

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS

BOARD OF THE STATE OF CALIFORNIA

IN MYUNG SONG and MYUNG HUI)	AB-7205
SONG)	
dba Mr. S. Liquor)	File: 21-245204
3885 Pacific Coast Highway)	Reg: 98042485
Torrance, California 90505,)	
Appellants/Licensees,)	Administrative Law Judge at
)	the Dept. Hearing:
v.)	M. Jeffrey Fine
)	
)	Date and Place of the Appeals
DEPARTMENT OF ALCOHOLIC)	Board Hearing:
BEVERAGE CONTROL, respondent.)	June 3, 1999 Los Angeles, CA
)	
)	

In Myung Song and Myung Hui Song, doing business as Mr. S. Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale general license for their clerk, Theodore Bemowski, having sold a 24-ounce Budweiser beer to Kelly Gaitan, an 18-year-old minor participating in a decoy operation being conducted by officers of the Torrance Police Department, said sale being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and a violation of Business and Professions Code §25658, subdivision (a).

¹The decision of the Department, dated July 30, 1998, is set forth in the appendix.

Appearances on appeal include appellants In Myung Song and Myung Hui Song, appearing through their counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on May 21, 1990.

Thereafter, the Department instituted an accusation against appellant charging the sale to Gaitan.

An administrative hearing was held on May 19, 1998, at which time oral and documentary evidence was received.

Detective Jim Lynch testified that, while outside appellants' premises and looking through a plate glass window, he watched the decoy, Kelly Gaitan, go to the rear cooler of the store, select a 24-ounce can of Budweiser beer, and take it to the counter. He saw her hand her driver's license to the clerk, Bemowski, who examined it, handed it back to her, and proceeded with the sale. Gaitan then exited the store momentarily, and then reentered, accompanied by detective Lynch, and identified the clerk who had sold her the beer. Lynch said he informed the clerk of the violation, and pointed out to him the red stripe which showed Gaitan would not be 21 years of age until the year 2000. According to Lynch, Bemowski acknowledged that he had made a mistake.

Kelly Gaitan also described the transaction, and her testimony was essentially the same as that of detective Lynch with regard to the details of the transaction. Gaitan acknowledged she was wearing makeup, but no jewelry

except, possibly, earrings. She also acknowledged that she had been told once or twice that she looks older than she actually is.

Myung Hui Song testified on behalf of appellants. She came to the store after receiving a phone call from Bemowski. Bemowski explained the incident to her in detail, and told her it was not his fault. He told her he asked the decoy her age and was told she was 21.

William Cowdin, a consultant, testified he visited the store on the Saturday afternoon shortly before the hearing to take photographs of the store. He said he was unable to see where the clerk would have been in the store while looking through the window from outside.

Gaitan, recalled as a witness, denied being asked her age. Detective Lynch, also recalled, explained where he was when he watched the transaction.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and that this was appellants' third sale-to-minor violation within a 36-month period,² and fourth since issuance of their license. Appellants' license was ordered revoked.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants challenge the penalty as excessive.

DISCUSSION

Appellants contend that the Department abused its discretion when it ordered appellants' license revoked. They suggest the Department had other

² The three violations actually occurred during a 13-month span.

alternatives than outright revocation, and should have pursued one of those alternatives, rather than enter an order that will inevitably inflict economic hardship on appellants. Appellants also suggest that the Department should have pursued two of the sales in a single proceeding, since the two accusations were signed only one week apart.

Appellants concede that the Department has the power, under Business and Professions Code §25658.1, to order revocation where a third violation has occurred within a 36-month period.

It appears to be appellants' theory that, if the two sales that were the subject of separate accusations and resulted in second and third violations had instead been consolidated into a single accusation, the requisite third violation would not exist. If this is their belief, they are mistaken. The three strikes legislation refers to "violations," and each illegal sale to a minor is a violation, whether or not joined with other sale-to-minor violations in a single accusation.

Appellants also suggest that if the three violations occurred within a very short span of time, the Department probably would not order revocation. This, of course, is pure speculation. It is just as conceivable that the Department could conclude that a licensee with three violations in a matter of days ought not to be in the business. It is not for the Board to say which is the wiser approach.

Of the three violations occurring within the 36-month time frame, the first occurred on November 27, 1996; the second on September 18, 1997; and the third on December 19, 1997. In the absence of any strong evidence of mitigation,

or any evidence of such at all, it cannot be said that the order of revocation exceeded the bounds of the Department's discretion.

Although appellants' brief cites "discrepancies" between the testimony of the officer and the minor which "cause significant concern as to the facts," it concedes that they are not such as to affect the outcome.

Finally, appellants cite Walsh v. Kirby (1974) 13 Cal.3d 95 [118 Cal.Rptr.1], and suggest that the Department improperly stacked violations. The facts of that case are very different from those in this case. The court in Walsh saw an attempt by the Department to accumulate violations for the purpose of increasing the level of fines which could be assessed, with the overall objective of causing a forfeiture of the license even though the statute involved did not provide for suspension or revocation. That is clearly not the case here.

ORDER

The decision of the Department is affirmed.³

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

³ This 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 order as provided by §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 §23090 et seq.