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

AB-8198
File: 20-240174 Reg: 03054998

7-ELEVEN, INC., HELEN KIM, and YOUNG B. KIM, dba 7-Eleven # 2172-22414
12752 Brookhurst Street, Garden Grove, CA 92840,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 5, 2004
Los Angeles, CA

ISSUED SEPTEMBER 17, 2004

7-Eleven, Inc., Helen Kim, and Young B. Kim, doing business as 7-Eleven # 2172-22414 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Helen Kim, and Young B. Kim, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

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[1]The decision of the Department, dated September 18, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 15, 1989. On May 18, 2003, the Department filed an accusation against appellants charging that, on December 18, 2002, appellants' clerk, Ravi Yaramotu (the clerk), sold an alcoholic beverage to 19-year-old Rebeca Lyons. Although not noted in the accusation, Lyons was working as a minor decoy for the Garden Grove Police Department at the time.

At the administrative hearing held on August 19, 2003, documentary evidence was received, and testimony concerning the sale was presented by Lyons (the decoy) and by John Gatine, a Garden Grove police officer. They testified that the decoy took a six-pack of Coors Light bottles from the cooler in the premises and placed them on the counter. The clerk asked for her identification and she gave him her genuine California driver's license bearing a red stripe with the words "AGE 21 IN 2004." The clerk looked briefly at the license, swiped it through a scanner of some sort, and proceeded to sell the beer to the decoy.

The decoy exited the store, gave the beer to officers waiting outside, and was escorted back in to identify the seller. Upon being asked who sold the beer to her, the decoy pointed to the clerk and said that he had. She was across the counter from the clerk at the time, no more than three or four feet from the clerk. A photograph was taken of the clerk with the six-pack on the counter in front of him and the decoy pointing to him (Exhibit 2).

Subsequently, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established. Appellants have filed an appeal contending that Rule 141(b)(5) was violated.

DISCUSSION

Rule 141(b)(5) (Cal. Code Regs., § 141, subd. (b)(5)) 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.

Appellants contend that this rule was violated because, in the photograph taken of decoy identifying the clerk, the clerk and the decoy were not looking at each other. They argue that to be a compliant face-to-face identification, there "must be a mutual acknowledgment between the seller and the decoy, so that the seller reasonably knows they are [sic] being accused." (App.Br. at 1.) Their argument is based on language in the appeal of *Chun* (1999) AB-7287, where the Board said that "face-to-face" means that

> the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

Appellants raised this issue at the hearing, and the administrative law judge (ALJ) rejected it in Conclusion of Law 5:

> The complaint is that the testimony indicated that the Exhibit 2 photograph shows the identification being done and it shows that the decoy and the clerk are not looking at one another. Therefore, the identification is not being done "face-to-face." That contention is rejected. It is apparent that the Exhibit 2 photograph has been staged. The decoy is holding up her driver's license, the beer is in the photo sitting on the counter and while she is looking into the camera, she is also pointing in the direction of the clerk. All the testimonial evidence indicated that decoy Lyons both pointed at the clerk and said that he is the one that made the sale when she did the identification. The photograph does not show her to be speaking. Therefore, the only conclusion that can realistically be drawn is that the identification had already taken place when the photograph was taken. No one knows for certain where the clerk was looking at that time,

> but the identification was done with the decoy standing across the sales counter from the clerk. The clerk was doing nothing more than giving his attention to the police investigation because he had earlier been confronted by Detective Gatine and other customers temporarily removed from the scene. The identification was done face-to-face, meaning in the presence of both the decoy and the clerk. No failure to comply with Rule 141(b)(5) was shown.

In their appeal, appellants assert that this conclusion is contrary to the testimony at the hearing and lacks the support of substantial evidence.

We disagree with appellants' assertion regarding Conclusion of Law 5. In rejecting appellants' argument, the ALJ made a reasonable inference based on the evidence presented and his own common sense. We also reject appellants' argument.

Appellants stretch *Chun* farther than its language warrants. In *Chun*, the Board said that the seller is, *or reasonably ought to be*, knowledgeable that he or she is being accused. And, as the Board has said in *Greer* (2000) AB-7403, it is not necessary that the clerk *actually* be aware that the identification is taking place.

The clerk did not testify, so we do not know if he was aware. However, in this case, it is unrealistic to assert that the clerk was not aware that the decoy was identifying him as the seller. The photograph shows the two standing with only the width of the counter separating them; the six-pack of Coors Light beer that the decoy purchased minutes before is on the counter, still partly in the bag, in front of the clerk; and the decoy, her arm outstretched, is pointing at the clerk, while holding her California driver's license in her other hand. We find it difficult to believe the clerk might not be aware of what the decoy, standing only a few feet away, was doing or saying. Nor does it follow that, because the clerk may have been looking elsewhere at the moment when his photograph was being taken, he was unaware of the identification process.

At the very least, the clerk reasonably ought to have been aware that the decoy was identifying him, and that is all that is required. We are satisfied that there was compliance with Rule 141(b)(5).

ORDER

The decision of the Department is affirmed.[2]

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

[2]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.