

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§ § §	BEFORE THE
vs.	§ §	STATE OFFICE OF
JOSE J. MARTINEZ ET AL. D/B/A SUPER MERCADO MEXICO #4	§ §	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission Staff (Petitioner) brought this action against Jose J. Martinez et al. d/b/a Super Mercado Mexico #4 (Respondent) alleging that on May 5, 1998, Respondent, with criminal negligence, sold alcoholic beverages through his agent, servant or employee to a minor, in violation of Tex. Alco. Bev. Code Ann. Secs. 106.03 and 106.13. Petitioner showed, by a preponderance of the evidence, that Respondent sold, with criminal negligence, an alcoholic beverage to a minor. This proposal therefore recommends that Respondent's permit and license be suspended for 10 days or that Respondent be given the option of paying a civil penalty of \$1,500 in lieu of suspension.

I.
PROCEDURAL HISTORY

On August 18, 1998, Petitioner issued a Notice of Hearing to Respondent, alleging that Respondent, by and through his agent, servant, or employee, sold alcoholic beverages with criminal negligence to a minor on May 5, 1998. A public hearing was scheduled for September 11, 1998. On September 11, 1998, Petitioner filed an Unopposed Motion for Continuance. The motion was granted and the hearing was reset for October 20, 1998. On October 20, 1998, a public hearing was held before Jerry Van Hamme, Administrative Law Judge, at the Offices of the State Office of Administrative Hearings, 6300 Forest Park Road, Dallas, Texas. Petitioner was represented by Timothy Griffith, attorney. Respondent was represented by Frank Shor, attorney.

II.
JURISDICTION

The Texas Alcoholic Beverage Commission has jurisdiction over this matter under Tex. Alco. Bev. Code Ann. Secs. 6.01, 11.61, and 61.71. The State Office of Administrative Hearings has jurisdiction under Tex. Gov't. Code Ann. Sec. 2003.



III. DISCUSSION

A. Factual Background

Respondent holds a Wine Only Package Store Permit, #Q-188165, and a Beer Retailer's Off-Premise License, #BF-216442 for Super Mercado Mexico #4, 5535 Columbia, Dallas, Dallas County, Texas. Respondent was issued the permit and license on January 8, 1987, and has renewed them continuously since that date.

B. Petitioner's Contentions and Evidence

Petitioner's witness, Detective C.A. Reynerson, testified at the hearing that he accompanied a minor, Ms. Rebecca Gage, to Respondent's licensed premises to conduct a covert inspection of possible sales of alcoholic beverages to minors. Ms. Gage was at the time of the inspection a youthful-looking 17 year old (date of birth: 6/29/80) wearing a striped tank top and blue jeans (Resp. Ex. 1). Her clothing, according to Det. Reynerson, was consistent with that worn by young, teenage, high school students.

Det. Reynerson testified that Ms. Gage entered Respondent's licensed premises and purchased a six pack of 12 ounce Coors Light beer from Respondent's employee, Juan Francisco Quiedo. Mr. Quiedo was working behind the checkout counter. He rang up the sale, took Ms. Gage's money, and gave her change in return. Ms. Gage then left the licensed premises. Det. Reynerson, who personally observed the transaction, testified that Mr. Quiedo did not ask Ms. Gage to produce any identification in order to make this purchase.¹ Det. Reynerson then identified himself to Mr. Quiedo and informed him that Ms. Gage was a minor. Mr. Quiedo, in turn, telephoned Mr. Martinez, the named license and permit holder, and informed him of the events that had occurred.

Petitioner therefore contends that Respondent has violated Secs. 106.03 & 106.13 Tex. Alco.Bev. Code Ann.,² and is subject to discipline pursuant to Sec.11.61 Tex. Alco. Bev. Code

¹The evidence at the hearing was inconsistent concerning whether Respondent's employee Mr. Quiedo asked to see any identification from Ms. Gage prior to making the sale. Det. Reynerson testified at the hearing that Respondent's employee did not ask to see any I.D. during the sale. The Prosecution Report of the Dallas Police Department, prepared on 5-11-98, however, states that Mr. Quiedo did ask for identification and that Ms. Gage had a valid Texas Driver's License with her that had "UNDER 21" stamped on it (Resp. Ex 1).

²Sec. 106.13. SANCTIONS AGAINST RETAILER.

(a) Except as provided in Subsections (b) and (c) of this section, the commission or administrator may cancel or suspend for not more than 60 days a retail license or permit or a private club registration permit if it is found, on notice and hearing, that the licensee or permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor or with criminal negligence permitted a minor to violate Section 106.04 or 106.05 of this code on the licensed premises.

Sec. 106.03. SALE TO MINORS.

(a) A person commits an offense if with criminal negligence he sells an alcoholic beverage to a minor.

Ann.,³ in that the store clerk exhibited criminal negligence in selling alcoholic beverages to Ms. Gage because she was clearly a minor, a fact obvious from both her personal appearance and, had the clerk asked, from the information on her driver's license.

C. Respondent's Contentions and Evidence

Respondent testified that he was paged by Mr. Quiedo and returned the phone call to the licensed establishment. Mr. Quiedo informed Respondent of the events that had occurred, but Respondent could not remember at the hearing whether, during the phone conversation, Mr. Quiedo told him that he had checked Ms. Gage's I.D. prior to selling her the beer. Respondent further testified that he did not discipline Mr. Quiedo in any way because he felt Mr. Quiedo had just been doing his job and had not done anything deserving of discipline.

In addition, Respondent contends in his closing argument that even if the sale took place as alleged, Petitioner nonetheless failed to show that the beer sold to Ms. Gage was an "alcoholic beverage" as defined under Tex. Alco. Bev. Code Ann. Sec.1.04(1).⁴ In particular, Respondent argues that "beer" according to Tex. Alco. Bev. Code Ann. Sec.1.04(15) means "a malt beverage containing one-half of one percent or more of alcohol by volume and not more than four percent of alcohol by weight." An "alcoholic beverage," on the other hand, as defined in Sec.1.04(1), is "alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted." Respondent argues that because no evidence was presented of the alcohol content of the Coors Lite beer, Petitioner therefore failed to show that Respondent sold an "alcoholic beverage" to a minor.

D. Analysis and Recommendation

To meet its burden of proof, Petitioner must show that Respondent sold an alcoholic beverage with criminal negligence to a minor.

³Sec. 11.61. CANCELLATION OR SUSPENSION OF PERMIT.

(b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:

(2) the permittee violated a provision of this code or a rule of the commission;

⁴Sec. 1.04. DEFINITIONS. In this code:

(1) "Alcoholic beverage" means alcohol, or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted.

(15) "Beer" means a malt beverage containing one-half of one percent or more of alcohol by volume and not more than four percent of alcohol by weight, and does not include a beverage designated by label or otherwise by a name other than beer.

1. Alcoholic Beverage

The evidence shows that Respondent, through its employee, sold a six pack of Coors Light beer to Ms. Rebecca Gage. This court may, and hereby does, infer from the evidence that Coors Light beer is an alcoholic beverage as defined in Tex. Alco. Bev. Code Ann. Sec.1.04(1).⁵

2. Sale to a Minor

The evidence shows that Respondent, through its employee, sold the alcoholic beverage to a minor. Petitioner presented evidence showing that Ms. Gage was a minor at the time of the sale. Respondent presented no evidence rebutting Petitioner's evidence that Ms. Gage was 17 years old at the time she purchased the beer.

3. Criminal Negligence

The evidence shows that Respondent, through its employee, sold an alcoholic beverage with criminal negligence to a minor. Criminal negligence is defined in Sec. 6.03 of the Penal Code as a "gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."⁶ The "actor's standpoint," in the instant case,

⁵ The Court of Criminal Appeals set the standard for inferring alcohol content from circumstantial evidence in Dixon v. State, 262 S.W.2d 488 (Tex. Cr. App. 1953). The court stated:

In [appellant's] argument, appellant stresses the fact that no can was opened and no liquor was tasted or smelled in order to show that the same was intoxicating liquor. This court has long held that whisky is an intoxicating liquor, as well as beer. The record is replete with statements as to 'this whisky' and 'this beer' ... The witnesses called it beer ... many times, and witnesses also identified it as being beer.... It was called that, it was labeled that, and it was so referred to throughout the case. For instance, one witness testified, 'Well, there was approximately ... two cases of Schlitz beer, canned beer; and ten cans of Schlitz beer in the refrigerator.' ... The witness further stated that he found the beer in the refrigerator, approximately ten cans of it'

The witnesses all testified relative to the large amount of whisky, beer, gin and malt liquor found in the house, and this court well knows that whisky, beer and gin are all intoxicants. See Weeks v. State, 140 Tex.Cr.R. 246, 143 S.W.2d 956; Bell v. State, 141 Tex.Cr.R. 59, 146 S.W.2d 1004; Skinner v. State, 144 Tex.Cr.R. 21, 159 S.W.2d 878; Parrack v. State, 154 Tex.Cr.R. 532, 228 S.W.2d 859, and cases therein cited. We think it is established satisfactorily by circumstantial evidence, at least, that the contents of the bottles and cans found in the appellant's house were intoxicating liquors and contained alcohol in excess of one-half of one per cent by volume. Id 490-491 (emphasis added).

⁶Sec. 6.03(d) states as follows:

A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

is Respondent's. Respondent knows, or certainly should know, that minors attempt to purchase alcoholic beverages from licensed premises. Respondent also knows, or should know, that, as a license and permit holder in a highly regulated industry, he has an affirmative obligation to not sell alcoholic beverages to minors. It is incumbent upon the holder of such permits and licenses to take the necessary steps, and to make the necessary observations, to ensure that alcoholic beverages are not sold to minors from their licensed premises.

In the instant case, Respondent's employee observed a youthful-looking 17 year old -- wearing clothing consistent with that worn by young, teenage, high school students -- attempting to purchase a six-pack of beer. By making the sale, without conducting an adequate review of the purchaser's identification or taking note of her obvious signs of youth, Respondent exhibited criminal negligence.

IV. RECOMMENDATION

This proposal recommends that Respondent's permit and license be suspended for 10 days or that Respondent be given the option of paying a civil penalty of \$1,500 in lieu of suspension for selling an alcoholic beverage with criminal negligence to a minor.

V. PROPOSED FINDINGS OF FACT

1. Respondent holds a Wine Only Package Store Permit, #Q-188165, and a Beer Retailer's Off-Premise License, #BF-216442 for Super Mercado Mexico #4, 5535 Columbia, Dallas, Dallas County, Texas. Respondent was issued this permit and license on January 8, 1987, which have been continuously renewed.
2. All parties received notice of the hearing, all parties appeared, and no objection was made to notice.
3. On May 5, 1988, Juan Francisco Quiedo was Respondent's employee, servant or agent at Respondent's licensed premises, Super Mercado Mexico #4, 5535 Columbia, Dallas, Dallas County, Texas.

In addition, pursuant to Sec. 6.02(d) Tx Penal Code, "criminal negligence" constitutes the lowest degree of culpable mental state of those listed in this section (i.e. intentional; knowing; reckless; and criminal negligence.)

4. On that same date, Ms. Rebecca Gage entered Respondent's licensed premises with Detective C.A. Reynerson.
5. Ms. Gage was a minor, with a youthful appearance and dressed in clothing consistent with that worn by young, teenage, high school students.
6. Mr. Quiedo, as the employee, servant, or agent of Respondent, sold a six-pack of Coors Light beer to Ms. Gage.
7. Mr. Quiedo did not ask Ms. Gage for any identification prior to selling the six-pack of Coors Light beer to her.
8. An "alcoholic beverage" is defined in Sec.1.04(1)Tex. Alco. Bev. Code Ann. as a beverage containing more than one-half of one percent of alcohol by volume.
9. "Beer" is defined in Sec.1.04(5) Tex. Alco. Bev. Code Ann. as a malt beverage having one-half of one percent or more of alcohol by volume.
10. Coors Light beer is an alcoholic beverage as defined in Sec.1.04(1)Tex. Alco. Bev. Code Ann.
11. Petitioner instituted disciplinary action against Respondent's permit and license alleging that Respondent had sold alcoholic beverages to a minor with criminal negligence in violation of Sec.106.03, Tex. Alco. Bev. Code Ann., and was therefore subject to discipline pursuant to Secs.106.13 & 11.61 Tex. Alco. Bev. Code Ann.

VI.
PROPOSED CONCLUSIONS OF LAW

1. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing of this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law pursuant to Tex. Gov't. Code Ann. Ch. 2003.
2. Based on Findings of Fact Nos. 1 & 2, the Texas Alcoholic Beverage Commission has jurisdiction over this matter. Tex. Alco. Bev. Code Ann. Secs. 6.01 & 11.61.
3. Based on Findings of Fact Nos. 3, 5, 6, 8, 9, & 10, Respondent sold an alcoholic beverage to a minor. Tex. Alco. Bev. Code Ann. Secs.1.04(1) & (15).

4. Based on Findings of Fact Nos. 3, and 5 through 11, Respondent sold an alcoholic beverage to a minor with criminal negligence. Tex. Alco. Bev. Code Ann. Secs. 1.04(1) & (15); and Sec. 106.03.

Signed and entered this 22nd day of March, 1999.


for Jerry Van Hamme
Administrative Law Judge
State Office of Administrative Hearings

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