

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-715910 AND ALL
OTHER SEAMAN'S DOCUMENTS
Issued to: William E. PACKARD

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1830

William E. PACKARD

This appeal had been taken in accordance with Title 46 United States Code 239b and Title 46 Code of Federal Regulations 137.30-1.

By order date 29 December 1969, an Examiner of the United State Coast Guard at Long Beach, Cal., revoked Appellant's seaman's documents upon finding him guilty of the charge of "conviction for a narcotic drug law violation." The specification found proved alleges that on or about 23 September 1969, Appellant was "convicted by the U.S. Magistrate, Southern District of California, of having in [his] possession a quantity of marijuana (narcotic paraphernalia) in violation of 18 U.S.C. 13 (violation of Section 11555 of Health and Safety Code of State of California)."

At the hearing, Appellant was represented by professional counsel. A plea of not guilty was entered to the charge and specification.

The Investigating Officer introduced in evidence certified copies of a complaint and a judgement entered in the United States District Court for the Southern District of California by the U.S. Magistrate for that District.

In defense, Appellant offered no evidence.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 2 January 1970. Appeal was timely filed on 27 January 1970 and perfected on 2 June 1970.

FINDINGS OF FACT

On 23 September 1969, Appellant was convicted, on his plea of guilty before a Federal Magistrate in the U.S. District Court for the Southern District of California, of a violation of Section

11555 of the Health and Safety Code of the State of California by having in his possession marijuana (narcotic paraphernalia).

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner.

Appellant makes three points on appeal. In his words they are as follows:

- (1) THERE WAS NO EVIDENCE THAT APPELLANT WAS CONVICTED OF A NARCOTIC DRUG LAW VIOLATION.
- (2) THE COAST GUARD REGULATIONS CONCERNING REVOCATION OF MERCHANT MARINER DOCUMENTS FOR POSSESSION OF MARIJUANA IS INVALID AS AN EXCESS OF THE AUTHORITY GRANTED TO THE COAST GUARD UNDER TITLE 46 U.S.C. SECTION 239 (b).
- (3) THE COAST GUARD REGULATIONS REQUIRING MANDATORY REVOCATION OF MERCHANT MARINER DOCUMENTS FOR CONVICTION OF A NARCOTIC DRUG LAW IS UNCONSTITUTIONAL AS VIOLATING THE DUE PROCESS AND EQUAL PROTECTIONS OF THE LAWS GUARANTEES OF THE U.S. CONSTITUTIONAL, VIOLATION OF ADMINISTRATIVE, DUE PROCESS AND UNCONSTITUTIONAL IN THAT THEY CONSTITUTE CRUEL AND INHUMAN PUNISHMENT.

APPEARANCE: Kessler and Drasin, Los Angeles, Cal, by Lawrence Drasin and Roger Gleckman, Esq.

OPINION

I

Appellant's argument on his first point is that the statute which Appellant was found to have violated, Section 11555 of the California Health and Safety Code, is not a narcotic drug law because it prohibits possession of "an opium pipe or any device, contrivance, instrument or paraphernalia used for unlawfully injecting or smoking a narcotic."

Appellant then points to 46 CFR 137.30-3 (a) and says that under the terms of the regulations the law is not a "narcotic drug law" for the reason that the law does not deal with "possession, use, sale, or association with narcotic drugs." This part of the argument fails for two reasons. One is that this paragraph of the regulations deals with only proceedings under 46 U.S.C. 239 (R.S. 4450), in which the charge would be "misconduct" and not with proceedings under 46 U.S.C. 239b, such as this is, with the charge

being "conviction of violation of a narcotic drug law." The other is that even if the proceeding could properly have been had under R.S. 4450, I would consider possession of narcotics paraphernalia as association with narcotic drugs.

Appellant, however, also refers me to Decision on Appeal No. 1513, in which one of three specifications alleging convictions for possession of narcotic drugs was dismissed because the conviction in question was based on unlawful possession of a hypodermic needle and other equipment used to inject narcotic drugs, not on possession of a narcotic as alleged.

If necessary a distinction may be made between that case and this. In this case in No. 1513, there was a variance between the allegation and the proof which brought about the dismissal. The dismissal of the one specification was not critical to the ultimate resolution of the case because proof of the other two convictions required revocation anyway. I may say here that if the issue were before me now and were critical to the ultimate disposition of the case I might act otherwise. While the term "narcotic drug" is defined in 46 U.S.C 239a, the term "narcotic drug law" is not defined. In the absence of a court decision on the point, I would be inclined to hold that a "narcotic drug law" is a law designed to regulate and control the use of narcotics drugs, and a conviction under such a law is a conviction within the meaning of 46 U.S.C. 239b. The placement of Section 11555 of the California Health and Safety Code in the "Illegal Narcotics" chapter convinces one that the statute is such a law.

What I find conclusive in the instant case obviates the need for further exploration of this question. Here there was no variance between the allegation and the proof. It was specified that the conviction was for possession of marijuana and the proof showed a conviction for possession of marijuana. This takes the case completely out of the theory inferred by Appellant from Decision on Appeal No. 1513.

Just as important is the fact that the judgment of the Federal Magistrate is that possession of marijuana is possession of narcotic paraphernalia under the California law. There is no California court decision to the contrary. I must hold that if possession of marijuana is violation of Section 11555 of the California Health and Safety Code, that section is a narcotic drug law within the meaning of 46 U.S.C. 239b. If the Federal Magistrate was wrong, Appellant is in the wrong forum to seek correction of his error.

II

On his second point, when Appellant refers to 46 U.S.C. 239(b), I assume that Section 239b is meant. The argument that the regulations are beyond the authority granted by Congress is not correct. The "may" in the Act of Congress is directed to whether action shall be instituted or not. Once action has been instituted and proof of conviction of a narcotic drug law violation has been established, revocation is the only order authorized by Congress.

III

Appellant's third point is not well taken. He alleges that revocation of his document under the circumstances of this case is "cruel and unhuman punishment" violative of his constitutional rights. It is presumed that this means "cruel and unusual punishment" prohibited by the Sixth Amendment.

An order of suspension or revocation under R.S. 4450 (46 U.S.C. 239) or of revocation under 46 U.S.C. 239b has never been held by a U.S. District Court since the original enactment of the Administrative Procedure Act to be a punishment," much less a "cruel and unusual punishment." Here again, however, Appellant's argument misconceives the meaning of certain regulations in 46 CFR 137. The regulations he cites deal with revocation made mandatory or desirable in proceedings under R.S. 4450. As mentioned in "I above, this proceeding was not brought under that statute but under 46 U.S.C. 239b. I repeat that under that section, once action has been instituted and the charge has been found proved the only action allowed is revocation of the document.

ORDER

The order of the Examiner dated at Long Beach, Cal., on 29 December 1969, is AFFIRMED.

T.R. SARGENT
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 12th day of January 1971.

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