UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 111 628
Issued to: Bobby Lee Cornelius

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2063

Bobby Lee Cornelius

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

By order dated 7 January 1976, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman documents for 6 months on 12 months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving under authority of the license above captioned, on or about 3 December 1975, Appellant (1) wrongfully failed to appear before the Investigating Officer at the U.S. Coast Guard Marine Safety Office, San Diego, California, pursuant to a subpoena issued on 26 November 1975 in the matter of license number 112 067 issued to Lewis F. Burk, and (2) wrongfully failed to appear before the Investigating Officer at the U.S. Coast Guard Marine Safety Officer, San Diego, California, pursuant to a subpoena issued on 26 November 1975 in the matter of license number 111 246 issued to Ralph Madruga.

At the hearing, Appellant elected to act as his own counsel and entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence seven exhibits and the testimony of three witnesses.

In defense, Appellant offered in evidence his own testimony and cross-examined two of the Investigating Officer's witnesses.

At the end of the hearing, the Judge rendered an oral decision in which he concluded that the charge and both specifications had been proved. He then served a written order on Appellant suspending all documents, issued to Appellant, for a period of 6 months on 12 months' probation.

The entire decision and order was served on 8 March 1976. Appeal was timely filed.

FINDINGS OF FACT

On 9 November 1975, the Senior Investigating Officer at the U.S. Coast Guard Marine Safety Office, San Diego, California, issued to a subpoena to the Appellant ordering him to appear and produce documents on 26 November 1975 in relation to an inquiry concerning possible licensing violations by crew members of the M/V AVANTI. The Appellant did appear before the Senior Investigating Officer on 26 November 1975 but failed to produce the requested documents. Appellant stated that he was not the owner or operator of the AVANTI and, therefore, could not obtain the documents. The Senior Investigating Officer thereupon issued two subpoenas, allowing the Appellant to appear and produce documents in the matters of license number 112 067, issued to Lewis F. Burk, and license number 111 246, issued to Ralph Madruga, on 3 December 1975.

On 3 December 1975, Appellant while serving under authority of his license failed to appear before the Senior Investigating Officer as ordered by the subpoenas issued on 26 November 1975, which called for him to testify and produce documents for suspension and revocation proceedings. On 18 December 1975, Appellant was charged with misconduct for wrongfully failing to appear at the 3 December 1975k hearing. Appellant was ordered to present himself for suspension or revocation proceedings concerning his license to be held on 23 December 1975.

At the hearing, Appellant stated that he had contacted his attorney,Mr. Arthwell C. Hayton, who in turn wrote a letter to the Coast Guard on 12 December 1975 requesting that any further correspondence be forwarded to him. However, at the hearing Appellant declared that Mr. Hayton was unable to represent him as he had a prior engagement in court. When a continuance was offered to the Appellant to allow him to obtain counsel, Appellant stated that he was leaving for Mexico on 10 January 1976 and would prefer to settle the matter of his license prior to that date. A continuance was granted upon the Investigating Officer's request to 7 January 1976. Upon conclusion of the hearing, the Judge found that the charge of misconduct had been proved and suspended Appellant's license for 6 months on 12 months' probation.

BASES OF APPEAL

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

(1) Appellant was denied his constitutional rights as he did not benefit of counsel;

(2) Appellant was denied his constitutional rights as no notification of the hearing or decision was forwarded to his attorney as requested;

(3) Hearsay evidence was wrongfully admitted which indicated that the AVANTI had operated while inadequately licensed;

(4) The Judge erred in granting the Investigating Officer's request for a continuance of the hearing to 7 January 1976;

(5) Findings and conclusions of the Judge are not supported by the evidence; and

(6) The evidence failed to establish Appellant as the owner or operator of the AVANTI.

APPEARANCE: Appellant, *pro* se.

OPINION

I

In response to the Appellant's contention that he was denied his constitutional right to be represented by counsel, the record indicates that the judge recognized this right and offered to grant Appellant a continuance to permit him time to obtain counsel (TR 4). The offer was not in any way restricted to apply only to the time period prior to Appellant's announced trip to Mexico as is asserted in the appeal brief. It, therefore, cannot be said that Appellant was "coerced" to proceed.

In addition, the Judge repeated his offer to grant a continuance after Appellant declared that the day before the hearing he had sought a change of venue to Long Beach, California (TR 24). In both instances, Appellant waived his right to counsel and a continuance for reasons of his own convenience (TR 4, 5, 24). *Harris v. Smith*, (C.A.N.Y. 1969), 418 F. 2d 899, upheld *the* constitutionality of a proceeding whereby a licensed mariner, subsequent to being informed of his right to a hearing and to be represented by counsel, waived his rights to both. It is, therefore, concluded that Appellant did not suffer an unconstitutional violation of his right to counsel.

II

Appellant argues that his constitutional right of notice was violated by the alleged failure to further all correspondence to his attorney. Appellant contends in the appeal brief that he:

> "at all times, advised the Coast Guard that he was (1) represented by counsel, and (2) that Coast Guard was to make all further contacts and communications with his attorney (page 25 line 20-26)."

However, the statement above is contradicted by the fact that in response to the Judge's question at the 23 December hearing concerning where to send the final written order, Appellant replied that it should be mailed to his home address (TR 7). In addition,

the U.S. Coast Guard Marine Safety Office received on 11 May 1976 a handwritten request by Appellant that all transcripts of the hearing be mailed to his home address. It must also be noted that the statutory requirements at 46 U.S.C. 239(g) direct an investigating officer:

> "In any investigation of acts of incompetency or misconduct or of any act in violation of the provisions of Title 52 of the Revised Statutes or of any of the regulations issued thereunder, committed by any licensed officer or any holder of a certificate of service, the person whose conduct is under investigation shall be given reasonable notice of the time, place, and subject of such investigation." (Emphasis added)

Furthermore, the declaration by counsel attached to the appeal brief and dated 5 May 1975, states that Appellant informed counsel that he was to appear at the 3 December 1975 hearing. Appellant's counsel also says that he received a telephone call from Appellant

> "several days prior to December 23, 1975, advising him that Mr. Cornelius was to appear at a hearing on that date."

In view of this admission by Appellant's counsel that he received actual notice of hearings from Appellant, his argument that "no notice was ever served upon counsel for appellant" is unconvincing.

In view of the statutory directions and the fact that Appellant and his counsel received actual notice of hearings and decisions, it is concluded that there were no violations of Appellant's constitutional rights regarding notice.

III

Appellant contends that the testimony of the San Diego Senior Investigating Officer concerning alleged licensing violations constituted inadmissable hearsay. Additionally, Appellant states that as there was no other valid evidence on this allegedly "vital and necessary point," the Judge committed prejudicial and reversible error in permitting the witness to quote the hearsay evidence.

In response, it is only necessary to point out that the Senior Investigating Officer was commenting upon an issue totally extraneous to the one at hand. Proof, or lack thereof, regarding the licensing status of the AVANTI or her crew has nothing to do with Appellant's failure to respond to a lawful subpoena and would in no way serve as a defense. The question of licensing pertained only to the reason why Appellant had been subpoenaed in the first place, not to his failure to respond. Furthermore, contrary to Appellant's argument, subsequent testimony on the question of license violations was given by Mr. Madruga, a former crew member of the AVANTI (TR 52). The court in *Wheatley v. Shields*, (D.C.N.Y. 1968) 292 F. Supp. 608, stated that even if evidence is erroneously introduced, no prejudice exists:

> "where all facts contained therein were likewise elicited by way of witness and deposition testimony."

The facts and the one issue involved in this case support the conclusion that the Senior Investigating Officer's testimony involved an issue which was in no way "vital and necessary" and could not have served to prejudice the Appellant.

IV

Appellant states that the Judge committed prejudicial error by granting the Investigating Officer's request for a continuance after he had rested his case. In response, it is noted that 46 CFR 5.20-10 permits a Judge to continue a hearing to a letter dated or different location on his own motion. See Appeal Decision 1576 (ASTRAUSKAS):

> "I am not much concerned that after a case has been `rested' it is permitted to be reopened. These remedial administrative proceedings under R.S. 4450 are not bound by the rules of criminal procedure or even by the court rules of civil procedure. Flexibility is allowable and desirable, to permit that the ultimate end of title 52 of the Revised Statutes, safety at sea, be reached."

5 U.S.C. 556(d) states that in regard to the procedure

required in an adjudication under the Administrative Procedure Act:

> "A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

As the Judge had explained at the initiation of the 7 January 1976 hearing, when a party presents evidence, the opposing party has a right to rebut even though they may have rested their case (TR 38). The record indicates that no prejudice to the Appellant resulted from the continuance.

V

Appellant argues that the findings and conclusions of the Judge are not supported by the evidence and that he did in fact appear before the Senior Investigating Officer on 26 November 1975 in response to the subpoena issued on 9 November 1975. Appellant states that at the hearing he gave all of the information he possessed with regard to the AVANTI to the Investigating Officer. Appellant also argues he had made it clear at the 26 November appearance that he was not the owner or operator of the AVANTI and, therefore, was not in a position to obtain the subpoena documents. Additionally, Appellant declares he had been informed by the Senior Investigating Officer that if he presented the requested documents to the Marine Inspection Officer at Long Beach, California, within the time allowed the spirit of the subpoena would be satisfied. Alternatively, Appellant argues that he had been given permission by the Senior Investigating Officer to call in the information.

It should be noted first that the subpoena power of investigating officer under 46 U.S.C. 236(e) is firmly established. It is described as being a "similar process as in the United States District Court." 46 CFR 5.15-25 describes the means by which a party or witness may quash a subpoena. It states:

> "The person to whom a subpoena is directed may, prior or during the hearing, apply in writing to the administrative law judge conducting the hearing a request that the subpoena be quashed or modified. The administrative law judge will notify the party for whom the subpoena was issued to."

The importance that this procedure be adhere to was illustrated in Appeal Decision Number 557 (Richard Hoyt);

> "The effectiveness of the proceedings authorized by 46 U.S.C. 239 (R.S. 4450) as amended will be seriously impaired if recipients of subpoenas have a right of election respecting their appearance or nonappearance in response thereto."

The Appellant made no effort to contest the subpoena or contact the Judge but instead merely continued to assert that he was not the owner or operator of the AVANTI. Appellant's statement that he appeared before the Senior Investigating Officer on 26 November 1975 is immaterial to the present issue concerning his failure to answer subpoenas ordering an appearance on 3 December 1975. The Senior Investigating Officer did, as Appellant alleges, state that the 26 November 1975 subpoena could be satisfied if the Appellant brought the documents requested to the Marine Investigating Officer at Long Beach, California (TR 15). However, why this fact is utilized as a defense is puzzling as the Senior Investigating Officer stated that no documents were ever presented (TR 17).

Concerning Appellant's statement that the Senior Investigating Officer gave him permission to phone in the information, the sole source for this statement appears to be Appellant himself. The Senior Investigating Officer testified that he did not recall making any proposition to that effect (TR 15-16). It is decided that Appellant fails to refute the conclusion and findings of the Judge that Appellant wrongfully failed to appear before the Senior Investigating Officer, San Diego on 3 December 1975. This conclusion is supported by Appeal Decision 557:

> "I hold, as a matter of law, that any person who has been served with the subpoena, issued by duly authorized Coast Guard personnel, to attend and testify at a hearing conducted under 46 U.S.C. 239, and who fails to appear (without reasonable cause, stated at an opportune time) is guilty of misconduct."

VI

Appellant finally puts forward as a defense the argument that the evidence failed to establish that he was the owner or operator of the AVANTI. The relevance of this issue in relation to Appellant's failure to answer a lawful subpoena is nonexistent as even a finding in Appellant's favor would fail to constitute a defense. However, as Appellant apparently places a great deal of importance to this issue througout his appeal, further comment appears appropriate.

It is conceded that there is no evidence Appellant owns or has an interest in the AVANTI. This is unimportant, however, as both of the subpoenas in question describe Appellant as the operator of the vessel. The record indicates that Appellant obtained a license "to operate this or any other boat" (TR 29a). The AVANTI's current certificate of inspection listed Appellant as the ship's operator (TR 39). Form CG-1259, Oath of Registry, License or Enrollment for the AVANTI, was also admitted with the Appellant's signature affixed under the heading of "master."

Mr. Madruga, a crew member of the AVANTI, testified that Appellant never expressly held himself out as the vessel's operator. However, he did state he had assumed as much as he had been hired by the Appellant (TR 44), Appellant took charge of the AVANTI when leaving and entering port (TR 44), he was paid with a check written out by Appellant (TR 45) and that orders, including when to go to sea were issued by Appellant (TR 46). Contrary to Appellant's argument, Mr. Madruga's assumption that Appellant was the operator is justified and not prejudicial. Again, although completely unrelated to the issue of Appellant's failure to appear in response to a subpoena, it is concluded that the Appellant was in fact the operator of the AVANTI during the period of time with which the hearing of 3 December 1975 was concerned.

CONCLUSION

It is concluded that substantial evidence of a reliable and probative nature supports the findings and conclusions of the Judge.

ORDER

The order of the Administrative Law Judge, dated at Long Beach, California, on 19 January 1976, is AFFIRMED.

E.L. Perry
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 14th day of July 1976.

INDEX

failure to obey subpoena

Notice
actual, adequacy of

Subpoena
failure to obey

Testimony
corroboration of, irrelevance to issue

***** END OF DECISION NO. 2063 *****

Top