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

AB-7972
File: 41-176179 Reg: 01051269

CEC ENTERTAINMENT, INC. dba Chuck E. Cheese's
1143 Highland Avenue, National City, CA 91950,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 13, 2003
Los Angeles, CA

ISSUED APRIL 10, 2003

CEC Entertainment, Inc., doing business as Chuck E. Cheese's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, with 10 days thereof conditionally stayed for one year, for its clerk having sold a glass of beer to a minor, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant CEC Entertainment, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John w. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on April 17, 1991. Thereafter, the Department instituted an accusation against appellant

[1]The decision of the Department, dated May 2, 2002, is set forth in the appendix.

charging that, on April 13, 2001, its employee, Irish Reyes Carranza, sold, furnished, or gave, or caused to be sold, furnished or given, an alcoholic beverage (beer) to Sophia Santiago, an eighteen-year-old minor. A second count in the accusation made similar charges with respect to a second employee, Joseline Sanchez.

An administrative hearing was held on January 4 and March 15, 2002, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Sophia Santiago, a police decoy; by Antonio Ybarra, a National City police officer; Belen Hebreo, a criminalist employed by the San Diego County Sheriff's Laboratory; and by Michael Schoellhorn, appellant's district manager.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged in count 1 of the accusation had been proven, and no defenses had been established. Count 2 was dismissed at the request of the Department.[2]

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there was not a completed sale by Carranza; and (2) Rule 141(b)(5) was violated with respect to Carranza.

DISCUSSION

I

Santiago, the decoy, testified that she ordered a draft beer from the clerk who was at the cash register on the other side of the counter, paid for the beer, got change,

[2] The decision states that the Department's request for dismissal was because there was no compliance with Rule 141(b)(2), which has to do with the appearance of the decoy. This appears to be a typographical error. Requesting that count 2 be dismissed, Department counsel stated [RT 220] that "there appears to have been no evidence of compliance with Rule 141(b)(5)."

and was given a receipt. She then moved two or three feet to the right, and was served the beer by a second employee. Appellant contends that, until the beer was actually delivered to the decoy, there was no completed sale transaction. Thus, says appellant, the transaction must be viewed as one in which Carranza and Sanchez collaborated. Consequently, it argues, both must be considered sellers and unless a face to face identification was conducted with both, Rule 141(b)(5) was violated.

The accusation tracked the language of Business and Professions Code section 25658, subdivision (a), which provides that "every person who sells, furnishes, gives, or causes to be sold, furnished or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." It would seem obvious that conduct by a licensee which results in the possession of alcohol by a minor will be within the reach of the statute regardless of through how many employees' hands it must pass to get there. In such a situation, any of the collaborators, to use appellant's analogy, is equally responsible. The fact that the count involving Sanchez was dismissed because the decoy was not asked to identify her does not affect the charge as it relates to Carranza.

We think that once the decoy ordered the beer, paid for it, received change, and received a receipt which she could exchange for the beer, the transaction was sufficiently complete to come within the broad proscription of section 25658, subdivision (a). At that point, it could be said, Carranza caused the beer to be sold furnished, or given away. If appellant's theory were the law, the opportunities for licensees to escape the sanctions of section 25658, subdivision (a), for causing alcoholic beverages to be supplied to minors would be limited only by the bounds of their imagination.

Appellant cites *People v. Stanfill* (1985) 170 Cal.App.3d 420 [216 Cal.Rptr. 472]

and *People v. Garrett* (1972) 29 Cal.App.3d 535 [104 Cal.Rptr. 829] in support of its contention that there was no completed sale until Sanchez delivered the beer to the decoy. Both of these cases dealt with street sales of controlled substances, and whether there was probable cause for police officers who observed the exchange of money for two small, thin, white, filterless cigarettes (*Stanfill*) and a five-inch long, flat package wrapped in wax paper (*Garrett*), had probable cause to believe a crime had been committed and to make an arrest. The issue of whether the transaction in either of those cases was a sale, furnishing, or giving away simply was not present.

II

Appellant contends that because Carranza was no longer behind the counter when the decoy identified her as the seller, but was standing in front of a booth with the police officers, the face to face identification required by Rule 141(b)(5) was invalid. Appellant cites the Board's decision in *Keller* (2002) AB-7848, and contends that the action of the officers in removing Carranza from her place behind the counter was the equivalent of the action of the police in *Keller* in taking the clerk outside the store to be identified.

A writ of review was granted in *Keller* on November 27, 2002, and the case is pending on appeal.[3] In any event, because of factual differences between the two cases, we do not consider *Keller* controlling.

Even though Carranza may have been standing near the police officers, this does not appear to have had any effect on the identification. The decoy testified [Rt 18-19]:

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[3] Case No. D040790, Court of Appeal, Fourth Appellate District, Division One.

A. I pointed to Irish, which was the girl that rang me up. She was standing next to me. And I said, 'this is the girl that sold me the beer.'

Q. So you pointed at her at the same time you said that?

A. Yes

Q. You said that her name was Irish?

A. Irish.

Q. That was who?

A. The girl who rang me up at the register.

Q. How did you know her name?

A. She had a nametag on.

We think the facts of this case are sufficiently different from those in *Keller* to require a different result. In *Keller*, the Board's concern was the removal of the clerk from the store before any identification was attempted. Here the clerk was only a few feet from where she was when the sale took place, certainly not so isolated as to mislead the decoy into accusing the wrong person.

It is worth noting that it was not until this appeal that appellant raised any contention regarding the adequacy of the Rule 141(b)(5) identification of Carranza.[4] At the hearing [RT 235-236], appellant's counsel referred to "testimony that there was supposedly a face-to-face identification of the cashier," and then said that "[w]hat we have is a face-to-face identification of someone who allegedly took some money for an order, but no adequate evidence that the order was ever filled." Appellant made no suggestion that the identification of Carranza was flawed by any action taken by the

[4] The Board's decision in *Keller*, *supra*, was issued August 14, 2002, several months after the hearing in this case.

police, instead, directing its argument at the failure to identify the employee who served the beer to Santiago. Appellant asserted that "[t]here was no identification other than perhaps the cashier."

ORDER

The decision of the Department is affirmed.[5]

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

[5] 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.