

NTBS Order No.
EM-11

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the National Transportation Safety Board
at its office in Washington, D. C.,
on the 8th day of July, 1970.

CHESTER R. BENDER, Commandant,¹ United States Coast Guard

vs.

LELAND O. DAZEY

Docket ME-9

OPINION AND ORDER

The appellant, Leland O. Dazey, has appealed Commandant's Decision No. 1767, revoking his license, merchant mariner's document, and all other seaman's documents.² The action of the Commandant was taken in an opinion affirming the initial decision of Coast Guard Examiner Daniel H. Grace, entered after an evidentiary hearing. Throughout the proceedings herein, appellant has been represented by his own counsel.

At the hearing, appellant was charged with misconduct under 46 U.S.C. 239(g), based on one specification alleging that on or about May 26, 1967, he did "wrongfully have in his possession a certain quantity of narcotics, to wit: marijuana," while serving as Third Mate on board a merchant vessel of the United States, the S.S. BEAVER VICTORY, in Yokohama, Japan.³ The case presented by the

¹By order No. EM-10, dated July 1, 1970, the name of the new Commandant of the U.S. Coast Guard, Admiral Chester R. Bender, is substituted in place of that of Admiral Willard J. Smith, his immediate predecessor, in all enforcement proceedings involving the U.S. Coast Guard pending before the Board.

²Appeal to this Board from decisions of the Commandant sustaining orders of revocation of licenses and documents is authorized under 49 U.S.C. 1654(b)(2). Such appeals are governed by the Board's Rules of Procedure set forth in 14 CFR Part 425.

³Regulations of the Commandant governing proceedings against seamen under 46 U.S.C. 239(g) are set forth in 46 CFR Part 137. Section 137.03-5(b)(8) thereof provides that possession of

Coast Guard Investigating Officer was based entirely on documentary evidence, consisting of certified copies of the voyage records of the BEAVER VICTORY and a Japanese court record, together with its English translation prepared in Yokohama by an employee of the Coast Guard.

This translated court record shows that appellant was indicted by the Public Procurator's Office of Yokohama under the Japanese Marijuana Control Law for possession of 0.7 grams of marijuana leaves in the bar "Quick Corner" in Yokohama, and that he received a sentence of 10 months' imprisonment at hard labor, suspended for 3 years from the Yokohama District Court, No. 9 Criminal Board. Logbook entries of the BEAVER VICTORY showed that appellant failed to be on board when the vessel departed Yokohama on the day following his arrest; that the Master had received information that he had been detained by Japanese authorities on charges of illegally carrying narcotics; and that no contraband was found in a subsequent search of his room and belongings aboard ship.

The examiner admitted these documents into evidence over objections of appellant's counsel that the log entry contained hearsay; and that the translation of the Japanese court record would not be admissible in U.S. court proceedings and was hearsay. Counsel also objected that the record of appellant's criminal conviction in Japan was offered without a showing that appellant had been adequately informed of his legal rights or afforded effective legal assistance before the Japanese court.

Appellant testified in his own behalf. Concerning his arrest in Yokohama, he testified that he had been drinking with a girl in the Quick Corner bar earlier that day, that he had given her his pack of American cigarettes and that she told him to leave and return at 9:30 that night. He did return at the appointed time "a little bit drunker and. . .happy as a lark."⁴ According to his testimony, the girl then returned his cigarette pack, which he put in his shirt pocket, and left him to get drinks. She returned with police officers who ordered appellant to empty his shirt pocket. Two cigarettes with "ends curled over" were found in his cigarette pack and the police took appellant to jail where, on analysis, these cigarettes were found to contain marijuana. Appellant maintained that the girl had "framed" him by inserting the marijuana cigarettes in the pack without his knowledge; further

marijuana is an offense among those for which revocation of licenses or documents is sought by the Coast Guard.

⁴Tr. p. 25.

that the police had told him later that she was wanted for prostitution and had "made a deal with the police, she would trade me for her."⁵

Appellant also admitted that he pleaded guilty to possession of marijuana in the Japanese court. He explained that after remaining in jail for 42 days,⁶ on "the last day a lawyer came and they took me to court and that was it." He maintained that he had pleaded guilty on the advice of his court-appointed lawyer, and also acted on the advice he had received in jail from a representative of the U.S. Consulate in Yokohama, that "if you didn't plead guilty in Japan they just hold you in jail to investigate and they've got guys been over there a year - fourteen months because they don't want to plead guilty and having a family and everything, I just couldn't afford to stay in Japan and fight the case."⁷ Appellant also testified that he was financially unable to hire the American lawyer he had consulted who wanted \$3,000 as a fee and advised him to "plead guilty and do what these people say and get out of the country."⁸ Finally, appellant stated that he signed a waiver of appeal from the Japanese conviction in order to leave Japan, after waiting an additional 17 days in the custody of investigation authorities. Appellant was not cross-examined regarding his testimony but simply questioned as to whether he realized the consequences of his conviction on his status in the merchant marine.

In support of his revocation order, the examiner found that the evidence clearly supported the ultimate facts contained in the specification under which appellant was charged with misconduct. The examiner also rejected appellant's testimony that the marijuana cigarettes were "planted" on him as unreliable evidence, and therefore held that appellant "had not rebutted the prima facie case made out by the ...log entry, indictment and conviction."

In his decision on appeal, the Commandant held that Exhibit C, consisting of the Japanese court record and its translation, was not properly authenticated and that it would not be admissible in U.S. court proceedings. However, he found that "although there was

⁵Tr. p. 27.

⁶From appellant's testimony it is not clear whether he was held without bail, or whether he was unable to post bail because he lacked sufficient funds.

⁷Tr. p. 22.

⁸Tr. p. 29.

hearsay, the weight, not the admissibility of the Exhibit would be in question." He further decided to avoid the question of whether the Coast Guard's evidence had established a prima facie case, stating: "had the proceeding terminated when the Investigating officer rested his case, there might have been a question as to whether the vessel's record that appellant had been detained by local police and Exhibit "C" analyzed above, constituted substantial evidence of the conviction and, hence, of the wrongful possession of marijuana. This question need not be reached." Instead, the Commandant's affirmance of the examiner's revocation order was based on appellant's admission of the Japanese conviction and the credibility decision of the examiner who, as trier of the facts, rejected appellant's testimony as to the frame.

In his appeal to this Board, appellant's counsel contends that the admission of Exhibit C into evidence constituted "a grave prejudicial procedural error," particularly in view of his objections on due process grounds to the Japanese proceeding. The Commandant has filed a brief in opposition, arguing that the fact of appellant's conviction was properly before the examiner for whatever weight he assigned to it.

Upon consideration of the briefs of the parties and the entire record, we are of the view that the findings of the examiner, as modified by the Commandant, are not supported by substantial evidence of a probative and reliable character, and that grave doubt exists as to whether appellant was afforded due process in the Japanese proceeding. The examiner and the Commandant made no disposition of the fundamental due process issues raised by appellant's uncontroverted testimony, which indicates that he was not properly informed of his legal rights before pleading guilty and that he was not properly represented by counsel in the Japanese proceeding. The Commandant failed to consider that guilty pleas may be improvidently entered by seamen charged with offenses in foreign countries. He simply states: "proof of conviction of an offense by an American seaman in a foreign country for violation of law of that country, when the seaman is amenable to action under R.S. 4450 (46 U.S. 239), especially when the offense would also be an offense under U.S. law, is prima facie proof of 'misconduct' and is 'substantial evidence' upon which an examiner may base his findings."

If this be the rationale supporting the revocation of appellant's documents, the quantum proof adduce by the Coast Guard was clearly insufficient. The nature and elements of the offence for which appellant was convicted by the Japanese court are not shown, nor can we tell with any certainty whether or not that offense would be an offense under U.S. law. Appellant's plea of guilty to possession of marijuana in the Japanese court may or may

not involve knowing possession, since the offense may or may not be subject to the defenses of intoxication⁹ or lack of scienter under the Japanese Marijuana Control Law.

Since appellant was charged with "wrongful" possession under 46 U.S.C. 239(g) based on his conviction in Yokohama, it was essential that the Coast Guard affirmatively show the nature and elements of the offense for which he had been convicted. Moreover, since appellant raised issues as to the lack of due process in the Japanese proceeding, it was incumbent on the Coast Guard to make a satisfactory showing that his legal rights were fully protected in that proceeding. In the absence of such proof, we are unable to decide whether appellant's conviction in Yokohama was based on knowing or otherwise wrongful possession of marijuana, and whether his conviction under the Japanese Marijuana Control Law afforded fundamental due process to him.

Under the circumstances of this case, we hold that the examiner erred in finding that the Japanese court record established appellant's wrongful possession of marijuana under 46 U.S.C. 239(g). We also disagree with the rationale underlying the Commandant's decision. We do not construe appellant's testimony as an admission of wrongful possession of marijuana constituting misconduct under the statute and, on the record before us, it is only shown that his Japanese conviction was for possession of marijuana without reference to the wrongfulness thereof. It is also impossible to determine from the record that appellant was afforded due process or given a fair opportunity to defend against the Japanese charge. For these reasons, we do not consider the Japanese court record of appellant's conviction, or his admission thereof, dispositive of the case. In our view, therefore, the Coast Guard failed to establish the wrongfulness of appellant's possession of marijuana under 46 U.S.C. 239(g) and the decision of the Commandant so holding is reversed.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it is hereby granted;
2. the order of the Commandant affirming the examiner's order revoking appellant's license, merchant mariner's document and all other seaman's documents be and it hereby is reversed; and
3. The appellant's license, merchant mariner's document, and

⁹It should be noted that the examiner made a finding that appellant was intoxicated at the material time, but did not determine the degree of his intoxication.

all other seaman's documents be returned to him upon request.

REED, Chairman, LAUREL, McADAMS, and THAYER, Members of the Board, concurred in the above opinion and order. BURGESS, Member, was absent, not voting.

(SEAL)