UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. (REDACTED)
Issued to: Stuart L. SCOTT

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2095

Stuart L. SCOTT

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 30 March 1976, 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 holder of the document above captioned, on or about 18 January 1972, Appellant was convicted by the Common Pleas Court of Auglaiza County, Ohio of possessing or having under his control an hallucinogen, to wit: cannabis, commonly known as marijuana, contrary to Section 3719.41 of the Revised Code of Ohio. Another specification concerning a narcotic drug law violation conviction by the County Court of Hamilton, New York on 18 September 1970 was found not proved because the copy of the conviction introduced in evidence had not been duly certified as required by 46 CFR 5.20-105(a).

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

With respect to the Ohio conviction the Investigating Officer introduced in evidence a duly certified copy of the Journal Entry for Case No. 5278 filed 18 January 1972 in the Common Pleas Court of Auglaize County, Ohio. A duly certified copy of the indictment was also introduced.

In defense, Appellant offered substantial evidence of

rehabilitation and good character. Appellant also made several motions to dismiss on various grounds, all of which were denied.

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

The entire decision and order was served on 2 April 1976. Appeal was timely filed on 29 April 1976.

FINDINGS OF FACT

On 18 January 1972, Appellant was the holder of the above captioned document. In May of 1971 Appellant was indicted for possessing or having in his control an hallucinogen, to wit: cannabis, commonly known as marijuana, contrary to Section 3719.41 of Chapter 3719 of the "Uniform Narcotic Drug Act" contained in the Health, Safety and Morals Section of the Ohio Revised Code. On 24 May 1971, Appellant was arraigned in the Court of Common Pleas, Auglaize County, Ohio and entered a plea of not guilty to the indictment. On 18 January 1972 Appellant withdrew his plea of not guilty and entered a plea of guilty. After waiving personal presence for sentencing, Appellant was sentenced to six months in the Auglaize County Jail. Appellant served 29 days; the remainder of the sentence was suspended.

The Court of Common Pleas of Auglaize County, Ohio is a court of record.

The judgement of conviction was entered within ten years prior to the institution of this proceeding.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that a modification of Ohio Statute 3719.41 which indicates that marijuana is not considered a narcotic requires a reversal of the revocation. It is also contended that Appellant had been deprived of due process of law by not being permitted to introduce evidence of experimentation, whereas, if he had been apprehended at sea this evidence would be admissible. Appellant's third argument is that the failure to consider evidence of rehabilitation also deprives

him of due process of law.

APPEARANCE: Hugh Fleischer, Esq., of Rice, Hoppner and Hedland, Anchorage, Alaska.

OPINION

I.

Appellant first contention is that the charge of "conviction for a narcotic law violation" must be dismissed because the statute upon which the conviction was based had since been amended to exclude marijuana as a narcotic. This contention has previously been addressed by the Commandant in Decision on Appeal 1955 (*Mills*). In *Mills*, the Commandant held that a conviction which became final prior to the effective date of repeal of the statute pursuant to which the conviction had been made was nonetheless a conviction for purposes of 46 USC 239b. This holding was affirmed by the National Transportation Safety Board in *Bender v. Mills*, NTSB Order EM-43. In the instant case, Appellant's conviction became final for all purposes on 18 January 1972. The amendment to Ohio Statute 3719.41 did not become effective until 1 July 1976, more than four years subsequent. It is therefore my opinion that the later modification of Ohio Statute 3719.41 has no bearing on the validity of the present charge and does not require a reversal of the Administrative Law Judge's decision.

II.

Appellant's second contention is that by not being permitted to introduce evidence of experimentation he has been deprived of due process of law. Appellant states that if he had been apprehended at sea instead of convicted by a state court, the charge against him would have been brought pursuant to 46 U.S.C. 239 rather than 46 USC 239b. If that were the case, he would have been permitted to introduce evidence of experimentation, and the Administrative Law Judge would have been empowered to render an order less drastic than revocation. Appellant claims that since the purpose of both 46 USC 239 and 239b is to ensure the safety of life and property at sea, to draw this distinction between the two sections of law is arbitrary and capricious. However, Appellant has directed this argument to the wrong forum. As stated by the Commandant in Decision on Appeal 2049 (*OWEN*), "An executive agency such as the Coast Guard is not competent to pass on the constitutionality of statutes it is charged with enforcing." On the other hand, an executive agency may construe the provisions of the statute and promulgate implementing regulations. In that

regard, I would point out that a review of the legislative history of 46 USC 239b makes it clear that Congress intended mandatory revocation for all narcotics convictions including marijuana. Hearings before the Senate subcommittee on Interstate and Foreign Commerce on H.R. 8538 held on 16 June 1954 (House Report No. 1559 of 4 May 1954, and Senate Report No. 1648 of 28 June 1954) stated that all convictions are to be treated in the same manner. By letter of 28 August 1953, the Department of Commerce, commenting on H.R. 4777, a predecessor bill to H.R. 8538 which also provided for mandatory revocation, urged that the mandatory revocation provision was too rigid and that a provision for suspension be included. This recommendation was not adopted.

III.

Appellant's third contention is that the failure of the Administrative Law Judge to consider evidence of rehabilitation has also deprived him of due process of law. Let me repeat that as an administrative agency, the Coast Guard is not empowered to determine questions concerning the constitutionality of duly enacted statutes. Rehabilitation is not a defense when a conviction for a narcotics law violation has been shown pursuant to 46 USC 239b. After a finding of conviction, the Administrative Law Judge has no discretion and according to 46 C.F.R. 5.03-10, must enter an order of revocation. However, evidence of rehabilitation may be considered on appeal. (See Decisions on Appeal 1594 and 2036) Therefore, based upon the substantial evidence of rehabilitation offered by Appellant at the hearing, it is my opinion that the order of revocation should be vacated.

CONCLUSION

I conclude that the proof of rehabilitation offered by Appellant is, in this case, of sufficient cogency and for a sufficient period of time to warrant vacating the order of revocation.

ORDER

The findings and order of the Administrative Law Judge dated at San Francisco. California on 30 March 1976 are affirmed; however, for good cause shown, the order of the Administrative Law Judge is vacated. In any subsequent action against Appellant's document, the record will be made to reflect that the charge in this case was proved, and that the order was entered, but vacated.

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

Commandant

Signed at Washington, D. C., this 25th day of Feb. 1977.

INDEX

***** END OF DECISION NO. 2095 *****

Top