UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. (REDACTED)
Issued to: Wavell H. McLAUGHLIN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2120

Wavell H. McLAUGHLIN

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

By order dated 11 May 1977, an Administrative Law Judge of the United States Coast Guard, at Tampa, Florida, revoked Appellant's seaman documents upon finding him guilty of the charge of "conviction of a narcotic drug law violation." The specification found proved alleges that, while being the holder of the above captioned document, on or about 7 June 1974, Appellant was convicted of a violation of Florida Statute 893.13(1)(e) in the Circuit Criminal Justice Court of Hillsborough County, Florida, for violation of a narcotic drug law.

At the hearing, Appellant elected to act as his own counsel, and entered a plea of guilty to the charge and specification.

The Investigating Officer introduced into evidence a certified copy of the Judgement of conviction for a narcotic drug law violation entered in Case No. 74-445 in the Circuit Criminal Justice Court of Hillsborough County, Florida, dated 7 June 1974.

Following the introduction of the court records, Appellant made a statement on his own behalf under oath.

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 by plea. He then entered an order revoking all documents issued to Appellant.

The decision and order was served on 1 June 1977. Appeal was timely filed on 10 June 1977.

No transcript was requested and additional handwritten appeal documents were received on 11 July 1977 and 19 August 1977. On 19 January 1978, a document was submitted by counsel for Appellant.

FINDINGS OF FACT

On 7 June 1974, Appellant was the holder of a Merchant Mariner's Document issued to him by the United States Coast Guard. He was convicted, on that date, in the Circuit Criminal Justice Court of Hillsborough County, Florida, a court of record as defined by 46 CFR 5.03-15, for violation of a narcotic drug law prohibiting the possession of marijuana, Florida Statute 893.13(1)(e).

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant requests that the decision be reversed on the following grounds:

(1) Appellant had not been convicted of a narcotic drug law violation.

(2) Appellant had been unable to obtain witnesses to testify on his behalf at the administrative hearing.

APPEARANCE: Appellant pro se. (An untimely appeal document was submitted by counsel for Appellant, Lawrence L. Scott, Esq., who had no other participation in the case.)

OPINION

I.

At the outset, it is necessary to note that this case was captioned as an action involving Merchant Mariner's Document Z-[REDACTED] D2. At the hearing, Appellant did not produce his document, apparently because it had been lost. Nevertheless, the Administrative Law Judge failed to verify that the document existed and he did not require the execution of a lost document affidavit

as prescribed by 46 CFR Section 5.20-40. Thus, during the proceedings, the status of the document at stake was somewhat uncertain. On the Judge's Report of Hearing, the caption has been changed to reflect action against a document numbered [REDACTED] D 5. The report additionally states, "status of license and/or MMD - MMD Z-[REDACTED]-D3 in possession of Coast Guard Headquarters upon application for duplicate. MMD Z-[REDACTED]-D2 was claimed by Resp to be lost." Regardless of the discrepancies existing as to the exact number of the document, the Appellant was adequately placed on notice that the proceedings were against the document issued to him, regardless of its number. Additionally, in his order entered in open hearing, the Administrative Law Judge ordered the revocation not only of Merchant Mariner Document [REDACTED] D2, but also "any other documents, licenses, or certificates of service issued to Wavell Haskell McLaughlin by the U.S. Coast Guard or any predecessor authority which he may now hold." Thus, Appellant was made aware that the action which was pending, and the action finally taken, was against his document, regardless of its number. Any defects caused by misidentification of the document may not be raised to the benefit of Appellant, the party who caused the problem by his failure to produce the document at the hearing.

II.

The Administrative Law Judge served his order in open hearing on Appellant, in person, on 11 May 1977, the day of the hearing. A complete copy of the Decision and Opinion was served by registered mail on 1 June 1977. Appellant filed appeal letters on 10 June 1977, 11 July 1977 and 19 August 1977. Counsel for Appellant submitted another document on 19 January 1978. There is no explanation for the late submittal of the August and January letters and no timely extension of time has been requested. On 11 May 1977, Appellant acknowledged in writing his receipt of a copy of the rules governing appeals. Specifically included in the rules was a copy of 46 CFR Section 5.30-3(a), which states in relevant part:

> Appellant may submit grounds for appeal and exceptions to the Administrative Law Judge's decision, whether or not such matter was filed with the notice of appeal. This matter must be submitted ... within 60 days of the date of effective service of the decision. Nothing further will be received and considered as a part of the appeal record after the applicable time had elapsed unless it is extended by the Commandant.

The August and January letters were submitted after the expiration of the sixty day limit. In view of the fact that there were no

requests for an extension of time and neither Appellant nor his counsel have furnished any explanation or reason for the late submissions, these letters have not been considered as a part of the appeal record.

III.

Appellant contends that he has not been convicted of a narcotic drug law. Rather, he claims that he was only convicted of an offense he categorizes as "construed possession of marijuana." Appellant claims that he did not actually possess any marijuana but admits that some marijuana was found in the vicinity of the place he was arrested. He contends that he pleaded guilty in the state court to the possession charge merely to avoid imprisonment on a charge of aggravated assault with a deadly weapon, a companion charge of which the state court also found him guilty.

The Appellant was charged with "violation of Narcotic Drug Law of the State of Florida, to wit possession of marijuana." At the hearing, he was confronted with the charge and, when asked how he plead, he responded, "That is guilty, sir. That is the truth." Following the arraignment and plea, the state court record of conviction was placed in evidence. This exhibit reads, in part, "...you having entered a plea of guilty to the offense of possession of marijuana ... the court hereby adjudges you to be guilty of said offense."

The record reveals that the Appellant was fully advised of his rights in this administrative proceeding. The Administrative Law Judge informed the Appellant that the guilty plea could lead to a finding that the charge and specification were proved and that his document was subject to revocation. At the time of the introduction of the court records and during his sworn statement, Appellant indicated that his state court conviction may have been for something other than simple possession of marijuana. At one point, he stated, "It wasn't a conviction of a marijuana law. It was a conviction of a construed marijuana law." Later, taking a slightly different position, Appellant stated that he was convicted of a "construed marijuana charge" and that the offense of which he was convicted was "construed possession of marijuana."

The regulations governing the conduct of suspension and revocation proceedings require an Administrative Law Judge to reject a plea of "guilty" if the charged party's post-arraignment presentation is inconsistent with the plea. 46 CFR 5.20-85(b). In questioning the Appellant about this "construed" possession

language, the judge received the explanation that the Appellant had pleaded guilty to the drug charge in order to avoid a prison sentence on his other charge, that of aggravated assault. Appellant also maintained that both these offenses were only misdemeanors, apparently believing that revocation was only appropriate for felony convictions.

The Florida Comprehensive Drug Abuse Prevention and Control Act provisions under which Appellant was convicted read as follows:

> It is unlawful for any person to be in actual or constructive possession of a controlled substance ... Fla. Stat. 893.13(1)(e).

Normally, the offense of possession is punishable as a felony unless the conviction is for a first offense possession of not more that 5 grams of marijuana. Fla. Stat. 893.13(f). Aggravated assault with a deadly weapon was, at the time of Appellant's conviction, and is, treated as a felony in Florida. See Title 44, Chapter 784, Florida Statutes.

It is clear from the Defendant's letter of appeal and the discussion occurring at the hearing that the Defendant felt that he had been convicted of what the Florida Drug Act terms "constructive possession." Since the Florida law treats constructive possession and actual possession the same, Appellant's claim that he was convicted of constructive possession is not inconsistent with his plea of guilty to having been convicted of a narcotic drug law offense involving possession of marijuana, in violation of Chapter 893 of the Florida Statutes.

Based on an apparent misreading of the record, the judge's written decision indicates that he thought that the Appellant stated that he had been convicted of possession of a substance "construed to be marijuana." A closer reading of the record indicates that it was not the substance's identity which was being "construed" but, rather, the possession which was "construed". Nevertheless, the outcome of the situation remains the same. Whether Appellant claims he was convicted of construed possession of marijuana or possession of material construed to be marijuana, there is no inconsistency with his plea that he was convicted of a state narcotic drug law. At the hearing and on appeal, Appellant attempts to collaterally attack the state conviction, arguing that he only plead guilty to the state court to obtain a lenient sentence and that the possession was only construed. The revocation and suspension process does not serve as an avenue of

collateral attack on state court proceedings. Thus, the underlying reasons for Appellant having decided to plead guilty in the state court are irrelevant here. The Judge pointed out at the hearing that 46 USC 239b provides for revocation if there has been a conviction or a plea of guilty to a narcotic drug law. Considerations of the specific facts behind a conviction and whether the offense was treated as a felony or misdemeanor have no bearing on the revocation decision. Thus, I find that the Appellant's statements made in extenuation and mitigation were not inconsistent with his plea of having been convicted of a state narcotic drug law.

IV.

The final issue to be considered is Appellant's argument that he was denied the presence of witnesses at the administrative hearing. In the appeal letter which was received on 11 July 1977, he states, "At the time of my hearing before the Administrative Law Judge in Tampa, Florida, the witnesses which I tried in vain to testify in my behalf were out of the country in various different employments."

Both the Administrative Law Judge and the U.S. Coast Guard Investigating Officer have the statutory authority to issue subpoenas. 46 USC 239. Furthermore, it is the expressed intent of the agency that subpoenas will be issued for the attendance of witnesses or the production of relevant evidence that may be needed by the person charged. 46 CFR Section 5.15-10.

The charge sheet served on Appellant specifically advised him that he had the right to "Have witnesses and relevant evidence subpoenaed."

The Investigating Officer testified that, at the time of service, Appellant had this right explained to him thusly, "... he had the right to have witnesses and relevant evidence subpoenaed, and, if the witnesses he desired were not available locally, their testimony could be taken by deposition. The Coast Guard would assist in locating any witnesses that were aboard U.S. Merchant ships." Furthermore, prior to arraignment, the judge advised Appellant at length about his rights with regard to obtaining the attendance of witnesses and the production of evidence. Having been fully advised of his rights in this regard, Appellant failed to request any witnesses. When questioned about his wishes by the judge, he indicated that he did not desire to have any witnesses or evidence obtained. Appellant never indicated in any manner that he

was trying in vain to obtain witnesses to testify. Even in his appeal letters, Appellant gives no hint as to the identity of the witnesses or the subject of their testimony. By his failure to have requested the witnesses at the hearing, Appellant waived his right to have them produced. His raising of the issue for the first time on appeal is untimely and not a proper basis for granting a new hearing.

CONCLUSION

Appellant's conviction for violation of a Florida narcotic drug law in a court of record was proved by his plea at the U.S. Coast Guard administrative hearing. The statements made by Appellant in extenuation and mitigation were not inconsistent with his plea. Appellant was properly advised of his right to have witnesses and relevant evidence and he failed to exercise the right. Accordingly, the hearing was properly conducted according to law and regulation and revocation of Appellant's license was proper.

The order of the Administrative Law Judge revoking Appellant's merchant waiver's document no. Z-[REDACTED] D2, as well as any other documents, licenses or certificates issued to him by the U.S. Coast Guard or any predecessor authority which he may hold, dated 11 May 1977 at Tampa, Florida, is AFFIRMED.

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

Signed at Washington, D. C., this 19th day of APRIL 1978.

INDEX

Appeals
letter filed late not considered

Documents
identification of document

Marijuana
constructive possession conviction

Narcotics

state conviction for constructive possession

Plea of guilty
explanation consistent with plea

Witnesses
failure to request subpoena or assistance in obtaining witnesses

Evidence
failure to request subpoena or assistance in obtaining evidence

***** END OF DECISION NO. 2120 *****

Top