

Mailing Date: January 24, 2001

PENNSYLVANIA LIQUOR CONTROL BOARD
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE, : Citation No. 00-0068
BUREAU OF LIQUOR CONTROL :
ENFORCEMENT :

vs.

UVC, INC. : License No. R-8385
t/a Track & Turf Tavern :
4202 Chester Avenue :
Philadelphia, PA 19104-4416 :

Counsel for Licensee: John J. McCreesh, III, Esquire
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Bureau of Liquor Control Enforcement
8320 Schantz Road
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OPINION

UVC, Inc., t/a Track & Turf Tavern ("Licensee"), appeals from the Adjudication and Order of Administrative Law Judge David L. Shenkle ("ALJ"), wherein the ALJ sustained the citation against Licensee and imposed a penalty consisting of a two-day license suspension and a fine of \$2,000.00.

The first count of the citation charged Licensee with violating section 493(1) of the Liquor Code [47 P.S. §4-493(1)], in that on December 11, 1999 and divers other occasions within the past year, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to seven male minors, 18 to 20 years of age.

The second count of the citation charged Licensee with violating section 493(14) of the Liquor Code [47 P.S. §4-493(14)], in that on December 11, 1999 and divers other occasions within the past year, Licensee, by its servants, agents or employes, permitted seven male minors, 18 to 20 years of age, to frequent its licensed premises.

Pursuant to section 471 of the Liquor Code [47 P.S. §4-471], the appeal in this case must be based solely on the record before the ALJ. Where the decision of the ALJ is based upon substantial evidence, the Board must affirm the decision.

The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion requiring something more than a scintilla creating mere suspicion of the fact to be established. Johnson v. Pennsylvania Board of Probation and Parole, 706 A.2d 903 (Pa. Cmwlth. 1998);

Chapman v. Pennsylvania Board of Probation and Parole, 86 Pa. Cmwlt. 49, 484 A.2d 413 (1984).

On appeal, Licensee argues that the ALJ's Adjudication and Order was not supported by substantial evidence in that two witnesses testified that they saw the minors provide identification cards to the bartender, and that the bartender testified that the identification cards were valid and, under Skoritowski v. Pennsylvania Liquor Control Board, 742 A.2d 704 (Pa. Cmwlt. 1999), such testimony should be a defense to the charge of serving minors.

We have reviewed the record and the ALJ's Adjudication and Order with Licensee's allegations in mind. On December 11, 1999, Officer Joseph Baran of the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau"), entered the licensed establishment in an undercover capacity at 10:55 p.m., observed youthful-looking patrons, then exited the establishment to get the rest of the Bureau detail. (N.T. 5-6). He returned at approximately 11:00 p.m. with Bureau officers Gary Kardisco, Robert Bandy and Frank Spera for an open inspection of the establishment which revealed that seven of the 11 patrons present were minors who were drinking glasses of draft beer. (N.T. 6-7). The officers retrieved nine false identification cards from the seven minors. (N.T. 7, 9-11; Ex. L-1).

Eric Knight possessed a New York non-driver's license in the name of Eric Silbert, with a date of birth reflected as October 5, 1976, and a New Jersey license containing the name Anthony Dutina Baer and a date of birth of July 1, 1975. (N.T. 8-9, 15-16; Ex. L-1). Officer Baran testified that the pictures on these licenses do not look like Eric Knight; however, he felt, in a dark bar, they could pass for him. (N.T. 10).

From Marc Belloli, the officers confiscated a Michigan driver's license containing Mr. Belloli's picture and correct sex, height, name and address, but a false date of birth. (N.T. 13-15; Ex. L-1). Likewise, a California driver's license obtained from Peter Strong reflected his photograph, correct street address and height and weight, but a different city and state and a false date of birth. (N.T. 14-15; Ex. L-1). The false birthdates on the identifications produced by Mr. Belloli and Mr. Strong indicated that they were over 21 years of age. (N.T. 15; Ex. L-1). They were cited for carrying false ID. (N.T. 15).

Clayton A. Beer possessed a University of Pennsylvania school identification which contained a picture and school ID number, but no date of birth. (N.T. 16). He was issued a non-traffic citation for underage drinking. (N.T. 16). Officer Baran testified that the New Jersey driver's

license he obtained, issued in the name of Daniel S. Mulholland, resembled Clayton Beer; however, he did not think it was him. (N.T. 17; Ex. L-1).

Officer Baran obtained four additional false identification cards: one for a female not involved in the situation, two obtained from Jonathan Neil Wallace (driver's licenses from New Jersey and Iowa), and one for Prescott Johnson (a driver's license from Florida), none of whom appeared at the hearing. (N.T. 8, 10-11, 17-18; Ex. L-1). Officer Baran testified that Licensee maintained a declaration of age card file; however, the file did not contain cards for any of the individuals from whom identifications were obtained. (N.T. 18-19).

Eric Knight testified that his date of birth is October 5, 1980, and that he was 19 years old when he went to the licensed establishment on December 11, 1999 at approximately 9:00 p.m. (N.T. 20). While on the licensed premises, he consumed beer from a pitcher. (N.T. 21). He was served beer without showing any identification. (N.T. 21). He was not asked to show any identification (N.T. 21, 25). He was not questioned by an employee relative to his age or asked to sign a declaration of age card. (N.T. 21, 23, 25). He does not recall what type of beer he drank or who ordered the drinks. (N.T. 21-22).

Clayton Beer testified that he was 18 years old, with a date of birth of July 29, 1981, when he went to the licensed premises on December 11, 1999 at approximately 8:45 p.m. (N.T. 25-26). While there, he drank Yuengling and Coors Light beer out of pitchers ordered by all of them. (N.T. 26). The beer was \$7 for "all-you-could-drink" up to a certain time. (N.T. 27). He was not questioned by any employees relative to his age (N.T. 27). He also was not required to show any identification or to sign a declaration of age card while on the premises that evening. (N.T. 27). The only identification he had with him was his University of Pennsylvania school ID. (N.T. 27, 29). He did not show or have in his possession that night a New Jersey driver's license in the name of Daniel S. Mulholland. (N.T. 28).

Marc Belloli testified that he was 19 years old, with a date of birth of August 24, 1980, when he entered the licensed premises on December 11, 1999 at around 9:00 p.m. (N.T. 29-30). While there, he consumed draft beer from pitchers ordered by all of them in turn, paying \$7 for "all-you-can-drink" for a certain amount of time. (N.T. 30-31). He was not questioned relative to his age, he was not required to sign any declaration of age card, and he did not show or otherwise use the Michigan driver's license he had with the incorrect age on it. (N.T. 31-32; Ex. L-1). He testified that he was

cited for underage drinking, that he is 6' 2 1/2" or 6' 3" tall, and that he weighs 160-170 pounds. (N.T. 32).

Peter Strong testified that his date of birth is February 29, 1980, and that he went to the licensed premises at approximately 9:00 p.m. on December 11, 1999. (N.T. 33-34). While on the premises, he consumed beer from pitchers ordered by each of them in turn, paying \$7 for "all-you-can-drink" for a certain amount of time. (N.T. 34). He was not questioned by any employee relative to his age (N.T. 36). He was not required to sign a declaration of age card or to produce the California driver's license he had with him to purchase any beer that night. (N.T. 35-36; Ex. L-1). Mr. Strong testified that, within the year prior to December 11, 1999, he had gone to the licensed premises two or three times and consumed alcoholic beverages while there. (N.T. 35). On one of those previous occasions, he was questioned regarding his age and he produced the aforementioned California driver's license which contained his picture and information and which showed him to be 21 or more years of age. (N.T. 35-37; Ex. L-1). He recognized Licensee's bartender from being on the premises before. (N.T. 37).

Nicholas Sommer testified that he was 20 years old, with a date of birth of August 2, 1979, when he entered the licensed premises on

December 11, 1999 between 8:45 and 9:00 p.m. (N.T. 38-39). While there, he consumed draft beer from pitchers, one of which he purchased. (N.T. 39). The price was \$7 for "all-you-can-drink." (N.T. 39). On that date, he was not questioned by any employee of Licensee relative to his age, nor was he required to sign a declaration of age card. (N.T. 39-40). He did not have any false identification with him on December 11, 1999; therefore, he was not charged for such an offense. (N.T. 39-40). Within the year prior to December 11, 1999, he had gone to the licensed premises and consumed alcoholic beverages two or three times. (N.T. 42). On one of those occasions, he was questioned by bartender, Lawrence Hackett, regarding his age, and he produced a false New Jersey driver's license containing his picture. (N.T. 40-41). Mr. Sommer is 6' 4" tall and weighs 235 pounds. (N.T. 41).

Lawrence Hackett testified that he has been employed by Jack Gillespie, owner of the Track & Turf Tavern, as a bartender for roughly 13 years. (N.T. 43-44). Prior to that, he was employed by Tom Gibson, owner of Gibson's Tavern, as a bartender for approximately 15 years. (N.T. 44).

Mr. Hackett recognized Nicholas Sommer and Peter Strong as patrons of the Track & Turf Tavern who were at the establishment together three or four times two or three months prior to December 11, 1999, at

which time he questioned them relative to their age. (N.T. 45-46, 48-50). They produced identification indicating they were over 21 years of age and he put them in the declaration of age file. (N.T. 45-46, 48-51). He does not know where those completed declaration of age cards are located. (N.T. 48-49).

Mr. Hackett testified that on December 11, 1999, seven minors (the five at the hearing, plus two others) entered the premises as a group and that he requested their ID's as soon as they walked in. (N.T. 46-47, 50-51). He did not recognize Eric Knight, Clayton Beer or Mark Belloli. (N.T. 50-52). They showed him identification and, based upon his experience as a bartender and from seeing a lot of college students from Penn, Drexel and Philadelphia College of Pharmacy, he believed the minors to be of age. (N.T. 47). He did not complete age declaration cards because the file was filled, and there were no blanks left. (N.T. 47).

Michael Rightley, a Track & Turf Tavern patron for ten years who knows owner, Jack Gillespie, was seated halfway down the bar from the door when he saw Mr. Hackett card the group of minors by the register ten feet away. (N.T. 52-53). After they were carded, the minors went to the tables in the back, where Licensee has games, and they drank pitchers. (N.T. 53-54). He left the premises between 9:00 and 9:30 p.m. (N.T. 54).

John O'Connor testified that he has known Mr. Gillespie for 15 years, and that he frequents the bar occasionally. (N.T. 54-55). On December 11, 1999, he was on the licensed premises between 8:15 p.m. and 9:30-10:00 p.m. (N.T. 52-54). He was talking to Mr. Rightley when he saw Mr. Hackett approach the minors and request ID. (N.T. 55). He saw the minors begin to remove their wallets, but he did not see them actually produce identification. (N.T. 55-56). He next knew that they were drinking beer in the back. (N.T. 55).

The record reveals that there is substantial evidence to support the ALJ's decision that the subject minors were permitted to frequent the licensed premises and were sold, furnished or given alcoholic beverages by Licensee, its agents, servants or employees, on December 11, 1999 and, in at least two other instances, on other occasions within the preceding year. While the Board would be reluctant to sustain the citation based on the Bureau officer's apparent hearsay testimony alone, the additional testimony of five of the subject minors was more than sufficient to support the findings of the ALJ. The ALJ clearly found the Bureau officer's and minors' testimony to be credible. Credibility of witnesses is a matter within the sole province of the ALJ as fact-finder. Borough of

Ridgway v. Pennsylvania Public Utility Commission, 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984).

On appeal, Licensee argues that the eyewitness and employee testimony it offered at the hearing should be acceptable as a defense to a charge of serving minors under Skoritowski, supra. Section 495 of the Liquor Code [47 P.S. §4-495] states that a licensee who has provided alcohol to a minor may nonetheless escape liability if the licensee required the minor to provide proper identification and if the licensee acted in good faith. In Skoritowski, the Commonwealth Court held that "[a]cting in good faith is a state of mind and can be determined from the testimony of the witnesses without further autoptic evidence. Once, however, autoptic evidence is introduced in a trial, then the factfinder decides what weight should be accorded to the same." Skoritowski v. Pennsylvania State Police, 742 A.2d at 707.¹

In this case, the minors who testified claim to have had no ID, college ID or false ID's with them on December 11, 1999, when they were on the

¹ The Board notes that prior to Act 199 of 1996, section 495 of the Liquor Code required a licensee to establish that it had required a minor to produce proper identification, had the minor fill out a verification of age card and it had taken these two steps in good faith in order to successfully defend itself from a charge that it had sold alcohol to a minor. Thus, prior to Act 199, acting in good faith was in addition to the other requirements set forth in section 495. Act 199 replaces the relevant "shall" in section 495 with "may" but also added a new subsection (f) which stated that a photograph or photocopy or other visual presentation of the identification presented could be offered as part of the licensee's defense. It, therefore, seems much more reasonable to assume that the replacement of the word "shall" with "may" referred to the type of autoptic evidence presented, i.e., written statement or video copy of the identification offered by the minor, and not a legislative intent to eliminate the need for any autoptic evidence at all. While the Board cannot fathom why the legislature, in 1996, would simultaneously allow licensees to use photographs of the identification card presented as another defense to the charge of selling alcohol to minors and to

licensed premises consuming alcohol; however, on that date, no one requested to see them. Even if one were to accept the testimony of Mr. Hackett and Mr. Rightley that these young men were requested to and did produce identification, the ALJ found the ID's confiscated not to be valid. In addition, Mr. Hackett's reason for not having had the minors complete declaration of age cards is that the file was filled, and he did not have any clean ones. Clearly, Licensee did not act in good faith.²

Because the ALJ's decision is supported by substantial evidence on the record, the Board affirms.³

amend the law so that no autoptic evidence whatsoever is needed, the Board is bound by the Commonwealth Court's interpretation of section 495.

² To accept Licensee's contention that merely establishing that Licensee asked for some form of identification is sufficient to establish good faith would render the concept of good faith meaningless.

³ Having decided this appeal on the merits, Licensee's request for supersedeas is moot.

ORDER

The decision of the ALJ is affirmed.

The appeal of Licensee is dismissed.

Licensee has paid the fine in the amount of \$2,000.00.

It is ordered that the restaurant liquor license of UVC, Inc., License No. R-8385, be suspended for a period of two days beginning at 7:00 a.m. on Monday, January 29, 2001 and ending at 7:00 a.m. on Wednesday, January 31, 2001.

Licensee is directed on Monday, January 29, 2001, at 7:00 a.m., to place a placard of Notice of Suspension (Form PLCB-1925 as printed with red and black ink) in a conspicuous place on the outside of the licensed premises or in a window plainly visible from outside the licensed premises and to remove said license from the wall and place it in a secure location.

Licensee is authorized on Wednesday, January 31, 2001, at 7:00 a.m., to remove the placard of suspension and return its license to its original wall location.

Licensee must adhere to all other conditions set forth in the ALJ's Order.

Board Secretary