

In the Matter of Merchant Mariner's Document No. Z-10791
Issued to: MIGUEL SICLANA

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

565

MIGUEL SICLANA

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

On 12 March, 1952, an Examiner of the United States Coast Guard at New York City revoked Merchant Mariner's Document No. Z-10791 issued to Miguel Siclana upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as messman on board the American SS WILLIAM H. WILMER under authority of the document above described, on or about 7 February, 1952, while said vessel was at Staten Island, New York, he wrongfully had in his possession or control a narcotic substance; to wit, marijuana.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Although advised of his right to be represented by an attorney of his own selection, Appellant voluntarily elected to waive that right and act as his own counsel. Since Appellant did not understand the significance of his plea of "guilty" to the charge and specification upon arraignment, the Examiner obtained a yeoman to act as interpreter and the plea was

changed to "not guilty."

Thereupon, the Investigating Officer and Appellant made their opening statements. Appellant stated that he had, in his locker, paper which was used to roll cigarettes but that he was not guilty of possession or control of marijuana.

The Investigating Officer then introduced in evidence the testimony of Luis Perez who occupied the same forecastle as the person charged, the testimony of Port Patrol Officer Berger who was one of the Customs Officers present when the marijuana was discovered and certified copies of the two seizure reports by the U. S. Customs Laboratory at New York City. Appellant testified under oath in his own behalf and stated that he had not given marijuana cigarettes to Perez.

At the conclusion of the hearing, having given both parties an opportunity to submit argument and proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specification. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-10791 and all other licenses, certificates of service and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that:

POINT I. The evidence introduced at the hearing did not establish the guilt of the defendant by a preponderance of said evidence.

POINT II. The rights of the person charged were not upheld and protected under the law during said hearing.

POINT III. The sentence of the Examiner was excessive and unwarranted.

APPEARANCES: Howard E. Goldfluss, Esquire, of New York City, of Counsel.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On a voyage including the date of 7 February, 1952, Appellant was serving as messman on board the American SS WILLIAM H. WILMER and acting under authority of his Merchant Mariner's Document No. Z-10791 while the ship was docked at Staten Island, New York.

At approximately noon on 7 February, 1952, several Port Patrol Officers boarded the ship in order to conduct a routine search. Port Patrol Officers Berger and Walesak went to the forecandle which was occupied by Appellant, Luis Perez, and another member of the crew.

Appellant was in his forecandle when the two Port Patrol Officers entered. Upon request, Appellant opened his locker to be searched. Officer Berger observed about ten or twelve loose Pall Mall cigarettes on the upper shelf in Appellant's locker and two packages of paper for making cigarettes on the lower shelf. Berger asked Appellant where the package for the loose cigarettes was. Appellant replied that he had thrown it away and did not know where it was. When questioned as to why he had the loose cigarettes in his locker, Appellant did not give any reason. Officer Berger made a thorough search of the room and found two cigarette butts in an otherwise empty, crumpled Pall Mall package which Berger found when he picked up the clothing on the deck alongside of Appellant's locker. Appellant admitted ownership of the clothing but denied ownership of the two cigarette butts which, upon subsequent analysis by the U. S. Customs Laboratory at New York City, were found to contain two grains of marijuana. A search of Appellant's person failed to disclose any additional evidence of marijuana. When questioned further, Appellant stated that he kept the cigarette paper to use when the ship was short of cigarettes and that he used the loose Pall Mall cigarettes to smoke in his pipe. During the course of the search, Appellant tore the paper off one of the Pall Mall cigarettes and put the tobacco in his pipe.

While Appellant was being searched, Luis Perez came to the forecandle. He emptied his pockets and three marijuana cigarettes were found in a package of Chesterfield cigarettes which he had

been carrying. At first, Perez said he had found the package of Chesterfield cigarettes on his bunk but then he changed his story and said that Appellant had given the package to him to hold at about 1100 on that day. Appellant denied ownership of the cigarettes found in Perez' possession but said that he would take the blame. Perez paid a duty or fine of \$1.60 for this marijuana and Appellant paid 13 or 16 cents as a fine for failure to manifest the two grains of marijuana contained in the two cigarette butts which were located when his clothes were searched by Officer Berger.

The only prior disciplinary action having been taken against Appellant during his fifteen years as a Merchant seaman was an admonition by an Investigating Officer in 1951 for causing a disturbance in the officers' mess aboard the SS LAGUARDIA.

OPINION

In support of the contentions that the charge and specification were not proved by a preponderance of the evidence (Point I) and that the rights of the person charged were not protected during the hearing (Point II), Appellant submits that the foremost reason for finding Appellant guilty was the testimony of Perez whose testimony was inconsistent with that of Port Patrol Officer Berger. Perez did not admit that he had changed his story as to how he had obtained the Chesterfield cigarette package but he consistently maintained that the package had been given to him by Appellant to hold for him. For this reason, as well as because of the reasonable inference that Perez changed his story when frightened by the Port Patrol Officer's gestures and language, it is contended that Perez' second story should not have been given greater credence than Appellant's testimony. It is also urged that in the absence of counsel for Appellant, the Examiner should have cross-examined Perez; and that the Examiner improperly stated that the failure of Appellant to cross-examine Perez left his unchallenged statements proved; that Appellant's statement that he would take the blame for the cigarettes in Perez' possession was not a confession since the testimony of Berger discloses that, at the same time Appellant made this statement, he also denied having given the cigarettes to Perez; and that the analysis report should not have been admitted in evidence.

It is my opinion that on the basis of these reasons assigned as error by Appellant, considered together with the decision of the Examiner, it is necessary to reverse the conclusion "that the marijuana cigarettes in the Chesterfield package which Perez was holding for Siclana were, in fact, Siclana's," as stated in the Opinion section of the Examiner's decision. The Examiner based this statement upon the following evidentiary findings:

5. "The search of the forecastlemate of Siclana, one Luis Perez, by the port patrol officers disclosed a pack of Chesterfield cigarettes which were opened and in the back of which were three (3) hand-rolled cigarettes containing marihuana.

6. "Luis Perez stated that the cigarettes were given to him to hold at eleven o'clock on the morning of 7 February, 1952, by the person charged, Miguel Siclana.

7. "The person charged did not cross-examine Perez and did not contradict him. He merely confined himself on his own testimony disclaiming ownership.

8. "The person charged stated at the time of the seizure that the cigarettes were not his but that he was willing to take responsibility for them.

* * * *

11. "The analysis of the two (2) cigarette butts found in the Pall Mall package among the clothes of Miguel Siclana were discovered to contain marihuana."

In view of the doubt cast upon the testimony of Perez for reasons pointed out by Appellant and in the absence of any clear-cut finding by the Examiner that he adopted Perez' statement (Finding No. 6) and rejected Appellant's testimony as being incredible, I do not think the conclusion of the Examiner was supported by his findings. There is also some inconsistency in finding that Appellant did not contradict Perez but that Appellant stated the cigarettes were not his and disclaimed ownership of them. The fact that Appellant failed to cross-examine Perez should not have been given any significant weight in determining whether

to accept Perez' statement that Appellant had given Perez the package of Chesterfield cigarettes. The Examiner's comment about Perez' unchallenged statements being proved and his Finding No. 7 indicate that the Examiner was improperly influenced by Appellant's failure to cross-examine Perez. Considering these factors and, in addition, the questionable value of the analysis report on the three cigarettes which states that the seizure was made from "Luiz Pekor," I am convinced that, on the present state of the record, the Examiner was not justified in reaching the conclusion that the charge and specification were supported by the marijuana found in the possession of Perez.

Concerning the two cigarette butts containing marijuana which were found by Officer Berger when he picked up Appellant's clothing, the findings and conclusions of the Examiner are sustained. The only points raised on appeal in connection with this incident are that:

- POINT A. In the absence of counsel, the Examiner should not have admitted the hearsay statements testified to by Officer Berger that he was told by the mate that the ship had never been short of cigarettes and that he was told by other members of the crew that they never recalled seeing Appellant smoke a pipe.
- POINT B. In the absence of counsel, the Examiner should have recalled Officer Berger and questioned him further about the clothing near Appellant's locker after Appellant had testified that all of this clothing did not belong to him.
- POINT C. The analysis report by the U. S. Customs Laboratory at New York City was not the best evidence that the two cigarette butts contained marijuana. Since the seized material was not in evidence, formal proof of the chain of travel of the alleged marijuana (from the time it was seized until it was analyzed and the report was made up) should have been offered to establish that the report refers to the same substance which was seized. Without this chain of proof, it was error to admit the report.

I do not think that the hearsay evidence complained about by

Appellant was prejudicial (Point A). Officer Berger mentioned what he had been told by the mate and other members of the crew, in an attempt to contradict a statement by Appellant at the time of the seizure that he kept the cigarette paper to use when the ship was short of cigarettes and the implication that Appellant usually put tobacco from loose cigarettes in his pipe to smoke since he did this at the time of the search. Any error in the admission of this hearsay evidence is rendered harmless by the improbability that Appellant would keep cigarette paper with which to make his own cigarettes and, at the same time, tear available cigarettes apart to smoke in his pipe. In addition, there is no indication that the Examiner gave any consideration to this hearsay evidence in arriving at his determination of the case.

There was no error in the failure of the Examiner to recall Officer Berger after Appellant testified that all of the clothing near his locker were not his (Point B). Berger testified that he asked Appellant if these clothes were his and that Appellant "admitted ownership of the clothes on the floor." (R.14) This testimony is perfectly clear and there is no reason to believe that Officer Berger would have changed his testimony on this point simply because of what Appellant subsequently testified to. It is also perfectly clear that the Examiner accepted the truth of Appellant's admission to Berger and rejected Appellant's later contradictory testimony. The Examiner stated in his decision that the two cigarette butts were found "among the clothes" of Appellant (Finding No. 12; and Opinion, para. 4).

To reject the testimony of Officer Berger at this point, it would be necessary to state, in effect, that the Examiner should have believed the testimony of Berger in preference to that of Perez but that Appellant's testimony must be accepted over that of either of the other two men who testified.

The U. S. Customs Laboratory Report of the cigarettes (Point C) was adequately identified. It states in part:

"Lab. No. D 2655 - - - - Sample (s) of 2 Weed
Cigarettes 2 gr. - - - - Received 2/8/52 - - - - Entry No.
Seizure 43496 - - - - Marks Dfdt. Miguel Siclana, SS WM. H.
WILMER, Szd by PPO Berger 7178 - - - - Net weight received
(penalty basis) 2 grains - - - - /s/ I. Schnopper, Actg. Asst.

Chief Chemist."

and is certified by the Acting Assistant Chief Chemist to be a true copy of chemist's report D2655. In addition to the other obvious means of identifying this substance as the same which was found by Officer Berger in Appellant's forecastle on 7 February, 1952, this report contains the same seizure number as the receipt held by Appellant for the substance on which he paid the 13 or 16 cents fine for failure to manifest, i.e., number 43496 (R.26).

Although there was no marijuana found on Appellant's person at the time of the search, there was sufficient circumstantial evidence to constitute reliable and substantial evidence that the two marijuana butts belonged to Appellant. These circumstances, which were all mentioned by the Examiner in his decision, are as follows:

1. The two butts were in a crumpled Pall Mall package.
2. The package was found among Appellant's clothing.
3. The clothing was near Appellant's locker.
4. Ten or twelve loose Pall Mall cigarettes were in Appellant's locker.
5. Loose cigarette paper was in Appellant's locker.

It is my opinion that this circumstantial evidence, considered together with the other facts presented, affords a rational basis upon which to draw the probable inference that the two butts containing marijuana belonged to Appellant. These facts present cumulative circumstantial evidence which all points independently to the same conclusion, rather than being inferences which rest upon other inferences. And these facts are based primarily upon the testimony of Officer Berger who was a disinterested witness and whose testimony, to a great extent, was not denied by Appellant. The Examiner found in accordance with the testimony of Berger and I am bound to uphold the findings of the Examiner in the absence of any arbitrary or capricious action on his part. Since his findings are adequately supported by the evidence, I must sustain them.

The fact that Perez had some Pall Mall cigarettes aboard does not dissuade me from reaching this conclusion anymore than I am persuaded to determine that Appellant gave Perez the package of Chesterfields simply because Appellant mentioned having some Chesterfield cigarettes in his possession. It is also true that Appellant admitted ownership of the loose Pall Mall cigarettes in his locker and told Officer Berger that he had thrown away the empty package. The package in which the two butts were found might have been the same one which had contained the ten or twelve loose Pall Malls or another empty Pall Mall package which belonged to Appellant. The loose cigarettes in Appellant's locker simply established that Appellant had available at least one empty Pall Mall package in which he could have put the two marijuana butts.

CONCLUSION

Appellant also urges that the order of revocation is excessive in view of his prior record during fifteen years at sea; the fact that he has a wife and two children to support; and going to sea is the only work Appellant has ever known (Point III). It is unfortunate that revocation of Appellant's document inflicts hardship upon Appellant as well as his family. But any association with narcotics by merchant seamen is considered to be such a serious offense as to require the most severe order of revocation.

ORDER

The Order of the Examiner dated 12 March, 1952, should be, and it is, AFFIRMED.

A. C. Richmond
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 2nd day of July, 1952.

***** END OF DECISION NO. 565 *****

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