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Washington State Supreme Court

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NO. 90754-4

SUPREME COURT OF THE STATE OF WASHINGTON

KNOCK OUT, INC.,

Petitioner,

v.

STATE OF WASHINGTON LIQUOR CONTROL BOARD,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Legislature has found that “while present state law prohibits the sale and distribution of tobacco to minors, youth obtain tobacco products with ease.” RCW 70.155.005. In light of that finding, the Legislature concluded that “it is imperative to effectively reduce the sale, distribution, and availability of tobacco products to minors.” *Id.* Compliance checks are integral to the Liquor Board’s ability to carry out the Legislature’s statutory directive to prohibit the sale and distribution of tobacco to minors. The Legislature expressly authorized the Liquor Board to enforce the provisions of RCW 70.155. RCW 70.155.110. Knock Out, however, seeks to dilute the Legislature’s clear statutory directives in this area. This Court should reject Knock Out’s attempt to do so. The Court of Appeals correctly concluded in this case that the Board’s explicit statutory authority applied to and permitted the compliance check using a minor investigative aide.

Moreover, no further regulations are required to implement the Board’s authority to conduct compliance checks. RCW 70.155.080(1) expressly contemplates the use of minors for controlled purchases as part of Board or health department activity. The Board is specifically authorized to work with local county health departments and enter businesses where tobacco is sold to conduct unannounced compliance

checks. *See* RCW 70.155.110. Finally, under the reasoning of *Dodge City Saloon v. Liquor Control Board*, 168 Wn. App. 388, 396-99, 288 P.3d 343 (2012), *rev. denied*, 176 Wn.2d 1009 (October 31, 2012), the use of a minor investigative aide for a compliance check of a public, licensed premises does not constitute a search.

II. COUNTER-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

If this court were to grant review, the issues before the court would be:

1. Whether the Department has sufficient statutory authority to use minor investigative aides to check compliance with tobacco sale age restrictions.
2. Whether regulations are required before the Department can lawfully use minor investigative aides.
3. Whether a compliance check can constitute an administrative search in light of the Court of Appeals' clear holding in *Dodge City Saloon*.

III. STATEMENT OF THE CASE

Knock Out operates the Star Mart convenience store in Clark County, Washington. AR 188. The Star Mart convenience store is licensed by the Board to sell tobacco products. *Id.*

Long Vue, a health educator with Clark County Public Health, conducted a tobacco compliance check at Star Mart with Jenna Nelmark, a minor investigative aide or "youth operative." AR 32-33, 41, 72-73.

The compliance check was part of a Youth Access Program funded by the Washington State Department of Health. AR 72, 75, 78-79. The Department of Health works with Board staff to monitor establishments licensed to sell tobacco products. AR 61-62. State and local health departments test compliance with laws and rules prohibiting minors from purchasing tobacco. AR 88-89; *see* RCW 26.28.080, RCW 70.155.110. They use minor investigative aides or “Youth Operatives” who attempt to purchase tobacco products. AR 61-62, 72-73.

Under Mr. Vue’s direction, the minor entered Knock Out’s business and purchased a package of Marlboro Special Blend cigarettes. Upon the clerk’s request, the minor produced her state issued identification, which identified her as being under the age of 18. AR-32-34. The clerk allowed her to purchase the cigarettes. *Id.* Clark County Public Health forwarded the evidence of Knock Out’s sale to the Board. AR 75. The Board charged Knock Out with an administrative violation of selling and/or allowing to be sold tobacco products to a person under 18 years of age, contrary to RCW 26.28.080 and subject to penalties under RCW 70.155.100(3) and (4). AR 152, 242-45.

The Office of Administrative Hearings then conducted an adjudicative hearing. AR 19, 25. At the hearing, Knock Out’s employee, Jeremy Rubbelke, admitted that he sold a package of cigarettes to the

minor, who was 17 years old on the day of the sale. AR 109, 112-13. The Administrative Law Judge issued an Amended Initial Order with findings of fact and conclusions of law, affirming the violation but reducing the monetary penalty from one thousand dollars (\$1000) to five hundred dollars (\$500) and reducing the suspension time from six months to three months. AR 267.

Board staff petitioned the Board to uphold the conclusion that an illegal sale occurred, and asked the Board to reinstate the full standard monetary penalty of \$1000 and a six-month suspension. AR 276-81. The Board corrected some of the Initial Order's findings of fact and conclusions of law, adopted the decision that an illegal sale occurred, and reinstated the full standard penalty for a third violation of selling tobacco products to a minor. AR 282-86.

Knock Out timely filed a petition for judicial relief in Clark County Superior Court, which affirmed the Board's Final Order. CP 38-42. Knock Out appealed to the Court of Appeals, which affirmed the Board's Final Order in an unpublished opinion. *Knock Out, Inc. v. Liquor Control Board*, 182 Wn.App. 1040, 2014 WL 3743405 (2014). As the Court of Appeals correctly noted, because Knock Out did not challenge any of the agency's factual findings from the administrative

hearing, those findings are verities on appeal. *Knock Out*, 182 Wn.App. 1040, 1042 (2014).

IV. ARGUMENT WHY REVIEW SHOULD NOT BE GRANTED

Knock Out contends that it is entitled to review based on RAP 13.4(b)(3) and (4). PFR at 4. Knock Out, however, fails to show that a significant question of law under either the Washington or United States Constitution is involved in this case. Nor does Knock Out demonstrate that an issue of substantial public interest should be determined by this Court. The Court of Appeals correctly applied existing statutory law and properly concluded that the Board's statutory and regulatory authority permitted the tobacco compliance check that established that Knock Out violated the prohibition against the sale of tobacco products to minors.

A. The Compliance Check Of Knock Out's Convenience Store Was Authorized By Statute, And There Is No Issue of Sufficient Importance To Warrant This Court's Review.

State law restricts the sale of tobacco to minors under the age of 18. RCW 70.155.005; .010. In enacting this restriction, the Legislature stated that "while present state law prohibits the sale and distribution of tobacco to minors, youth obtain tobacco products with ease. Availability and lack of enforcement put tobacco products in the hands of youth."

RCW 70.155.005. The purpose of the chapter is “to effectively reduce the sale, distribution, and availability of tobacco products to minors.” *Id.*

The Legislature expressly authorized the Board to enforce the provisions of RCW 70.155. RCW 70.155.110. The Board and its authorized agents or employees have “full power and authority to enter any place of business where tobacco products are sold for the purpose of enforcing the provisions of this chapter.” RCW 70.155.110(2). The statute permits the Board to work with county health departments “to conduct random, unannounced, inspections to assure compliance.” RCW 70.155.110(4). The Board may then impose monetary fines and suspend a retailer’s tobacco license for selling tobacco to minors. RCW 70.155.100; .110. The law specifically excepts minors from the prohibition against them purchasing or possessing cigarettes or tobacco for “a person under the age of eighteen, with parental authorization, [who] is participating in a controlled purchase as part of a liquor control board, law enforcement, or local health department activity.” RCW 70.155.080(1).

The Court of Appeals correctly concluded that the Board’s explicit statutory authority applied to and permitted the compliance check in this case using minor investigative aides. No further regulations are required to implement that authority or to conduct such checks. RCW 70.155.080(1) expressly contemplates the use of minors for

controlled purchases as part of Board or health department activity. The Board is specifically authorized to work with local county health departments and enter businesses where tobacco is sold to conduct unannounced compliance checks. RCW 70.155.110. The Court of Appeals correctly rejected Knock Out's contention that the Board must first adopt rules allowing the use of minors for compliance checks.

Further, Knock Out's petition asserts that "[a]s the Court of Appeals conceded, 'Knock Out is correct that chapter 70.155 RCW [does] not explicitly state that the Board may use minors to conduct tobacco compliance checks.'" PFR at 7. Although Knock Out correctly quoted the Court of Appeals sentence above, it failed to quote the Court's ruling that immediately followed the above sentence:

Knock Out is correct that chapter 70.155 RCW does not explicitly state that the Board may use minors to conduct tobacco compliance checks. This authority is nevertheless clear from reading the statute as a whole. RCW 70.155.080(1) expressly contemplates the use of minors 'in a controlled purchase as part of a liquor control board...or local health department activity.' RCW 70.155.110 authorized the Board to work with local county health departments and enter businesses where tobacco is sold to conduct announced compliance checks. Reading these provisions together demonstrates that the Board may use minor investigative aides in tobacco compliance checks. To read the chapter as Knock Out suggests would contravene the plain language and purpose of the chapter.

Appendix A at 5.

Both the Court of Appeals and the Superior Court correctly applied existing law and rejected Knock Out's strained and unpersuasive interpretation of the Board's existing statutory authority. The compliance check conducted in this case was fully authorized by the Board's existing statutory authority. This issue is not one of substantial public importance warranting this Court's review.

B. Compliance Checks Are Not Searches, There Was No Basis To Suppress Evidence Of The Check, And This Case Does Not Raise A Constitutional Question Warranting This Court's Review

Knock Out contends that the Fourth Amendment and Article I, Section 7 of the Washington Constitution are implicated because the compliance check by the minor investigative aide constituted a search. Knock Out is incorrect for the reasons stated in the Court of Appeals' decision in *Dodge City Saloon*, which rejected a similar contention. A compliance check in which an adult and a minor investigative aide enter the business in the way any other member of the public does is not a search. The act of purchasing merchandise as the owner has invited the public to do during normal business hours, requires no warrant. There is no search and no constitutional issue in need of resolution. *Dodge City Saloon* disposes of Knock Out's arguments and thus, this case raises no unresolved constitutional issues.

In *Dodge City Saloon*, the Court of Appeals held that a liquor licensee has no privacy interest in the area of its business which is open to the public, and the Court rejected the notion that a minor conducted a warrantless search when he purchased alcohol in that public area. *Dodge City Saloon*, 168 Wn. App. at 396-99.

Here, Knock Out did not challenge the factual findings established at the administrative hearing, and the undisputed facts fail to support Knock Out's argument for suppression of evidence related to the compliance check. Knock Out runs a business that it holds open to the public. AR 122-25. The minor entered and remained in the public portion of Knock Out's premises. AR 33. A Knock Out employee admittedly sold the minor a package of Marlboro Special Blend cigarettes while the minor was in the public portion of the store. AR 33-34. The minor never went outside the public areas of the business. *Id.* Knock Out's expectation of privacy does not extend to the area that Knock Out voluntarily exposed to the public. Therefore, no administrative search occurred.

In addition, Knock Out accepted its license with the understanding that the premises would be open to inspection by local law enforcement authorities, local county public health departments, and Board staff. RCW 70.155.110(4). It cannot now credibly argue that it was unaware

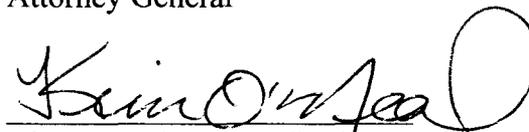
that its heavily regulated premises would not be visited by government officers or other law enforcement during its business hours. As the Court of Appeals found in *Dodge City Saloon*, the protections of the Fourth Amendment and Article I, section 7 of the Washington Constitution are not applicable under these circumstances. Because Knock Out cannot establish either a constitutional or a statutory violation, there is no valid legal justification for suppressing the evidence in this case.

V. CONCLUSION

The lower courts correctly interpreted and applied the Board's existing statutory authority to conclude that the compliance check which established Knock Out's violation was lawfully conducted. Knock Out's Petition fails to meet the high threshold for review under RAP 13.4(b)(3) or (4). The Board respectfully requests that this Court deny the Petition.

RESPECTFULLY SUBMITTED this 16th day of December, 2014.

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Attorneys for Respondent

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SUPREME COURT OF THE STATE OF WASHINGTON

KNOCK OUT, INC., d/b/a STAR
MART,

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DECLARATION OF
SERVICE

I, Jeanne Roth, make the following declaration:

1. I am over the age of 18, a resident of Pierce County, and not a party to the above action.

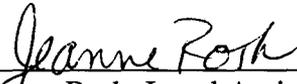
2. On December 17, 2014, I caused to be served a true and correct copy of the Answer to Petition for Review and this Declaration of

Service via U.S. Mail:

Steven E. Turner
Steven Turner Law PLLC
1409 Franklin St, Ste 216
Vancouver, WA 98660

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of December, 2014, at Olympia,
Washington.



Jeanne Roth, Legal Assistant