

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-786 465
Issued to: MARK H. MILLER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2055

MARK H. MILLER

This appeal has been taken in accordance with Title 46 United States Code 239b and Title 46 Code of Federal Regulations 5.30-1.

By order dated 14 October 1975, an Administrative Law Judge of the United States Coast Guard at San Diego, California, revoked Appellant's seaman documents upon finding him guilty of "conviction for a narcotic drug law violation." The specifications found proved alleges that on or about 21 July 1971, Appellant was convicted in Superior Court in the County of San Diego for a violation of California Health and Safety Code, section 11530.5 (possession of marijuana for sale).

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 the certified duly attested abstract of the court record, criminal minutes of the Superior Court of the State of California, probation order, and order remanding Appellant to the custody of the sheriff.

In defense, Appellant offered in evidence a certified, duly

attested copy of an order from the Superior Court setting aside the plea of guilty in the State criminal action, vacating such plea and entering a plea of not guilty and dismissing the information pursuant to section 1203.4(a) of the California Penal Code. Appellant also testified on his own behalf.

At the end of the hearing, the Judge rendered an oral decision in which he concluded that the charge and specification had been proved. He then entered an order revoking all documents issued to Appellant.

The entire decision was served on 14 October 1975. An amended decision and order was subsequently served on 30 October 1975. Appeal was timely filed on 24 October 1975.

FINDINGS OF FACT

Appellant is the holder of merchant mariner's document number Z-786 465. On or about 21 July 1971 Appellant was convicted in Superior Court in the County of San Diego for a violation of California Health and Safety Code, section 11530.5 (possession of marijuana for sale). Appellant was remanded to prison for a term of five months, plus three years' probation.

On 13 August 1975 Appellant was charged to appear at a hearing looking to the suspension or revocation of his merchant mariner's document based upon the above conviction.

On 24 September 1975 the Superior Court set aside the plea of guilty in the criminal action, vacated said plea, entered a plea of not guilty, and dismissed the information pursuant to section 1203.4 of the California Penal Code.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Counsel for the Appellant contends that section 1203.4 of the California Penal Code sets aside a conviction for all purposes, so that no conviction now exists as defined by 46 U.S.C. 239b. Counsel further contends that 46 U.S.C. 239b should

be construed as permissive rather than mandatory, so that Appellant's documents are not required to be revoked as the Administrative Law Judge held. Alternatively, counsel urges that Appellant be granted administrative clemency in view of the time lapse since the narcotics conviction and Appellant's excellent previous and subsequent record.

OPINION

I

46 CFR 5.03-10(b) provides that "(a)n order of revocation will be rescinded by the Commandant if the seaman submits satisfactory evidence that the court conviction on which the revocation is based has been set aside for all purposes...." In this brief on appeal, counsel for Appellant contends that section 1203.4 of the California Penal Code operates to expunge Appellant's narcotics conviction from the record. However, it does not do so "for all purposes" as required by section 5.03-10(b). For example, the prior conviction may be pleaded and proved in a subsequent prosecution of the defendant for any other offense, it may be used to prevent the defendant from being licensed to practice certain professions, and the conviction will prevent the defendant from obtaining a permit to own, possess or have in his custody or control any firearm capable of being concealed on the person. In *Garcia-Gonzales v. Immigration and Naturalization Service*, 344 F. 2d 804, 808 (9th Cir. 1965) the court said, "by its own terms, as well as by the terms of other statutes, section 1203.4 does not, in fact, release all penalties and disabilities. It is sheer fiction to say that the conviction is 'wiped out' or 'expunged'." The Commandant has long held that section 1203.4 of the California Penal Code does not come within the meaning of "set aside for all purposes" as expressly set forth in the regulation. (See Commandant's Decision 1223, 1746, and 1786.) Therefore, for the purpose of this case it suffices to say that a conviction exists upon which to predicate a revocation proceeding and to uphold a finding that Appellant's merchant mariner's document would be revoked.

II

Counsel for Appellant also contends that the Administrative

Law Judge erred when he stated that he had no discretion to revoke or not to revoke once the elements of the narcotics conviction were found proved. However, the Commandant has interpreted 46 U.S.C. 239b to provide that the only discretion is whether or not revocation proceedings will be instituted. [The Secretary "may take action."] Once that decision is made, 46 U.S.C. 239b states that the judge "shall" enter a revocation order. the administrative law judge's analysis of his duty was therefore correct; the power of discretion rests with the convening authority rather than with the trier of fact.

III

The documentary evidence more than adequately supports a finding that Appellant, while holder of the above captioned document, was convicted of a narcotics offense by a court of record. The court records, coupled with notice of California State laws, satisfy the requirement of 46 CFR 5.20-95(b) that findings must be based upon substantial evidence of a reliable and probative character.

IV

The procedure for administrative clemency is separate and independent of the procedure for reviewing appeals from the decision and order of an Administrative Law Judge. Clemency procedures are detailed in 46 CFR 5.13 and essentially require documentation as to rehabilitation. When these regulatory procedures are complied with an evaluation will be made for determining the propriety of issuance of a new document. It is suggested that Mr. Miller file an application for administrative clemency in person with the nearest Officer in charge, Marine Inspection.

CONCLUSION

Section 1203.4 of the California Penal Code does not unconditionally set aside a conviction for all purposes as required by 46 CFR 5.03-10(b). The revocation proceeding was commenced within the ten year time frame contemplated by 46 U.S.C. 239b and was based on substantial evidence. Therefore, the Administrative Law Judge correctly revoked Appellant's document.

ORDER

The order of the Administrative Law Judge revoking Appellant's merchant mariner's document No. Z-786 465, dated 14 October 1975 at Long Beach, California, as amended is AFFIRMED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 23rd day of April 1976.

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