

NO. 44914-5-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON,

<p>KNOCK OUT, INC., Appellant</p> <p>v.</p> <p>STATE OF WA, LIQUOR CONTROL BOARD, Respondent</p>
<p>APPELLANT KNOCK OUT, INC'S OPENING BRIEF</p>

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TABLE OF AUTHORITIES

CASES	PAGE
<i>City of Seattle v. McCready</i> 123 Wn.2d 260, 868 P.2d 134(1994).....	4
<i>Camara v. Municipal Court</i> 387 U.S. 523, 534, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).....	4
<i>Alverado v. Washington Public Power System</i> 111 Wn.2d 424, 435-36, 759 P.2d 427 (1988).....	4
<i>State v. Melrose</i> 2 Wn.App. 824, 828-29, 470 P.2d 552 (1970).....	9
<i>State v. Singleton</i> 9 Wn.App. 327, 511 P.2d 1396 (1973).....	9
STATUTES	
RCW 70.155.090.....	6
RCW 66.08.030(1).....	6
RCW 70.155.080(1).....	7
WAC 314-21-005.....	8
RCW 10.31.100.....	10
RCW 34.05.452(1).....	12

I. IDENTITY OF APPELLANT

Knock Out, Inc., Appellant, asks this court to overturn the Superior Court decision.

II. ISSUES PRESENTED FOR REVIEW

1. Is the Washington State Liquor Control Board's (WSLCB) use of a minor investigative aide in compliance checks unlawful when not authorized by statute, rules or regulations adopted by WSLCB?

III. STATEMENT OF THE CASE

Appellant's establishment, Star Mart, is located at 2517 NE Andresen Road in Clark County, Washington. At all times relevant hereto, Appellant has been licensed to sell tobacco at the licensed premises. The premises consist of a gasoline/diesel retail pump and corresponding convenience store where refreshments are sold, *inter alia*. CP 9.

The owners of Appellant, H.S. and Gurdip Bains, own several gas station and convenience marts in Washington, which include licenses to sell tobacco products. Appellant conducts rigorous employee training in the area of age verification for sales of tobacco and alcohol products. On at least one prior occasion, Appellant successfully passed a compliance check and received a certificate from the investigating agency. Appellant

uses an electronic scanning cash register system which automatically prompts a check of customer I.D. whenever a tobacco or alcohol product is scanned. Said system requires input of the person's birthdate or employee override in order for the transaction to consummate. CP 10.

On February 3, 2010, Long Vue, employee of the Clark County Department of Public Health, and a minor investigative aide, Jenna Nelmark, conducted a compliance check at Star Mart. Ms. Nelmark's date of birth is July 27, 1992. She was seventeen (17) years of age at the time of this compliance check. CP 10.

Upon entering Star Mart, Ms. Nelmark went to the cashier on duty, Jeremy Rubbelke, and requested to purchase a pack of cigarettes. Mr. Rubbelke admits to selling a pack of cigarettes to Ms. Nelmark. CCP 10.

Long Vue issued an Administrative Violation Notice (AVN) to Star Mart on February 2, 2010, for selling tobacco to a minor under age eighteen in violation of RCW 70.155.090. This is the third AVN issued by the Board to this Appellant within the previous two years for a violation of RCW 70.155.090. CP 11.

As a result of the same compliance check, a citation was also issued to Mr. Rubbelke for selling tobacco to a minor in violation of the same statute. CP 11.

Appellant requested an administrative hearing through the Washington Office of Administrative Hearings, which was held in Vancouver, Washington on January 25, 2011. Administrative law judge Robert Krabill issued Findings and Conclusions and an Initial Order on February 3, 2011 sustaining the complaint but reducing the sanction to three months' license suspension and a fine of \$500. The state petitioned for review of the Initial Order and the ALJ reinstated the six months' suspension and \$1,000 fine by entering its Final Order sustaining the administrative complaint against Appellant on May 24, 2011. CP 9.

On March 16, 2012 held a hearing for Judicial Review of the Final Order in the above referenced case. The Honorable Judge Scott Collier upheld the Final Order. CP 38-42.

IV. ARGUMENT

A. The compliance check was unlawful.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Article I, Section 7, of Washington's Constitution precludes governmental interference in a person's private affairs. These constitutional provisions apply when the government purports to enter upon private property to ascertain whether there is

compliance with governmental regulations. *City of Seattle v. McCready*, 123 Wn.2d 260, 868 P.2d 134(1994).

Such intrusions may be conducted with a properly issued warrant supported by probable cause. *Camara v. Municipal Court*, 387 U.S. 523, 534, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967); *City of Seattle v. McCready*, *supra*, 123 Wn.2d at 273. Valid administrative searches of regulated industries may be made without a warrant under certain circumstances:

“In a long line of cases beginning with *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), the United States Supreme Court has set forth the requirements for valid administrative searches. Because routine inspections are often essential to adequate enforcement of valid government regulation, probable cause is not required. While warrants are still required for code-enforcement inspections of a home and most businesses, *Camara v. Municipal Court*, *supra*, and *See v. Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967), warrantless searches are constitutionally tolerable as an exception to the warrant requirement for administrative inspections in ‘pervasively regulated industries.’ *See Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) (liquor business); *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (firearms and munitions dealers); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (underground and surface mines); and *New York v. Burger*, 469 U.S. 325, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (automobile junkyard).” *Alverado v. Washington Public Power System*, 111 Wn.2d 424, 435-36, 759 P.2d 427 (1988).

The requirements for an administrative search without a warrant are: (1) the regulatory scheme shows a substantial government interest is at stake; (2) the warrantless search is necessary to further the regulatory

scheme; and (3) procedures in the regulatory scheme provide a constitutionally adequate substitute for a warrant. *Alverado*, 111 Wn.2d at 439. In the present case, however, the WSLCB compliance check of Star Mart was not authorized by and directly violated the regulatory scheme applicable to Appellant .

Under RCW 70.155.090, the Board is authorized to appoint enforcement officers with the power to enforce the provisions of Title 70.155, the tobacco control regulatory scheme in Washington.

By contrast in the case of alcohol, RCW 66.08 gives the Board broad powers with regard to the regulation of the sale of liquor in Washington. The statute specifically authorizes the Board to enforce the provisions of the chapter. But all of the Board's powers are subject to RCW 66.08.030(1), which requires the Board to exercise its powers through public regulations:

“(1) For the purpose of carrying into effect the provisions of this title according to their true intent or of supplying any deficiency therein, the board may make such regulations not inconsistent with the spirit of this title as are deemed necessary or advisable. All regulations so made shall be a public record and shall be filed in the office of the code reviser, and thereupon shall have the same force and effect as if incorporated in this title. Such regulations, together with a copy of this title, shall be published in pamphlets and shall be distributed as directed by the board.”

The administrative complaint against Appellant was based on the Enforcement's use of the Clark Co. Dept. of Public Health, and a minor, to enter into its store and attempt to purchase tobacco. Under RCW 70.155.080(1), a minor who attempts to purchase tobacco is guilty of a civil infraction.

A person under the age of eighteen who purchases or attempts to purchase, possesses, or obtains or attempts to obtain cigarettes or tobacco products commits a class 3 civil infraction under chapter 7.80 RCW and is subject to a fine as set out in chapter 7.80 RCW or participation in up to four hours of community restitution, or both. The court may also require participation in a smoking cessation program. This provision does not apply if a person under the age of eighteen, with parental authorization, is participating in a controlled purchase as part of a liquor control board, law enforcement, or local health department activity.

The statute is clear on its face. A minor commits a violation by attempting to purchase tobacco unless he or she is participating in a controlled purchase program authorized by the Board as part of a liquor control board, law enforcement, or local health department activity, presumably under rules adopted by the Board.

Therefore, unless Enforcement's use of a minor investigative aide in its compliance check was authorized by and conducted pursuant to rules adopted by the Board, the Enforcement officers were not acting under the supervision of the Board or pursuant to any authority granted by the

Legislature to the Board in using a minor investigative aide to conduct the compliance checks.

The only rules formerly adopted by the Board pursuant to RCW 66.44.290 are contained in WAC Chapter 314-21. But while this chapter is titled "Controlled Purchase Programs," the three regulations contained in this chapter, WAC 314-21-005, WAC 314-21-015, and WAC 314-21-025, all only address in-house programs conducted by liquor Appellants themselves, not Enforcement. WAC 314-21-005 explains:

"(1) Per RCW 66.44.290, an in-house controlled purchase program is a program that allows retail liquor Appellants to use eighteen, nineteen, or twenty year old persons to attempt to purchase alcohol for the purpose of evaluating the Appellant's training program regarding the sale of liquor to persons under twenty-one years of age.

"(2) The Appellant's controlled purchase program must meet the requirements of RCW 66.44.290, WAC 314-21-015, and 314-21-025.

(3) Per RCW 66.44.290, violations occurring under an in-house controlled purchase program may not be used for criminal prosecution or administrative action by the liquor control board."

These regulations very clearly only apply to in-house controlled purchase programs. None of these regulations address controlled purchase compliance checks conducted by Enforcement's own officers.

WAC Chapter 314-21 contains the only rules formerly adopted by the Board concerning the use of minors in controlled purchase programs.

The State nevertheless argued that the Enforcement officers have broad general regulatory authority to use a minor investigative aides as decoys in compliance checks, even checks conducted on premises posted off-limits to minors. The Board unquestionably has broad regulatory and police powers in the area of alcoholic beverage control. But even in this area, Enforcement's police powers are not completely unfettered. Enforcement must conduct itself in compliance with the statutes contained in Title 66 and the regulations, rules and policies adopted by the Board pursuant to that Title. Appellant does not contend that Enforcement lacks the authority to use minors in controlled purchase compliance checks, only that any such compliance checks must be authorized by and conducted according to rules adopted by the Board. The compliance check involving Appellant was not conducted according to any statutes contained in Title 66 or rules adopted by the Board thereunder and was, therefore, unlawful.

B. Evidence obtained from the use of the minor investigative aide must be suppressed.

Law enforcement violations of statutes in other contexts have led to suppression of evidence. For example, police officers may make arrests for certain misdemeanors, but only if the misdemeanor is committed in the officer's presence. RCW 10.31.100. If an officer makes an arrest for a misdemeanor not committed in the officer's presence, the remedy is

suppression of all evidence and statements obtained from the defendant or as a result of the arrest. *State v. Melrose*, 2 Wn.App. 824, 828-29, 470 P.2d 552 (1970). See also *State v. Green*, 150 Wn.2d 740, 744, 82 P.3d 239 (2004). Other statutes provide for impound of vehicles. If a vehicle impound is not authorized by statute, evidence seized pursuant to an impound search must also be suppressed. *State v. Singleton*, 9 Wn.App. 327, 511 P.2d 1396 (1973).

In Washington, the Fourth Amendment exclusionary rule applies in civil proceedings that are quasi-criminal in nature:

“Evidence obtained by means of an illegal search and seizure conducted in violation of the Fourth Amendment is not admissible in a civil proceeding that is quasi-criminal in nature. *E.g.*, *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) (forfeiture action). Such evidence has also been held inadmissible in cases in which the government is seeking to exact a penalty from, or in some way punish, the person against whom the evidence is sought to be admitted. *E.g.*, *Pizzarello v. United States*, 408 F.2d 579 (2nd Cir.), *cert. denied*, 396 U.S. 986, 90 S.Ct. 481, 24 L.Ed.2d 450 (1969) (tax assessment on money illegally seized by the government); *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir.1966) (discharge proceeding against an air force civilian employee); *contra Governing Board of Mountain View Sch. Dist. of Los Angeles Cy. v. Metcalf*, 36 Cal.App.3d 546, 111 Cal.Rptr. 724 (1974) (proceeding to dismiss probationary public school teacher).” *McDaniel v. City of Seattle*, 65 Wn.App. 360, 363-64, 828 P.2d 81 (1992).

There is an exception to this rule of exclusion that applies if in the civil action the defendant is attempting to use the exclusionary rule in

support of an affirmative claim against the Government. While the exclusionary rule will be applied to prevent the Government from making affirmative use of unlawfully obtained evidence in quasi-criminal civil actions, it will not be applied where the defendant affirmatively asserts claims in the quasi-criminal action, such as assault, false arrest, false imprisonment, or malicious prosecution, and then attempts to “turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.” *McDaniel*, 65 Wn.App. at 365 (citing to *Walder v. United States*, 347 U.S. 62, 65, 74 S.Ct. 354, 98 L.Ed. 503 (1954)).

The present administrative case is quasi-criminal in nature. Under the WSLCB's order, Appellant's business license will be suspended if it does not pay a monetary fine. Appellant is not asserting any affirmative claims against the Board and is not attempting to use the illegal method by which Enforcement obtained the evidence against them to their own advantage. As in the criminal action against the Appellant's employee, Appellant simply asserts that the exclusionary rule prohibits the Government from using unlawfully obtained evidence against Appellant in this quasi-criminal action.

Washington's Administrative Procedure Act governs the administrative proceeding. The rule for admissibility of evidence in the administrative proceedings is set out in RCW 34.05.452(1), as follows:

“Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.”

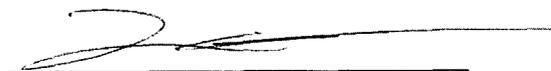
The mandate of this statute is clear. Evidence that is excludable on constitutional or statutory grounds cannot be admitted in administrative proceedings. All of the evidence gathered by Enforcement in its compliance checks of Appellant's operations is excludable on constitutional and statutory grounds. Without this evidence, Enforcement cannot show any administrative violations by Appellant.

V. CONCLUSION

Enforcement utilized a minor investigative aide in the compliance check at Appellant's store. The use of the minor investigative aide is not authorized by statute, rules or regulations adopted by the Washington State Liquor Control Board and any evidence obtained must be suppressed. Therefore, Appellant respectfully requests this court overturn the Superior Court's affirmation of the ALJ's Final Order.

DATED this 7 day of October, 2013.

RESPECTFULLY SUBMITTED:



Quinn H. Posner, WSBA #31463
Of Attorneys for Appellant Knock Out, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on this 7th day of October, 2013 the foregoing Appellant's Opening Brief with attached Certificate of Service was caused to be served via upon the following at the addresses listed below:

The undersigned caused the original to be filed with the appellate court clerk (by e-mail) and a copy to counsel for Respondent U.S. Mail at the addresses listed below:

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