

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. 438-48-2479
Issued to: Richard J. Frank

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2376

Richard J. Frank

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 28 February 1983, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, revoked Appellant's seaman's document upon finding him guilty of misconduct. The specification found proved alleges that while serving as utility 3rd on board the S.S. ASHLEY LYKES under authority of the document above captioned, on or about 5 February 1983, while said vessel was in the port of Houston, Texas, Appellant wrongfully possessed certain narcotics, to wit: hashish and marijuana.

The hearing was held at Houston, Texas on 28 February 1983.

At the hearing, Appellant elected to act as his own counsel and entered a plea of guilty to the charge and specification.

The Investigating Officer introduced in evidence four exhibits and the testimony of one witness.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specification had been proved by plea. He then served a written order on Appellant revoking all documents issued to him.

The entire decision was served on 15 March 1983. An appeal was timely filed on 13 April 1983 and perfected on 29 November 1983.

FINDINGS OF FACT

On 5 February 1983, Appellant was serving as utility 3rd on board the S.S. AHELY LYKES and acting under authority of his document while the vessel was in the port of Houston, Texas.

On that date, U.S. Customs Officer Damron, Inspector Blanchard and Officer Damron's trained canine "Bubba" boarded the S.S.ASHLEY LYKES. The canine "alerted" outside Appellant's room, indicating the presence of narcotics . Inside Appellant's room the canine again alerted on a bathrobe. Mr. Damron found some material, subsequently identified as hashish and marijuana, in one of the bathrobe pockets. Appellant admitted that the robe, the hashish, and the marijuana were his. The material seized consisted of approximately 2.5 grams of hashish and approximately 0.5 gram of marijuana.

During the hearing, Appellant admitted that he knew that the material in his robe were "narcotics". He claimed to have found the hashish and marijuana in the passageway of the vessel. Appellant gave no satisfactory explanation of why he failed to surrender the hashish marijuana to the Master. Moreover, at the time of the incident on 5 February 1983, Appellant stated to the Customs officials that he bought the hashish on a dock in Egypt. He also told the Customs officials that he never smoked on duty, only after his tour.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends that:

1. The search and seizure violated the Fourth Amendment of the Constitution;
2. The Administrative Law Judge erred by not fully explaining the experimentation exception found at 46 CFR 5.03-4;
3. The Administrative Law Judge erred by not finding experimentation;
4. The Administrative Law Judge erred by not apprising the Appellant of the implications of a guilty plea;
5. The Administrative Law Judge erred by treating statements made by Appellant prior to his being placed under oath as evidence; and
6. The Administrative Law Judge violated the requirements of neutrality when he interrogated the Appellant.

APPEARANCE: Law offices of Marvin I. Barish by Jeffrey N. Kale.

OPINION

I

Appellant asserts that the search which resulted in discovery of the hashish and marijuana violated the 4th Amendment of the United States Constitution. His challenge is not timely.

This issue was not raised at the hearing and cannot be raised for the first time on appeal. 46 CFR 5.30-1(f).

Further, the issue was waived by Appellant's plea of guilty. A plea of guilty, properly entered, is sufficient, in and of itself, to support a finding of proved. Such a plea is an admission of all matters of fact as charged and averred. It further constitutes a waiver of all non-jurisdictional defects and defenses. Decision No. 1203 (DODD). An appeal may not contravene a guilty plea, Appeal Decision No. 1631 (WOLLITZ), and such a plea obviates the requirement for otherwise establishing a prima facie case. Appeal Decision No. 1712 (KELLY).

Had Appellant pleaded not guilty and challenged the admission of the evidence from the search, the legality of the search could have fully litigated and all relevant evidence presented.

II

Appellant next contends that the Administrative Law Judge erred by not fully explaining the experimentation exception found at 46 CFR 5.30-4. I do not agree.

Appellant asserts that the Administrative Law Judge's failure to instruct Appellant ... "at great length, as to his possible defenses regarding the possession of narcotics" violated Appellant's rights under the Due Process Clause of the Fifth Amendment of the United States Constitution. The only case cited for this line of argument, United States v. Rudmall, 55. F. 2d 548 (10 Cir. 1978) raises the issue of pre-indictment delay which is not relevant in this appeal. Appellant cites no other authority for this proposition.

The Administrative Law Judge put Appellant on notice of the availability of the experimentation exception found at 46 CFR 5.03-4 by reading him the entire regulation including the experimentation exception. This is sufficient.

Appellant next contends that the Administrative Law Judge erred in not finding experimentation. I do not agree.

Appellant was put on notice of the experimentation exception

which the Administrative Law Judge read aloud the regulation containing the exception at the outset of the hearing.

Appellant did not rely on the experimentation issue at the hearing. He did not assert that his possession of marijuana and hashish was in preparation for experimentation or that his past use of marijuana was experimentation. On the contrary, Appellant admitted smoking marijuana on prior occasions between ten and twenty times.

The facts do not unequivocally support a claim of experimentation. The Administrative Law Judge did not err by not holding that Appellant's possession of marijuana and hashish was for experimentation.

IV

Appellant next contends that the Administrative Law Judge erred by not fully and fairly apprising him of the implications arising from a plea of guilty. I do not agree.

Immediately upon receiving Appellant's plea of guilty, the Administrative Law Judge asked Appellant whether he realized that by making this plea he was pleading guilty to all parts of the charge and specification. Further, the Administrative Law Judge warned Appellant that the inevitable outcome of his guilty plea would be an order revoking his document. After this explanation Appellant maintained a plea of guilty, although he said he would like to make a statement with the guilty plea. At a later time in the hearing, the Administrative Law Judge gave Appellant the opportunity to make a statement to be considered in mitigation pursuant to 46 CFR 5.20-85(b). Throughout the hearing Appellant did not retreat from his original plea and his testimony was not inconsistent with a guilty plea.

A review of the entire record indicates that Appellant was fairly put on notice and fully understood the gravity attendant upon a guilty plea. This is sufficient. See, Appeal Decision No. 2132 (KEENAN).

V

Appellant next urges that the Administrative Law Judge erred by considering as evidence statements he made before he was under oath. I do not agree.

A person who pleads guilty or is found guilty may present evidence or mitigating circumstances believed to be material. This may be done either under oath or not. See 46 CFR 5.20-85(b), and

Appeal Decision No. 1969 (RIDDOCK).

Appellant made the statements complained of during his cross-examination of a Coast Guard witness. The Administrative Law Judge did not err when he allowed these questions and considered them as evidence. Even if it had been improper to allow or consider these statements, Appellant would not have been prejudiced since he subsequently testified to the same events in greater detail under oath.

VI

Appellant's final argument is that the Administrative Law Judge violated the requirements of neutrality when he interrogated the Appellant. I do not agree.

Appellant took the witness stand. 46 VFR 5.20-90 specifically provides that an Administrative Law Judge may question a witness at any time that he is on the stand. The record makes it clear that the Administrative Law Judge asked Appellant questions in order to bring out and clarify Appellant's position. The Administrative Law Judge must conduct the hearing in such manner so as to bring out all the relevant and material facts, and insure a fair and impartial hearing. 46 CFR 5.20-1(a). I find no error here.

CONCLUSION

There was substantial evidence of a reliable and probative nature to support the findings of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated February 28, 1983 at Houston, Texas, is AFFIRMED.

J. S. GRACEY
Admiral, U. S. Coast Guard
Commandant

Signed this 2d day of February, 1985.