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

AB-8075
File: 47-175086 Reg: 02053368

BARBARA A. CARVER and MERLE L. CARVER dba The Fireside
8522 Lincoln Boulevard, Los Angeles, CA 90045
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: December 2, 2002
Los Angeles, CA

ISSUED JANUARY 21, 2004

Barbara A. Carver and Merle L. Carver, doing business as The Fireside (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, all of which were conditionally stayed for one year, for their bartenders having served alcoholic beverages to two minors, violations of Business and Professions Code section 25658, subdivision (a).[2]

Appearances on appeal include appellants Barbara A. Carver and Merle L. Carver, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren 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 December 5, 2002, is set forth in the appendix.

[2] All statutory citations herein are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued on September 19, 1985. Thereafter, the Department instituted an accusation against appellants charging the unlawful sale of alcoholic beverages to, and permitting the consumption thereof by, Natasha Saltz (Saltz), Jennifer Clark (Clark), Catherine Rotunno (Rotunno), and Erin Hughes (Hughes), all of whom were alleged to be under the age of 21.

An administrative hearing was held on October 3, 2002, at which time oral and documentary evidence was received with respect to the charges involving Clark and Hughes. Rutonno and Saltz were not present at the hearing, and those counts of the accusation were ultimately dismissed.

Subsequent to the hearing, the Department issued its decision which determined that the charges with respect to Clark and Hughes had been established, and appellants had failed to establish an affirmative defense under Business and Professions Code section 25660.

Appellants thereafter filed a timely appeal in which they contend that they established such a defense. They argue that the administrative law judge erred in treating the doorman's good faith reliance on false governmentally-issued identification as mitigation rather than a complete defense.

DISCUSSION

The single issue in this appeal is whether appellants' are entitled to a defense under section 25660 where their bartenders sold to, and permitted consumption of alcoholic beverages by, Erin Hughes and Jennifer Clark, in the belief that the two minors had displayed valid identification or proof of majority to a doorman in order to gain entrance to the premises. The doorman had permitted the minors to enter the

premises without having required them to display identification. However, both the minors had visited the premises on several prior occasions, and had displayed to that same doorman what on their face appeared to be valid governmentally-issued driver licenses, Hughes' purportedly issued by the State of New York, Clark's by the State of California. Neither was authentic.

The administrative law judge (ALJ) concluded that the doorman "relied upon in good faith what appeared to him to be valid evidence of majority and identity for both Clark and Hughes on many occasions prior to April 11, 2002 ..." He also concluded that the differences in appearance between the identification displayed by Clark and a California driver license "are so slight as to be imperceptible to the untrained eye," and that any differences in appearance there may be between the identification displayed by Hughes and an authentic New York State driver license had not been established by the evidence. However, the ALJ concluded, neither qualified as a defense under section 25660 because neither had been issued by a federal, state, county or municipal government or subdivision or agency thereof.

Section 25660 provides a defense to a sale-to-minor charge when the licensee or its agent "demanded, was shown and acted in reliance upon ... bona fide evidence" that the person attempting to buy was at least 21 years of age. The statute defines "[b]ona fide evidence of majority and identity of the person" as

> 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.

There is an affirmative duty on a licensee to maintain and operate his or her premises in accordance with the law, and section 25660, as an exception to the general

prohibition against sales to minors must be narrowly construed. The statute provides an affirmative defense, and "[t]he licensee has the burden of proving ... that evidence of majority and identity was demanded, shown and acted upon as prescribed by ... section 25660." (*Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734].)

"It is well established that reliance in good faith upon a document issued by one of the governmental entities enumerated in section 25660 constitutes a defense to a license suspension even though the document is altered, forged or otherwise spurious." (*Kirby v. Alcoholic Bev. etc. Appeals Board* (1968) 267 Cal.App.2d 895, 897 [73 Cal.Rptr. 352].) To provide a defense, reliance on the document must be reasonable, that is, the exercise of due diligence. (See, e.g., *Lacabanne, supra*; 5501 *Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820].)

Reasonable reliance cannot be established unless the appearance of the person presenting identification indicates that he or she could be 21 years of age and the seller makes a reasonable inspection of the identification offered. (*5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control, supra*, 155 Cal.App.2d at pp. 753-754.) A licensee, or a licensee's agent or employee, must exercise the caution which would be shown by a reasonable and prudent person in the same or similar circumstances. (*Lacabanne, supra*; *Farah v. Alcoholic Bev. Control Appeals Board* (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood, Inc. supra*, 155 Cal.App.2d at p. 753.)

The ALJ reasoned that appellants' doorman, and, by implication, their bartenders, had acted in good faith (Conclusions of Law 8-12):

> Respondents assert an affirmative defense under section 25660 citing *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control* ... . In

that case, the Department's discipline of a licensee for violating Section 25658 was reversed by the court, which held that "... where the minor patron has exhibited to one employee on entry, and at all times thereafter has on his person, what is found to be bona fide evidence of majority and identity, the licensee may assert reliance on the original demand and exhibition in selling, furnishing or permitting the consumption of an alcoholic beverage by that minor following that entry; and that such defense is not lost because a second employee pursued an inadequate inquiry before serving the minor. *Lacabanne Properties*, *supra,* 261 Cal.App.2d, at 193.

The instant case is different from *Lacabanne* in that the minor there showed identification at the door and was later served that evening after the bartender called to the doorman and asked if he had checked the minor. The doorman responded that he had and the bartender then served the minor a beer. Here the bartenders both relied on the doorman, but neither asked if he had checked the identifications of Clark or Hughes upon their respective entries into the premises that night or any other night. Bartender Peck had seen Hughes in the premises on other occasions when a doorman was on duty. Bartender Taunton had seen Clark in the premises on other occasions when a doorman was on duty. Doorman Snyder had checked the identification of both Clark and Hughes many times previously, but did not check their identifications on April 11, 2002. The identifications shown on the prior occasions were in the possession of Clark and Hughes on April 11, 2002.

Lacabanne does not apply to the instant facts if one construes it strictly, restricting its holding to those cases where the minor has shown identification on the same night the bartender serves the minor after checking with the doorman.

Lacabanne also noted that there is an affirmative duty on the licensee to maintain and operate his premises in accordance with law, and failure to discharge this duty may amount to permitting any prohibited conduct to occur. *Lacabanne Properties*, *supra*, 261 Cal.App.2d, at 188, citations omitted. "[A] licensee does not act at his peril in selling liquor and ... if he uses due care and acts in good faith his license is not to be jeopardized because some minor representing himself as an adult succeeds in purchasing liquor." *Lacabanne Properties*, *supra*, 261 Cal.App.2d, at 189, citations omitted. "The licensee is barred by the acts and omissions of his employees." *Lacabanne Properties*, *supra*, 261 Cal.App.2d, at 190, citations omitted. "By the same token he should have the benefit of their collective conduct." (*Id.*) In 1959, Section 25660 was amended to delete the words "immediately prior" from the requirement to inspect documentation and appearance of the minor before a sale. (*Id.*)

Applying these general principles to the current facts, doorman Snyder relied upon in good faith what appeared to him to be valid evidence of majority and identity for both Clark and Hughes on many occasions prior to April 11, 2002, permitting them both to enter the Licensed Premises after 10:00 p.m. While his

> instructions were to request identification on entry of persons he believed could be underage, on a few occasions he permitted persons he recognized and whose identification he knew he had checked before to enter without a renewed showing.

Despite his belief that appellants' doorman had acted in good faith, and that appellants' bartenders were entitled to rely on the doorman, the ALJ concluded that appellants were not entitled to a defense under section 25660, because the documents on which the doorman had relied were not, in fact, governmentally issued documents. He appears to have read section 25660 as permitting a defense only if the documents purporting to have been issued by a governmental agency were in fact so issued.

We agree with appellants that this view, urged by the Department in its brief and in oral argument, is mistaken. Indeed, the Department itself ruled to the contrary in a matter heard by the Appeals Board in 1996. (See *Baxter* (1996) AB-6617, reviewing the decision of the Department in Registration No. 95031785.)[3] In that case, appellant's bartender had sold alcoholic beverages to two persons under the age of 21. One of the two, Wheeler, had produced a fraudulent California identification card bearing his photograph and physical description. The ALJ in that case found that the identification card appeared "genuine on first glance" and did so even when compared to a current, valid California driver license. "The forged California identification card ... appeared to be genuine to all but those having extensive training or experience in detecting forged or altered identifications." The ALJ then concluded that the licensee had established a complete defense under section 25660, finding that appellant's bartender "acted in good faith, was diligent, and reasonably relied on the document

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[3] The Department ruled that the section 25660 defense had not been established with respect to the second minor. The Appeals Board affirmed the Department's decision.

Wheeler presented to establish he was over twenty-one." In adopting the ALJ's proposed decision, the Department implicitly agreed with the ALJ's determination that

> the defense extends not only to government documents which are so skillfully altered as to reasonably deceive a licensee attempting to comply with the law into the mistaken but good faith belief the document is genuine, but also to forged government documents which are presented which reasonably give the appearance of authenticity.

The Department now asserts broadly that

> to construe section 25660's definition of bona-fide evidence of majority to include 'false identifications" that only resemble, look like, imitate, purport to be or ostensibly appear to be issued by the listed governmental identifications would result in materially and qualitatively expanding the defense well beyond the scope the legislature has specifically defined and limited.

The Department misreads the statute when it argues (Dept.Br., at page 8) that the phrase "document issued by a federal, state, county, or municipal government" is modified by the term "bona fide." The statute does not say that a bona fide governmentally issued document is required; instead, it defines, for this particular purpose, what constitutes [b]ona fide evidence of majority and identity of the person." For purposes of the statute, a document issued by a federal, state, county or municipal government is "[b]ona fide evidence of majority and identity of the person."

The Department cites the Appeals Board's decision in *The Southland Corporation/Uppal* (2001) AB-7462, a case in which the Appeals Board ruled, qualifiedly, that the document offered as proof of age and identity must be one issued by a governmental entity, citing *Kirby v. Alcoholic Beverage Control Appeals Board* (1968) 267 Cal.App.2d 895 [73 Cal.Rptr. 352] as controlling.

Kirby was decided after section 25660 had been amended by the Legislature to its present form. In that case, a minor had obtained employment after presenting to the

licensee a birth certificate, which was her sister's, and an identification card with her photograph, which she created herself and then signed before a notary. The Appeals Board decision had sustained a defense based upon section 25660. The court reversed, stating (73 Cal.Rptr. at 354):

> It is well-established that reliance in good faith upon a document issued by one of the governmental entities enumerated in section 25660 constitutes a defense to a license suspension proceeding even though the document is altered, forged or otherwise spurious. (Dethlefsen v. State Bd. of Equalization, 145 Cal.App.2d 561, 303 P.2d 7.)
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> Thus the question narrows to whether reliance in good faith upon evidence of identity and majority other than a document emanating from sources specified in section 25660 serves to relieve a licensee from the consequences of committing acts forbidden by sections 25658, 25663, or 25665. The Department concluded that it does not; the Appeals Board ruled that it does. We agree with the Department.

Describing the Appeals Board's decision as having established a "non-statutory defense," the court cited and quoted language from *Lacabanne Properties, Inc.*, *supra*, to the effect that, as an exception to the statute prohibiting sales to minors, §25660 must be narrowly construed.

> Thus a licensee charged with violating sections 25658, 25663 or 25665 has to meet a dual burden; not only must he show that he acted in good faith, free from an intent to violate the law, as the licensee did here, but he must demonstrate that he also exercised such good faith in reliance upon a document delineated by section 25660. Where all he shows is good faith in relying upon evidence other than that within the ambit of section 25660, he has failed to meet his burden of proof.

(*Kirby v. Alcoholic Beverage Control Appeals, supra*, 73 Cal.Rptr. at 355.)

As if anticipating the case now being reviewed, the Board in *The Southland Corporation/Uppal* added a significant caveat in a footnote:

> We are not confronted here with a fraudulent, non-governmentally issued, identification so perfectly constructed and so well matched to its holder as to deceive most anyone into believing it to be genuine. Under such circumstances,

> it is conceivable that, even under *Kirby*, a licensee could be entitled to a defense under §25660. That is a case for another day.

The documents relied upon in *Kirby* were not issued by a governmental agency, nor did they purport to be governmentally issued. Since the court had already said that a defense could arise from a "document issued by one of the governmental entities enumerated in section 25660 ... even though the document is altered, forged or otherwise spurious," the court's insistence upon a document delineated by section 25660 would seem to include spurious or forged documents that purport to be governmentally issued.

"Spurious" means "lacking authenticity or validity in essence or origin; not genuine; false," and "forged" means "to fashion or reproduce for fraudulent purposes; counterfeit." Absent some more specific direction from a court, this Board is not willing to reject, categorically, spurious documents that purport to be governmentally issued. The determining question is whether the seller's reliance on a governmentally issued, or purportedly governmentally issued, document was in good faith and reasonable. Since the ALJ found that appellants' doorman had acted in good faith and reasonably relied on the document presented by Clark and Hughes, he should have sustained appellants' defense under section 25660.

The problem of sales to minors and the attendant problems of underage drinking justify strict enforcement of the sale-to-minor prohibition in section 25658, subdivision (a). Strict enforcement, however, is not the same as strict liability. In enacting section 25660, the Legislature created a method intended to afford protection for licensees in ceratin situations. While the statute should be narrowly construed, it should not be construed so narrowly that it disappears.

The courts have said that section 25660 was designed to be a "safe harbor" for licensees who inspect the appropriate types of identification in good faith and with due diligence. Good faith and due diligence mean that licensees and their employees are required to act reasonably, not perfectly.

We conclude that the Department erred as a matter of law and abused its discretion in finding that appellants did not establish a section 25660 defense to the sale-to-minor charges.

ORDER

The decision of the Department is reversed.[4]

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

[4] 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.