UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. (REDACTED)
Issued to: Don E. WHITLOW

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2067

Don E. WHITLOW

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 11 February 1974, and amended 19 February 1974, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, revoked Appellant's seaman documents upon finding him guilty of the charge of "conviction for a narcotic drug law violation." The specification found proved alleges that while being the holder of the document above captioned, on or about 10 April 1973, Appellant was "convicted in court of record for violation of Health and Safety Code, a Narcotic Drug Law of the State of California."

At this 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 an affidavit of service and a certified Minute Order by the Municipal Court for the city and county of San Francisco, California, dated April 12, 1973.

In defense, Appellant offered in evidence a certified copy of an order of the same municipal court dated June 4, 1973.

At the end of the hearing, the Judge rendered a written 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 and order was served on 21 February 1974. Appeal was timely filed on 27 February 1974.

FINDINGS OF FACT

On 12 April 1973, Appellant was holder of the captioned document. On that date Appellant was convicted in the Municipal Court in the city and county of San Francisco, California, a court of record, of violation of Section 11357, California Health and Safety Code, a narcotic drug law. Appellant was sentenced to be imprisoned in the county jail for sixty days, with sentence suspended on probation to court for one year.

On 31 May 1973, Appellant's plea of guilty to the above charge was withdrawn, a plea of not guilty was entered, and all charges against Appellant were dismissed. This action was taken pursuant to California Penal Code Section 1203.4.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. On appeal it is urged that:

(1) In view of the subsequent dismissal of charges, there is no bona fide conviction upon which to base revocation of Appellant's document.

(2) Appellant should be permitted to raise the affirmative defense of experimentation pursuant to 46 CFR 137.03-4.

APPEARANCE: Penrod, Himelstein, Savinar and Sims, San Francisco, California; Richard M. Sims III, of Counsel.

OPINION

I

Appellant argues on appeal, as he did before the Administrative Law Judge, that the dismissal of charges by the court against Appellant is the kind of revocation of court conviction specified in 46 CfR 137.03-10(b) (now 46 CFR 5.03-10(b)), which would require the Commandant to rescind the order of revocation. However, 46 CFR 5.03 provides that a revocation will be rescinded by the Commandant if "the court

conviction on which the revocation is based has been set aside for all purposes." 46 CFR 5.20-190 provides that "rescission of the revocation of a license, certificate, or document will not be considered, unless the applicant submits a specific court order to the effect that his conviction has been unconditionally set aside for all purposes."

A discussion of Section 1203.4 of the California Penal Code is contained in Commandant's Decision 2055 (MILLER), which stated:

> For example, the prior conviction may be pleaded and proved in a subsequent prosecution of the defendant for any other offense, it may be USEDto 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 side for all purposes" as 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 should be revoked.

Appellant argues that in previously decided cases involving the same issue there is no indication that a separate order was entered specifically ordering that a former plea of guilty be withdrawn, a not guilty plea be entered and all charges be dismissed. Appellant also argues that there was not a final conviction in this case, as required by 46 CFR 137.03-10(a) (now 46 CFR 5.03-10(a)), since his probationary period pursuant to his earlier plea of guilty had not expired prior to the court action dismissing the charges against him. These arguments place form over substance. The order of the court dated June 4, 1973 expressly states that the dismissal of charges was made pursuant to Section 1203.4 of the California Penal Code. Therefore, regardless of the timing of the dismissal or the form of the order, the effect of the dismissal is limited by the provisions of the cited state statute.

II

The affirmative defense of experimentation, which Appellant seeks to raise pursuant to 46 CFR 137.03-4 (now 46 CFR 5.03-4) applies only to the charge of "misconduct by virtue of the possession, use, sale or association with narcotic drugs, including marijuana, or dangerous drugs," a charge which may be brought under 46 U.S.C. 239(g). However, Appellant was charged with "conviction for a narcotic drug law violation," a charge which was brought under 46 U.S.C. 239b. An order of revocation is mandatory under the provisions of 46 CFR 5.03-10(a) following proof of an alleged conviction.

Contrary to the allegations of Appellant, the Administrative Law Judge is not "obligated to enter an order less than revocation, unless he feels, beyond a reasonable doubt, that this is not a case of experimentation." With respect to the opinions of the National Transportation Safety Board in *Bender v. Packard*, ME-21 (1972) and *Bender v. Nickels*, ME-22 (1972), it remains my opinion that "[t]he only discretion authorized under Section 239b is on the part of the Coast guard who must decide, based upon an investigation and evaluation of the facts and supporting evidence, whether or not charges should be placed in the first instance." *Commandant'* Decision 1983 (SESNY). Once the charge is proved before an Administrative Law Judge, he is required to revoke all licenses and documents issued to the person charged by the Coast Guard.

A review of the legislative history of 46 U.S.C. 239b makes it quite clear that Congress intended mandatory revocation for all convictions. Hearings before the Senate Subcommittee on Interstate and Foreign Commerce on H.R. 8538 held on 16 June 1954, House Report No. 1559 of May 4, 1954, and Senate Report No. 1648 of June 28, 1954 are quite explicit in providing that all convictions are to be treated in the same manner. In all of these documents, the only words used when discussing the appropriate order following proof of conviction are "deny" and "revoke." Congress was not concerned with the degree or nature of the offense which led to conviction; they were only interested in the fact of conviction. The Department of Commerce, commenting on H.R. 4777, a predecessor bill to H.R. 8538 which also provided for revocation only after a hearing, by letter of 28 August 1953, urged that the mandatory revocation provision of the bill was too rigid and that a provision for suspension be included. Congress did not agree with the proposed change from "shall permanently revoke" to "may suspend or permanently revoke," and subsequent revisions, reports, and minutes refer only to revocation.

Therefore, the regulations controlling this matter have not been amended. The Administrative Law Judge is bound by the provisions of the Code of Federal Regulations. Under those

regulations he was correct to refuse to consider experimentation as an argument in support of mitigation of the order.

CONCLUSION

The Administrative Law Judge acted properly in revoking Appellant's document because he has been convicted in a court of law for violation of a narcotic drug law and is not entitled to the defense of experimentation.

ORDER

The order of the Administrative Law Judge dated at St. Louis, Missouri, on 11 February 1974, is AFFIRMED.

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

Signed at Washington, D. C., this 26th day of July 1976.

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