

In the Matter of Merchant Mariner's Document No. Z-65997(R)
Issued to: EMILIANO ACABEO

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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EMILIANO ACABEO

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.

By order dated 9 July, 1954, an Examiner of the United States Coast Guard at New York, New York, revoked Merchant Mariner's Document No. Z-65997(R) issued to Emiliano Acabeo upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as an ordinary seaman on board the American SS Yorkman under authority of the document above described, on or about 26 July, 1951, while said vessel was at Balboa, Canal Zone, he wrongfully had marijuana in his possession.

The hearing commenced in absentia and the Examiner entered a plea of "not guilty" on behalf of Appellant after the Investigating Officer made his opening statement. The Investigating Officer then introduced in evidence two documentary exhibits: a certified copy of Appellant's conviction, in the Magistrate's court for the Town and Subdivision of Balboa, Canal Zone, for possession of marijuana on 26 July, 1951; and a certified copy of Appellant's Arrest Record for possession of marijuana at Balboa on 26 July, 1951.

When Appellant put in appearance later on the same day, he 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. After an adjournment, Appellant was represented by a civilian attorney of his own choice. Appellant's counsel stated that he had no objection to the two exhibits which had been admitted in evidence.

Counsel then made his opening statement in which he conceded that the evidence made out a prima facie case against Appellant. But counsel also stated that Appellant had not been represented by an attorney in the Balboa Court and, for that reason, Appellant entered a plea of "guilty" in the Balboa Court although he had no knowledge concerning the marijuana cigarette which was found in his package of regula cigarettes.

Counsel for Appellant and the Investigating Officer then stipulated that Appellant was in the service of the YORKAMAR on 26 July, 1951. The Investigating Officer then rested his case.

Prior to adjournment, argument was presented as to whether the conviction in the Balboa Magistrate's Court was a conviction by a "Federal court" within the meaning of 46 C.F.R. 137.15-5(a). The Investigating Officer argued that since it was a court constituted by an Act of Congress, it was a "Federal Court", in the regulation, was limited to U.S. District Courts, Circuit Courts of Appeal and the Supreme Court of the United States.

During the remainder of the hearing, Appellant was represented by non-professional counsel who also testified as a character witness in behalf of Appellant. The attorney who had represented Appellant did not continue to do so because Appellant was unable to pay additional fees to the attorney.

Appellant testified under oath in his own behalf. Appellant admitted that a marijuana cigarette was found in his possession and that he entered a plea of "guilty" when charged before the Magistrate's Court with possession of marijuana. But Appellant also stated that he had no knowledge that the marijuana cigarette was on his person; he had never before see a marijuana cigarette; and the marijuana cigarette must have been put in Appellant's

package of Chesterfield cigarettes by a Panamanian to whom Appellant had handed his package of cigarettes when the native asked for one.

At the conclusion of the hearing, having heard the argument of the Investigating Officer and given both parties and opportunity to submit 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-65997(R) and all other licenses, certificates 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 respectfully requested that Appellant be given an opportunity to rehabilitate himself since he has been going to sea for 12 years and this is his only means of supporting his 4 children who live in Puerto Rico. Appellant promises to observe good conduct if he is reinstated as a seaman in the Merchant Marine.

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

FINDINGS OF FACT

On 26 July, 1951, appellant was serving as an ordinary seaman on board the American SS YORKMAN and acting under authority of his Merchant Mariner's Document No. Z-65997(R) when the ship arrived at Balboa, Canal Zone.

On the afternoon of 26 July, 1951, Appellant went ashore without permission and visited several bars. When Appellant returned to the gate of the dock where the ship had been berthed, the ship had departed. Two Customs officials searched Appellant and found a marijuana cigarette in a package of Chesterfield cigarettes which Appellant was carrying in the left side pocket of the shirt he was wearing.

On the basis of these facts, Appellant was arraigned on the following day before the Magistrate's Court for the Town and Subdivision of Balboa, Canal Zone, for possession of marijuana on 26 July, 1951, in violation of Section 581, Title 5, of the Canal

Zone Code. Appellant was convicted on his plea of "guilty". He was sentenced to pay a fine of \$25.00 and to serve 10 days in jail. Execution of the jail sentence was suspended and Appellant was placed on probation for one year. Appellant paid \$22.00 of the fine and spent 3 days in jail in lieu of the payment of the balance of \$3.00 fine.

Title 46 C.F.R. 137.21-10 provides that possession of narcotics is sufficient evidence upon which to revoke a seaman's documents "unless the person charged proves the possession not to be wrongful to the satisfaction of the Examiner." After having the opportunity to hear and observe Appellant, the Examiner not only stated that the Appellant had not given any satisfactory explanation for the possession of the marijuana but the Examiner also stated specifically that Appellant intentionally and voluntarily took possession of a narcotic. Thus, the Examiner totally rejected Appellant's testimony that he had no knowledge as to the presence of the marijuana cigarette in the package of Chesterfields; and the Examiner properly revoked Appellant's document in accordance with the above regulation and 46 C.F.R. 137.03-1 which makes revocation mandatory whenever a seaman has been found guilty of an offense involving narcotics. This action by the Examiner was also in line with the numerous cases which state that questions of credibility are for the trier of the facts to determine and uncontradicted testimony need not be accepted by him. *Broadcast Music, Inc. v. Havana Madrid Restaurant Corp.* (C.C.A. 28 1949), 175 F2d 77; *The Dauntless* (C.C.A.9, 1904), 129 Fed. 715. Although Appellant's testimony as to lack of knowledge of the marijuana cigarette was not directly contradicted, his plea of "guilty" in the Magistrate's Court was at least inconsistent, to some extent, with his claim of lack of knowledge.

It is evident from the above that a prima facie case was made out against Appellant by the record of his conviction in the Magistrate's Court; and Appellant's testimony was not accepted as sufficient to rebut the prima facie case. Therefore, it is not necessary for the purpose of this case to determine whether the conviction was res judicata and conclusive in this case. But in the interest of future clarity, this point will be discussed briefly.

Strictly speaking, the Magistrate Courts in the Canal Zone are

"Federal courts" in the sense that they were provided for by Congressional legislation under former section 1342 of Title 48 of the U. S. Code, which section is now part of the Canal Zone Code. But they are territorial, legislative courts of limited jurisdiction set up by Congress under Article IV, section 3, clause 2, of the United States Constitution. This portion of the Constitution gives Congress the authority to make all "needful rules and regulations" respecting the territories of the United States. Therefore, these courts are not courts of the United States in the Constitutional sense since they are not part of the Federal judicial system created under Article III, section 1, of the Constitution. See *O'Donoghue v. United States* (1933), 289 U.S. 516, 536; *Ex Parte Bakelite Corp.* (1929), 279 U.S. 438, 449.

It is also significant that an appeal may be taken from a Canal Zone Magistrate's Court to a District Court in the Canal Zone which was provided for by 48 U. S. C. 1344. It is my opinion that the regulation, making "Federal court" judgements of conviction rest *judicata* in these proceedings, was not intended to embrace courts below the level of District Courts of the United States constituted under Article III of the Constitution. Therefore, I concur with the Examiner's conclusion that the record of conviction in the Magistrate's Court was not *res judicata* of the issues decided therein; but that it was *prima facie* evidence of the allegation of wrongful possession of marijuana.

Because of the serious nature of all offenses involving narcotics, Appellant's plea for leniency cannot be granted and the order of revocation will be sustained despite the personal hardship which this action might cause Appellant and his family.

ORDER

The order of the Examiner dated at New York, New York, on 9 July, 1954, is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 5th day of January, 1955.

***** END OF DECISION NO. 785 *****

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