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

AB-7848
File: 20-269236 Reg: 01050460

7-ELEVEN, INC., LUCINDA D. KELLER, and WILBUR L. KELLER
dba 7-Eleven Store #13655
2270 Fletcher Parkway, El Cajon, CA 92021,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 4, 2002
Los Angeles, CA

ISSUED AUGUST 14, 2002

7-Eleven Inc., Lucinda D. Keller, and Wilbur L. Keller, doing business as 7-Eleven Store #13655 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for appellants' 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., Lucinda D. Keller, and Wilbur L. Keller, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated June 14, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 2, 1992. Thereafter, the Department instituted an accusation against appellants charging that, on December 20, 2000, appellants' clerk, Brandon Rogers ("the clerk"), sold an alcoholic beverage to 17-year-old Michael Pollard. Pollard was acting as a decoy for the El Cajon Police Department at the time of the sale.

An administrative hearing was held on May 8, 2001, at which time documentary evidence was received and testimony concerning the transaction was presented by Pollard ("the decoy") and by El Cajon police officer Matthew Conlon.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and determined that no defense had been established.

Appellants thereafter filed a timely notice of appeal in which they raise the following issues: (1) the Administrative Law Judge (ALJ) erred by refusing to allow appellants' counsel to videotape the decoy's testimony; (2) the ALJ erred in refusing to bifurcate and continue the hearing; (3) the ALJ erred in not allowing the testimony of another clerk who sold to this decoy at another premises; (4) there was not compliance with Rule 141(b)(5) (4 Cal. Code Regs. §141, subd. (b)(5)); and (5) Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)) was violated.

DISCUSSION

I

Appellants contend the ALJ should have granted counsel's request to videotape the decoy's testimony because the ALJ relied on the decoy's appearance at the hearing in making his finding regarding the decoy's apparent age at the time of the sale and the videotape would assist the Appeals Board in reviewing the ALJ's finding.

This Board has acknowledged previously the necessity for an ALJ to use the decoy's appearance at the hearing to aid in determining whether the decoy displayed the appearance of a person under the age of 21 at the time of the violation. We said, in Circle K Stores, Inc. (2000) AB-7265:

> "We are well aware that the rule requires the ALJ to undertake the difficult task of assessing [the] appearance [of a decoy] many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date."

This Board has repeated many times that it is not in a position to second-guess the finding of the ALJ, who has the opportunity, which this Board does not, of observing the decoy in person, and we have deferred to the judgment and discretion of the ALJ's in most instances. Occasionally there have been cases where circumstances compel us to re-examine the ALJ's finding. Those instances, however, have not been the result of the Board's disagreement based upon looking at a photograph of the decoy, but upon some indication that the ALJ has taken into consideration (or omitted from consideration) some factor that may have unfairly or improperly affected the ALJ's determination of the decoy's apparent age.

There is nothing in this decision or record that causes this Board to question the fairness or propriety of the ALJ's finding as to the apparent age of the decoy, and a videotape of the decoy's testimony is neither necessary nor desirable for our limited review.

The ALJ has great discretion in the conduct of the hearing, and it would have been no abuse of discretion for the ALJ in this instance to deny the videotaping on simply practical grounds, such as the time it would take. Indeed, the ALJ gave a

perfectly acceptable and sufficient reason for prohibiting the videotaping when he said that he believed that videotaping would be disruptive of the hearing and likely to intimidate witnesses and prevent them from acting naturally. [RT 16.]

II

Appellants contend the ALJ erred in refusing to bifurcate the hearing to allow the clerk to testify at a later date. The clerk signed a declaration on April 28, 2001, stating that he was then playing professional baseball in Iowa for the Cedar Rapids Kernels, but would return to California "by October 2001," and, if subpoenaed, would be available to testify at that time. As the ALJ observed [RT 114], appellants were essentially requesting a continuance so that they could present the clerk as a witness. Appellants assert that the denial of the request violates their statutory hearing rights under the Administrative Adjudication Bill of Rights (Gov't Code §11425.10 et seq.).

When initially requesting the continuance, appellants' counsel stated that the clerk would be called to testify regarding the decoy's appearance on the night of the violation and his belief that the decoy appeared to be over 21 at that time [RT 9]. Later, appellants' counsel stated that he wanted to have the clerk testify "regarding what took place" during the transaction with respect to the decoy's manner of showing his identification to the clerk.

The ALJ deferred consideration of the request for a continuance until after the testimony of the witnesses was completed. At that time, he considered the arguments made by appellants in support of granting the continuance and those of the Department opposing it. After counsel for the Department withdrew her objection to the introduction into evidence of the clerk's declaration, the ALJ denied appellants' request for continuance, stating [RT 120]:

> "All right. Based upon the fact that Ms. Kim has withdrawn her objection to Exhibit B, that we have Exhibit B into evidence based upon the fact that you initially asked for a continuance or of a bifurcation because you wanted the witness to testify regarding the appearance of the minor decoy, and based on the fact that you did not make a timely request for a continuance prior to today's hearing, as you should have, I do not find good cause to continue this case until sometime in October simply hoping that this witness will be available at that time, because you give us no assurances that he might not be transferred to some other ball club or he may decide to stay in Iowa or somewhere else, not in California. "

Pursuant to Government Code §11524, the ALJ has the right to grant or deny a request for a continuance for good cause. Under subdivision (b) of that section, a party is ordinarily required to apply for the continuance within 10 working days after discovering the good cause for the continuance, unless that party did not cause and sought to prevent the condition or event establishing the good cause. An appellant has no absolute right to a continuance; one is granted or denied at the discretion of the ALJ and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Givens* v. *Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

The ALJ based the denial, in part, on the failure of appellants to make a timely request for a continuance. He noted that appellants knew of the unavailability of the clerk more than 10 days before the hearing, yet did not request a continuance at that time. Appellants' counsel stated that, although the clerk told him he was out-of-state, counsel wanted to have a declaration to that effect so that he would know the clerk was not "yanking [counsel's] chain." Apparently the ALJ did not find that an adequate reason for not making more timely contact with Department counsel to arrange a continuance. Based on our reading of the record, we cannot say that the ALJ abused his discretion in finding counsel's explanation insufficient.

The ALJ also found insufficient the justification offered by appellants' counsel for granting the continuance. As noted above, counsel at first asserted the need for the clerk's testimony with regard to the decoy's apparent age. After appellants' exhibit B, the declaration of the clerk, was admitted into evidence, appellants' counsel stated that he was still requesting a continuance. When the ALJ asked why, counsel replied [RT 117]:

> MR. BUDESKY: Because I want to have the clerk here testifying regarding what took place.
> JUDGE ECHEVERRIA: Regarding what? What aspects of the – of Mr. Rogers' testimony do you feel are critical to your case and why do you think that having this declaration from Mr. Rogers in evidence, why you need him in person, why we should have to continue this matter until sometime after October to finish the hearing to get his testimony?
> MR. BUDESKY: Well, because I learned some new things from Mr. . . . Raymond. And I would like to have Mr. Rogers be here and tell us what happened on 12-20-2000.

Earlier in the hearing, appellants' counsel wanted to have another clerk, Tucker Raymond, from a different store, testify about the manner in which this same decoy had presented his identification. When asked to justify that line of questioning, counsel responded [RT 101]:

> MR. BUDESKY: . . . . Okay. I think Mr. Raymond's testimony regarding the I.D. not being handed over to him is relevant because, as you know, I'm going to make a request to bifurcate the hearing so we can have Mr. Rogers testify regarding what took place.
> JUDGE ECHEVERRIA: All right. Are you saying that Mr. Rogers will be testifying that the minor either – in this particular case, either did not hand his identification to the clerk, Mr. Rogers, or that he had a tug of war with Mr. Rogers over the identification?
> MR. BUDESKY: I'm not saying that. I don't know what Mr. Rogers will testify with respect to that because I concentrated on other things when I interviewed.
> JUDGE ECHEVERRIA: So you don't know what Mr. Rogers will testify to. Fine. . . .

We agree with the ALJ's implicit conclusion that appellants' speculations about what the clerk might testify to do not provide a basis for asserting that the clerk's

testimony was necessary for appellants' case. Appellants assert in their brief on appeal that the clerk's "testimony would have constituted evidence in and of itself, and it would have rebutted the Department's evidence . . . ." Appellants offer no more justification of this statement on appeal than they offered at the hearing.

There was no abuse of discretion in the ALJ's denial of the continuance.

III

Appellants contend the ALJ erred in not allowing the testimony of another clerk, Tucker Raymond, who sold to this decoy at another premises on the same night as appellants' clerk sold to him. They assert that Raymond would have testified that the decoy tugged at his identification when presenting it to Raymond, which, they say, would have violated both the fairness requirement of Rule 141(a) and the requirement of Rule 141(b)(3) that the decoy present his identification when asked. It would show, appellants assert, the decoy's habit and practice, and "it also was necessary for Mr. Rogers' testimony, which could have corroborated it . . . ." (App. Br. at 14.)

Again, as discussed in part II, above, appellants are trying to turn their mere speculation about the clerk's testimony into solid evidence of a violation of Rule 141. Speculation about what certain testimony might be does not provide a sufficient justification for allowing that testimony. In any case, the testimony of the other clerk, Raymond, could not possibly show the decoy's "habit and practice," since more than one occurrence of an event or action is necessary to establish the existence of "habit" and "practice."

The ALJ would have allowed this witness to testify regarding his opinion of the decoy's age, but not about other aspects of the decoy transaction with which he was involved. The testimony of this witness about the decoy presenting his identification

was not relevant, and the ALJ properly disallowed it. Appellants' counsel then chose not to question his witness.

IV

Appellants contend there was not compliance with Rule 141(b)(5) (4 Cal. Code Regs. §141, subd. (b)(5)), arguing that the evidence does not show that a face-to-face identification occurred. The ALJ found that the identification did occur, as follows (Finding II.C.):

> "C. The preponderance of the evidence established that a face to face identification of the seller of the beer did in fact take place.
>
> "1. The decoy initially testified that he had returned to the premises to identify the clerk who had sold him the beer. However, after viewing the videotape (Exhibit C) which does not show him going back into the premises, he testified that he was confused as to whether the identification had taken place inside or outside the premises. However, he did recall identifying the clerk who had sold him the beer and he remembered that he and the clerk were within five feet of each other when this identification took place. He was just not sure as to whether the identification had taken place inside or outside the premises.
>
> "2. Although the police report indicates that Officer Moulton escorted the decoy back into the premises, Officer Conlon testified that the report was in error in that respect, and that he did not discover that mistake until he viewed the videotape (Exhibit C) at the hearing. Conlon did not take notes on the night of the sale and he prepared his report the next day. Conlon testified that the videotape refreshed his recollection and that he has an independent recollection that the identification took place outside the premises. This testimony is consistent with the videotape that shows the clerk being escorted outside. This testimony is also consistent with the photograph depicted in Exhibit 3 that shows the clerk and the decoy outside the premises. Conlon also testified that while outside the premises, Officer Moulton escorted the decoy to a location which was about five feet from the clerk, that either he or Moulton then asked the decoy to identify the person who had sold beer to him and that the decoy pointed to the clerk and stated that he was the clerk who had sold beer to him. The clerk was issued a citation after he had been identified by the decoy."

It was not unreasonable for the ALJ to conclude that the decoy identified the clerk. However, that does not mean that Rule 141(b)(5) was complied with. That rule 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 make a face to face identification of the alleged seller of the alcoholic beverages."

The court in *Acapulco Restaurants, Inc.* v. *Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] addressed the requirements of Rule 141(b)(5):

"The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection of the licensees, the public and the decoys themselves. If the rules are inadequate, the Department has the right and the ability to seek changes. It does not have the right to ignore a duly adopted rule. [Fn. omitted.]

"We hold that rule 141, subdivision (b)(5) means what it says and that '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 premises and have the minor decoy who purchased the alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.' A '[f]ailure to comply with [rule 141(b)(5)] shall be a defense to any action brought pursuant to . . . [s]ection 25658.' (Rule 141, subd. (c).)"

The court's call for strict adherence to the rule compels us to conclude that the face-to-face identification made in this case did not comply with the rule. The officers did not have the decoy re-enter the premises and identify the seller. Instead, after the decoy left the store with the beer he had purchased, officer Conlon, who was inside the store and observed the sale from a distance of 12 to 15 feet, approached the counter, identified himself to the clerk as a police officer, and told the clerk he had sold to a minor decoy [RT 69-70]. His testimony continued:

Q. What happened after you identified yourself to the clerk?
A. We began identifying him, getting his information, and then we were – I'm sorry. Go ahead.
Q. I'm sorry. You say "we." So who was "we"?
A. I'm sorry. There was also other officers involved. Shortly after Pollard exited the store, Officer Kirk and Taub entered the store and then a short time after that Officer Moulton entered the store.

Q. All right. So the officers – other officers and yourself are getting identifying information from the clerk. Did you do anything after that?
A. We escorted the clerk outside.
Q. And why was that done?
A. So that we could conduct our business without disrupting the operation of the store.
* * *
Q. What was done at that location outside the store?
A. We took our Polaroid photo of him and the decoy and the beer. We did our – not necessarily in this order, our face-to-face.

Rather than the decoy identifying the seller for the officers, in this case the officers, essentially, identified the seller for the decoy by bringing the clerk outside to the decoy for identification. By bringing the clerk outside for the identification, they created something akin to a line-up with only one person in the line. The court in *Acapulco*, *supra*, made it clear that the officer's observation of the sale did not obviate the requirement of the decoy re-entering the premises and identifying the seller of the alcoholic beverage. The rule was presumably designed, at least in part, to help ensure an unbiased identification process. Although the officer who observed the violation presumably brought out the right clerk and there is no indication in the present case that the decoy mis-identified this clerk as the seller, the manner in which the identification process was handled does not comply with the strict adherence to the rule dictated by the court in *Acapulco*, *supra*. This failure to strictly adhere to the rule creates a complete defense to the accusation. (4 Cal. Code Regs. §141, subd. (c).) Therefore, the decision of the Department must be reversed.

V

Appellants contend Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)) was violated in that the decoy "had the looks and demeanor of an individual who appeared over 21 years of age at the time of the sale, in violation of Rule 141(b)(2)." Rule

141(b)(2) provides:

> "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense;"

Appellants rely for this contention on the decoy's height of six feet and weight of 142 pounds. If anything, such a combination of height and weight in most young people would cause one to be described as a "gangly youth."[2] There is certainly nothing about that size that would lead us to believe that the decoy's appearance was that of a person over the age of 21.

They also rely on the decoy's prior experience playing soccer and volunteering for law enforcement work.[3] As with any other prior experience, these factors are relevant only insofar as they have an observable effect on the decoy's appearance, something the appellants do not allege to have existed.

The only other factor cited by appellants in support of this contention is that, according to them, officer Conlon testified that the clerk told him that the decoy appeared to be 21 years old. They cite page 75 of the transcript for that testimony. However, on that page, officer Conlon's testimony was that the clerk "indicated to me that [the decoy] appeared to be *under* 21." (Emphasis added.)

None of the "factors" relied on by appellants provide any support for their contention that the decoy's appearance violated Rule 141(b)(2).

ORDER

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[2]See, e.g., Naeem (2002) AB-7798, in which the ALJ described the 5'11", 164-pound decoy as a "gangly youth."

[3]His "law enforcement volunteer work" consisted of posting and distributing road closure signs along the route of a "Mother Goose [as in fairy tales] Parade."

The decision of the Department is reversed for failure to comply with Rule 141(b)(5).[4]

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

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[4]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.