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

AB-8229
File: 20-353036 Reg: 03055119

7-ELEVEN, INC., MANZOOR A. URSANI, and YASMEEN URSANI
dba 7-Eleven Store 2173-18690
16711 South Vermont Avenue, Gardena, CA 90247,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 2, 2004
Los Angeles, CA

ISSUED JANUARY 28, 2005

7-Eleven, Inc., Manzoor A. Ursani, and Yasmeen Ursani, doing business as 7-Eleven Store 2173 18690 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Mohammed Islam, having sold a 24-ounce can of 211 Steel Reserve High Quality Lager to Gary David ("David"), a 19-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Manzoor A. Ursani, and Yasmeen Ursani, 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 31, 2003, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 21, 1999. On June 12, 2003, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to David on March 13, 2003.

An administrative hearing was held on November 14, 2003, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had been established and appellants had failed to establish an affirmative defense under Business and Professions Code section 25660.[2]

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) The administrative law judge (ALJ) questioned David in areas which could expose him to possible self-incrimination, but refused to permit appellants' counsel to pursue a line of questioning essential to their defense, because of possible self-incrimination; and (2) the penalty was imposed pursuant to an illegal underground regulation.

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[2] 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."

DISCUSSION

I

It is undisputed that David was not asked his age or for identification in connection with the purchase at issue. Appellants sought to establish a defense under section 25660, relying on the testimony of their clerk that he had on prior occasions been shown a California driver's license or identification card.

Appellants contend that the ALJ limited their cross-examination of the minor, in order to protect him against self-incrimination, even though the ALJ and Department counsel had already questioned him in areas that could have exposed him to self-incrimination, and by doing so impaired appellants' ability to establish the affirmative defense provided by section 25660. At no time was the minor admonished concerning his Fifth Amendment rights.

Department counsel, without objection, elicited testimony from David to the effect that he purchased the alcoholic beverage in question at appellants' premises. Then, during cross-examination by appellants' counsel, the ALJ refused to permit her to ask David if he had purchased alcohol at the premises prior to March 13, 2003, the date of the transaction underlying the accusation. After counsel represented that she was attempting to establish a defense of reasonable reliance under section 25660, the ALJ permitted her to ask if he had made such a purchase prior to November 14, 2003, more than one year prior to the date of the hearing. David answered, "Not that I remember." David admitted he visited the store on an almost daily basis.

Appellants' clerk testified that David had displayed identification on prior occasions, the most recent being three or four months earlier, which purportedly

showed David to be over 21. The clerk described the identification as a "state ID," later explaining that it was either a California driver's license or a California identification.

David, recalled as a rebuttal witness and questioned by the ALJ, denied ever having any identification showing him to be other than his true age.[3] He also denied ever having purchased tobacco or lottery tickets at the premises, where he might have been asked for identification.

Appellants' counsel made no reference to any improper curtailment of her cross-examination during her summation, and, although she suggested, prior to his rebuttal testimony, that David be admonished about his Fifth Amendment rights, she did not object to any of the questioning conducted by the ALJ. Thus, it could be said, she waived any objection she may have had. In any event, the testimony she sought to pursue, *i.e.*, testimony concerning the existence or non-existence of identification which would pass muster under section 25660, was elicited in David's rebuttal testimony (see RT 88-91), and, as the ALJ correctly found, was insufficient to support such a defense.

The ALJ was confronted with the claim of appellants' clerk that he had been shown some form of identification by David that showed him to be over 21, and David's denial that he had ever displayed identification at the premises. He concluded:

> It is not necessary to decide whether David had previously shown to [the clerk] a license or identification card indicating that he, David, was at least twenty-one years old. As no evidence was presented regarding the information on the alleged license / identification card, there is no evidence that [the clerk's] reliance on it was reasonable and / or in good faith. Therefore, Respondents have not established a Section 25660 defense for [the clerk's] sale of the beer to David.
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> Testimony that a minor produced an identification card purporting to show he or

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[3] Although Department counsel called David as a rebuttal witness, the questioning was conducted by the ALJ, with the apparent consent of both counsel. (See RT 85-86.)

she was 21, by itself, is not enough to establish a defense under section 25660.

> The defense must be asserted in good faith, that is, the licensee or the agent of the licensee must act as a reasonable and prudent [person] would have acted under the circumstances. Obviously, the appearance of the one producing the card, or the description on the card, or its nature, may well indicate that the person in possession of it is not the person described on such card. In such case the defense permitted by [Section 25660] could not be successfully urged.

(*Keane v. Reilly* (1955) 130 Cal.App.2d 407, 410 [279 P.2d 152]).

Appellants' clerk was unable to state whether what he claimed he had been shown by David was a California driver's license or a California identification card. He could only vaguely recall what he had purportedly been shown (RT 78):

> Q. What kind of – can you tell us anything more about the kind of ID you say Mr. David has shown you?
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> A. As far as I can remember, it was a state ID.
>
> Q. Do you remember which state?
>
> A. I think California ID.
>
> Q. Do you remember if it was a driver's license or an identification card?
>
> A. I cannot remember.

We have no way of knowing whether appellants' clerk was shown identification which would pass muster under section 25660. The ALJ obviously felt the same way, and necessarily concluded that appellants had not met their burden of proof. We cannot say his conclusion was unreasonable.

II

Appellants contend that the 15-day suspension cannot stand because it is based on an "underground regulation" in violation of the Administrative Procedure Act. (Gov. Code, § 11340 et seq. (APA).)

Government Code section 11340.5, subdivision (a), states: "No state agency

shall utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." Section 11342.600 defines regulation as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." Section 11425.50, subdivision (e), provides that "a penalty may not be based upon a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule subject to Chapter 3.5 (commencing with section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with section 11340)."

In *Vicary* (2003) AB-7606, the Board determined that the penalty guidelines found in the Department's Instructions, Interpretations and Procedures Manual were "underground regulations," i.e., regulations that have not been adopted as such under the provisions of the APA. Appellant alleges that these same penalty guidelines were the basis for the penalty imposed in the present case.

There is no evidence in the record that would support a determination that the penalty imposed by the ALJ was pursuant to any guidelines.

The Department made no reference to any guidelines in its decision, nor did Department counsel when making the penalty recommendation on behalf of the Department. Hence, it would be unwarranted for the Board to assume that the penalty order was based upon guidelines, and appellants have offered nothing to support their

argument that any guidelines were followed.

We cannot assume, simply because penalty guidelines exist, that they controlled the penalty imposed by the Department. The mere fact that Department counsel recommended, and the Department ordered, a 15-day suspension is not, by itself, proof that it was based upon an underground regulation.

This is not a new issue for the Board. It has been raised frequently, but, without some evidence that suggests the ALJ felt bound by the Department's recommendation and/or its guidelines, we cannot say with sufficient certainty to justify reversal that the penalty was based on such guidelines. Surely, knowing that its guidelines have been said to be underground regulations, the Department is not precluded from imposing a certain penalty simply because it is the same as the guidelines criticized in *Vicary*.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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.