

**UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD**

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
	:	
	:	NO. 2699
MERCHANT MARINER LICENSE	:	
&	:	
MERCHANT MARINER DOCUMENT	:	
	:	
	:	
<u>Issued to: EARL WAYNE MAXWELL</u>	:	

APPEARANCES

For the Government:
Gary F. Ball, Esq.
CWO Carol Cruise, USCG

For the Respondent:
Walter J. LeBlanc, Jr., Esq.

Administrative Law Judge: Bruce Tucker Smith

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter “D&O”) dated April 5, 2011, an Administrative Law Judge (hereinafter “ALJ”) of the United States Coast Guard revoked the Merchant Mariner credentials of Mr. Earl Wayne Maxwell (hereinafter “Respondent”) upon finding proved a charge of conviction of a dangerous drug law violation. The specification found proved alleged that on July 29, 2010, Respondent “was convicted of Use/Possession of Paraphernalia by the District Court of Mobile County, Alabama.”

PROCEDURAL HISTORY

On September 23, 2010, the Coast Guard filed an original Complaint against Respondent, which was later amended. [D&O at 1] On November 30, 2010, after receiving an extension of time, Respondent filed an Answer to the original Complaint wherein he admitted all jurisdictional allegations but denied all factual allegations. [*Id.*]

The Coast Guard filed its first Amended Complaint in the matter on December 20, 2010. [D&O at 1] On January 7, 2011, the Coast Guard filed a second Amended Complaint. [D&O at 2] The factual allegations of the second Amended Complaint alleged as follows:

1. On 07/29/2010, the Respondent, Earl W. Maxwell . . . was convicted of Use/Possession of Drug Paraphernalia by the District Court of Mobile County, Alabama.
2. Use/Possession of Drug Paraphernalia is a misdemeanor under the Code of the State of Alabama, Title 13A; Criminal Code Section 13A-12-260.
3. Code of the State of Alabama, Title 13A; Criminal Code Section 13A-12-260 is a Dangerous Drug Law of the State of Alabama.
4. The Respondent, Earl W. Maxwell was convicted within the last 10 years of violating a Dangerous Drug Law of a State, as described by Title 46 U.S. Code Section 7704(b).

The hearing in the matter convened on March 15, 2011, in Mobile, Alabama. [D&O at 2] The Coast Guard introduced the testimony of three witnesses during its case-in-chief and entered one contested exhibit into the record. Respondent introduced the testimony of one witness and did not enter any exhibits into the record. [D&O at 3] Six other exhibits were entered into the record through stipulation of the parties. The ALJ entered one exhibit into the record.

On April 13, 2011, Respondent filed a Notice of Appeal in the matter. He perfected his appeal by filing an Appellate Brief on June 2, 2011. The Coast Guard filed a Reply Brief on July 7, 2011. This appeal is properly before me.

FACTS

At all times relevant herein, Respondent was the holder of the Coast Guard-issued Merchant Mariner credentials at issue in this proceeding. [D&O at 3]

On January 12, 2010, Respondent was arrested by a State of Alabama Alcoholic Beverage Control Board law enforcement officer for unlawful possession of a controlled substance in violation of the Code of Alabama § 13A-12-212. [D&O at 3-4] Respondent was found to possess three rocks of crack cocaine. [D&O at 4] On July 29, 2010, Respondent pled guilty to an amended charge of unlawful use/possession of drug paraphernalia. [D&O at 4; CG Exhibit (hereinafter “Ex.”) 1 at 3-4] As a result of his guilty plea, Respondent received a six-month suspended sentence on one year of probation and he was ordered to pay court costs. [D&O at 4; CG Ex. 1 at 2-3]

Under the Criminal Code of the State of Alabama § 13A-12-260, unlawful use/possession of drug paraphernalia is a Class A misdemeanor. [D&O at 4; CG Ex. 6; Stipulated Fact] The charge of unlawful use/possession of drug paraphernalia is a dangerous drug law of the State of Alabama. [D&O at 4; Stipulated fact]

On September 21, 2010, Respondent filed a motion to withdraw his guilty plea in accordance with Alabama Rules of Criminal Procedure Rule 14.4. [D&O at 4; CG Ex. 1 at 6-7] On September 27, 2010, the court ordered that the amended charge of unlawful use/possession of drug paraphernalia would be dismissed subject to four conditions: 1) that Respondent pay court costs; 2) that Respondent stay current with restitution payments of \$200.00 per month in another state court action; 3) that Respondent not be arrested for another crime in the following five months; and 4) that Respondent appear before the court on February 24, 2011, to verify compliance with the foregoing conditions. [D&O at 4; CG Ex. 1 at 11; Stipulated fact]

On February 17, 2011, Respondent’s guilty plea to unlawful use of drug paraphernalia was vacated and withdrawn by the court. [D&O at 4; CG Ex. 2; Stipulated fact] On the same

date, the charge of unlawful use/possession of drug paraphernalia was dismissed by the court, with prejudice. [*Id.*]

BASES OF APPEAL

Respondent appeals the ALJ's D&O finding the charge of conviction of a dangerous drug law violation proved. Respondent raises the following bases of appeal:

- I. *Critical findings of fact were not supported by substantial evidence;*
- II. *Critical conclusions of law are not in accord with applicable Alabama law, precedent, and public policy; and*
- III. *The ALJ abused his discretion in not giving weight to attorney Steven Sciple's uncontradicted testimony.*

OPINION

The essence of Respondent's appeal is that the ALJ erred in his interpretation of Alabama criminal law and procedure.

It is well settled in these proceedings that the decision of the ALJ will only be reversed if it is arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See, e.g., Appeal Decision 2683 (DeSIMONE) (citing Appeal Decision 2570 (HARRIS), aff'd NTSB Order No. EM-182 (1966)).*

The key issue presented is whether Respondent has been convicted of a dangerous drug law of a state. 46 U.S.C. § 7704(b) provides:

If it is shown at a hearing . . . that a holder of a license, certificate of registry, or merchant mariner's document . . . within 10 years before the beginning of the proceedings has been convicted of violating a dangerous drug law of . . . a state, the license, certificate, or document shall be suspended or revoked.

Under the heading "Use of judgments of conviction," 33 C.F.R. § 20.1307(d) provides:

If the respondent participates in the scheme of a State for the expungement of convictions, and if he or she pleads *guilty* or *no contest* or, by order of the trial court, has to attend classes, contribute time or money, receive treatment, submit to any manner of probation or supervision, or forgo appeal of the finding of the trial court, the Coast Guard regards him or her, for the purposes of 46 U.S.C. 7703 or 7704, as having received a conviction. The Coast Guard does not consider the conviction expunged without proof that the expungement is due to the conviction's having been in error.

In this case, Respondent does not deny that he was convicted of a dangerous drug law violation of a State. However, Respondent contends that because the conviction was later vacated by the trial court, he has been convicted of nothing.

Before the ALJ, Respondent argued that his criminal plea was withdrawn and vacated due to "manifest injustice." The record shows that Respondent sought withdrawal of his guilty plea because he had believed that he would be able to keep his Captain's license, but later learned that the Coast Guard would take action against his Captain's license based on the guilty plea. [CG Ex. 1 at 6] The ALJ discounted the withdrawal and vacating of Respondent's guilty plea because Respondent sought withdrawal of the plea only to avoid the potential impact a criminal conviction would have on his mariner credentials, without any indication of legal error in any of the Alabama criminal court pleadings or court orders. [D&O at 12-13] Even though the conviction was later vacated by the court, in the absence of a showing that the vacation was due to the conviction having been in error, the ALJ implicitly found that Respondent had received a conviction for Coast Guard purposes.

On appeal, Respondent contests the ALJ's Findings of Fact 12 and 13, which state:

12. No Order emanating from the District Court . . . pertaining to Respondent references any legal error or "manifest injustice" in response to Respondent's Motion for Withdrawal of his guilty plea to the charge of possession of drug paraphernalia.

13. The sole basis for the Order issued by the District Court . . . on February 17, 2011 in response to Respondent's Motion to Withdraw his plea of guilty to the charge of possession of drug paraphernalia, was a concern over Respondent's potential loss of his Coast Guard-issued mariners credentials – and not because of any legal error or manifest injustice.

[D&O at 4-5]

Respondent also contests Ultimate Finding/Conclusion 11, which states:

11. Respondent's Alabama criminal court conviction was not expunged, vacated, withdrawn, rendered a nullity or set aside because of either a legal error or "manifest injustice."

[D&O at 14]

Respondent's defense attorney at the Alabama trial, Steven Sciple, testified before the ALJ that after Respondent pleaded guilty, he later reported to Mr. Sciple that the Coast Guard was initiating proceedings to revoke his license. [R. at 62] Mr. Sciple sought to withdraw the guilty plea under Rule 14.4 based on manifest injustice. [R. at 64-65; *see* Alabama Rule of Criminal Procedure 14.4(e), ALJ Ex. I at 2] Mr. Sciple testified before the ALJ that there were two flaws providing legal basis for a motion to withdraw the plea. [R. at 65] However, he did not plead those legal flaws in the motion he submitted; the basis was manifest injustice and the potential loss of Respondent's Captain's license. [R. at 65-67; *see* CG Ex. 1 at 6] The court orders in response to the motion, ultimately granting the motion and dismissing the charge, do not add any information as to their basis. [CG Ex. 1 at 11; CG Ex. 2]

Respondent contends that, under Alabama law, the two legal flaws identified by Mr. Sciple in his testimony in this proceeding would have rendered Respondent's conviction subject to mandatory reversal by the Alabama Supreme Court for legal error, and that it was error for the ALJ to ignore the testimony presented and controlling case law that established Respondent's conviction was an absolute nullity. I reject his contentions. As explained more fully below, whether there may have been a basis under Alabama law to contest the initial plea of guilty is irrelevant where Respondent did not plead it at the time and the Alabama court did not rely on it in the decision to vacate the conviction. There was no error in the ALJ's findings and conclusion, based on Mr. Sciple's motion and the court orders, to the effect that the final disposition of Respondent's case was not based on a legal error. Further, Alabama law as to

whether Respondent has a valid conviction today following the action of the Alabama court is not controlling in this proceeding. Whether Respondent has received a conviction for purposes of this proceeding is a matter of the interpretation of 33 C.F.R. § 20.1307, and whether or not it is an absolute nullity for other purposes under Alabama law is irrelevant.

The ALJ correctly concluded that Respondent has been convicted of a dangerous drug law of a state pursuant to 33 C.F.R. § 20.1307, notwithstanding the vacation of Respondent's conviction of use/possession of drug paraphernalia based on his motion to withdraw his guilty plea.

In its Reply Brief, the Coast Guard argues that this case is similar to Appeal Decision 2629 (RAPOZA), and that because Respondent had to meet specific conditions -- he had to stay out of trouble, pay court costs and continue to pay restitution in another pending state matter -- before his guilty plea would be vacated and the charge would be dismissed, the case constitutes a conviction for Coast Guard purposes.

In Appeal Decision 2629 (RAPOZA), the respondent was arrested for possession of cocaine. The respondent was placed in a "drug court program" designed to allow a defendant to avoid prosecution and conviction, provided that he or she complies with the conditions of the program. Under this program, the respondent was required to undergo treatment for drug use, pay a \$100 fee, and be placed under supervision, which included periodic random urinalysis testing. The respondent did not enter a plea of any kind, nor was there a determination of guilt by the court. Under 33 C.F.R. § 20.1307(d), a person need not have entered a plea, much less be convicted, for a conviction to exist for Coast Guard purposes. Under that regulation, a respondent is viewed as having received a conviction if a court orders him to attend classes, contribute time or money, receive treatment, submit to probation or supervision, or forgo appeal of the trial court's finding. Irrespective of the fact that there was no conviction under state law in the *Rapoza* case, I found that the facts of the respondent's participation in the program met the terms of 33 C.F.R. § 20.1307(d), and hence the respondent had received a conviction for purposes of 46 U.S.C. § 7704(b).

Indeed, this case is much like *Rapoza*. Here, although Respondent's guilty plea was withdrawn, the trial court had previously ordered Respondent to pay court costs, stay out of trouble, and continue to make restitution payments in a separate court action in order to achieve withdrawal of the guilty plea.

In *Rapoza*, the respondent was in a "drug court program." In this case, there is nothing to indicate that withdrawal of Respondent's guilty plea and dismissal of the charge was part of any established program. This raises the question of whether the ALJ correctly found that the conviction survived the dismissal of the charge for purposes of 33 C.F.R. § 20.1307, which refers to "the scheme of a State for the expungement of convictions." The regulatory history of 33 C.F.R. § 20.1307 offers some guidance. In response to a comment suggesting that 33 C.F.R. Part 20 define the word "conviction," the drafters of the regulation stated, "We believe that § 20.1307 establishes a definition of the term 'conviction' that both is adequate and is consistent with the definition in 46 CFR 10.103."¹ 64 Fed. Reg. 28,060 (May 24, 1999).

Whereas 33 C.F.R. § 20.1307 provides a rule for determining whether a mariner has been convicted for purposes of a suspension and revocation proceeding, 46 C.F.R. § 10.107 sets forth what constitutes a conviction for the purpose of 46 C.F.R. § 10.211, which addresses the eligibility of an applicant for a Merchant Mariner credential.

46 C.F.R. § 10.107 provides, in relevant part:

If an applicant pleads guilty or no contest, is granted deferred adjudication, or is required by the court to attend classes, make contributions of time or money, receive treatment, submit to any manner of probation or supervision, or forgo appeal of a trial court's conviction, then the Coast Guard will consider the applicant to have received a conviction. A later expungement of the conviction will not negate a conviction unless the Coast Guard is satisfied that the expungement is based upon a showing that the court's earlier conviction was in error.

¹At the time, definitions for 46 C.F.R. Part 10, including the definition of "conviction," were found at 46 C.F.R. § 10.103, as is stated in the quotation. In 2009, in the course of comprehensive changes to 46 C.F.R. Part 10, the definitions were moved to 46 C.F.R. § 10.107. The substance of the definition of "conviction" remained the same. See 74 Fed. Reg. 11,196, 11,217 (Mar. 16, 2009).

33 C.F.R. § 20.1307 and what is now 46 C.F.R. § 10.107 substantially mirror each other, with minor exceptions. The regulatory history set forth above strongly suggests they should be read consistently. 33 C.F.R. § 20.1307 refers to “the scheme of a State for the expungement of convictions;” 46 C.F.R. § 10.107 does not. 33 C.F.R. § 20.1307 provides, “The Coast Guard does not consider the conviction expunged without proof that the expungement is due to the conviction’s having been in error.” 46 C.F.R. § 10.107, addressing the same issue, provides, “A later expungement of the conviction will not negate a conviction unless the Coast Guard is satisfied that the expungement is based upon a showing that the court’s earlier conviction was in error.”

The import of both regulations is that once a mariner is brought under the criminal jurisdiction of a court, any of the enumerated actions – deferred adjudication or a court requirement to attend classes, make contributions of time or money, receive treatment, submit to probation or supervision, or forgo appeal, or subsequent action by the court to expunge a conviction – is immaterial to the Coast Guard’s determination that the person has been convicted of a dangerous drug offense. I conclude that “the scheme of a State for the expungement of convictions” is descriptive and refers generally to the broad authority of a court to vacate and expunge convictions. I further conclude that the intent of both provisions is that expungement does not negate a conviction unless the impetus for the expungement was the court’s conclusion that the conviction was in error. There is no evidence that was the case here.

As noted above, under 33 C.F.R. § 20.1307(d), a person need not have entered a plea, much less be convicted, for a conviction to exist for Coast Guard purposes; a respondent is viewed as having received a conviction if a court orders him to attend classes, contribute time or money, receive treatment, submit to probation or supervision, or forgo appeal of the trial court’s finding. In this case, although Respondent’s guilty plea was withdrawn and no conviction remained, he was required to meet several conditions ordered by the court – conditions that are among those listed in the regulation. Having been charged with violating a dangerous drug law of Alabama, and having been required to meet court-ordered conditions before the case would be dismissed, he could only escape the sanction against his Merchant Mariner credentials if

dismissal of the State charge had been due to the conviction having been in error. The ALJ found otherwise, and did not err in so finding.

CONCLUSION

The ALJ's D&O was not arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. The ALJ's decision to revoke Respondent's Merchant Mariner credentials was not an abuse of discretion.

ORDER

The ALJ's D&O dated April 5, 2011, at Mobile, Alabama, is **AFFIRMED**.


VICE ADMIRAL

Signed at Washington, D.C. this 14 day of JUNE, 2012.