

In the Matter of Merchant Mariner's Document No. Z-516632
Issued to: MITCHELL ALLEN

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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MITCHELL ALLEN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

On 25 October, 1951, an Examiner of the United States Coast Guard at New Orleans, Louisiana, revoked Merchant Mariner's Document No. Z-516632 issued to Mitchell Allen upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as messman on board the American SS JUNIOR under authority of the document above described, on or about 13 February, 1948, while said vessel was in the port of New Orleans, Louisiana, he wrongfully had in his possession 174 marijuana cigarettes and one ounce 196 grains of bulk marijuana.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by an attorney of his own selection and he entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence the testimony of five United States Customs employees and that of Joseph Salibba, an employee of the United Fruit Company. The parties stipulated, without admitting the truth of the statement, to include in the record a sworn statement made by Appellant's roommate, J. W. Stovall, before two Customs Agents.

After the Investigating Officer had rested his case, counsel moved to dismiss the charge and specification on the ground that due to the inability to produce the alleged marijuana and the hiatus in the chain of evidence connecting Appellant with the substance determined by analysis to be marijuana, there is a failure of proof that the substance found in Appellant's possession was marijuana. The Examiner found that there was substantial evidence to prove the latter fact and he denied the motion.

In defense, Appellant offered in evidence the testimony of two character witnesses, two letters relative to his good character, and his own sworn testimony.

At the conclusion of the hearing, having heard the arguments

of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specification. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-516632 and all other licenses, certificates of service and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that the conclusions of the Examiner are contrary to the law and evidence in the case; the Examiner erroneously concluded that parts of Appellant's testimony are irreconcilable, by accepting the veracity of the stipulated testimony of Stovall and using his testimony as a norm; and the Examiner found Appellant to be an incredible witness on the basis of his oversight of a minor arrest in 1946 despite testimony by credible witnesses as to Appellant's good reputation for truthfulness, honesty and law observance.

APPEARANCES: John D. Schilleci, Esquire, of New Orleans, Louisiana, of Counsel.

FINDINGS OF FACT

On 13 February, 1948, Appellant was serving as messman on board the American SS JUNIOR and acting under authority of his Merchant Mariner's Document No. Z-516632 while the ship was in the port of New Orleans, Louisiana.

At about 1840 on this date, Appellant departed from the vessel to go ashore. Port Patrol Officer Helffrich was stationed on the wharf at Erato Street to search persons as they left the ship. Officer Helffrich stopped Appellant as he walked off the gangplank and searched him. A package wrapped in newspaper pages and containing cigarettes was found in Appellant's left suit coat pocket. Officer Helffrich suspected that the cigarettes contained marijuana, so he took Appellant upstairs to the passengers' baggage platform and searched him further in the presence of U. S. Customs Inspector LaCroix and Joseph Salibba, a United Fruit Company employee.

Before the second search was undertaken, Mr. Salibba saw Appellant attempting to take something out of one of his overcoat pockets and hide it under the bench on which he was sitting. Mr. Salibba called this to the attention of Officer Helffrich who was talking with Inspector LaCroix.

A total of four similarly wrapped packages were found in Appellant's suit coat and overcoat pockets. Three of the packages contained cigarettes which had the paper twisted at the ends. In the fourth package, there were six cartouches containing quantities of a loose tobacco-like greenish substance. Inspector LaCroix broke open one of the cigarettes and confirmed Officer Helffrich's impression that it contained marijuana.

Appellant was then taken to the Customhouse office and U. S. Customs Agents McLendon and Whitney were called in to prepare a report of the case. While at the office, Officer Helffrich counted 174 cigarettes in the three packages and he turned over all four packages to Agent McLendon when he arrived at about 2130. Both of the agents thought that the substance contained

in the cigarettes and in bulk form was marijuana. The packages were opened and laid on a table in the office. Appellant identified the packages as the same ones which had been found on his person but he stated that another messman named Stovall had asked Appellant to take the packages ashore and he had not known what was in the packages. A statement was taken from Stovall and he denied having given Appellant any packages to take ashore for him.

Appellant was imprisoned overnight and the next day, Saturday February 14th, a complaint against Appellant was filed with the United States Commissioner. It does not appear that Appellant was ever arraigned on this charge or that any action was taken against him by the U. S. Attorney. The reason for this does not appear in the record.

Agent McLendon locked the packages in a safe and personally turned them over to U. S. Customs Chemist Peterson on the morning of 16 February, 1948, which was a Monday. The seizure given to Chemist Peterson consisted of 174 cigarettes and six cartouches of a bulk substance. The analysis by Chemist Peterson disclosed that there was marijuana in the cigarettes and also in the six cartouches. After the nature of the substance was established by microscopic examination and two types of chemical tests, Chemist Peterson prepared a Laboratory Report before sending the marijuana to the Collector of Customs for disposition. Agent McLendon received a copy of this report which identified the analyzed marijuana as that which had been seized from Appellant.

Appellant is forty-four years of age and is married. There is no prior record of disciplinary action having been taken against him during approximately seven years at sea.

OPINION

Appellant contends that it was not established by the evidence that the substance analyzed by Chemist Peterson was the same as that which was found in Appellant's possession and, therefore, the necessary alternative was to produce the evidence at the hearing in order to prove that the alleged substance was marijuana.

I do not agree with this proposition since it was definitely proven that the substance found in Appellant's coat pockets was marijuana. As stated by the Examiner, there was presented by the Investigating Officer an unbroken chain of evidence tracing the substance from the time it was seized until it was analyzed. In addition, four U. S. Customs employees, who were experienced in narcotics traffic and familiar with the general characteristics of marijuana, testified that the substance was marijuana. This identification was made by Officer Helffrich and Inspector LaCroix at the time of the seizure; and by the two Customs Agents at a time when Appellant admitted that the packages in the Customhouse were the same packages he had had in his possession. The fact that the seized and the analyzed substances were identical is further established by the testimony of Officer Helffrich that he counted 174 cigarettes; the testimony of Agent McLendon that one of the packages contained six or eight cartouches; and the testimony of Chemist Peterson that the sample given to him and identified as the seizure from Appellant consisted of 174 cigarettes and six cartouches. Due to these facts, it cannot be disputed that there was much more than the required degree of substantial evidence to prove that the substance on Appellant's person was marijuana as

alleged in the specification. In the presence of this proof, I find no merit in Appellant's demand for the production of the evidence in this administrative proceeding.

Next, Appellant states that the Examiner erroneously rejected Appellant's testimony in favor of the stipulated testimony of Stovall despite testimony by credible witnesses as to Appellant's good reputation for truthfulness and honesty.

Appellant attempted to overcome the prima facie case by denying that he had any knowledge that the packages contained marijuana. He testified that the marijuana was in packages which Stovall had asked Appellant to take ashore when Stovall was packing and said he did not have enough room to pack the packages which he gave to Appellant to carry; and that Appellant thought the packages contained sport socks and souvenirs which Stovall had purchased in Seattle because the packages were wrapped in the same paper (that "looked like newspaper") in which the purchases had been wrapped.

The Examiner gave several plausible reasons for not accepting Appellant's testimony as credible evidence. Consequently, the Examiner stated that the testimony of Appellant was not sufficient to rebut the prima facie case. His decision was based not so much upon Stovall's denial of having given the packages to Appellant, as upon the self-contradictions within Appellant's testimony and the conflicts between the latter testimony and that of the Investigating Officer's witnesses. The most significant of these points seems to be the weakness of Appellant's testimony wherein he stated that he thought the packages contained souvenirs (purchased at least several days earlier) since they were wrapped in the same paper, and then later testifying that he could not identify the packages at the Customhouse since they had been taken away from him and he had not seen them for about three hours. This would indicate a very convenient or flexible memory except that the latter statement was not in agreement with Appellant's identification of the packages which occurred at the time he was taken to the Customhouse. It also seems peculiar that souvenirs would be wrapped in newspapers at the place where they were purchased in Seattle. Besides the factors mentioned by the Examiner, Appellant's testimony differed in several respects from his sworn statement which was taken at the Customhouse on 13 February, 1948. Evidence of a reputation for honesty and truthfulness cannot reconcile these differences.

The hearing Examiner who saw the witnesses has considerable authority in estimating their credibility; and the Examiner's findings of fact, based on his disbelief of Appellant's testimony, may not be disregarded upon appeal unless it is revealed in the record that the Examiner used irrational tests of credibility. In view of the many and perfectly logical grounds upon which the Examiner rejected Appellant's testimony, I see no merit in the contention that Appellant's testimony successfully established his lack of knowledge that the substance in his possession was marijuana.

The failure to take criminal action against Appellant does not deserve serious consideration since no evidence has been presented to show what disposition of the case was made by the U. S. Attorney's office. Even a dismissal on the merits would not be conclusive in this administrative proceeding which requires substantial evidence of proof rather than proof beyond a reasonable doubt as in criminal prosecutions.

CONCLUSION

Appellant's testimony having been rejected, the prima facie case prevails. Despite Appellant's prior clear record, the order will be sustained in accordance with the Coast Guard policy of revocation for all narcotics offenses which have been proven by substantial evidence.

ORDER

The order of the Examiner dated 25 October, 1951, is AFFIRMED.

A. C. Richmond
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 3rd day of September, 1952.