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

AB-8821
File: 21-441490 Reg: 07066253

KANTDARA KENNY TRY and NORA UY, dba Don's Liquor
411 West Pacific Coast Highway, Wilmington, CA 90744,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: December 3, 2009
Los Angeles, CA

ISSUED MARCH 11, 2010

Kantdara Kenny Try and Nora Uy, doing business as Don's Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 45 days, 15 of which were conditionally stayed for two years, for violations of Business and Professions Code section 25658, subdivision (a) and Penal Code section 330b, subdivision (a).

Appearances on appeal include appellants Kantdara Kenny Try and Nora Uy, appearing through their counsel, Ralph B. Saltsman and Jonathan R. Ota, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

We note at the outset that the scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's

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[1]The decision of the Department, dated January 23, 2008, is set forth in the appendix.

decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on July 25, 2006. Thereafter, the Department instituted a six-count accusation against appellants charging the sale or furnishing of alcoholic beverages to four persons under the age of 21 (counts 1 through 4), and the possession of and permitting the operation of a slot machine (counts 5 and 6).

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[2]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

An administrative hearing was held on November 27, 2007, at which time documentary evidence was received and testimony concerning the slot machine and sale-to-minor violations charged was presented by Department investigators Jeanine Peregrina, Victoria Brown, and Danny Vergara; by the four minors charged with having been sold or furnished alcoholic beverages: Celina Leyba and Alyssa Bautista (Counts 1 and 2 of the accusation); Ulises Rodriguez and Danielle Phillips (Counts 3 and 4); and by Desiree Lopez, a minor who accompanied Rodriguez and Phillips, who, according to investigator Peregrina, was cited but not named in the accusation.

Subsequent to the hearing, the Department issued its decision which determined that all of the counts of the accusation had been proved, and ordered the suspensions which are now the subject of this timely appeal.

Appellants raise the following issues: (1) the Department abused its discretion when it denied appellant Nora Uy's motion for a continuance first made on the day of the hearing; (2) the decision as to the counts concerning Leyba and Bautista must be reversed because a defense was established under Business and Professions Code section 25660; and (3) the decision as to the counts concerning Phillips and Rodriguez must be reversed because there is no evidence the clerk saw the exchange of money between Phillips and Rodriguez prior to Rodriguez making the purchase, or that the clerk saw Phillips assist in carrying the alcohol from the store.

DISCUSSION

I

Appellant/co-licensee Nora Uh Try moved for a continuance on the day of the hearing on the ground that she was a defendant in a pending criminal proceeding

arising out of the same circumstances as the administrative proceeding, and would be the main witness in the administrative proceeding. If forced to testify prior to the criminal proceeding, she argued, she would risk damaging her criminal matter by such testimony. Department counsel objected to a continuance of the entire hearing on the ground he had four subpoenaed witnesses and three investigators present, and was awaiting arrival of a fifth witness, but indicated he might be amenable to a bifurcation of the hearing. The administrative law judge (ALJ) deferred ruling on the request until after the Department had presented its case, and after hearing argument, denied the request. Try, on advice of counsel, then refused to testify, claiming her constitutional privilege against self-incrimination, and rested her case without presenting any witnesses or evidence.

Pursuant to Government Code section 11524, the ALJ has the right to grant or deny a request for a continuance for good cause. Under subdivision (b) of that section, a party is ordinarily required to apply for the continuance within 10 working days after discovering the good cause for the continuance, unless that party did not cause and sought to prevent the condition or event establishing the good cause. An appellant has no absolute right to a continuance; they are granted or denied at the discretion of the ALJ and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. *(Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

Not until the day of the hearing did appellant Nora Uy Try request that it be continued. There was no explanation why the request had not been made in a timely fashion, nor any showing of an effort to change the date of the event which was the

subject of her concern. Four of the Department's witnesses had already arrived for the scheduled hearing, with a fifth expected shortly. The administrative law judge, a Department attorney and a court reporter were also present, as was the evidence the Department intended to present.

In his initial ruling, the ALJ indicated he might consider bifurcating the hearing, to permit Try's testimony at a later date. However, Try did not request a bifurcation, but simply refused to testify after her motion for a continuance was denied.

A continuance would have resulted in substantial expense and inconvenience to all concerned. Given the untimely nature of the request, the resulting expense and inconvenience, and the absence of any explanation why the request could not have been made in timely fashion, we cannot say that the ALJ abused his discretion by denying the request for continuance.

II

Appellants contend that their clerk made a reasonable inspection of what appeared to be a DMV-issued identification card identification, and that it was an abuse of discretion to reject a defense based on Business and Professions Code section 25660.

Leyba presented what purported to be a genuine California identification which bore her picture and a physical description which matched her photo and appearance. The identification purported to show that Leyba was 21 years of age. She was 17. The clerk looked at the identification for "probably a minute" [RT 89] and went forward with the sale. Leyba admitted to the investigators that it was a fake, and later signed a declaration to that effect.

Department investigator Victoria Brown testified that she had received from 10 to 15 hours training in the detection of false ID's over a period of years. One of those hours was training provided three or four years earlier by the DMV. The instruction consisted of her being provided with "a pile of IDs" for her to decide whether they were true or not. She was also provided lights to see how the light of a given day affects the ID, and a magnifying glass to see the small print. (Brown described several characteristics of the Leyba identification which led her to conclude it was not genuine. The first thing she noticed was that the card "did not bend." [RT 106.] "It should flex and bend." [RT 110]. She also noticed the "type on it, but could not say the name of the type or the font. I recognize it by eye." [*Ibid*.]" Brown testified that the picture on the Leyba ID was "a lot larger" than on a true ID [RT 116], and the font on the red stripe was also larger. As to the length of time it took her to conclude it was a false ID, "The actual feel of the card I noticed immediately, and then I looked into the other things and noticed it within probably 10 to 15 seconds." [RT 117.]

Appellants' clerk did not testify.

Appellants contend that Leyba gave the clerk a replica of a California Drivers License possessing remarkable similarity to an actual license. Indeed, it did possess such similarity. It contained Leyba's picture and matching physical description, but misstated her date of birth. It carried a black stripe on its back, a feature the investigator did not mention. Appellants' arguments did not sway the ALJ. He wrote (Conclusion of Law 6):

> Section 25660 provides respondents with a defense if they can establish that they reasonably relied on bona fide evidence of majority. As to Counts 3 and 4, no such evidence was presented.

> As to Count 1 and 2, Leyba did testify that she gave Clerk Eap a fake identification (Exhibit 12). However, there are several problems associated with Exhibit 12. The photo on Exhibit 12 is larger in size than is found on a true California identification. The identification card itself is noticeably stiffer to the touch than a true California identification card and does not bend in the same manner. The font is different. The street name of the address is obviously misspelled. The red stripe on Exhibit 12, which contains the words "AGE 21 IN 2006" is in a different font and size than is found on a California true identification card. Also, the magnetic stripe on the back of Exhibit 12 is not raised as it is on a true identification card. Clerk Eap did not appear and testify at the hearing. It is not known what if anything Eap was relying on prior to completing the sale. To start with, the extremely youthful appearance of both Leyba and Bautista should have raised a "red flag" to the seller of alcoholic beverages. That should have caused the clerk to examine Exhibit 12. Such an examination should have disclosed the problems noted above and prevented this sale. Respondent did not prove that Clerk Eap reasonably relied on bona fide evidence of majority.

Appellants' problem is that their argument that Exhibit 12 closely resembled a California driver's license is off the mark. Exhibit 12 is a California identification card. Whether a California identification card is identical in form to a California driver's license is something we do not know with any degree of assurance, and there is nothing in the record to inform us. Investigator Brown's testimony about the flaws in Exhibit 12 that expose its counterfeit nature was unrefuted, and was accepted by the ALJ. It is also significant that the ALJ, who observed 17-year-old Leyba at the hearing concluded that a reasonable person's suspicions would have been sufficiently aroused by the apparent age discrepancy between the identification card age and Leyba's appearance. Together, the indicia of fraud shown by Investigator Brown's testimony, the ALJ's own examination of Exhibit 12, his assessment of Leyba's appearance, and the absence of any testimony by the clerk, compel the conclusion that appellants did not sustain the burden imposed on them by section 25660.

To establish a defense under section 25660, a licensee must establish that an

identification which reasonably purported to be issued by a government agency had been displayed and that the clerk's reliance on that identification was reasonable. (*Dept. of Alcoholic Bev. Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429 [13 Cal.Rptr.3d 826] *(Masani*).) The burden in such a case is on the party asserting the defense.

"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." (*Kirby v. Alcoholic Bev. etc. Appeals Bd*. (1968) 267 Cal.App.2d 895, 897 [73 Cal.Rptr. 352].) Reliance on the document is considered reasonable if it is shown to be the result of exercising due diligence. (See, e.g., *Lacabanne Properties, Inc. v. Alcoholic Beverage etc. Appeals Board* (1968) 261 Cal.App.2d 181, 189 [67 Cal.Rptr. 734] (*Lacabanne*); *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820] (*5501 Hollywood*).)

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, 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 Bd*. (1958) 159 Cal.App.2d 335, 339 [324 P.2d 98]; *5501 Hollywood*, *supra*, 155 Cal.App.2d at p. 753.)

Although section 25660 was designed "to relieve vendors of alcoholic beverages

from having in all events to determine at their peril the age of the purchaser," by allowing them to rely on certain documentary evidence of majority and identity, "the bona fides of such documents must be ascertained if the lack of it would be disclosed by reasonable inspection, the circumstances considered." (*Dethlefsen v. State Bd. of Equalization* (1956) 145 Cal.App.2d 561, 567 [303 P.2d 7].)

Considering his proposed decision in light of these precedents and the record evidence, we are satisfied that the ALJ did not abuse his discretion in finding that appellants failed to establish a section 25660 defense.

III

Appellants dispute that part of Finding of Fact 12 that states that Bautista and Leyba were standing next to each other when Leyba purchased the two 40-ounce bottles of Mickey's Fine Malt Liquor, arguing that Leyba stood closer to the counter, Bautista standing behind her, citing Bautista's testimony. Leyba, on the other hand, testified [RT 89] that Bautista was "[r]ight next to me" when she was paying for the Mickey's.

Bautista, who was also 17 on the date in question, testified that she carried one of the 40-ounce Mickey's to the counter [RT 96], and carried both of them out of the store. She also testified that she and Leyba had a conversation with the clerk in which they told her they intended to go to a friend's house that evening.

Given Bautista's involvement, i.e., bringing a large bottle of beer to the counter where the clerk was in a position to associate her with the beverage, talking to the clerk about her and Leyba's plan to take the beer to a friend's house, and Bautista's carrying both bottles from the store, these were all events that an alert clerk would have reacted

to, and which compel the conclusion that the clerk furnished an alcoholic beverage to Bautista. The fact that only Leyba paid for the beer is immaterial in light of the compelling evidence that it was a partner-like transaction involving two young females. Had the clerk been diligent, and asked Bautista for identification, the sale would probably not have happened.

Appellants make a similar argument with respect to Phillips. They argue that the exchange of money between Rodriguez and Phillips did not take place at the counter as the ALJ found (Finding of Fact 10), but took place before the two reached the counter area, citing to a portion of Phillips' testimony.

Once again, appellants have picked and chosen fragments of testimony that support their theory of the case, ignoring other testimony that undercuts it. Rodriguez testified that he "got the money together and gave it to" the clerk. [RT 56].

> Q. When you say you got the money together, where did you get the money from?
>
> A. My partners gave me half and I gave half from my pocket.

Department investigator Peregrina, whose attention had been drawn to Rodriguez, Phillips, and Lopez by their youthful appearance, observed the transaction at the counter. She testified:

> Q. Focusing on Mr. Rodriguez and Ms. Phillips, where were they when you entered?
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> A. They were at the front register counter.
>
> Q. And what were they doing at the front register?
>
> A. They were talking to the clerk and paying for the products that were being rung up.

Q. You say they were paying. Were they both putting forth money?

A. Yes.

Q. How were they doing that?

A. Well, they were going back and forth with money. And Phillips gave Rodriguez money, Rodriguez gave Phillips money, and then Rodriguez took the money and handed it over to the clerk.

Phillips' testimony [RT 82] also supports the finding of an exchange of money occurring at the counter. As to when he handed money to Rodriguez,

Q. Before or after you reached the counter area?

A. I want to say before.

Q. And did anybody including yourself, hand Ulises the money while he was at the counter?

A. It could have been possible.

Other circumstances which would have alerted a diligent clerk include the fact that Phillips stood next to Rodriguez at the counter, she and Lopez carried some of the alcoholic beverages to the counter, and, not least, the sheer volume and variety of the alcoholic beverages purchased: a 20-pack of 12-ounce bottles of Budweiser beer; a six-pack of Bacardi Silver, labeled 5 percent alcohol by volume; two 40-ounce bottles of King Cobra Premium Malt Liquor; a 24-ounce bottle of Heineken beer; a 40-ounce bottle of Budweiser beer; one bottle of Alize Gold Passion liqueur, labeled 16 percent alcohol by volume; and two bottles of Jagermeister liquor, labeled 35 percent alcohol by volume.

Appellants' arguments with respect to Bautista and Phillips are rejected.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD ORDER

[3] 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.