

Mailing Date: OCT 10 2014

[Appeal](#)

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ADMINISTRATIVE LAW JUDGE
FOR THE
PENNSYLVANIA LIQUOR CONTROL BOARD

PENNSYLVANIA STATE	:	
POLICE, BUREAU OF	:	In Re: Citation No. 12-1735C
LIQUOR CONTROL ENFORCEMENT	:	
	:	
v.	:	BLCE Incident No. W01-452765
	:	
J & D'S THE BROADWAY LLC	:	
T/A THE BROADWAY	:	PLCB LID - 64438 25
E. BROADWAY AVE.	:	
CLIFTON HEIGHTS PA 19018-2305	:	
	:	PLCB License No. R-AP-SS-660
	:	
DELAWARE COUNTY	:	

APPEARANCES:

FOR THE BUREAU OF ENFORCEMENT:

ERIK S. SHMUKLER, ESQ.

FOR THE LICENSEE:

WILLIAM B. MORRIN, ESQ.

BEFORE: JUDGE WRIGHT

ADJUDICATION

BACKGROUND:

J & D's The Broadway, LLC t/a
The Broadway
In Re: Citation No. 12-1735C

This proceeding arises out of a citation that was issued on December 18, 2012, by the Bureau of Liquor Control Enforcement of the Pennsylvania State Police (hereinafter "Bureau") against J & D's The Broadway, LLC, t/a The Broadway, License Number R-AP-SS-660 (hereinafter "Licensee").

An Administrative hearing was held on Wednesday, January 14, 2014, pursuant to requisite and appropriate hearing notice. The parties stipulated to the service and receipt of the notice letter and the citation.

The citation charges Licensee with violation of Section 493(1) of the Liquor Code, 47 P.S. §4-493(1), in that on October 24, 2012, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, twenty (20) years of age.

FINDINGS OF FACT:

1. Officer J.C. from the Bureau of Enforcement has been employed by the Bureau for approximately nine years. On October 24, 2012, he along with eight officers from the Bureau conducted an age compliance check using a person who was under twenty-one years of age to attempt to purchase alcoholic beverages in a liquor establishment (N.T. 7).

2. On October 24, 2012 at approximately 7:45 p.m., Officer J.C. entered the licensed premises in an undercover capacity and took a seat at the bar to insure that the bar was a safe environment for the minor to enter (N.T. 8-9).

3. The officer noted that there were approximately seven patrons in the premises. The officer was to text the supervisor who was waiting outside if there were any factors which made the bar unsafe (N.T. 9).

4. The officer detected a strong odor of cigarette smoke and patrons were smoking in the premises (N.T. 10).

5. The Underage Buyer entered the premises and sat at the bar across from the officer. The minor ordered a twelve ounce bottle of Bud Light beer from the bartender on duty. The bartender got the beer from the cooler and placed it in front of the minor. The Underage Buyer gave the bartender currency. The bartender placed the currency in the cash register. The bartender returned change to the Underage Buyer. The Underage Buyer lifted the bottle up and looked at the officer and then placed the bottle back on the bar and departed the premises (N.T. 10-11).

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6. Five to ten minutes later, the supervisor on duty entered the premises to speak with the bartender about the age compliance program. Officer J.C. remained undercover and left the premises while his supervisor was talking with the bartender (N.T. 11).

7. On October 26, 2012, Officer J.C. checked the records to ascertain whether or not the premises had a smoking exemption. He then went back to the premises to do a routine inspection and to ascertain that the premises did maintain a smoking exemption. Officer J.C. returned to the premises on October 25, 2012 at approximately 4:10 p.m. The owner confirmed that he did not have a smoking exemption, but was very cooperative. Licensee issued a warning with regard to the smoking on the premises (N.T. 11-12).

8. The officer sent a notice of non-compliance letter to the licensed premises, which was dated November 1, 2012 (N.T. 12-13 and Exhibit B-3).

9. The officer visited a number of bars that night, with the same Underage Buyer, in order to do compliance checks (N.T. 15-16).

10. E.S. was born September 11, 1992 and is part of the Underage Compliance Program with the Bureau of Enforcement. He was retained as part of that program by submitting an application to the Pennsylvania State Police. He was a student at the time and was interested in criminal justice aspects of law. He was provided training, passed the test and began working with the Underage Compliance Program between 2011 and 2012 (N.T. 26-27).

11. Officer J.C. was on the premises before E.S. arrived. E.S. was approached by the bartender and the Underage Buyer ordered a Bud Light twelve-ounce bottle of beer. The bartender brought him the Bud Light and advised him that the price was \$3.00. He gave him a ten dollar bill and was given seven dollars in change. E.S. indicated that he put his hands around the bottle and lifted it up, but did not drink it. He picked up his cell phone and walked out, feigning a call. E.S. returned to the supervisor and detail of officers outside of the premises, leaving the beer on the premises (N.T. 28-29).

12. E.S. was not asked to show identification nor did he sign a declaration of age card. His only identification was his own driver's license. In that he was under twenty-one at the time, his driver's license shows his age in bold print. However, he was not asked for identification on that evening (N.T. 30).

13. E.S. indicated that the age compliance program is a volunteer program and he is only given money by the police for purchases of alcoholic beverages and is otherwise not paid (N.T. 31-32).

14. At the time of the investigation, the Underage Buyer was dressed in a long sleeve shirt and slacks and had a little bit of facial hair (N.T. 35-36 and Exhibit L-1).

15. M.R. is a supervisor with the Bureau of Enforcement and has been an Enforcement officer for approximately ten years and a supervisor for approximately two years. On October 24, 2012, he had to be sure that the detail had an Underage Buyer and a correct number of officers to run the detail. Also he was responsible for notifying the Licensee, who was non-compliant and who had served an Underage Buyer (N.T. 40-41).

16. M.R. entered the bar to notify the Licensee that an Underage Buyer had been served there. The supervisor identified himself to the bartender. The bartender indicated that he knew that it was a "setup" and that he had been "entrapped" (N.T. 43-45).

17. M.R. also pointed out to the bartender that patrons were smoking on the premises in violation of the Clean Air Act and asked him if he had an exemption letter, which the bartender was unable to produce (N.T. 45-46).

18. There had been no complaints of underage buyers at the licensed premises. There had been other bars in the area for which complaints had come in and so the officer conducted compliance checks at those bars and randomly selected other bars in the general vicinity for compliance (N.T. 46-47).

19. There were five or six premises that sold to E.S. on that night (N.T. 48 and 55).

20. E.S. was under M.R.'s supervision for an entire eight hour shift, while doing compliance checks (N.T. 52-53).

21. The officer indicated that at the time of the investigation, E.S. was not noticeably balding on October 24, 2012. He did not have a significant amount of facial hair on the day of the investigation. A photo was taken the day of the investigation (N.T. 58-60 and Exhibit L-1).

22. Dennis Massimo is a fifty percent owner of the licensed premises and the Board approved manager. The Licensee has had a liquor license since 2011 with no prior complaints regarding service to minors. The Licensee stated that their policy is to serve no one under thirty without asking for identification (N.T. 65-67).

23. Mr. Massimo indicated that the bartender was RAMP certified and that he had been trained by the manager (N.T. 67).

24. Mr. Maher is a bartender for the licensed premises. Mr. Maher has worked in the liquor industry for approximately twenty years and has been RAMP certified on several occasions.

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He also stated that it is Licensee's policy not to serve anyone under the age of thirty without carding them. As a bartender, he has served approximately five to ten thousand people and has never been responsible for a Licensee having been issued a citation for sales to minors. He indicated that the minor had a long sleeve shirt on and had facial hair, which was the equivalent of more than just a five o'clock shadow. He appeared to the bartender to be at least thirty years of age (N.T. 68-74).

CONCLUSIONS OF LAW:

On October 24, 2012, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, twenty (20) years of age, in violation of Section 493(1) of the Liquor Code, 47 P.S. §4-493(1).

PRIOR RECORD:

Licensee has been licensed since August 15, 2011, and has a record of prior violations as follows:

In Re:

Citation No. 12-0622. \$250.00 fine.

1. Used loudspeakers or devices whereby the sound of music could be heard beyond the Licensee's property line.
November 5, 2011 and January 15, 2012.

DISCUSSION:

Licensee is charged with violation of Section 493(1) of the Liquor Code, 47 P.S. §4493(1), in that on October 24, 2012, Licensee, by its servants, agents or employees, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) minor, twenty (20) years of age. The minor, who was served, was a member of the Bureau of Liquor Control Enforcement Age Compliance Program.

The attorney for the Licensee, Mr. Morrin, argues that the Licensee was entrapped and that in this instance, the bartender was not predisposed to commit a criminal act and that the government did something to entice, seduce or trick the bartender into doing something that he ordinarily would not be predisposed to do. Mr. Morrin argues that this Licensee had no previous history of serving minors and that the bartender had twenty years of experience. The Licensee's attorney indicated that the bartender believed that the Bureau used this particular minor because he looked thirty-five years of age, in that he had facial hair and was balding.

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The Bureau argued that the Age Compliance Program is a legislatively created program and that the Bureau was operating under its statutory authority and guidelines. The Bureau argues that the premises is in the business of selling alcoholic beverages, but what made it unlawful was the sale to a person under the age of twenty-one. The bartender did not ask E.S. for identification, and the person was determined to be under the age of twenty-one. At least one or two Licensee's carded E.S. on that same evening.

An investigation of the premises began on October 24, 2012, not as a result of a complaint but as a *random* compliance check of licensed premises in the general vicinity of a licensed premise that was in fact the subject of a complaint for sales to minors.

A supervisor, in the age compliance program, testified that he was responsible for selecting the premises that were to be checked and ensuring that there were a sufficient number of officers and a minor for the age compliance checks scheduled for October 24, 2012. The minor was not asked to show identification, but was served, feigned a phone call and left the premises without consuming an alcoholic beverage. Licensee was advised shortly thereafter that they had served a minor. The bartender who served the minor immediately claimed that he had been entrapped. The investigation was closed on October 25, 2012.

The manner in which compliance checks are to be performed and the requirements of officers, employees and interns of the Bureau to undergo approved training prior to participation in a compliance check is prescribed by 37 Pa.C.S. §23. The minor who was served appears to have met the age (18-20) and training requirements to participate in the program. The Bureau seemingly complied with the letter of the law.

Here, (1) the minor selected for this assignment was twenty years of age and had the required training to participate in the age compliance program. In reviewing the photograph taken at the time of the minor's visit to the licensed premises, the minor wore a casual shirt and slacks, and may have had very slight facial hair. Although the Court agrees that he appears older than his actual age, he did not appear to have done anything in particular to make himself look older. The photograph does not indicate any signs of balding in October of 2012 and the officer testified credibly that the individual did not appear to be balding at that time. At the time of the hearing, the minor was twenty-one years of age, clean shaven, slightly balding and appeared to be older than his actual age; and (2) on October 24, 2012, the minor was utilized in the investigation of several randomly selected licensed premises in various areas of the city, as well as in the investigations of

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locations which were the subject of complaints for sales to minors. Of the eight premises, five to six were found to be noncompliant on that evening.

Title 18 Pa. C.S. §313 provides a criminal defense of entrapment if the person charged shows by a preponderance of the evidence that a law enforcement official or a person cooperating with the official induces a person to engage in the offense by either making false statements to induce belief that the conduct is not prohibited or using methods of persuasion to create a substantial risk that an offense will be committed by persons other than those ready to commit it. It is applicable only to criminal prosecutions. On the other hand, as noted by Licensee's counsel, Common Law Entrapment, a defense which existed prior to codification of the Rules of Criminal Procedure, is still a viable concept in administrative actions. *See Smith v. State Horse Racing Comm.*, 535 A.2d 596 (Pa. 1988); *4-6 Club v. Pennsylvania Liquor Control Board*, 275 A.2d 40 (Pa. 1971). However, it has long been established that the fact that officers provide opportunities for the commission of an offense does not defeat prosecution.

Licensee claims to check all people's identification that appear to be under the age of thirty, but was mistaken in their belief as to the age of the patron. Licensee is strictly liable for offenses of §4-493(1) and did not present any of the defenses available in §4-495 of the Liquor Code. On the issue of strict liability *Commonwealth v. Koczwar*, 155 A.2d 825, 828 (Pa. 1959), *cites Tahiti Bar, Inc. Liquor License Case*, 150 A. 2d 112 (Pa. 1959): "There is perhaps no other area of permissible state action within which the exercise of the police power of a state is more plenary than in the regulation and control of the use and sale of alcoholic beverages." **Koczwar** further states:

It is abundantly clear that the conduct of the liquor business is lawful only to the extent and manner permitted by statute. Individuals who embark on such an enterprise do so with knowledge of considerable peril, since their actions are rigidly circumscribed by the Liquor Code.

Because of the peculiar nature of this business, one who applies for and receives permission from the Commonwealth to carry on the liquor trade assumes the highest degree of responsibility to his fellow citizens. As the licensee of the Board, he is under a duty not only to regulate his own personal conduct in a manner consistent with the permit he has received, but also to control the acts and conduct of any employee to whom he entrusts the sale of liquor.

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Such fealty is the *quid pro quo* which the Commonwealth demands in return for the privilege of entering the highly restricted and, what is more important, the highly *dangerous* business of selling intoxicating liquor.

While critical of the Bureau's utilization of minor's who appear to be older than the age of twenty-one, in this case the Court does not believe that the Licensee was entrapped. The Licensee was randomly selected because the Bureau was doing age compliance checks in the area. Licensee will encounter individuals who appear younger or older than their stated ages, but prudence requires that licensees check for valid identification before rendering service of alcoholic beverages. Licensee fell short of its duty and responsibility.

After careful consideration of the facts and circumstances of this case, a monetary penalty shall be imposed.

PENALTY:

Section 471 of the Liquor Code, 47 P.S. Section 4-471, prescribes a penalty of suspension or revocation of license or imposition of a fine of not less than \$50.00 or more than \$1,000.00, or both, for violations of the type found in this case.

That Section further provides for mandatory compliance with Liquor Code Section 471.1, 47 P.S. Section 4-471, pertaining to Responsible Alcohol Management when, as in this matter, Licensee has been found to have violated Section 493(1) as a first offense as it relates to sales to minors or sales to a visibly intoxicated patron.

Accordingly, we issue the following

ORDER:

THEREFORE, it is hereby Ordered that Licensee, J & D's The Broadway, LLC, t/a The Broadway, License Number R-AP-SS-660, pay a fine of One Thousand Two Hundred Fifty Dollars (\$1,250.00) within twenty (20) days of the mailing date of this Order. In the event the aforementioned fine is not paid within twenty (20) days from the mailing date of this Order, licensee's license shall be suspended or revoked.

IT IS FURTHER ORDERED that Licensee shall comply with the requirements set forth in Liquor Code Section 471.1, pertaining to Responsible Alcohol Management in the following manner. The Licensee is directed to contact the Bureau of Alcohol Education, Pennsylvania Liquor Control Board (Toll Free Telephone No.: 1-866-275-8237; Web Site:

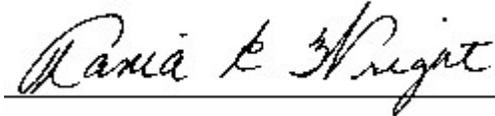
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www.lcb.state.pa.us) within thirty (30) days of the mailing date of this Adjudication in order to receive assistance in the compliance process. Licensee must receive Certification within ninety (90) days of the mailing date of this Adjudication. Licensee must remain in compliance for a period of one year from the date such Certification is issued. The Bureau of Liquor Control Enforcement is further directed to monitor compliance with this Adjudication.

Failure to comply with this Order will be grounds for modification of penalty in this case. Failure to comply may also constitute grounds for issuance of a new citation as authorized by Section 471(d) of the Liquor Code, 47 P.S. Section 4-471(d).

Jurisdiction of this matter is retained.

Dated this 8TH day of October, 2014.



Tania E. Wright, J.

NOTE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED WITHIN 15 DAYS OF THE MAILING DATE OF THIS ORDER TO THE OFFICE OF ADMINISTRATIVE LAW JUDGE AND REQUIRE A \$25.00 FILING FEE. A WRITTEN REQUEST FOR RECONSIDERATION MUST BE SUBMITTED WITH THE FILING FEE.

If you wish to appeal the decision of the Administrative Law Judge's Order, the appeal must be filed within 30 days of the mailing date of the Order. Please contact the Office of the Chief Counsel of the Pennsylvania Liquor Control Board at 717-783-9454.

mm

Detach Here and Return Stub with Payment - Note Citation Number on Check

The fine must be paid by Treasurer's Check, Cashier's Check, Money Order or a check drawn on the account of an attorney, who must be licensed in Pennsylvania. **Personal and business checks are NOT acceptable unless they are certified by your bank.** If you are paying by

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guaranteed check, please make it payable to the Commonwealth of Pennsylvania and mail, along with any required documentation, to:

PLCB - Office of Administrative Law Judge
Brandywine Plaza
2221 Paxton Church Road
Harrisburg, PA 17110-9661

Credit/Debit Cards may be used: visit www.lcb.state.pa.us and look under LEGAL/Office of ALJ for instructions.

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