

In the Matter of License No. A-15749
Issued to: DONALD A. PREBLE

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

601

DONALD A. PREBLE

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 11 June, 1952, an Examiner of the United States Coast Guard at New York City suspended License No. A-15749 issued to Donald A. Preble upon finding him guilty of negligence based upon two specifications alleging in substance that while serving as Master on board the American SS RIDER VICTORY under authority of the document above described, on or about 16 November, 1947, while said vessel was underway in Cape Cod Bay, he contributed to the collision with and sinking of the fishing vessel ALERT, as a result of which Douglas Greeke lost his life, by: failing to allow sufficient clearance when the RIDER VICTORY was overtaking the ALERT (First Specification); and failing to give proper whistle signals (Second Specification).

At the commencement of the hearing on 19 October, 1950, Appellant was given an explanation of the nature of the proceedings and the possible results of the hearing. Appellant was represented by an attorney who waived a recitation of the rights to which Appellant was entitled, which rights had been explained to

Appellant at the time he was served with the charge and specifications.

On the opening day of the hearing, counsel for Appellant moved to dismiss the two specifications on the ground that they were too indefinite and uncertain as to the acts of negligence with which Appellant was charged. The Examiner granted the motion to the extent of adjourning the hearing sine die for the purpose of permitting the Investigating Officer to amend the specifications.

On 11 February, 1952, the hearing was reconvened with the two specifications in the above form. Appellant entered a plea of "not guilty" to each of the two specifications. The Investigating Officer then made his opening statement and counsel for Appellant reserved the right to make a statement at a later time.

Without objection, the Investigating Officer introduced in evidence the depositions of Gilbert Avila, Raymond Levesque and Arthur Francis Pike. The Investigating Officer also offered in evidence a certified copy of a Criminal Information filed against Appellant in the United States District Court for the District of Massachusetts on 6 December, 1949, and a certified copy of the Judgment entered on 6 December, 1949, by which Appellant was sentenced to pay a fine of \$500 after he had been arraigned on the Information and a plea of nolo contendere had been accepted by the Court. The Investigating Officer stated that the purpose of these documents was to show that Appellant was convicted in a criminal action based upon the same facts as the two specifications; and, consequently, that the Judgment of Conviction was res judicata within the meaning of 46 Code of Federal Regulations 137.15-5(a). Counsel objected on the ground that there had been no determination on the merits of the case because a plea of nolo contendere had been entered; and, therefore, there had been no conviction within the language of Section 137.15-5(a). The hearing was adjourned on 11 February, 1952, to afford both parties the opportunity to submit memorandum briefs on this point.

When the hearing was reconvened on 28 March, 1952, the Examiner overruled counsel's objection and received the copies of the Information and Judgment in evidence. Counsel then moved that the Examiner reconsider his decision and requested permission to file a supplemental brief in support of his motion for

reconsideration. Appellant also requested that the Examiner obtain a ruling from the Commandant in accordance with 46 Code of Federal Regulations 137.07-5(d) which permits Examiners to obtain instructions from the Commandant "on questions of law and policy" at any time. The Examiner agreed to the requests and adjourned the hearing.

Upon reconvening the hearing on 11 June, 1952, and having considered counsel's supplemental memorandum, the Examiner upheld his former ruling on the bases of 46 United States Code 375 and Headquarters [Appeal No. 422](#). The latter decision states: "Since the Information and First Specification are based on the same set of facts, the Federal Court Judgment of Conviction on a plea of nolo contendere must be held to be conclusive in this proceeding." Because of this statement, the Examiner did not consult with the Commandant on this question of law.

After counsel had expressed Appellant's desire to rest his case without submitting any evidence in mitigation, the Examiner announced his findings and concluded that the charge had been proved by proof of the two specifications. He then entered the order suspending Appellant's License No. A-15749 for a period of six months.

In this appeal which has been taken from the decision of the Examiner, it is contended that a license can be suspended on the basis of a conviction on a plea of nolo contendere only when a statute authorizes the suspension upon presentation of evidence of a prior conviction of a specified type; and that since Section 137.15-5(a) is not a statute but a regulation, Appellant is being improperly deprived of a hearing on the merits of the case.

Appearances: John I. Dugan, Esquire, of New York City, of Counsel.

FINDINGS OF FACT

On 16 November, 1947, Appellant was serving as Master on board the American SS RIDER VICTORY and acting under authority of his License No. A-15749 when his ship collided with the fishing vessel ALERT while both vessels were underway in Cape Cod Bay about two miles northeast of the eastern entrance to the Cape Cod Canal. The

owner and master of the ALERT, Douglas Greeke, did not survive the collision and his vessel sank soon after it was hit by the RIDER VICTORY.

From about 0600 until the collision occurred at 0620, the ALERT was proceeding on a straight course and at a speed of eight or nine knots as the RIDER VICTORY approached from astern of the smaller vessel in clear weather with a visibility of at least two miles. The RIDER VICTORY began to overtake the ALERT without previously sounding the appropriate whistle signal for this maneuver. The RIDER VICTORY sounded three or four blasts on her whistle just before her bow struck the stern of the ALERT, which sank almost immediately. Mr. Greeke and deponent Raymond Levesque were standing in the bow of the ALERT at the moment of impact and both of them were knocked down. Levesque was washed overboard but Greeke tried to cut the dory loose and was next seen swimming towards a keg in the water. Both men were picked up by the crew of the SONNY AND JOYCE but Greeke was already dead. Deponent Avila was a member of the crew of the latter vessel. Arthur Pike, the helmsman on the ALERT, was the third deponent. The record does not disclose what action he took after the collision.

OPINION

The two counts in the Information filed against Appellant in the United States District Court for the District of Massachusetts charge that while Appellant was Master of the RIDER VICTORY on 16 November, 1947, he did "operate said vessel in a negligent manner so as to endanger" the life of Douglas Greeke (Count 1) and the fishing vessel ALERT (Count 2) "in violation of 46 U.S.C. 526(1)." Appellant entered a plea of nolo contendere to each of these two counts; judgment was entered against him; and he was sentenced to pay a fine of \$500. There is no question but that the information and the two specifications are based on the same acts or omissions. But Appellant contends that the purpose of Section 137.15-5 was not intended to apply except in cases where the facts had previously been presented before a court or where there had been a plea of guilty entered prior to conviction by the court.

It is uniformly recognized that the facts alleged in an indictment or information are admitted on a plea of nolo contendere only for the purpose of the case at bar; and although a conviction

obtained on the basis of this plea is an implied confession, it cannot be used as a confession or admission of the facts in any other civil or criminal action. Appellant concedes that judicial action against a license may rest upon a conviction on a plea of nolo contendere when a statute authorizes such action on the basis of evidence of conviction for certain offenses. But Appellant contends that Section 137.15-5 cannot be used to bring about the same result because it is merely a regulation.

As stated by the Examiner, Title 46 United States Code 375 requires that "the Commandant of the Coast Guard shall establish all necessary regulations required to carry out in the most effective manner the provisions of Title 52 of the Revised Statutes, . . . and such regulations shall have the force of law." The authority of 46 U.S.C. 375 is referred to, as required by Section 4(a)(2) of the Administrative Procedure Act, in the "Notice of Proposed Changes in Regulations" appearing in 12 Federal Register 1109 on 18 February, 1947. In accordance with this notice, a public hearing on suspension and revocation proceedings was held on 27 March, 1947, and Section 137.15-5 was published in 12 F.R. 6746 on 14 October, 1947.

Since the Commandant has been directed specifically by 46 U.S.C. 239(j) to make regulations for proceedings under Section 239 and since 46 U.S.C. 375 contains the general mandate that gives these regulations the force of law, it is my opinion that Section 137.15-5 can be employed in these remedial administrative proceedings, for which it was promulgated, to the same extent that a statute, which authorizes revocation of a license upon a prior conviction, can be utilized in judicial proceedings. And *Bruno v. Reimer* (CCA2, 1938), 98 F.2d 92, is authority for the proposition that when a statute authorizes action of this nature on the basis of a prior conviction, the fact that the conviction resulted from a plea of nolo contendere does not prevent the application of the statute.

In addition, it is logical that the requirement to make regulations "to secure the proper administration of this section" (46 U.S.C. 239(j)) is a sufficient delegation of authority to permit regulations which control these administrative proceedings as long as the regulations do not exceed the standard set as to the offenses which are within the scope of 46 U.S.C. 239(g). This

restriction is complied with under Section 137.15-5 since the use of a judgment of conviction is limited to those cases where the "acts forming the basis of the charges in a Federal court are the same as those involved in proceedings attempting to establish that which seems apparent from a comparison of the Information and the two specifications: the same acts form the bases for the charges set out in the Information and the specifications.

The depositions establish the facts that the bow of the RIDER VICTORY struck the stern of the ALERT and she sank very shortly thereafter; and that the RIDER VICTORY was attempting to overtake the ALERT but the overtaking signal was not sounded by the RIDER VICTORY. There is no evidence in the record as to the part Appellant played in navigating the RIDER VICTORY so close to the ALERT that a collision occurred and in the omission to obey the rules with respect to whistle signals. But Appellant was Master of the RIDER VICTORY and, therefore, responsible for her improper navigation. Even in the absence of the application of 46 C.F.R. 137.15-5(a), Appellant must be held to have been negligent to some extent for the manner in which the ship under his command was operated. Although Appellant did not submit evidence in mitigation of the offense, the order is modified as follows because of Appellant's clear record for more than twenty years and the length of time which has expired since the offense occurred.

ORDER

"That Master Mariner's License No. A-15749, and all other licenses, certificates of service and documents issued to Donald A. Preble by the United States Coast Guard or its predecessor authority, are hereby suspended for a period of six (6) months. The last five (5) months of this suspension shall not be effective provided no charge under R.S. 4450, as amended (46 U.S.C. 239), is proved against you for acts committed within eleven (11) months of the expiration of the one (1) month outright suspension."

As so MODIFIED, the Order of the Examiner dated 11 June, 1952, is AFFIRMED.

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

***** END OF DECISION NO. 601 *****

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