

NTSB Order No.
EM-23

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 12th day of April 1972

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

vs.

MICHAEL A. SPERLING, Appellant.

Docket ME-24

OPINION AND ORDER

The appellant, Michael A. Sperling, has appealed from the decision of the Commandant sustaining the revocation of his merchant mariner's document (No. Z-1225264) and all other seaman's documents for misconduct aboard ship.¹ Appellant was serving at the time as an engineering cadet on the SS AMERICAN CHARGER, a merchant vessel of the United States. The offense found as the basis for revocation was appellant's wrongful possession of 14 marijuana cigarettes aboard the vessel on August 12, 1968, at the port of Norfolk, Virginia.

The revocation action was previously appealed to the Commandant (Appeal No. 1847) from the initial decision of Coast Guard Examiner Walter E. Lawlor, rendered after a full evidentiary hearing.² Throughout the proceedings herein, appellant has been represented by his own counsel.

In his brief on appeal, appellant contends that the evidence presented against him was inadmissible under the Supreme Court's ruling in Miranda v. Arizona, 384 U.S. 436 (1966), that a mandatory revocation was imposed under an arbitrary, capricious, and unreasonable regulation, which deprived him of "due process and

¹The Commandant's action was taken pursuant to 46 U.S.C. 239(g). The appeal to this Board is authorized by 49 U.S.C. 1654(b)(2) and is governed by rules of procedure set forth in 14 CFR 425.

²Copies of the decisions of the Commandant and the examiner are attached hereto.

equal protection, especially in light of [his] character and background," and that coincident with a liberalizing regulatory change during the pendency of his appeal to the Commandant, the case should have been remanded to the examiner for consideration of a sanction less than revocation. Counsel for the Commandant has not filed a reply brief.

Upon consideration of appellant's brief and the entire record, we conclude that his misconduct was established by substantial, probative, and reliable evidence, and that the asserted error in receiving such evidence is unfounded. We adopt the examiner's findings as our own, to the extent not modified herein. Moreover, we agree with the Commandant that the sanction imposed herein was warranted, both under the applicable regulation at the time of his hearing and as revised.

The undisputed evidence of record shows that appellant was subjected to a standard customs search for contraband on the date in question. The AMERICAN CHARGER was docked at Norfolk after completing a foreign voyage and one of the departing crewmembers had named appellant to customs officers as a marijuana user during the voyage. Appellant was still on board the vessel and, when found, was requested to take two of the officers to his own room. Once there, he was briefly detained while a third officer, in charge of the search party, was summoned to conduct the further questioning.³ The entire point of appellant's first contention rests on the argument that this period of detention, accompanied by the questions thereafter put to him, constituted "custodial interrogation" under the Miranda decision, which entitled him to be warned beforehand that any statement he made could be used against him, and of his rights to remain silent and have an attorney present.

The preliminary questioning of appellant concerned whether he had made his customs declaration and whether he had any foreign purchases not declared or any prohibited items, several of which were enumerated, including marijuana. Appellant gave "yes" and "no" answers that he had made a declaration and had no unlisted foreign purchases or prohibited items. The customs officer then told appellant that his room would be searched and "if he had anything to declare to customs, now would be the time to say so."⁴ With this, appellant opened his desk drawer and removed a cigarette

³This was after appellant made an unsuccessful attempt to mislead the officers by taking them to a vacant room next to his own.

⁴Deposition of Officer Blaski, Tr. 3 (Exhibit 3).

pack containing 14 handmade cigarettes which he admitted were marijuana. It was conceded by the officers that they had not yet given appellant Miranda-type warnings.

The Miranda decision applies only to custodial interrogation, which it defines as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."⁵ Appellant's detention for interrogation by customs officers upon entering the United States from a foreign country was not custodial in our view, but rather fell within the category of "General on-the-scene questioning as to facts surrounding a claim or other general questioning of citizens in the fact-finding process [which] is not affected by [the Court's] holding" in Miranda v. Arizona.⁶

We are reinforced in this view by the reasoning of the Federal courts in border search cases, among which United States v. Salinas is particularly apposite, as follows:

"...Thousands of persons enter the country daily and are subject to some degree of detention while their luggage is searched and they are asked routine questions... whether they have items to declare, questions regarding contraband and the like. To hold that questioning of these types or routine border searches of luggage place a person 'in custody' within the meaning of Miranda would unduly distort that case."⁷

While the final statement of the officer in charge might have been subjectively interpreted as a threat by appellant, this was obviously not the case in reality. He was then under suspicion, adequately founded, of concealing merchandise which could not be imported legally. The search of his room would be an action well within the bounds of the officer's statutory authority under these

⁵384 U.S. at 444. The administrative law decision cited by both the examiner and the Commandant may be distinguished from the instant case, since the evidence presented there was not obtained by a law enforcement officer competent to take persons into custody. See also Kent v. Hardin (5th Cir. 1970) 425 F. 2d 1346.

⁶384 U.S. at 477-478. Other Supreme Court cases cited by appellant as extending the Miranda doctrine, also pertain exclusively to the questioning of persons in custody. See Mathis v. United States, 391 U.S. 1 (1968); Orozco v. Texas, 394 U.S. 324 (1969).

⁷(5th Cir. 1971) 439 F.2d 376, 379; see also United States v. Davis, 259 F.Supp. 496 (D. Mass. 1966).

circumstances.⁸

Accordingly we find no basis, in law or in fact, for holding that appellant's initial detention and questioning was a custodial interrogation, as defined in the Miranda decision, or for excluding the evidence obtained by customs officers in this phase of the border search.⁹

With respect to sanction, the examiner concluded that he was required to impose a revocation order under the then applicable regulation, "to comply with 46 CFR 137.03-3(a)," which provided that:

"Whenever a charge of misconduct by virtue of possession, use, sale, or association with narcotic drugs, including marijuana, is found proved, the examiner shall enter an order revoking all licenses, certificates and documents held by such a person."

However, the examiner also agreed that the argument of appellant's counsel was "not without merit" that a relatively minor offense, such as the one involved herein, should call for mandatory revocation whereas other more serious revocable offenses are listed in another regulation containing a proviso that such orders "are average only and should not in any manner affect the fair and impartial adjudication of each case on its merits."¹⁰

The regulation cited by the examiner was revised and renumbered while this case was on appeal to the Commandant. It is now 46 CFR 137.03-4, and provides for "orders less than revocation" for offenses involving marijuana, in those cases where the examiner is satisfied that the offense is the result of experimentation by the seaman and he has submitted satisfactory evidence that it will

⁸19 U.S.C. 482, 1581, 1582.

⁹Appellant's brief does not mention issues raised by his hearing testimony that he was "scared" by seeing a holstered gun worn by one of the officers and because he was told that he would spend the rest of his life in prison if marijuana were found with his fingerprints on it (Tr.121). Such threat was flatly denied by the officers on cross-examination and the matter of exposing a gun was not even pursued. In any event, we have no occasion to disturb the examiner's rejection of appellant's testimony on grounds of his lack of credibility.

¹⁰46 CFR 137.20-165(a), (b) Group F.

not recur.¹¹

The Commandant evaluated all of the evidence of record, in light of the liberalized policy reflected in 46 CFR 137.03-4. This included his review of extensive documentary materials incorporated with appellant's brief concerning his good character and academic record at marine engineering school, as well as his clear service record during 6 months at sea subsequent to August 1968. Nonetheless, having adopted the examiner's factual findings, the Commandant held that appellant's offense involved more than his experimental use of marijuana and that any reduction of sanction could not reasonably be entertained by the examiner.

Based on our review of the record, we agree with the Commandant's disposition on sanction. The only reason offered for rejecting any of the examiner's factual findings is appellant's set of objections under the Miranda decision. We have already held that these objections were not applicable. It then becomes apparent that not only appellant's wrongful possession of 14 marijuana cigarettes was established but, in addition, proof of his possession of a tin box containing a residue of the substance found by the officers in the ensuing search of his desk drawer and proof of his subsequent admission, while in custody, that he had rolled approximately 30 cigarettes from marijuana which he had purchased in a foreign port and taken aboard his ship, and that he had smoked 16 of them during the voyage.¹²

The examiner made all such findings as established by the evidence and further found that the presence of marijuana in the 14 remaining cigarettes seized was confirmed by the laboratory report and testimony of a customs chemist.¹³

¹¹This regulatory change occurred on October 20, 1970; see 35 Fed. Reg. 16371. The Commandant's decision is dated July 9, 1971.

¹²Appellant's signed statement was produced wherein he acknowledged that all warnings of his rights against self-incrimination had been read and explained to him and that he fully understood and waived them, prior to this questioning (Exhibit 2, following deposition of officer Bessinger.) Appellant's testimony that he did not remember signing this document was not credited by the examiner on amply sufficient grounds considering his other testimony concerning this phase of the interrogation, and the officer's testimony that appellant's damaging admission came after signing the waiver is not otherwise challenged.

¹³Appellant's objection that this evidence should have been excluded as "fruits of the poisonous tree," since these cigarettes

It is obvious that the examiner's findings establish recurrent use of marijuana cigarettes on appellant's part. They dispel any notion that he was an experimental user of the prohibited substance during the voyage of the AMERICAN CHARGER. The liberalized policy concerning experimental marijuana offenses by seamen, reflected in 46 CFR 137.03-4, would be utterly frustrated by its application in appellant's case, wherein he was shown as a continuing user of marijuana during his first voyage at sea.

We recently upheld the revocation of a seaman's documents for wrongful possession of marijuana, admittedly a substantial quantity, as a necessary and appropriate remedial action on grounds that he "represents a constant threat, in himself and because of his harmful influence as a carrier of marijuana upon other seamen, to the overall discipline and safe operation of any ship on which he might serve."¹⁴ We have determined to uphold the sanction herein upon stronger grounds, believing that the record shows both substantial use and possession of marijuana by appellant.

Appellant has referred us to the decision of another Coast Guard examiner in another case which imposed an order less than revocation under 46 CFR 137.03-4, where the seaman was guilty of possession of 28 grams of marijuana found concealed in his boot.¹⁵ It suffices to say that we are not persuaded by the force of the examiner's reasoning in that case.¹⁶

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and
2. The order of the Commandant affirming the examiner's revocation of appellant's seaman's documents, under authority of 46 U.S.C. 239(g), be and it hereby is affirmed.

REED, Chairman, LAUREL, McADAMS, THAYER, and BURGESS, Members of the Board, concurred in the above opinion and order.

were obtained in violation of his rights under the Miranda doctrine, also fails once the doctrine is held inapplicable to events preceding the seizure.

¹⁴Commandant v. Powe, Order EM-20, adopted January 26, 1972.

¹⁵Decision re Dale Gerald Schanlaub, Jr., of Examiner Clint G. Livingston, Houston, Texas, April 21 1971 (08-0028-CGL 71).

¹⁶Appellant's request for oral argument before this Board is denied for lack of a showing of good cause. 14 CFR 425.25.

