

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

AB-7866

File: 20-359321 Reg: 00050052

7-ELEVEN, INC., DORIS GEWARGIS KHAMO, and SHIMON YOUAB KHAMO
dba 7 Eleven Store 2237-17326E
1138 West F Street, Oakdale, CA 95361,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeffrey Fine

Appeals Board Hearing: October 24, 2002
San Francisco, CA

ISSUED JANUARY 24, 2003

7-Eleven, Inc., Doris Gewargis Khamo, and Shimon Youab Khamo, doing business as 7-Eleven Store 2237 17326E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold an alcoholic beverage (a six-pack of Corona beer) to a non-decoy minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, section 22, arising from a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Doris Khamo, and Shimon Khamo, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

¹The decision of the Department, dated July 26, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 2, 1999. Thereafter, the Department instituted an accusation against appellants charging that, on September 30, 2000, appellant's clerk, John Johnson, sold, furnished, or gave, or caused to be sold, furnished, or given away, alcoholic beverages (beer) to Bryan Sturgill, a person who was then approximately 17 years of age.

An administrative hearing was held on June 20, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Bryan Sturgill ("the minor"), sheriff's officer Joe Cockrell, appellant Shimon Khamo, and Thomas Browning, appellants' assistant manager.

Sturgill testified that when he was asked for identification, he presented an expired California driver's license. The license (Exhibit 2) bore a date of birth of January 29, 1976, indicating that the person to whom it was issued was 24 years of age. As noted, Sturgill was then 17. The license expired on January 29, 1996.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been established, and that appellants had failed to establish a defense under Business and Professions Code section 25660.

Appellants thereafter filed a timely appeal in which they contend that the clerk relied upon bona fide identification, affording them a defense under section 25660.

DISCUSSION

Business and Professions Code section 25660 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.

A licensee has a dual burden under section 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 section 25660.” (*Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895, 899 [73 Cal.Rptr. 352].) 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, 189 [67 Cal.Rptr. 734]; *5501 Hollywood, Inc. v. Department of Alcoholic Beverage Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820].)

The Board has held in other cases that reliance upon a driver’s license that has expired may not be reasonable, depending upon the length of time it has been expired.

As the Board stated in *Amir Nourollahi* (1997) AB-6649, “there can be no per se rule, but the longer a license has been expired, the higher the level of diligence which should be required for a successful defense under §25660.” The fact of expiration, the Board said

“is a factor to be weighed in determining whether appellants’ reliance was reasonable and in good faith. It is one thing for a person to offer their license as identification a few days after its expiration, when they may not have yet received its replacement. It is another for someone to carry a license outdated for more than two years. When the document’s expiration is added to the fact that the person presenting the identification is youthful enough to put the seller on notice of inquiry in the first instance, it seems fair to say that the seller was derelict in not seeking further proof of identity. A driver’s license which expired as long ago

as the license in this case should be a 'red flag' to any potential seller."²

In *Gurbachan Singh Sandhu* (2000) AB-7280, the Board rejected the notion that reliance upon an expired driver's license issued to a person other than the minor, containing a description which differs materially from that of the person displaying it, could ever be said to be reasonable.

In *22000, Inc.* (2000), the Board affirmed a decision of the Department which had rejected a section 25660 defense based upon a driver's license which had expired three years earlier, in spite of the close similarity between the photo and description on the license and the appearance of the person presenting it. In so doing, the Board stated:

"Read literally, it would seem that §25660 is not available when the identification proffered by a minor is that of a person other than the minor. "Bona fide evidence of majority and identity of the person is a document ... including, but not limited to, a motor vehicle operator's license ... which contains the name, date of birth, description, and picture of the person."... However, the Board need not go this far to sustain the Department in this case.

"The fact that the driver's license had expired nearly three years earlier cannot be ignored. The current validity of a document offered to prove identity is always a material factor to be considered in according the proper deference to the document. The likelihood that a licensed driver will present a license that is long expired, to prove his or her identity, is so unlikely that its acceptance cannot be said to have been reasonable."

In *Alejandro and Remigia Loresco* (2000) AB-7310, a school identification card was held insufficient to sustain a section 25660 defense, its expiration two years earlier cited as one of the grounds for its rejection.

² Would not a reasonably prudent seller ask, "Why is this person who is obviously of driving age presenting me with an expired driver's license?" Ought he or she not ask, "Do you have a current license?" Is not the seller on notice that something is amiss if the answer is no? Is this not simply a measure - indeed, a critical measure - of the diligence exercised by the seller? We think it is.

The Administrative Law Judge observed the minor at the hearing, found that the expiration date on the license was clearly visible, the picture on the license did not match the minor, and the minor did not look 24 years of age.

In the face of all this, appellant argues that “it is important to point out that no one from law enforcement was ever present during the transaction, so the officer who cited the clerk never observed the sale or circumstances leading up to the sale.”

Appellant does not say what the circumstances are that the officer would have been able to observe, had he been present. The license speaks for itself, and had expired four years earlier, a period longer than any similar case to reach this Board.

The suggestion that the officer had more time to examine the license than did the clerk misses the mark. A prospective seller needs to be diligent if he expects to prevent a sale to a minor - and that means he has to take the time necessary to do the job right. Here, the clerk obviously did not.

ORDER

The decision of the Department is affirmed.³

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

³ 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.