inc. and Young S. Suh, doing business as 7-Eleven #13649 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their 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 appellants 7-Eleven, Inc. and Young S. Suh, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and Stephen Allen Jamieson, 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 April 19, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 11, 1994. Thereafter, the Department instituted an accusation against appellants charging that, on July 27, 2000, appellants' clerk, Todd Robert Janes, sold, furnished, or gave an alcoholic beverage (beer) to Stacey Farrell, a person then approximately 19 years of age. Although not stated in the accusation, Farrell was acting as a police decoy for the La Mesa Police Department.

An administrative hearing was held on March 8, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Stacey Farrell ("the decoy"), La Mesa police officer Justin Smith, and Department investigator Peter Tyndall. Appellants did not present any witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and that appellants had not established any defense to the charge.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the police violated Rule 141(b)(5); (2) the Department failed to make proper credibility findings; and (3) the decoy did not have the appearance required by Rule 141(b)(2).

DISCUSSION

I

Department Rule 141(b)(5) (4 Cal. Code Regs. §141(b)(5)) provides:

> "Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic

> beverages to make a face to face identification of the alleged seller of the alcoholic beverages."

Appellants claim that this rule was violated in two separate respects; they contend that the citation was issued before the face to face identification took place, and that the police officer who conducted the face to face identification with the decoy was not the officer in charge of the decoy operation.

A. **The issuance of the citation.**

Appellants assert that the decoy testified that, as she returned to the store after making her purchase, she observed Officer Smith writing a citation. They say that Officer Smith's testimony that he issued the citation after the decoy had identified the clerk as the seller is not credible.

The decoy's testimony [RT 51] that she saw Officer Smith writing the citation is not as dispositive as appellants would have it.

> 'Q. When you went back inside of the store, what was – with Investigator Tyndall – what was Officer Smith doing?
>
> "A. I believe writing a citation.
>
> "Q. So as you walked into the store, Officer Smith was writing a citation?
>
> "A. Yes.
>
> "Q. And you could see that's what he was doing, writing a citation?
>
> "A. He was writing, yes.
>
> "Q. You could see specifically that he was writing a citation; correct?
>
> "A. He was writing. I'm not sure if it was a citation or notes.
>
> "Q. Well, did he have – do you know what his citation book looks like?
>
> "A. Not really.

"Q. Was he filling out like – I don't know – like a lab notebook, or was it a preprinted form?

"A. I didn't pay much attention to what he was writing.

"Q. But based on what you observed, you concluded he was writing a citation; correct?

"A. Yes."

On redirect examination, she acknowledged that she could be no more precise than to say Officer Smith was writing in a bound book.

Officer Smith, on the other hand, testified that he issued the citation to the clerk after the decoy had identified the clerk as the seller [RT 17.]

Officer Smith denied that, during the estimated five to eight minutes that passed between the time the decoy left the store and returned, he had started filling out paperwork related to the case. He "wrote [his] information in [his] officer's notebook, but [he] did not have the paperwork at that time to fill anything out." [RT 32.] The clerk was waiting on other customers during this time. When Investigator Tyndall brought the decoy back into the store, Tyndall also brought Smith's supplies from the vehicle. The supplies, which were not more specifically identified, were in an expandable manila envelope.

Giving appellants the benefit of the doubt, they have, nonetheless, shown only that Officer Smith might have been in the process of filling out a citation form when the decoy returned to the store. This in no way contradicts Officer Smith's testimony that he did not issue the citation until after the face to face identification had been accomplished.

On these facts, it is obvious that appellants did not meet their burden of proving

that the issuance of the citation preceded the face to face identification. Their contention to the contrary is unpersuasive.

B. Officer directing decoy.

Appellants also contend that Rule 141(b)(5) was violated because Officer Smith, who conducted the face to face identification, was not the officer directing the decoy operation.

Officer Smith testified that he was in charge of the decoy operation [RT 19]. He also testified that he could not recall whether it was Investigator Tyndall who had asked the decoy to identify the clerk [RT 33].

Both the decoy [RT 45] and Investigator Tyndall [RT 62] testified that it was Officer Smith who asked her to identify the clerk.

Appellants argue that Officer Smith could not have been in charge of the decoy operation because he had never conducted a decoy operation before; because he was part of a team to which Department investigators had already been assigned and he was working only because he had been offered overtime; and that as a patrol officer his duties did not include ABC enforcement.

None of the reasons tendered by appellants are inconsistent with Smith's having been in charge of the decoy operation. But, even if any were, it still would not matter. Rule 141(b)(5) does not require the officer directing the decoy operation to conduct the identification; the rule requires the officer directing the decoy to do so. Clearly, Officer Smith was that person. He accompanied the decoy into the store, he watched as the decoy made her purchase, and he remained in the store for her return.

Thus, the decoy's belief that Investigator Tyndall was in charge of the operation, even if

correct, does not overcome the fact that Officer Smith's role in the identification process met the requirement of the rule.

II

Appellants contend that the Department committed error by failing to explain why it concluded that Officer Smith was in charge of the decoy operation at appellants' premises, even though there was the decoy's testimony to the contrary.

First, it should be noted that the decoy's testimony is equivocal as to who was in charge. Although she agreed with appellants' counsel that Investigator Tyndall was in charge of the decoy operation, her testimony was based upon the fact that, while at the police station, Tyndall instructed her and the officer regarding what to do. However, she said Tyndall did not give them any instructions while at appellants' premises.

Second, Tyndall testified that his role in the operation was simply as a cover officer, in the event Smith needed any assistance. Indeed, it was Smith who instructed Tyndall to bring the decoy back into the store in order to conduct the face to face identification [RT 61-62].

Third, the decoy's opinion as to whom was in charge of the operation is entitled to little weight. Even if that was her belief, the decision to accept the first-hand testimony of the police officer and the investigator instead of the decoy's testimony is not a credibility determination.

Finally as indicated in Part I, supra, it is really irrelevant as to whom was in charge of the decoy operation, so even if it could be said that the Department made a credibility determination, it was on an immaterial point, and, at most, harmless error.

III

The Administrative Law Judge (ALJ) found as follows with respect to the appearance of the decoy [Finding of Fact II-D):

> "D. The decoy's overall appearance including her demeanor, her poise, her mannerisms, her size and physical appearance were consistent with that of a nineteen year old and her appearance at the time of the hearing was substantially the same as her appearance on the day of the decoy operation except that her hair was in a ponytail at the time of the hearing. On the date of the sale, the decoy was five feet four and one half inches in height, she weighed approximately 147 pounds, her hair was combed down, she wore no makeup, she was wearing a watch, and she wore blue jeans and a white blouse. The two photographs depicted in Exhibits 2-A and 2-B were taken on the night of the sale and they depict how the decoy appeared that night. At the hearing, the decoy testified that she had not participated in any prior decoy operations and that she had not volunteered or worked for any other law enforcement agencies. After considering the photographs depicted in Exhibits 2-A and 2-B, the decoy's overall appearance when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense."

Appellants argue that, because the decoy was a college student studying mathematics who worked during the summer and who was not nervous while in appellants' store, she clearly could not have displayed the appearance of a person under twenty-one years of age.

Appellants' argument is specious. Each of the criteria they point to as causing the decoy to appear older than twenty-one could just as easily apply to a precocious sixteen-year old.

As this Board has said many times, the ALJ is the trier of fact, and has the opportunity, which this Board does not have, of observing the decoy as she testifies. This Board is not in a position to second-guess the trier of fact especially where all we

have to go on is a partisan appeal, in this case one that borders on frivolity.

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 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.