

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

BARBARA A. and MERLE L. CARVER	)	AB-6931
dba The Fireside)	
8522 Lincoln Boulevard	)	File: 47-175086
Los Angeles, California 90045,	)	Reg: 97038832
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	May 6, 1998
	)	Los Angeles, CA
)	

Barbara A, and Merle L. Carver, doing business as The Fireside (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 20 days, with 10 days stayed for a probationary period of two years, for their bartender having sold a 12-ounce bottle of Budweiser beer to a minor decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

¹The decision of the Department, dated August 7, 1997, is set forth in the appendix.

Appearances on appeal include appellants Barbara A. and Merle L. Carver, appearing through their counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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 that on July 30, 1996, their bartender, Vincent Barnosky, sold a bottle of Budweiser beer to Edwin Benitez, who was then approximately 18 years of age.

An administrative hearing was held on July 10, 1997, at which time oral and documentary evidence was received.

Los Angeles police officer Stacey Young testified that she entered appellants' bar 10 to 15 seconds before the minor decoy entered, and her partner came in shortly after the decoy. The decoy entered and took a seat at the bar five to six stools away from the officers. The minor asked the bartender if food was being served, and when told no, ordered and was served a bottle of Budweiser beer, paid for it with a \$10 bill, and was given change. Identification was neither requested nor shown. Young remained at the bar, while her partner went outside to signal the backup officers there had been a violation. Young testified [RT 11-12]:

"Q. And after you gave the signal, and to your supervisor, what did you do next in terms of the investigation?

A. I stood by until I had my backup there and then I went over to my decoy. And with the presence of my sergeant we presented and told the bartender that this young man is 18 years old and that you served him and did not ask for any ID whatsoever.

Q. How much time elapsed from the time the service had been made until the time you contacted the bartender?

A. Um, I would say he served him once I saw the violation because it was plain - I was sitting right there. I saw the violation. My sergeant also saw it. So she just went back outside. So I would say no more than two or three minutes.

When her backup officers entered, one of them, Officer Clinton, issued a citation to the bartender after Young advised him he had sold beer to a minor. In response to questioning by appellants' counsel, Young said [RT 34-35]:

Q. Sometime during all that you told [the bartender] that he just sold to an 18 year-old; is that right?

A. That was when I first walked up to my decoy and I advised him, "Sir, can I --can I talk to you for a moment. He came over and that's when I introduced him to my decoy and advised him that he's 18 years of age.

...

Q. All right. So what you did in this instance was simply to tell [the bartender] that he sold to an 18 year old, and you were referring to [the decoy] who was standing somewhere near you, right?

A. Right next to me.

Q. And during that [the decoy] said nothing?

A. Right.

Q. Didn't do anything other than just stand next to you? Did he do anything?

A. No."

When the decoy testified, he confirmed that he had first inquired about food, then asked for a Budweiser. After he was served, the officers approached.

"Q. Okay. Was one of them Officer Young who's here in the room [with] us today?

A. Yes.

Q. Okay. And did she have some discussion with the bartender?

A. Yes, she did.

Q. Okay. And at that point where were you - where were you standing or sitting?

A. I was in back of Officer Young sitting down, you know, waiting till she told me, let's go. ... She told me to stay back."

On cross-examination. the decoy said he stood behind officer Young for two or three minutes while she spoke to the bartender, but he could not hear what she was saying. He then went over and sat in a booth, and later left with officer Young.

The bartender testified that when officer Young approached him, she took the decoy to a booth, where he remained while he was issued a citation. During that time, the decoy never said anything to him.

A patron also testified, stating that officer Young took the decoy over to a booth before talking to the bartender, and from that point until the decoy left the bar, he did not see him do anything to identify the bartender.

Called in rebuttal, officer Young enlarged upon her earlier testimony [RT 76-77]:

Q. Officer Young, at the point in time you had observed [the decoy] being served the beer, that you said you testified that you then went to the counter and then you initiated contact with the bartender?

A. That is correct.

Q. All right. At that point in time I - what were the - initially the first things you said to the bartender?

A. I advised him, I said, "Sir, may I speak with you a moment?" He came right over. "I'd like to inform you that you sold to a minor." I -

Q. Okay. At that point in time, where is [the decoy]?

A. [The decoy] is - he's right next to me, but just slightly behind me. He's still standing next to me but slightly behind me because I'm closer to the bar. And he gets up and steps somewhere behind me, but he's not seated at that point behind me.

Q. How close is that to the bar?

...

A. I would say like two feet. He's like within arm distance from him, but I'm closer to the counter than he is.

Q. It's at that point - then you continue on with your discussion with the bartender about why you're there, and did you in any sense make a gesture or anything to the bartender indicating what minor, if any, you were talking about?

A. Right. I - when I introduced my decoy I said "Sir, I would like to inform you that" - I'm talking - my hands are pointing to my decoy."

Administrative Law Judge Lo rejected the Rule 141 defense, stating in his findings (IV and V) and determinations (II-A through D):

"IV. The entire transaction between the bartender and the decoy was witnessed by a Los Angeles police officer (Young) who was also seated at the fixed bar.

"V. After the transaction was completed, the police officer informed the bartender that he had just sold beer to an 18-year old, pointing to the decoy. The decoy was standing a few feet behind the police officer and did not say anything. Respondents argue that because the decoy did not make a 'face to face identification' of the bartender, the police officer violated the Department's Rule 141(b)(5), resulting in an affirmative defense for them. For reasons discussed below, Respondents' argument is rejected.

...

"II-A. The Department's Rule 141(b)(5) provides as follows: "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 to make a face to face identification of the alleged seller of the alcoholic beverages. Title 4, California Code of Regulations, Section 141(b)(5).

"II-B. While it is generally true that ambiguity in a statute is a condition precedent to its interpretation, the 'literal meaning of its words' may be disregarded to avoid absurd results or to give effect to manifest purposes that, in light of the statute's legislative history, appear from its provisions considered as a whole. (Citations omitted). Henreid v. Superior Court (1976) 59 Cal.App.3d 552, 558, 130 Cal.Rptr. 892.

"II-C. In order to interpret Rule 141(b)(5) properly, it is necessary to read it in its entirety. The first thing that the rule requires the peace officer to do is to enter the premises after the sale of the alcoholic beverage. In order to comply literally with this rule, Officer Young, who was already inside the premises and witnessed the sale of the beer to the decoy, would have to leave the premises for no reason, and then reenter the premises. This is an "absurd result" which the rule does not require. In other words, a reasonable interpretation of Rule 141(b)(5) is that it does not apply in those cases where the peace officer is already in the premises and witnessed the sale of the alcoholic beverage.

"II-D. Furthermore, Rule 141(b)(5) does not actually require the decoy to do anything. Its directive is to the peace officer - to have her make a "reasonable attempt" to have the decoy make a face to face identification of the seller. (The words "reasonable attempt" must include reference to the officer's efforts to "have the decoy ... make a face to face identification of the alleged seller." It would make little sense to have the words "reasonable attempt" refer merely to the officer's efforts to enter the licensed premises.) When Officer Young informed the bartender that he had just sold beer to an 18-year old, pointing to the decoy, she satisfied the "reasonable attempt" requirement of Rule 141(b)(5)."

In their appeal, appellants raise a single issue, asserting that the failure of the police officer to comply with Rule 141 affords them a complete defense.

DISCUSSION

Appellants contend that officer Young failed to comply with the identification requirements of Rule 141, and that her failure to do so affords them a complete

defense to the charges of the accusation. The Department argues, in accordance with the findings of its decision, that there was sufficient compliance with the rule, rendering the defense inapplicable.

The decision of the Board in Kviatkosky (AB-6856), issued in January of this year, and the decisions in Chicago Pizza, Inc. (AB-6874) and Rajab Ali and Azad A. Virani (AB-6873), following the January 1998 hearing, all involved similar Rule 141 issues, and in each the Board voted to affirm the Department.

In Kviatkosky, the Board sustained the Department where the “face to face identification” consisted of the police officer pointing out the two minors to the bartender and having them remove their identification so he could show the bartender the two were both minors. The two minors were sitting on stools directly across from the bartender.

The Board said, in Kviatkosky:

“The inferences to be drawn from this scenario would seem obvious. As indicated, the four actors in the event were situated so that the opposing interests were facing each other. In the presence of the minors, the police officer demonstrated to the bartender he should not have sold them an alcoholic beverage, and the minors were participating in the demonstration by exhibiting their identification for the bartender to examine. All of the actors were proceeding on the unspoken but ineluctable premise that they, and no one else, were the persons involved in the incident. In such circumstances, the only thing lacking was the physical act of pointing fingers.

“There is an ancient legal maxim that the law neither does nor requires idle acts. Our reference to this maxim is not intended to suggest that the Appeals Board does not consider the identification requirement of Rule 141 important. To the contrary, its purpose, which is to ensure that it is the person who made the sale of the alcoholic beverage who is the person charged, and not an innocent employee who happens to be a bystander, is not to be demeaned. But where, as here, the line between substantial compliance, as the Department found, and strict compliance, which

appellants demand, is so thin as to be virtually invisible, justice would not be served by a reversal of the Department's decision."¹

¹ Indeed, now that Rule 141 has become effective and identification of the seller by the minors is mandatory, the Department would be well-advised to again remind law enforcement authorities of the importance that there be reliable evidence of compliance with Rule 141."

In Virani (AB-6873), the police officers were apparently outside the store when the sale took place. However, when they entered the store, the minor returned with them, and, according to the testimony of the minor, "that's when they confronted the clerk." The rationale of the decision is that since the minor was present when the officers confronted the clerk, and the clerk had to have been identified in order to be confronted, and since the minor was then present, there was sufficient evidence to support a reasonable inference that the minor made the requisite identification.

In Chicago Pizza, Inc. (AB-6874), the minor was standing directly next to the police officer; the bartender was directly opposite them. The Board's decision addressed the interpretation of the rule in such circumstances:

"Rule 141 became operative in February 1996, and cases involving its application are just now beginning to ripen into appeals. Thus far, the focus has, for the most part, been on the alleged absence of compliance with the identification provisions of the rule in subdivision (b)(5).

"Given the nature of the evidence on the compliance issue in this case, it is useful to look at the relevant text of the rule, against which the evidence must be measured:

"Rule 141. Minor Decoy Requirements

...

(5) 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.

(6) Failure to comply with this rule shall be a defense to any action brought pursuant to Section 25658.'

"The classic pointing of a finger, accompanied with the spoken declaration "That's the man," is not present in this case. The Department, however, contends that what occurred was the equivalent of a face-to-face identification, and, accordingly, there was compliance with both the rule and the purpose of the rule.

"Appellant argues for a stricter application of the rule, asserting that it demands nothing less than a clear-cut determination that the minor, by word and/or gesture, so singled out the seller as to label him or her the transgressor. In this case, the minor stood next to the police officer, said nothing, and did not affirmatively identify the bartender.

"The Department, in turn, argues for an interpretation of the rule that permits it to be satisfied by circumstances where there can be no doubt from the evidence that the person who is being cited is the person who sold the alcoholic beverage to the minor. In this case, the Department points to the fact that the police officer observed the sale, and that there was no question as to the identity of the seller. (Footnote omitted.)

"In other cases before the Appeals Board, appellants have argued that one of the purposes of the rule was to afford the seller an opportunity to confront the minor, presumably to be able to challenge in some manner the conduct of the minor that induced the seller to make the sale.

"The Department routinely argues that the purpose of the rule is to protect the seller against a mistaken accusation in those situations where the police officer was outside the premises, or otherwise not in a position to observe the transaction take place.

"Certain portions of the language of the rule tend to support the Department's argument. The rule requires the officer, before a citation is issued, to "make a reasonable attempt to enter the licensed premises and have the minor decoy make a face to face identification" Thus, the rule does contemplate possible situations where the officer who may intend to issue a citation was outside the premises, and not in a position to see for himself what actually took place. In such a circumstance, the minor's identification could be critical.

“Under the Department’s view, the purpose of the identification is for the assistance of the officer so that he can cite the person who ought properly to be cited, and for the protection of other clerks or employees against being falsely accused. Thus, where the officer has observed the transaction, and would, in a non-decoy context, be able to cite the seller without more, the need for the face- to-face identification has been satisfied by the circumstances surrounding the transaction, and the interests protected of all the persons for whom the rule exists.

“From a strict legal standpoint, on the facts of this case, the rule has effectively been satisfied. There is nothing in the record that suggests unfairness in the citation having been issued, or in the Department’s disciplinary proceeding having been brought. On the other hand, with an obvious violation committed in the presence of the police officer, and no doubt that the transaction took place exactly as described by the witnesses, it would be unfair to apply the restrictive interpretation urged by appellant.

“Appellant argues that, if allowed to stand, the decision will stand for the proposition that law enforcement agencies need not follow Department rules. On the facts of this case, that argument is unpersuasive. This is not a case where the minor is whisked out the door, or where the officer issuing the citation is not the officer who observed the transaction, or some other scenario that, measured against the mandate of the rule, might warrant reversal. Such a case might well serve as a message from the Appeals Board to the law enforcement community that Rule 141 has teeth. This is not such a case.”

Nor is this such a case. Here, there is only a technical non-compliance with the most rigid and literal interpretation of Rule 141. It is clear that neither the Board, the Department, or the administrative law judges have thus far seen any merit or wisdom in dismissing cases for a failure to comply with Rule 141 when the police officer has observed the entire transaction while sitting only a few feet away, where there was no question that the violation occurred, and there was no claim of mis-identification.

There is something to be said for an interpretation of a statute or rule which takes into account reality. And the reality of this case, illustrative of the cases the

Board is being asked to review, is that there is no need for the requirement of identification when the peace officer is already an eyewitness to the transaction. In that sense, the interaction between the minor and the seller is itself a face-to-face identification. This is why Administrative Law Judge Lo's interpretation of the rule has appeal:

"In other words, a reasonable interpretation of Rule 141(b)(5) is that it does not apply in those cases where the peace officer is already in the premises and witnessed the sale of the alcoholic beverage."

This interpretation does no violence to the rule, and eliminates the need for a purposeless exercise that assumes the peace officer did not see what had just taken place before his eyes.

Thus, we are persuaded that we should adopt an interpretation of the rule in accord with that asserted by Administrative Law Judge Lo, to be applied where the officer has witnessed the transaction while inside the premises. Any claim of misidentification, albeit infrequent, then becomes a straightforward factual issue for the trier of fact.

There is nothing profound in reading Rule 141 to apply only where the police officer is outside the premises or has otherwise been unable to see (and, in most cases, hear) the transaction in real time.² Indeed, such an interpretation injects common sense into the rule without distorting or ignoring its literal text.

The Department and appellants have both argued in support of their respective positions that the rule is unambiguous. In fact, it is ambiguous on the

² Of course, a peace officer who witnesses the transaction while inside the premises, but is unable to hear the conversation between the minor and the seller, is still a competent witness with respect to identification of the seller.

critical element in issue. Does the phrase “the peace officer directing the decoy shall make a reasonable attempt to enter” meaningfully apply to a peace officer who is already inside the premises? Does it not make more sense for the rule to be understood to apply only where the officer is outside the premises and not in a position to observe the transaction, so that identification of the seller is necessary?

The rule’s requirement that identification occur before a citation is issued is consistent with the notion that it is the object of the rule to prevent a mistaken accusation. As stated earlier, when the peace officer watches the transaction while inside the premises and able to see clearly what has transpired, it is as if a face-to-face identification, by both word and gesture, has taken place before his eyes. He should then be free to issue a citation, if otherwise warranted.

Appellants make much of the language in subdivision (a) of the rule that provides that the use of decoys must be “in a fashion that promotes fairness.” They argue that it is unfair to omit the identification ritual even though the peace officer has witnessed the transaction, but the only thing they point to as constituting unfairness is the omission of the minor’s affirmative identification of the person who sold him or her the alcoholic beverage.

We do not think it can be said that the police are engaged in some sort of scheme to circumvent Rule 141 by placing themselves inside the store during the decoy operation. In all probability, what is happening is simply the result of a police belief that the decoy program will operate more successfully, and more safely, if the officer is inside the premises, in a position to view and, if necessary, to protect the minor while he or she attempts to make a purchase. Indeed,

appellants' theory, pursued to its logical end, would almost require the peace officer to remain outside the premises while the minor attempts the purchase, and await the minor's exit from the store or bar before taking any enforcement action.³

Finally, there is the general rule, reiterated in Judson Steel Corp. v. Workers' Comp. Appeals Board (1978) 22 Cal.3d 658, 668-669 [150 Cal.Rptr. 250]:

"While the ultimate interpretation of a statute is an exercise of the judicial power (Whitcomb Hotel, Inc. v. Cal. Emp. Com. (1944) 24 Cal.2d 753, 757 [151 P.2d 233 ...]), when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts 'and will be followed if not clearly erroneous. [Citations.]' (Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal.2d 321, 325-326 [109 P.2d 935].)"

In George v. Department of Alcoholic Beverage Control (1957) 149 Cal.App.2d 702 [308 P.2d 773, 779], the court, citing Coca-Cola Co. v. State Board of Equalization (1945) 25 Cal.2d 918 [156 P.2d 1, 2-3]), ruled similarly:

"[W]here a statute needs construction, or implementation by rule or regulation, or where a valid rule requires interpretation, an administrative agency charged with its enforcement may reasonably furnish such construction or interpretation in aid of the purpose of the law, and that contemporaneous administrative construction is entitled to great weight and courts generally will not depart from it unless it is clearly erroneous or unauthorized."

The Department's interpretation of Rule 141 is manifested in the uniformity in which it has held the rule not to preclude a finding of a violation of the statute prohibiting a sale of an alcoholic beverage to a minor in the context of a decoy operation where the peace officer was inside the premises and situated in a position

³ It may very well be that in some communities, the peace officers necessarily may remain outside because their identities are known to the licensees. In those circumstances, their entry into the premises in advance of the minor would doom the decoy operation to failure at the outset.

to see, and sometimes even hear, the entire transaction. While the various proposed decisions written by administrative law judges which we have seen reflect minor differences in approach, they are all consistent in their unwillingness to read Rule 141 to require a result they consider absurd.

The preamble to Rule 141, in subdivision (a) of the rule, admonishes the police: "A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages ... in a fashion that promotes fairness." We find nothing unfair in a decoy operation where the peace officer enters the premises and observes the transaction as it takes place. Nor do we find anything unfair in dispensing with a meaningless identification ritual when, in any realistic assessment, the peace officer was already a participant, so to speak, in the transaction - albeit in the role of an observer.

The requirement that the "peace officer directing the decoy shall make a reasonable attempt to enter ..." is posited by Rule 141 as a "minimum standard." The objective is to eliminate the officer's reliance only on a description given to him by the minor after a sale is made and reported to the officer upon the minor's exit from the licensed premises, or, in some instances, as overheard through a door or window, or via a concealed radio transmitter.

"It is elementary that, if possible, statutes will be so construed as to avoid absurd applications and to uphold their validity." (In re Cregler (1961) 56 C.2d 308 [14 Cal.Rptr. 289, 291].)

A practical reading of the rule, rather than a technical one, results in wise policy and avoids mischief or absurdity. The object sought to be accomplished by

the rule, the risk of false or mistaken accusation, is eliminated. The evil to be remedied, the sale of alcoholic beverages to minors, is addressed. Perhaps the best proof of the validity of the position urged by the Department is that neither in this nor in any of the other cases presently before the Board is there any claim of mistaken identification.

It seems clear from the uniformity of the Department's rulings that its interpretation of Rule 141 is essentially as articulated, explicitly or implicitly, by the administrative law judges who have written proposed decisions on the issue. In our considered view, this interpretation is not unreasonable, is consistent with the overall objective of Rule 141 and Business and Professions Code §25658, subdivision (a), avoids results which, viewed objectively, would seem absurd, and is not unfair to either the Department or the licensee.⁴

CONCLUSION-

The decision of the Department is affirmed.⁵

RAY T. BLAIR, JR., CHAIRMAN
 JOHN B. TSU, MEMBER
 BEN DAVIDIAN, MEMBER
 ALCOHOLIC BEVERAGE CONTROL
 APPEALS BOARD

⁴ The parties have debated the question whether the defense created in Rule 141 (b)(5) is an absolute defense or something less. We do not need to reach that issue where, as here, the peace officer witnessed the entire transaction from a vantage point within the licensed premises and we find that no defense is available.

⁵This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.