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

AB-9866
File: 20-473018; Reg: 19089227

7-ELEVEN, INC. and RAJAN UPPAL,
dba 7-Eleven Store #14338F
1080 Holly Street
San Carlos, CA 94070,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: September 10, 2020
Telephonic

ISSUED SEPTEMBER 14, 2020

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Rajan Uppal,

Respondent: Sean Klein, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Rajan Uppal (Uppal), doing business as 7-Eleven Store #14338F (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days because their clerk furnished an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658(a).

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[1] The decision of the Department, dated February 20, 2020, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 4, 2008. There is no prior record of departmental discipline against the license.

On September 16, 2019, the Department filed a single-count accusation charging that, on March 9, 2019, the co-licensee, Uppal, furnished an alcoholic beverage to 19-year-old Olivia Devoy (the decoy). Although not noted in the accusation, the decoy was volunteering for the San Mateo Sheriff's Office (SMSO) at the time. In addition, the accusation arose as the result of a "shoulder tap" operation[2] conducted by SMSO.

At the administrative hearing held on December 3, 2019, documentary evidence was received, and testimony concerning the sale was presented by the decoy and SMSO Deputy Randolph Cousenes (Cousenes). Uppal testified for the appellants.

Testimony established that on March 9, 2019, the decoy arrived at the licensed premises parking lot with SMSO deputies, including Dep. Cousenes, who were supervising the operation. After arriving, the decoy approached an elderly patron, later identified as Roger Marcell[3] (Marcell), who was about to enter the premises. The decoy identified herself as a 19-year-old and told him she could not buy alcohol from the

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[2] "The focus of the operation was to have [the decoy] approach adults outside of businesses that sell alcoholic beverages and ask them to buy alcoholic beverages for her. [She] would tell the person that she was 19 years old when she was making the request so that it was clear to the target of the investigation that she was underage. [The decoy] would provide cash for the purchase if the person agreed to make the purchase on her behalf. If the persons followed through and made an alcoholic beverage purchase for [the decoy], they would be contacted and cited by the SMSD deputies that were supervising the operation." (Findings of Fact, ¶ 4.)

[3] The Department's decision refers to him as "Marcell" while appellants refer to him as "Marcelo". For the purposes of this decision, we shall refer to him by the former.

licensed premises. After asking if he could buy her beer since she was not of age, Marcell agreed. The decoy then handed him the $20 that had been provided to her by SMSO.

Marcell first entered alone. He had been a regular customer for around 10 years and was on friendly terms with Uppal, who was working at the counter when Marcell entered. Uppal was familiar with Marcell, who always purchased lottery tickets and scratchers from the premises, including on the day of the incident. (Exh. L-1.)

Deviating from his normal routine, Marcell told Uppal that he would like to purchase Corona cigarettes. However, Uppal informed him that they did not sell such a product. Upon hearing this response, Marcell exited the store to speak with the decoy to clarify what she wanted him to purchase for her. The decoy had been waiting just outside the premises and was visible from the inside—including from where Uppal was standing near the counter—through plate glass windows.

The decoy then followed Marcell into the licensed premises and the two had a discussion just inside the front door. Uppal, from behind the counter, had a direct view of where Marcell and the decoy were talking. The decoy informed Marcell that she wanted beer, not cigarettes. At Marcell's request, the decoy went to select the beer she wanted him to buy for her. As the decoy headed towards the beer coolers, she walked in front of where Uppal was standing. Uppal was not servicing any customers at that moment.

When a customer subsequently walked up to Uppal to make a purchase, Marcell stepped to the left of the counter to make way. Marcell remained directly across from Uppal. As Uppal completed the sale with the customer, the decoy returned with a six-

pack of Corona beer and handed it to Marcell, in front of Uppal, before proceeding to exit the premises.

While the decoy was inside the premises, she noticed Uppal was observing and staring at her. Uppal never spoke with the decoy at any point. Once Uppal finished assisting the customer, Marcell moved towards Uppal to pay for the six-pack. He paid for the beer with the money provided to him by the decoy. Notwithstanding that Uppal was aware Marcell had never purchased beer or cigarettes during his shopping history at the licensed premises, Uppal completed the transaction. He placed the beer in a bag, made change, and handed them to Marcell. After exiting, Marcell immediately approached the decoy right next to the window adjacent to where Uppal was standing. Marcell returned the change and beer to the decoy.

Cousenes monitored the transaction and witnessed Marcell handing the beer to the decoy. A few minutes later, Cousenes entered the premises, approached Uppal, and identified himself as a law enforcement officer. He asked Uppal if he knew Marcell, and Uppal acknowledged he did. Uppal stated he asked Marcell about the beer, since Marcell had never purchased beer on prior occasions. Uppal acknowledged that he saw Marcell with the decoy, and that he was aware the beer was purchased for the decoy.

The administrative law judge (ALJ) issued a proposed decision on December 12, 2019. The ALJ sustained the accusation and recommended a 10-day suspension of appellants' license. The Department adopted the proposed decision in its entirety. Appellants then filed a timely appeal contending that the Department erred when it

concluded that appellants furnished alcohol to a minor who was not a direct participant in the transaction.

DISCUSSION

Appellants argue the Department erred by concluding that they "furnished" alcohol to the minor decoy within the meaning of section 25658(a). Specifically, appellants allege that a "licensee cannot be said to have 'furnished' alcohol to a minor when the minor is not identified to the licensee as the end recipient of alcohol, does not take part in the transaction, and is not even in the store when the transaction is made." (AOB, p. 5.)

Section 25658(a) states, "[e]xcept as otherwise provided in subdivision (c), every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor."

The Department found that the evidence established a violation of section 25658(a) with regard to appellants furnishing beer to the decoy through Marcell. Based on detailed findings of fact, the following conclusions were reached:

> 4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) as alleged in the Accusation on the basis that on March 9, 2019 the Respondent, Uppal, inside the Licensed Premises, sold alcoholic beverages to Marcell under circumstances where it was apparent that the alcoholic beverages were going to be furnished by Marcell to Devoy, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-12)
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> 5. Here, there is no dispute that Devoy was under 21 when she presented a 6-pack of Corona beer to Marcell to purchase on her behalf in the Licensed Premises. Devoy appeared youthful enough that she would be subject to the requirement to show identification if she was making an alcohol purchase. The requirement for identification would have revealed that Devoy was not old enough to buy alcoholic beverages. The overall circumstances made it clear that Marcell, as an intermediary, was making

> the purchase for Devoy. Despite this, Devoy was not asked for identification and Uppal did not refuse to make the sale. (Findings of Fact ¶¶ 2-12)
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> 6. … The [appellants] argued that Uppal was sufficiently diligent and that Marcell said the purchase was for a "neighbor" who was not present. *This assertion is found to be not credible* because it is at odds with the physical evidence received in this matter. Uppal watched Marcell enter on March 9, 2019 and ask for Corona cigarettes. Marcell is told they don't exist by Uppal. Marcell leaves briefly and then enters with Devoy. They stand and have a conversation just feet from where Uppal is standing. This is the conversation where Marcell instructs Devoy to get the beer she wants. Marcell then comes and stands at the register area while Devoy obtains the beer. *Marcell never goes to the coolers himself*. Devoy brings the beer to Marcell while Marcell remains standing directly across from Uppal. During the pendency of the verbal and physical interactions between Devoy and Marcell over several minutes, there are only two momentary interruptions that distract Uppal from watching Devoy and Marcell coordinate the beer purchase. Cousenes says Uppel admitted to being aware the beer was for Devoy. *The testimony of Cousenes is found to be credible* because it is consistent with the video of the transaction. (Findings of Fact ¶¶ 2-12)

(Conclusions of Law, ¶¶ 4-6, emphasis added.) The Department relied not only on testimonial evidence, but also on video evidence taken from the licensed premises. (Exh. L-1.)

In determining whether a decision of the Department is supported by substantial evidence, this Board's review is limited to determining, in light of the entire administrative record, whether substantial evidence exists—even if contradicted—to reasonably support the Department's factual findings, and whether the decision is supported by those findings. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113] (*Boreta*).) The Board is bound by the factual findings of the Department. (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 113 [28 Cal.Rptr. 74] (*Harris*).) A factual finding of the Department may not be disregarded merely because a contrary finding

would have been equally or more reasonable. (*Boreta*, *supra*, at p. 94.) The Board may not exercise independent judgment regarding the weight of the evidence; it must resolve evidentiary conflicts in favor of the Department's decision and view the whole record in a light most favorable to the decision. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) The Board must accept all reasonable inferences from the evidence which support the Department's decision. (*Harris*, at p. 113.)

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. N.L.R.B.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) Moreover, it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Department of Alcoholic Beverage Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

In "shoulder tap" operations, licensees are often not disciplined as they are either (1) unaware that the alcohol is going to a minor, or (2) aware of the operation but are cooperating with law enforcement to prevent underage drinking. Occasionally, however, the factual circumstances will result in a licensee being cited and disciplined for furnishing alcohol to a minor. The instant case is "one of those rare instances." (Respondent's Reply Brief, p. 2 (RRB).)

The decision below took note of the conflict between the testimonies of Uppal and Cousenes. The Department resolved these conflicts in favor of Cousenes after

finding that his testimony was consistent with video evidence. To the extent there is any evidentiary conflict, we are required to resolve it in favor of the Department's decision. The Department found Cousenes' testimony more credible, and we see no reason for disturbing this determination.

With this dispute resolved, the remaining inquiry is whether alcohol was actually "furnished" to the decoy. Whether the beer was furnished or not is a question of law. Accordingly, the Board is not bound by the ALJ's assumptions, but considers the question *de novo*. (*Rudd v. California Casualty Gen. Ins. Co.* (1990) 219 Cal.App.3d 948, 951-952 [268 Cal.Rptr. 624] ["It is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to de novo review on appeal. [Citation.] Accordingly, we are not bound by the trial court's interpretation."]; *Pueblos Del Rio South v. City of San Diego* (1989) 209 Cal.App.3d 893, 899 [257 Cal.Rptr. 578] [An appellate court is free to draw its own conclusions of law from the undisputed facts presented on appeal].)

The definition of "furnish" has been discussed in previous cases. For example:

> In order to violate section 25658, there must be some affirmative act of furnishing alcohol. "The word 'furnish' implies some type of affirmative action on the part of the furnisher . . . ." (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 905 [141 Cal.Rptr. 682].) Among other things, it means to supply, to give, or to provide. (*Id*. at pp. 904-905.)
>
> [¶ . . . ¶]
>
> In order to furnish an alcoholic beverage . . . it is sufficient if, having control of the alcohol, the defendant takes some affirmative step to supply it to the drinker.

(*Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1157-1158 [221 Cal.Rptr. 675] (*Sagadin*).) In addition:

> As used in a similar context the word "furnish" has been said to mean: "'To supply; to offer for use, to give, to hand.'" [Citation.] It has also been said the word "furnish" is synonymous with the words "supply" or "provide." [Citation.] In relation to a physical object or substance, the word "furnish" connotes possession or control over the thing furnished by the one who furnishes it. [Citation.]

(*Bennett v. Letterly*, *supra*, at pp. 904-905.)

Appellants argue that the Department improperly relied on "inapposite" precedent in *Sagadin*, while ignoring more recent and relevant precedent in *Ruiz v. Safeway* (2012) 209 Cal.App.4th 1455 [147 Cal.Rptr.3d 809] (*Ruiz*). (AOB, p. 5.) Specifically, appellants contend that, by "relying on *Sagadin* and ignoring *Ruiz*, the Department failed to follow clear and commanding precedent interpreting the meaning of the word 'furnishes' in a retail setting." (AOB, p. 7.)

Despite appellants' claim, it is *Ruiz*—not *Sagadin*—that is inapposite on several grounds. First, *Ruiz* involves section 25602.1, not 25658. Appellants assert that as the two statutes contain similar phrasing and language, there is no reason to read them differently. (AOB, p. 6, fn. 1.) However, the position they stake out is only possible under a superficial reading. As summarized by the *Ruiz* court, section 25602.1 states:

> [A] cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed, or required to be licensed … who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage … *to any obviously intoxicated minor* where the furnishing, sale or giving of that beverage to the minor is the *proximate cause of the personal injury or death sustained by that person*.

(*Ruiz*, *supra*, at p. 1460, emphasis added.) As an initial matter, section 25602.1 is the *lone* exception to the immunity granted to licensees who provide alcohol to a person who subsequently injures another as a result of their inebriation. (*Id*. at pp. 1459-1460; RRB, p. 7.) Thus, *Ruiz* emphasized that as the "single exception to what our Supreme

Court has characterized as the 'sweeping civil immunity' granted by section 25602 … [section 25602.1] must be construed *narrowly*." (*Ruiz*, *supra*, at p. 1462, emphasis in original.) Unlike *Ruiz* and the cause of action contemplated under section 25602.1, the instant case does not involve the injury or death to an individual caused by an obviously inebriated minor. Moreover, although section 25602.1 must be construed narrowly, appellants provide no basis for stretching its purview to encompass the circumstances present here.

Second, unlike the narrow construction of section 25602.1, the law requires that the provisions of the Alcoholic Beverage Control Act—which includes section 25658—be applied broadly in order to effectuate the purposes behind the Act:

> This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. *It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people*. All provisions of this division *shall be liberally construed for the accomplishment of these purposes*.

(Bus. & Prof. Code, § 23001, emphasis added.) Section 25658(a), which prohibits selling or furnishing alcohol to minors, is part of the division referenced and therefore implicates the economic, social, and moral well-being and safety of the public. Accordingly, we are obligated to liberally construe this provision to accomplish the purposes of the Act.

Third, a key factual distinction renders *Ruiz* inapposite here. In *Ruiz*, two minors—Spitzer and Morse—entered a Safeway store to purchase beer. (RRB, p. 7.) Although the two of them entered together, Spitzer was the one who presented his

identification to the Safeway employee and paid for the beer. (*Ruiz*, *supra*, at pp. 1457-1458.) After leaving the store, Spitzer and Morse got into their car, and Morse began driving. (*Id*. at p. 1458.) During the drive, Spitzer, the one who made the purchase, handed a beer to Morse, who consumed a portion of it as he drove. (*Ibid*.) Morse then allegedly caused the car accident that led to the death of the appellants' son in that case. The court ultimately concluded that the store employee did not authorize "Spitzer to provide beer to Morse, nor did [the employee] take any affirmative step to provide the beer to Morse." (*Id*. at p. 1463.) Due to this lack of authorization or knowledge by the employee, with respect to the furnishing of beer to Morse, the *Ruiz* court declined to apply *Sagadin*. (*Ibid*.)

Notably, nothing in *Ruiz* "gives a retail license immunity from furnishing alcohol to a minor when the evidence of furnishing is present in the record." (RRB, p. 8.) Such evidence is present in the instant case. Therefore, the *Ruiz* court's justification for distinguishing *Sagadin*—that there was no evidence the employee authorized beer to be furnished to a minor, either directly or through an intermediary—is absent here.

Unlike *Ruiz*, *Sagadin* involves the same statute at issue—section 25658(a)—and is more factually relevant here. *Sagadin* involved an automobile accident following a party in which the occupants of a car were injured after drinking. There, the father of the "party-host tacitly allowed the party-goers, many of whom were underage, to drink beer from his built-in beer dispenser." (RRB, pp. 8-9.) This tacit permission was established when the father told his son that "any beer his friends drank would have to be replaced." (*Ibid*.) The father took the affirmative step of authorizing beer to be furnished to minors despite being aware of the totality of circumstances. Similarly,

Uppal tacitly allowed Marcell to act as an intermediary in furnishing beer to the decoy, despite being aware of the decoy's presence, youthful appearance, and her interactions with Marcell.

In sum, we decline to apply *Ruiz* to the instant case. As outlined above, *Ruiz* is distinguishable on multiple grounds. Appellants also fail to provide a sufficient basis for disregarding *Sagadin*. Since *Sagadin* is both factually similar and is centered on the same statute, the instant case will be evaluated under the criteria set forth therein.

Here, appellants maintain that Uppal took no affirmative action to furnish alcohol to the decoy. Appellants also suggest that Uppal's failure to protest or attempt to stop Marcell's transfer of the beer to the decoy should not constitute a furnishing. (AOB, p. 7.) This self-serving depiction, however, is unsupported by the record.

Uppal was no passive actor. As *Sagadin* held, furnishing does not need to rise to the level of, for example, literally pouring the drink to the recipient. (*Sagadin*, *supra*, at p. 1158.) It is enough if, having control over the alcoholic beverage, the offender takes an affirmative step to provide it to the end recipient. (*Ibid*.) Here, Uppal was the on-duty employee. As such, he directly controlled both the transaction and the alcohol involved. He was obligated, especially as the licensee, to comply with all applicable alcoholic beverage laws, including section 25658. Uppal accepted the alcohol set on the counter, scanned it, bagged it, and returned it to Marcell after completing the sale.

This sequence did not occur in a vacuum. Uppal took these affirmative steps despite being aware of the totality of circumstances. He was aware that Marcell never bought beer for himself. That Marcell first asked for Corona *cigarettes* instead of beer should have further heightened Uppal's suspicions. After this exchange, Uppal

observed Marcell exiting the store and consulting with the decoy outside. When both Marcell and the decoy entered the store together, Uppal had a view of the decoy walking towards the beer coolers while Marcell remained near the counter. Uppal told Cousenes that he saw the decoy hand the beer to Marcell at the register. (RT at p. 67.) He also admitted to Cousenes that he knew the beer was for the decoy. The decoy confirmed that she made "eye contact" with Uppal when the handoff took place. (RT at pp. 15-16.)

The instant case is clearly distinguishable from *Ruiz*. In *Ruiz*, there was no authorization by the Safeway employee for Spitzer to furnish beer to Morse. Here, Uppal authorized it when he saw Marcell's interactions with the decoy and completed the transaction after being told the beer was for someone else. Under the circumstances, who else could the beer have been intended for aside from the decoy? In *Ruiz*, the Safeway employee did not take any affirmative step to provide the beer to Morse directly. Indeed, Spitzer was the one who placed the beer on the belt, presented his identification, and paid for the beer. Here, however, Uppal witnessed the decoy obtaining the beer, handing it off to Marcell at the register, and Marcell paying for the beer. In short, Uppal was on clear notice of the situation, authorized Marcell to purchase the beer for the decoy, and took the affirmative step of completing the sale.

Altogether, there is sufficient evidence to support the conclusion that Uppal furnished alcohol to the minor decoy. Appellants' argument that the decoy never directly interacted with Uppal is a red herring. As this Board has observed:

> The clerk is the person in control of the sale. He or she must be alert to the substance of the transaction, and cannot ignore circumstances that ought to raise questions in the mind of a reasonably prudent person. When the transaction is in the nature of a group purchase, as the one in

> this case appeared to be, a clerk must establish that each of those who are involved in the transaction are 21 or over. It is not enough that the person who assembled the various selections and pays for them is 21. A clerk may not close his or her eyes to the reality of what is taking place. The critical fact in this case is not the mere presence of minors, it is their participation in the transaction, all of which took place in front of the clerk.

(*Circle K Stores, Inc*. (2004) AB-8209, at p. 4.) While the facts of that case were somewhat different from those here, it nevertheless provides appropriate guidance. It was not error for the Department to conclude that Uppal was on clear notice that the decoy was part of the transaction. Uppal had the authority and duty to require the decoy to "present identification and then void the transaction to prevent a minor from being furnished alcohol. He failed to comply with this duty and violated section 25658 as a result." (Conclusions of Law, ¶ 9.) Uppal's claim that he believed Marcell was purchasing alcohol for a neighbor who was over 21—since he had never known Marcell to be dishonest—is no excuse. In fact, it is willful blindness and is dismissed as such.

Appellants' position is that there can be no affirmative act of furnishing to an individual who neither participated in the transaction nor interacted directly with the store employee. This depiction is not only undercut by the record, but we find appellants' contention to be untenable, if not absurd. Uppal cannot avoid liability by alleging that he merely stood by as a passive observer. Here, Uppal was not only the on-duty employee, but he is the licensee. To permit licensees or their employees to take the word of a customer that they are purchasing alcohol for someone over 21, and complete the sale under these circumstances would incentivize negligent behavior. Needless to say, this would be wholly inconsistent with public welfare and morals.

As stated above, we must liberally construe controlling provisions to effectuate the purposes of the Act. As substantial evidence supports concluding that Uppal

furnished a six-pack of beer to the decoy, through a thinly veiled intermediary, we see no reason to disturb the Department's decision.

ORDER

The decision of the Department is affirmed.[4]

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4] 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.

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*.

APPENDIX

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL BY: 7-ELEVEN, INC., RAJAN UPPAL DBA: 7-ELEVEN STORE 2366 14338F 1080 HOLLY ST SAN CARLOS, CA 94070-2536 OFF-SALE BEER AND WINE - LICENSE	CONCORD DISTRICT OFFICE File: 20-473018 Reg: 19089227 AB: 9866

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Yuri Jafarinejad, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on May 28, 2020, in the City of Sacramento, County of Sacramento, State of California.

Office of Legal Services

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST: 7 ELEVEN, INC. RAJAN UPPAL 7 ELEVEN STORE 2366 14338F 1080 HOLLY STREET SAN CARLOS, CA 94070-2536 OFF-SALE BEER AND WINE - LICENSE Respondent(s)/Licensee(s) Under the Alcoholic Beverage Control Act	CONCORD DISTRICT OFFICE File: 20-473018 Reg: 19089227 **CERTIFICATE OF DECISION**

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on February 5, 2020. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after April 1, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: February 20, 2020

Matthew D. Botting
General Counsel

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE ACCUSATION AGAINST:

7 Eleven, Inc., Rajan Uppal DBA: 7 Eleven Store 2366 14338F 1080 Holly Street San Carlos, California 94070-2536 Respondent	File: 20-473018 Registration: 19089227 License Type: 20 Page Count: 60 Reporter: Valerie Harris-CSR # 4401 Atkinson Baker
Off-Sale Beer and Wine License	**PROPOSED DECISION**

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Redwood City, California, on December 3, 2019.

Sean Klein, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Adam Koslin, Attorney, represented Respondents 7 Eleven, Inc. and Rajan Uppal (Respondent).

The Department seeks to discipline the Respondent's license in an Accusation on the grounds that;

1) On or about March 9, 2019, Respondent-Licensee's agent or employee, Rajan Uppal, at said premises, sold, furnished, gave, or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Olivia Devoy, a person under the age of 21 years, in violation of section 25658(a) (Exhibit D-1).

In the above Accusation, the Department further alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b). The Department further alleged that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b).

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on December 3, 2019.

FINDINGS OF FACT

1. The Department filed the Accusation on September 16, 2019. (Exhibit D-1)

2. On December 4, 2008 the Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location (the Licensed Premises).

3. There is no record of prior Department discipline against the Respondent's license during its period of licensure.

4. Olivia Devoy (Devoy) was born on August 5, 1999 and was 19 years old on March 9, 2019. On that date, Devoy was volunteering for the San Mateo Sheriff's Department (SMSD) as an underage minor decoy in an operation they were conducting. The focus of the operation was to have Devoy approach adults outside of businesses that sell alcoholic beverages and ask them to buy alcoholic beverages for her. Devoy would tell the person that she was 19 years old when she was making the request so that it was clear to the target of the investigation that she was underage. Devoy would provide cash for the purchase if the person agreed to make the purchase on her behalf. If the persons followed through and made an alcoholic beverage purchase for Devoy, they would be contacted and cited by the SMSD deputies that were supervising the operation. These investigations are commonly referred to by law enforcement as "Shoulder Tap" operations.

5. Devoy appeared and testified at the hearing. Her appearance on the date of the operation was also captured in video that was taken by the Respondent in the Licensed Premises. (Exhibit L-1[1]) On March 9, 2019 Devoy was wearing her hair down with her face fully exposed. She wore little makeup on her face other than mascara. She was wearing jeans and cowboy boots. Devoy wore a hoodie with the hood down under a denim jacket. Devoy was approximately 5 feet, 7 and a half inches tall and weighed approximately 140 pounds. Her overall appearance, during the operation and when she appeared at the hearing, was consistent with her chronological age.

6. Between 11 a.m. and noon on March 9, 2019 Devoy arrived at the Licensed Premises parking lot with the SMSD deputies that were supervising her. The parking area was shared by multiple businesses in a small plaza. Devoy approached an elderly male who was about to enter the Licensed Premises. He was later identified as Roger Marcell (Marcell). Devoy told Marcell that she was 19 and that she could not buy beer in the 7-Eleven. She then asked Marcell if he would buy a 6-pack of Corona beer for her. Marcell agreed to buy the Corona and Devoy gave him $20 that had been provided to her by the SMSD.

7. Marcell initially went into the Licensed Premises alone. Marcell had been a regular customer for approximately 10 years at the Licensed Premises and he was friendly with the Licensee,

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[1] The video that is L-1 has no audio. While it is a clear video and in color, the lens is a fisheye, so the images are slightly distorted to capture a larger area in the store. In addition, the video plays at about 2-3 times speed, so the motion is quicker than the actual events.

Rajan Uppal (Uppal) who was working at the counter when Marcell entered. Uppal was familiar with Marcell's purchases because he consistently bought Lottery tickets and Lottery Scratchers during his visits. On March 9, 2019 when Marcell entered, Marcell approached Uppal and he made his regular purchase of lottery products. (Exhibit L-1) Marcell then asked to buy Corona cigarettes. Uppal informed Marcell that they did not sell Corona Cigarettes. After being told this, Marcell went outside and contacted Devoy again regarding what she wanted Marcell to buy. Devoy had been waiting just outside of the Licensed Premises and she was visible through the plate glass windows from inside the Licensed Premises, including from where Uppal was standing behind the counter. (Exhibit L-1)

8. Devoy followed Marcell into the Licensed Premises and had a conversation with Marcell just inside the front door. Uppal was behind the counter and in direct view of where Marcell and Devoy were conversing. While standing inside the front door, Devoy told Marcell she didn't want cigarettes, she wanted beer. Marcell then had Devoy go and select the beer she wanted, herself. Devoy walked from left to right in front of where Uppal was standing in order to obtain the 6-pack from the beer coolers. At the time of this conversation and when Devoy initially walked towards the coolers, Uppal was not serving any customers. While Devoy was retrieving the beer, Marcell walked up to the counter and appeared to speak with Uppal. (Exhibit L-1)

9. A customer subsequently walked up to make a purchase. Marcell stepped to the left of the counter to get out of the way of the transaction, but he remained directly across the counter from Uppal. During this customer's transaction with Uppal, Devoy returned to Marcell with the 6-pack of Corona beer that she had selected. She handed the 6-pack to Marcell and then walked out of the front door of the Licensed Premises. The handoff occurred directly in front of the counter where Uppal was serving the customer. Marcell and Devoy were directly behind the customer during the handoff. Marcell then immediately returned to the left of the counter with the Corona beer while Devoy walked out. During the time she was in the Licensed Premises, Devoy observed Uppal looking at her. Uppal never spoke with Devoy at any point while she was in the Licensed Premises with Marcell. Marcell moved directly across from Uppal to complete the beer purchase after Uppal was done with the customer. (Exhibit L-1)

10. Marcell paid Uppal for the beer purchase with the money Devoy provided. Uppal was aware that the beer purchase and the prior request for cigarettes was unusual for Marcell because he had never purchased those items during his 10 years shopping at the Licensed Premises. Uppal placed the beer in a bag and gave Marcell the change. Marcell walked out and immediately approached Devoy right next to the window adjacent to where Uppal was working at the register. (Exhibit L-1) Marcell then handed Devoy the beer and the change.

11. SMSD Deputy R. Cousenes (Cousenes) was one of the officers working with Devoy during the operation on March 9, 2019. He monitored the transaction and contacted Marcell and Uppal after watching Marcell hand the beer to Devoy. Cousenes entered the Licensed Premises a few minutes after Marcell gave the beer to Devoy. Cousenes approached Uppal and identified himself as a law enforcement officer. Cousenes asked Uppal if he knew Marcell and he acknowledged that he did. Uppal said he asked Marcell about the beer purchase because he had

never purchased beer before. Uppal told Cousenes that he saw Devoy with Marcell and that he was aware the beer was for her.

12. Uppal testified in this matter. He denied being aware that the beer bought by Marcell was for Devoy. Uppal testified that he asked Marcell about the beer purchase and Marcell said it was for a neighbor who was of legal age. Uppal denied telling Cousenes that he was aware the beer was for Devoy. Uppal offered into evidence a letter from law enforcement that in February 2019 the Licensed Premises had refused to sell to an undercover decoy. (Exhibit L-2)

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) as alleged in the Accusation on the basis that on March 9, 2019 the Respondent, Uppal, inside the Licensed Premises, sold alcoholic beverages to Marcell under circumstances where it was apparent that the alcoholic beverages were going to be furnished by Marcell to Devoy, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-12)

5. Here, there is no dispute that Devoy was under 21 when she presented a 6-pack of Corona beer to Marcell to purchase on her behalf in the Licensed Premises. Devoy appeared youthful enough that she would be subject to the requirement to show identification if she was making an alcohol purchase. The requirement for identification would have revealed that Devoy was not old enough to buy alcoholic beverages. The overall circumstances made it clear that Marcell, as an intermediary, was making the purchase for Devoy. Despite this, Devoy was not asked for identification and Uppal did not refuse to make the sale. (Findings of Fact ¶¶ 2-12)

6. Respondent contends that Uppal sold to Marcell, who was clearly old enough to purchase alcohol, and that Uppal met his legal responsibility by determining that Marcell was of legal age to make this purchase. The Respondent argued that Uppal was sufficiently diligent and that Marcell said the purchase was for a "neighbor" who was not present. This assertion is found to be not credible because it is at odds with the physical evidence received in this matter. Uppal watched Marcell enter on March 9, 2019 and ask for Corona cigarettes. Marcell is told they don't

exist by Uppal. Marcell leaves briefly and then enters with Devoy. They stand and have a conversation just feet from where Uppal is standing. This is the conversation where Marcell instructs Devoy to get the beer she wants. Marcell then comes and stands at the register area while Devoy obtains the beer. Marcell never goes to the coolers himself. Devoy brings the beer to Marcell while Marcell remains standing directly across from Uppal. During the pendency of the verbal and physical interactions between Devoy and Marcell over several minutes, there are only two momentary interruptions that distract Uppal from watching Devoy and Marcell coordinate the beer purchase. Cousenes says Uppel admitted to being aware the beer was for Devoy. The testimony of Cousenes is found to be credible because it is consistent with the video of the transaction. (Findings of Fact ¶¶ 2-12)

7. *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141 is a civil case that resulted from tort actions involving an accident that flowed from the consumption of alcohol by a minor. Some of the stated causes of action involved allegations of indirect furnishing of alcoholic beverages to a minor by the parents of the minor's friend. These allegations led to an analysis of section 25658 and whether liability can be established in situations where there is not a direct sale or furnishing. *Sagadin* held:

> "In order to violate section 25658, there must be some affirmative act of furnishing alcohol. "The word 'furnish' implies some type of affirmative action on the part of the furnisher...." (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 905, 141 Cal.Rptr. 682.) Among other things, it means to supply, to give, or to provide. (*Id.,* at pp. 904–905, 141 Cal.Rptr. 682.) Consequently, allegations which do not allege that the defendant "actually furnished liquor" fail to state a cause of action for negligence under a furnishing statute." *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1157

8. In finding that the cause of action against the father was supported by the evidence, the Sagadin court further held:

> "In order to furnish an alcoholic beverage the offender need not pour the drink; it is sufficient if, having control of the alcohol, the defendant takes some affirmative step to supply it to the drinker. By authorizing his son to supply beer to the underage partygoers, Mr. Boal's act was one of misfeasance rather than nonfeasance; his affirmative conduct created the risk. Robert Boal may then be said to have furnished beer." *Sagadin v. Ripper* (1985) 175 Cal.App.3d 1141, 1158

9. In this matter, the overall circumstances made Uppal fully aware that the alcohol being paid for by Marcell was going to be directly and immediately furnished to Devoy. Uppal was on clear notice that Marcell was just an intermediary and that Devoy was the actual person seeking the beer, not Marcell. Uppal was aware that Marcell never bought beer for himself. Marcell reinforced his lack of sophistication regarding alcohol purchases by asking for Corona cigarettes. Marcell completed his own transaction separate and apart from the one he later made on behalf of Devoy. Uppal watched Marcell consult with Devoy after he was told that Corona cigarettes do not exist. Uppal was able to watch Devoy walk towards the beer coolers while Marcell remained at the counter. Devoy then walked up and handed Marcell a 6-pack of Corona beer. Given all of

this, Uppal had the authority and duty to have Devoy present identification and then void the transaction to prevent a minor from being furnished alcohol. He failed to comply with this duty and violated section 25658 as a result. (Findings of Fact ¶¶ 2-12)

10. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

PENALTY

The Department recommended that the Respondent's license be suspended for the standard penalty of 15 days. The Department argued against any mitigation even though there is a long period of discipline-free licensure because of the aggravating factor of direct licensee involvement.

The Respondent argued that the Accusation was not proven, but if discipline was warranted, a stayed penalty would be appropriate given the lack of prior discipline during the long period of licensure and the evidence that the Respondent takes underage sales seriously as evidenced by its success during the investigation that was conducted in February 2019. (Exhibit L-2)

The Respondent's argument that these factors warrant an all stayed penalty are blunted, somewhat by the circumstances of this case. No evidence was offered regarding the Respondent's policies to prevent sales of alcoholic beverages to underage individuals or efforts to prevent something like this from occurring again at the Licensed Premises. The Department is correct that the transaction directly involved one of the licensees. While the Respondent has been licensed since December 2008 and this is their first incident, it is not clear that the Respondent takes its responsibilities in performing alcohol sales seriously given that the Licensee himself was the person who furnished the alcohol. As such, an all stayed penalty is unwarranted even though some mitigation is supported.

The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 10 days.

Dated: December 12, 2019

Alberto Roldan
Administrative Law Judge

☒ Adopt

☐ Non-Adopt: _____

By: _____

Date: 2/5/2020