

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-560-80-6619 LICENSE NO. 472381
Issued to: STEPHEN BACON SMITH

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2109

STEPHEN BACON SMITH

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 30 November 1976, an Administrative Law Judge of the United States Coast Guard at San Francisco, California revoked Appellant's seaman documents upon finding him guilty of the charge of possession of a narcotic drug. The specification found proved alleges that while serving as a Third Assistant Engineer on board the United States SS PRESIDENT JEFFERSON under authority of the documents above captioned, on or about 12 August 1976, Appellant was wrongfully in possession of heroin.

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

The Investigating Officer introduced in evidence six exhibits and the testimony of four witnesses.

In defense, Appellant offered in evidence one exhibit.

At the end of the hearing, the Judge deferred rendering a decision. The Judge subsequently concluded that the charge and one specification had been proved and entered an order revoking all documents issued to Appellant.

The entire decision and order was served on 2 December 1976. Appeal was timely filed on 29 December 1976.

FINDINGS OF FACT

On 12 August 1976, Appellant was serving as Third Assistant Engineer on board the United States SS PRESIDENT JEFFERSON and acting under authority of his documents while the ship was at sea. Appellant had been suffering from an inflammation of the left eye which he had first reported to the ship's Purser on 7 August. On 10 August Appellant reported to the ship's Master stating that the condition of his eye was becoming worse. The Master contacted the

U.S. Public Health Service by radio for the recommended treatment which was administered. In 12 August the Master again examined Appellant's eye and observed that the condition was not only worsening but had spread to his right eye. In addition, the Master noticed that Appellant appeared groggy, inattentive, incoherent and that his speech was "fuzzy".

Following the examination the Master called a conference of the department heads to discuss Appellant's condition. During the course of the conference one of the ship's officers brought to the Master's attention the fact that Appellant had apparently been having hallucinations. The basis for the report was that Appellant had wandered though the passageways the previous night asking crewmen when the next boat was going ashore in the belief that the vessel was in port. At that time the vessel was located in the middle of the Pacific Ocean approximately 2000 miles west of San Francisco. The Master and three of the ship's officers therefore decided to search Appellant's quarters to determine if he had any alcohol or other substances which might be responsible for his condition. The Master and the three officers proceeded to Appellant's quarters, knocked and entered informing Appellant that they were going to conduct a search. Appellant merely replied, "Go ahead". During the course of the search the Master picked up a small plastic container from Appellant's desk in which there was a grayish, granulated substance.

When the Master picked up the container Appellant became excited and stated that the container was not his but had been lying on the table when he had first moved into the quarters a few months earlier. The Master became suspicious because of Appellant's sudden reaction and therefore took the container and put it in the ship's safe. The Master turned the container over to the U.S. Customs Department in San Francisco the day after his arrival at the port. The grayish, granulated substance within the plastic container was subsequently identified by the U.S. Customs Laboratory as a mixture of heroin and caffeine known as #3 rock heroin.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

- (1) The evidence is insufficient as a matter of law to sustain the finding that Appellant wrongfully possessed heroin or to justify the decision and order of the Judge.
- (2) The decision and order of the Judge is excessive.

APPEARANCE: Jarvis, Miller & Brodsky of San Francisco,

OPINION

I

Appellant asserts that there is insufficient evidence to either justify the Decision and Order of the Judge or to find as a matter of law that he had been in wrongful possession of a narcotic substance. The facts refute both of Appellant's contentions. The ship's Master, accompanied by three officers, had conducted a search of Appellant's quarters and discovered a plastic container within which was a substance identified by the U.S. Customs laboratory in San Francisco as #3 rock heroin. 46 CFR §5.03-3 states that evidence of possession of narcotic drugs is adequate to support a finding of misconduct. In other words, Appellant's knowledge of the character of the substance found in his quarters, generally recognized to be an element of the charge of possession (see U.S. v. Sawyer, 294 F.2d 24(4th CIR 1961)), is presumed.

Appellant contends that the presumption of knowledge was rebutted by his testimony to the effect that the plastic container had been in his quarters upon his first moving into them and that other crewmen had access to his quarters. Appellant argues that the mere presence of the drug in his quarters is insufficient to constitute possession was exclusive. The court in Jackson v. United States, 408 F.2d 306 (9th CIR 1969) explained that possession is "such dominion and control as to give power of disposal of the drug". The admission that the drug had been in Appellant's quarter for several weeks certainly gave Appellant dominion and control. The court in U.S. v. Davies, 329 F.Supp. 493 (W.D. Pa. 1971) elaborated further and stated that:

It is well established that the requisite possession under the statutes involved in this case may be either actual or constructive...Moreover, neither need be exclusive, but may be shared with others.

In reference to Appellant's position that his unsubstantiated testimony alone was sufficient to rebut the presumption of knowledge of the character of the drug, the court in Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407(1963) declared in relation to a criminal charge of possession:

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Emphasis

added)

Commandant's Appeal Decision Numbers 1906 and 1536 are in accord. Therefore, Appellant's merely proceeding with an unsubstantiated hypothesis that some of the crewmen may have entered his quarters is insufficient to rebut the presumption of Appellant's knowledge as the trier of fact retains the duty to weigh the credibility of Appellant's story against the countervailing evidence.

Appellant's argument that his attentive and capable performance should also serve to rebut any inference of his use or wrongful possession of drugs may be dismissed as Appellant was not performing his duties for 2 days prior to the Master's search of his quarters. Also, the Master's suspicions regarding Appellant's possible use of an illegal substance had been initially raised by Appellant's lack of attentiveness and coherence. In addition, Appellant's emphasis upon his physical condition and the unreliability of the report that he had been observed hallucinating is misplaced as these facts are not elements of the charge. Proof that Appellant had been acting in an unusual manner would only constitute additional circumstantial evidence of his use and possession of an illegal substance but is not essential to show possession. In the same way, the absence of any traces of narcotics in the syringe found in Appellant's quarters only indicates that the syringe had not been used for the purpose of injecting heroin. Finally, Appellant's argument that the Master had not seen any needle track marks upon his arms is irrelevant as the Master testified that he never looked for them.

II

Appellant contends that the Decision and Order revoking his seaman's documents is excessive under the circumstances. Contrary to Appellant's apparent belief, the Judge does not have any discretion to issue an Order less that revocation of all seaman's documents following a finding that Appellant had in fact been in wrongful possession of a narcotic substance. 46 CFR §5.03-4, entitled, "Offenses for which revocation of licenses or documents is mandatory." states that:

Whenever a charge of misconduct by virtue of the possession, use, sale or association with narcotic drugs, including marijuana, or dangerous drugs is found proved, the administrative law judge shall enter an order revoking all licenses, certificates and documents held by such a person. (Emphasis added).

The Judge's Order revoking all of Appellant's seaman's documents must be left to stand.

CONCLUSION

I conclude that substantial and reliable evidence of a probative nature was presented at the hearing and sustain the charge of wrongful possession of a narcotic drug.

ORDER

The order of the Administrative Law Judge, dated at San Francisco, California on 30 November 1976 revoking Appellant's Merchant Mariner's License No. 472381 and Merchant Mariner's Document No. 560-80-6619 is AFFIRMED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 18th day of July 1977.

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