

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

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

Circle K Stores, Inc.
DBA: Circle K 1161
1396 Palm Avenue
Wasco, CA 93280

Licensee(s).

File No.: 20-161557

Reg. No.: 18086319

**Precedential Decision
No.: 19-06-E**

**DESIGNATION OF DECISION AS PRECEDENTIAL UNDER
GOVERNMENT CODE SECTION 11426.60**

Pursuant to Government Code Section 11425.60, the Department of Alcoholic Beverage Control hereby designates as precedential its decision, dated December 20, 2017, in the above-referenced action.

This decision is designated precedential effective November 22, 2019.

Sacramento, California

Dated: November 22, 2019

Jacob A. Appelsmith
Director

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DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on October 16, 2018, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on April 17, 2018, before Administrative Law Judge Matthew G. Ainley, and the written arguments of the parties, and good cause appearing, the proposed decision of the Administrative Law Judge dated May 11, 2018, is hereby adopted as the decision of the Department.

Sacramento, California

Dated: October 16, 2018

Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

7-Eleven, Joanna So Ae Yi & Richard Shin Sung Yi
Dba 7-Eleven #2173-25848
21-215340; 17085326
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Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Circle K Stores Inc.	}	File: 20-161557
dba Circle K #1161	}	
1396 Palm Ave.	}	Reg.: 18086319
Wasco, California 93280	}	
	}	License Type: 20
Respondent	}	
	}	Word Count: 7,000
	}	
	}	Reporter:
	}	Joan Parker
	}	Kennedy Court Reporters
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Bakersfield, California, on April 17, 2018.

Jonathan V. Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Donna J. Hooper, attorney-at-law, represented respondent Circle K Stores Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about June 13, 2017, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to James Murphy, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

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 April 17, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on January 16, 2018.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 20, off-sale beer and wine license to the Respondent for the above-described location on August 21, 1984 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. James Murphy was born on August 6, 1997. He served as a minor decoy during an operation conducted by the Kern County Sheriff's Department on June 13, 2017. On that date he was 19 years old.
5. Murphy appeared and testified at the hearing. On June 13, 2017, he was 6' tall and weighed 150 pounds. He wore a gray t-shirt, tan pants, and black and white tennis shoes. (Exhibits 3-4.) His appearance at the hearing was the same.
6. On June 13, 2017, Det. Corey Stacy entered the Licensed Premises. Murphy entered a short time later, walked to the coolers, and selected a 3-pack of Bud Light beer, which he took to the register. The clerk, Veronica Bravo, asked to see his ID. He handed his California driver license (exhibit 2) to her. She looked at the ID for a few seconds, then handed it back to him. She rang up the sale, he paid, and she gave him some change. Murphy exited with the beer. Det. Stacy exited as well.
7. Outside, Murphy met up with Det. Stacy and Det. Richard Hudson, then re-entered with them. Det. Hudson asked Murphy, "Who sold you the beer?" Murphy pointed to Bravo and said, "She did." Bravo was behind the register, five to ten feet away, assisting other customers. With Murphy by his side, Det. Hudson contacted Bravo, explained the violation to her, and asked her to come out from behind the counter. She did so. Det. Hudson had Murphy and Bravo stand next to each other and took a photo of them. (Exhibit 3.) Bravo was subsequently cited. While speaking to the deputies, Bravo stated that she always checks ID. She also stated that it was her first day.
8. Murphy learned of the decoy program through his participation in the Explorers. He had been an Explorer for approximately three years as of June 13, 2017 and had risen to the rank of senior Explorer. As a senior Explorer, his duties included assisting the sergeant, imparting information to other Explorers, and supervising other Explorers. The number of Explorers he supervised changed depending on the size of the squad. As an Explorer, Murphy wore a uniform and interacted with the public. He participated in various community service events. He also took an ethics class.
9. Murphy had been a decoy approximately 20 times before this operation. Typically, he visited at least five locations during an operation. On June 13, 2017, he visited nine locations. The Licensed Premises was the only which sold an alcoholic beverage to him.

10. Murphy appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in the Licensed Premises on June 13, 2017, Murphy displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Bravo.

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

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) on the basis that on June 13, 2017, the Respondent's clerk, Veronica Bravo, inside the Licensed Premises, sold an alcoholic beverage to James Murphy, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2)² and 141(b)(5) and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that Murphy was tall, had a receding hairline, and had a mature demeanor (specifically describing his time as an Explorer and the number of operations in which he participated). This argument is rejected—Murphy's appearance was consistent with that generally expected of a person under the age of 21. (Finding of Fact ¶ 10.) There is no evidence that his training or experience had any impact upon his appearance or behavior, particularly in the absence of any testimony from Bravo. Additionally, while Murphy has a high forehead, there is

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

no evidence that his hairline is receding. Hairlines vary from person to person and there is no evidence that Murphy's hairline has changed in any way.

6. With respect to rule 141(b)(5), it is clear that Bravo was engaged with other customers at the time she was identified. While the better practice may be to contact a clerk before conducting a face-to-face identification, there is no requirement that law enforcement do so. Rather, as the court of appeal in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Garfield Beach CVS, LLC)*³ makes clear, compliance with rule 141(b)(5) must be determined based on the totality of the circumstances. In *Garfield Beach CVS*, the decoy identified the seller from a distance of approximately 10 feet. With the decoy beside her, the officer then contacted the clerk and explained the violation to her. Finally, the decoy and the clerk stood next to each other while a photo was taken. At no point did the clerk dispute the sale; instead, she said that she was sorry.⁴ In the words of the court of appeal, the clerk "had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation. The identification here meets the letter and the spirit of Rule 141."⁵

7. *Garfield Beach CVS* is directly on point. Murphy identified Bravo at a distance of five to ten feet, stood next to Dep. Hudson when he contacted Bravo and explained the violation to her, then stood next to Bravo with the beer in his hand while a photo of the two of them was taken. Bravo did not dispute the sale to Murphy, she simply stated that this was her first day and that she always checks ID. (Finding of Fact ¶ 7.) Under the totality of the circumstances, there was a valid face-to-face identification under rule 141(b)(5).

PENALTY

The Department requested that the Respondent's license be suspended for 10 days, with all 10 days stayed, based on its 33 years of discipline-free operation. The Respondent agreed that an all-stayed penalty was appropriate if the accusation were sustained. The penalty recommended herein complies with rule 144.

ORDER

The Respondent's off-sale beer and wine license is hereby suspended for 10 days, with execution of 10 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that

³ 18 Cal. App. 5th 541, 226 Cal. Rptr. 3d 527 (2017).

⁴ *Id.* at 543, 226 Cal. Rptr. 3d at 528.

⁵ *Id.* at 547, 226 Cal. Rptr. 3d at 531.

should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his or her discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: July 9, 2020

Matthew G. Ainley
Administrative Law Judge

<input type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____

By: _____
Date: _____