UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. REDACTED
Issued to:Robert William Foedisch

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2297

Robert William Foedisch

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.3-1.

By order dated 13 July 1981, and Administrative Law Judge of the United States Coast Guard at Seattle, Washington suspended Appellant's seaman's documents for six months, upon finding him guilty of misconduct. The specification found proved alleges that, while serving as Ordinary Seaman on board the SS JOHN LYKES, O.N. 282772 under authority of the captioned document, on or about 9 May 1980, Appellant wrongfully possessed approximately 12.5 grams of marijuana, a narcotic.

The hearing was held at Seattle, Washington on 8 December 1980, 5 February 1981 and 22 June 1981.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence six documents and a deposition.

In defense, Appellant testified in his own behalf and offered eight documents in evidence.

At the end of the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and

specification had been proved. He then served a written order on Appellant suspending all documents issued to Appellant for a period of six months.

The entire decision was served on 14 July 1981. Appeal was timely filed on 27 July 1981 and perfected on 26 October 1981.

FINDINGS OF FACT

On 9 May 1980, Appellant was serving as Ordinary Seaman on board the SS JOHN LYKES and acting under authority of his document while the vessel was in the port of Stockton, California.

On 9 May 1980, the JOHN LYKES was moored in the port of Stockton, California, after arriving from San Francisco, with previous stops at Long Beach, California, and Tacoma, Washington. A United States Customs Blitz Team consisting of approximately ten Customs patrol officers boarded the vessel to conduct a routine search for contraband. Officer George Walters observed Mr. Welch, Appellant's roommate quickly return to his stateroom upon seeing him. On the basis of that furtive act Appellant's room was selected at the first to be examined by this particular pair of Customs officers. After knocking on the closed door and identifying themselves, the Customs officers entered the stateroom. The stateroom was shared by Appellant and Mr. Welch, both of whom were present. Initially Appellant was sleeping or at least lying on his bunk and Mr. Welch was standing in the center of the room. The Customs officers inspected Mr. Welch and other areas of the room and Appellant arose from his bunk. Officer Walters then began to search Appellant and his bunk and discovered a plastic bag containing a leafy substance under the pillow. The material in the bag was subjected to a field test by Official Walters which resulted in a positive reaction for THC. Chemical analysis late showed the material was approximately 12.5 grams of marijuana. Three law enforcement agencies, the Drug Enforcement Administration, the Office of Investigating of United States Customs, and the local police recommended no prosecution of the case. Mr. Foedisch paid a $50 administrative penalty to Customs, was logged by the Master of the JOHN LYKES and discharged for cause as a result of the discovery of the marijuana.

BASES OF APPEAL

This appeal has been from the order imposed by the Administrative Law Judge. It is contended that:

(1) the evidence upon which the charge of misconduct was based was obtained as a result of an unconstitutional search and should have been suppressed;

(2) the charge of misconduct was not proved by substantial evidence, reliable and probative in character; and
(3) the untimeliness of bringing the charges and method of prosecution was violation of Appellant's right to due process of law.

APPEARANCE: R. Thomas Olson and Shane C. Carew, of Moriarty, Mikkelborg, Broz, Wells and Fryer, Seattle, Washington.

OPINION

I

Appellant argues that because there was no evidence in the record of a border crossing the search was unreasonable and its fruits should be excluded from evidence. I do not address the portion of the argument concerning the border crossing because, for the reasons stated below, I conclude that the exclusionary rule is not applicable to these remedial safety proceedings.

The 4th Amendment to the U.S. Constitution assures the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The exclusionary rule is a judicially created means of effectuating rights secured by the 4th Amendment. Prior to the decisions of the U.S. Supreme Court in *Weeks v. United States*, 232 U.S. 383(1914), and *Gouled v. United States*, 255 U.S. 298 (1912), there existed no barriers to the introduction in criminal trials of evidence obtained in violation of the 4th Amendment. Later decisions discussed the principal reasons for the application the rule to federal trials. In *Elkins v. United States*, 364 U.S. 206 (1960), the Supreme Court referred to its supervisory duty over lower federal courts and discussed the concept of judicial integrity as an imperative which mandated the exclusion of illegally seized evidence to prevent the contamination of the judicial process. But, even in that context, the emphasis was on deterring law enforcement officials from illegal searches. Therefore, the prima purpose of the exclusionary rule, if not the sole one, is to deter future unlawful police conduct.

In more recent cases the Court has retreated somewhat from the harshness of the exclusionary rule. It has placed more limitations on who has standing to object to the introduction of evidence seized in violation of the 4th Amendment. *United States v. Salvucci*, 448 U.S. 83 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978); *Brown v. United States*, 411 U.S. 223(1973). The Court has also allowed the use of unlawfully seized evidence in grand jury proceedings. *United States v. Calandra*, 414 U.S. 33,

(1974). The right of state prisoners to attack their convictions in *habeas corpus* proceedings based on the use of unconstitutionally obtained evidence at trial has been withdrawn. *Stone v. Powel*, 428 U.S. 564 (1976). The Court has also ruled that evidence need not be excluded on behalf of a defendant who lacks standing even when the evidence is the fruit of a search which was "flagrantly illegal" and possibly criminal. *United States v. Payner*, 447 U.S. 727 (1980).

The U.S. Supreme Court discussed the admissibility of illegally obtained evidence in a non criminal proceeding in *United States v. Janis*, 428 U.S. 433(1976). Here the Court held that the exclusion from federal civil proceedings of evidence unlawfully seized by a state enforcement officer had not been shown to have sufficient likelihood of deterring of the state police so that it outweighed the social costs imposed by the exclusion. The relevant evidence in *Janis* consisted of cash and wagering records seized by a city police officer who had a search warrant in his possession for the search. In a subsequent state criminal proceeding against the individual from whom the evidence was seized, the trial court found the search warrant to be defective and ordered the wagering records to the defendant. At the time of the defendant's arrest the Internal Revenue Service was informed. Using a calculation based on the seized evidence, the IRS assessed the respondent for wagering excise taxes and levied the assessment upon the cash seized by the police officer. The respondent moved to suppress the evidence and to quash the assessment. The District Court and the Court of Appeals ruled in favor of the respondent. In reversing the lower courts, the Supreme Court recognized that the exclusionary rule has never been applied to civil proceedings:

> "...In the complex and turbulent history of the rule the court never had applied it to exclude evidence from a civil proceeding, federal or state..."*Janis*,*supra* at 449

The Court recognized that the prima, if not sole, purpose of the exclusionary rule is deterrence.

> "The rule is intended to deter law enforcement personnel from violating the Constitutional rights of criminal defendants. If the evidence is excluded and thus not available for the conviction of the defendant then the incentive to disregard the Constitutional guarantee against unreasonable search and seizure is removed. A desire to limit application of the rule exists since application of the rule results in concededly relevant and reliable evidence being rendered unavailable. Since the objective of the rule is deterrence, it would make

no sense to apply the rule to a situation where no deterrent effect is possible."*Id.*

I have previously held that the unlawfulness of a search does not bar the use of the product thereof in a remedial non-criminal proceeding. Decision on Appeal 2187 (CASTLEBERRY). See also Decision on Appeal No. 1518 (WIGREN). The admissibility of evidence in an administrative proceeding is not subject to all the strictures which attend criminal actions. Decisions on Appeal 2098 (CORDISH), and 2135 (FOSSSANI).

Appellant would have me attempt to deter the alleged unlawful actions of U.S. Customs officers by the excluding evidence from a remedial safety proceeding. The Supreme Court has restricted application of the exclusionary rule to those circumstances where its deterrent effect would most like be "substantial and efficient." *Janis*,*supra*, 428 U.S. at 453. The Court cautioned that any extension of the rule beyond its core application barring use of the illegally seized items in the trial of the matter for which the search was conducted - must be justified by balancing the "additional marginal deterrence" of the extension against the cost to the public interest of further impairing the pursuit of truth. *Janis*,*supra* 428 U.S. at 453-54. Deterrence of Customs officers may be effected when and if appropriate criminal proceedings and initiated and evidence is ruled inadmissible. It may be that the potential inadmissibility of the evidence frustrated criminal proceedings that had been sought earlier by United States Customs. I cannot determine this from the record. However, the exclusion of evidence from a remedial proceeding concerning fitness to remain the holder of a merchant mariner's license or document would not serve to deter even a flagrantly unlawful Customs search. Furthermore, The public interest in not impairing the pursuit of truth at a remedial safety proceeding outweighs any deterrence that could result from the exclusion of this evidence. Therefore, it is my conclusion that the evidence seized is admissible in these proceedings.

II

Appellant contends further that the charge of misconduct was not proved by substantial evidence, reliable and probative in character. His brief on appeal bases this contention on his hope for success in having the evidence suppressed. In light of the resolution of that issue, his contention concerning the sufficiency of the evidence is without merit.

III

Appellant contends that the untimeliness of bringing the charges and the method of prosecution is violative of his right of due process under the law. On appeal he elaborates the time delay of bringing charges and the failure of the Investigating Officer to call Appellant's roommate as a witness. He also lists various prejudices which he has suffered or will suffer because of the proceedings. His contentions are without merit.

The time consumed was in the initial attempt to locate Appellant and serve him with charges. Appellant is protected by the time limits in 46 CFR 5.05-23 from unreasonable delays. None was shown here. Both the Investigating Officer and Appellant required continuances. There is no evidence of intentional misconduct or oppressive design on the part of the government. No substantial prejudice resulted from either the delay in charging Appellant or the several continuances granted to both parties. Reversal is not required under these circumstances. Decisions on Appeal Nos. 2253 (KIELY) and 2064 (WOOD).

Appellant's desire to have his roommate testify was apparently not his earliest consideration in approaching this case since there is no evidence in the record of requests for Mr. Welch's presence. The Investigating Officer is not required to anticipate the witnesses desired by the respondent as part of planning the government's case-in-chief. Appellant cannot now complain that a witness for which he made no request to either the Administrative Law Judge or the Investigating Officer, was not called to testify.

CONCLUSION

The exclusionary rule does not require suppression of the marijuana found in Appellant's stateroom. The findings are based on substantial and reliable evidence. Appellant was not been denied due process of law.

ORDER

The order of the Administrative Law Judge dated at Seattle, Washington, on 22 June 1981 is AFFIRMED.

B.L. STABILE
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 6th day of April 1983.

***** END OF DECISION NO. 2297 *****

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