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

AB-8076
File: 20-63168 Reg: 02052989

CIRCLE K STORES, INC. and ROBERT S. FIELD, JR. dba Circle k Store #1012
10069 Folsom Boulevard, Rancho Cordova, CA 95670,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: September 4, 2003
San Francisco, CA

ISSUED NOVEMBER 4, 2003

Circle K Stores, Inc., and Robert S. Field, Jr., doing business as Circle K Store #1012 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, 10 of which were conditionally stayed for one year, for their clerk, Arthur Cofield, having sold a six-pack of Bud Light beer to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Circle K Stores, Inc., and Robert S. Field, Jr., appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

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[1]The decision of the Department, dated December 26, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 1, 1978. On May 23, 2002, the Department instituted an accusation against appellants charging an unlawful sale of an alcoholic beverage to a minor, in violation of Business and Professions Code section 25658, subdivision (a).

An administrative hearing was held on August 8, 2002, and October 30, 2002, at which time oral and documentary evidence was received. James Patterson, the decoy, and Sacramento County sheriff's deputies Richard Limpach and James Manning testified about the sale of the beer to decoy Patterson, and Steven Speelman, a district manager for Circle K, testified on behalf of appellants. Following the hearing, the Department adopted the proposed decision of the administrative law judge (ALJ) which determined that the charge of the accusation had been established, and that appellants had not established any affirmative defense under Rule 141.

Appellants have now filed a timely appeal in which they raise the following issues: (1) the Department violated Business and Professions Code section 25666 and deprived appellants of constitutional due process by its failure to produce decoy Patterson at the continued hearing on October 30, 2002; (2) Rule 141(b)(3) was violated; (3) the Department deprived appellants of due process and fairness because it did not identify the second decoy, Erin Carmen, by name until the second day of the hearing; (4) the Department violated section 25666 because decoy Carmen was not present at the hearing on August 8, 2002; and (5) the Department violated Rule 141(b)(2). Issues 1 and 4 will be discussed together.

DISCUSSION

I

Business and Professions Code section 25666 provides that in any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, or 25665, "the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable" because of death, physical or mental illness or infirmity.

Appellants say this statute was violated because decoy Patterson, who had been called into active duty in the military after the first hearing day, was not present at the second day of the hearing, and that decoy Carmen was not present on the first day.

Decoy Patterson was examined and cross-examined at length on the first day of the hearing. On direct examination, he testified that he entered the store, proceeded to the cooler, selected a six-pack of Bud Light beer, and took the beer to the counter. The clerk asked for identification, and Patterson produced his military ID card.[2] The clerk took it in his hand, examined it for about ten seconds, said "Okay," and handed it back. The clerk bagged the beer, Patterson paid for it, received change, and left the store. Patterson then reentered the store, and in the presence of deputies told the clerk that he, Patterson was a minor and that the clerk had just sold beer to him.

On cross-examination, Patterson agreed that another decoy, later identified as Erin Carmen, was involved in the decoy operation, but he did not believe Carmen had entered the Circle K store.[3] "I'm pretty sure she didn't go in. There may have been a

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[2] Exhibit 2 is a copy of the military ID card which was presented to the clerk. Deputy Limpach testified that he photocopied the card.

[3] Deputy Limpach could not recall if the female decoy had entered the store, but thought it possible. Deputy Manning had no recollection whether the second decoy was present in the store.

time afterwards where she may have walked in, but I'm pretty sure that she didn't go in." [I RT 287.]

Patterson testified that he had been in the law enforcement academy for four years, and had undergone training in various areas of law enforcement. He did not have a driver's license at the time; the military ID was the only identification he had. He and the other decoy visited from 10 to 13 stores that night, and there was one other sale, to the other decoy.

When Patterson concluded his testimony, appellants' counsel requested that he not be excused. The ALJ instructed Patterson to remain in the hallway, where, presumably, he remained until the hearing adjourned. Deputies Limpach and Manning then testified, and there was a long colloquy concerning the admissibility of a surveillance video recording of the decoy operation at appellants' store. There was no further reference to decoy Patterson when the hearing adjourned. Patterson was not shown the surveillance video during his testimony, or told it existed, and appellants' counsel made no attempt to impeach Patterson by what was on the video.

When the second day of the hearing began, the ALJ was advised that decoy Patterson had been called to active duty in the military. The record indicates that the ALJ and counsel were aware earlier of the possibility this could occur.

We do not believe the Department was obligated to produce Patterson on the second day of the hearing, even if it could have. Patterson's presence at the first day of the hearing satisfied section 25666. Appellants' attorney had ample opportunity during his cross-examination of Patterson to explore what was on the surveillance video, including the presence of decoy Carmen. Instead, in what suggests litigation strategy, he did not disclose the fact that the video showed the presence of decoy Carmen until

just before the hearing concluded, after he had cross-examined two of the Department's three witnesses, and was almost finished with the third. As a consequence, he lost any chance he may have had to impeach Patterson with the video.

It is worth noting that the video recording was made on a machine that records several cameras at once, and requires special playback equipment, which the Department does not have. Thus, only appellants' counsel knew what was on the tape during Patterson's testimony and that of the two deputies.

Nor should appellants be heard to complain that, had Patterson been present on the second hearing day, their attorney could have impeached him with the testimony of decoy Carmen. Mr. Eicher expressly declined the opportunity to examine the second decoy, who was present at the second day of hearing, explaining [II RT 68]: "However, cross-examining her at this point, I would not be able to tactically have Mr. Patterson take the stand for impeachment as far as her presence inside the store after he was already excused." He did not offer any further explanation of how decoy Patterson was to be impeached, nor did he make an offer of proof.[4] Hence, without knowing what Carmen would have said, and without an offer of proof, there is no way the Board can determine whether there was any prejudice from Patterson's absence on the second day. Patterson had already testified that he did not remember Carmen's presence in the store; it is difficult to see any material impeachment flowing from a further demonstration of that fact.

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[4] The closest he came to explaining his strategy came earlier during the continued hearing when he said [II RT 17]: "The video will show at least there was a significant memory lapse as to the witnesses so far for the department."

The ALJ was, as are we, clearly unpersuaded by appellants' argument (Determination of Issues II-C):

> The fact that he did not recall her accompanying him at the store's cooler or check-out counter was ascertained sufficiently to make any further testimony by him at the continued hearing merely repetitious of his failed memory regarding her presence in the store at the time of the transaction.

We do not see any prejudice accruing to appellants from their inability to further examine decoy Patterson on the involvement of the second decoy - but, if there was any, it was the result of appellants' attorney's litigation strategy.[5]

Appellants' contention that decoy Carmen was required to be present at the hearing is also without merit. Section 25666 requires the presence of the "alleged minor." The accusation identifies the "alleged minor" in this case as Patterson. He is the person to whom an alcoholic beverage was sold. He is the person who must be proved a minor in order to establish that section 25658, subdivision (a), was violated.

Carmen was not an "alleged minor." Even as a companion to Patterson, she was effectively a bystander.

Even assuming Carmen could be considered an "alleged minor," appellants suffered no prejudice. The Department is only obligated under section 25666 to "produce the alleged minor for examination." Appellants were afforded that opportunity and declined it.

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[5] In their brief (App.Br., pages 1, 12, 13, 16), appellants repeatedly claim they did not know the identity of the second decoy until the final day of the hearing, which was October 30, 2002. This is untrue. The record contains a letter (Exhibit G) dated September 13, 2002, from the Department to counsel for appellants, identifying the second decoy as Erin Carmen, and explaining how she could be contacted. Curiously, the letter was placed in evidence by counsel for appellants.

In their closing brief, appellants acknowledged that they were informed of Carman's identity before the second day of hearing.

Appellants make much of the fact that decoy Carmen was standing next to decoy Patterson when he purchased the beer. Citing *7-Eleven, Inc./Smith* (2001) AB-7740, they argue that consideration of decoy Carmen's appearance was essential for disposition. In *7-Eleven, Inc./Smith*, the second decoy participated in the transaction by making a purchase of her own (albeit not an alcoholic beverage), and neither decoy was asked for identification. Under those circumstances, the Board believed the involvement of the second decoy such that the clerk would have considered the appearance of both in deciding whether to make the sale. Here, to the contrary, decoy Patterson was asked for, and produced, identification, and decoy Carmen was not a participant in the transaction.

The clerk did not testify; his employment was terminated as a result of the sale. Hence, there is nothing in the record that would suggest that Carmen's presence in any way affected his decision to sell the beer to Patterson.

II

Rule 141(b)(3) provides that a decoy shall either carry identification showing the decoy's correct date of birth or carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages

Appellants complain that there is no specific finding with respect to the identification that was actually provided to the clerk by Patterson, because it no longer exists. They argue further that there is no evidence establishing that Patterson carried or displayed his own valid identification to the clerk, and that the Department did not meet its burden of showing that the identification displayed Patterson's date of birth. Lastly, they say (App.Br., Page 12) that the original identification, of which Exhibit B is a photocopy, does not display his true date of birth: "Circle K now contends there is no

evidence the date of birth on the identification presented to the Circle K clerk displayed Patterson's true and correct date of birth."

Appellants' contention that Rule 141(b)(3) was violated is tortured and specious.

The rule creates only an affirmative defense. The burden is on appellant to demonstrate that something other than valid identification was shown to the clerk. They did not do so. Patterson testified, and the ALJ found [Finding of Fact III] that he showed the clerk his "military ID card."

The ALJ observed (I RT 18) that the date of birth was the same on Exhibit 2, the photocopy of the identification shown to the clerk, as on its active duty replacement. The date, September 9, 1983, is the same date Patterson testified was his date of birth.

We do not see any need for a more specific finding with respect to Patterson's identification, it being clear from the decision that the ALJ believed Patterson had presented his valid identification to the clerk when so requested.

Appellant has offered nothing that would even suggest any possible defect in the identification actually shown to the clerk. Although Exhibit 2 is not the finest example of a photocopy, it is sufficiently legible to refute appellants' contention.

III

Appellants claim (App.Br. 12-13) they were deprived of due process by the Department's alleged failure to disclose the identity of the second decoy, Erin Carmen, "prior to the second hearing."

Appellants cite Determination of Issues II-C, which states just the opposite:

> As for the second decoy's availability, she was known to Respondents by name prior to the continued hearing and was present and available for examination at the continued hearing. Moreover, since Respondents possessed the videotape

which showed decoy Patterson had a companion at Respondent's store, Respondents had ample opportunity prior to the first hearing to inquire about her.

Appellants apparently did make an inquiry, and although the Department's response was not until after the first day of the hearing, it preceded the second day by one and one-half months. (See Exhibit G.)

Appellants' counsel knew about decoy Carmen, and when he knew has been discussed at length in part I, *supra*. There is no need to repeat that discussion here. Suffice it to say that appellants' argument has been less than candid, and deserves no credence.

IV

Finally, appellants claim that Rule 141(b)(2) was violated because no evidence was presented that Carmen presented the appearance required by the rule - that which could generally be expected of a person under 21 years of age under the actual circumstances presented to the alleged seller of alcoholic beverages.

Appellants argue that Carmen was an active participant in the transaction, citing *7-Eleven, Inc./Smith* (2001) AB-7740. We have already disposed of this argument in part 1, supra. Carmen was little more than a bystander.

In any event, the rule creates only an affirmative defense. Appellants have offered no evidence that would tend to show that Carmen lacked the appearance required by the rule.

ORDER

The decision of the Department is affirmed.[6]

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[6] 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

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

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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.