

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 136296
Issued to: Charles FOSSANI, Jr.

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2135

Charles FOSSANI, Jr.

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 29 April 1977, an Administrative Law Judge of the United States Coast Guard at New York, New York, revoked Appellant's license upon finding him to be a user of a narcotic drug. The specification found proved alleges that on or about 8 October 1976, Appellant was, at or about [REDACTED] [REDACTED], New Jersey, wrongfully a user of a narcotic drug.

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 certain documents and the testimony of several witnesses.

In defense, Appellant offered in evidence his own testimony and that of his mother.

At Appellant's request, the Administrative Law Judge arranged for examination of Appellant at U.S.P.H.S. Hospital, Staten Island, New York, and then himself called the examining physician as a witness.

At the end of the hearing, the Judge rendered a 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 20 May 1977. Appeal was timely filed, and perfected on 1 December 1977.

FINDINGS OF FACT

(The Findings of Fact made by the Administrative Law Judge are hereby adopted and made part of this Decision. Numbered "1" through "24", they are recited here in full.)

1. CHARLES FOSSANI, Jr., no Z number, being the holder of license No. 136296, on 8 October 1976 at [REDACTED] [REDACTED], New Jersey was wrongfully a user of a narcotic drug.

2. Respondent is [REDACTED] of age and resides at [REDACTED] , N.J.. The Respondent was issued his first license when he was 18 years of age authorizing him to operate vessels carrying up to six passengers for hire.

3. The Respondent is presently the holder of License No. 136296, Issue 3, dated 27 April 1976, authorizing him to serve as the operator of mechanically propelled passenger carrying vessels as defined in the Act of May 10, 1956 of not more than 100 gross tons upon the Atlantic Ocean, not more than 100 miles offshore, between Block Island and Cape May, N.J..

4. On 8 October 1976 Judge RONALD HORAN of the Municipal Court of the Borough of [REDACTED], N.J. on the affidavit of Police Officer VENTIMIGLIA issued a warrant authorizing entry into a residence known as [REDACTED], [REDACTED], N.J. then under the control of the Respondent, for the purpose of conducting a search therein for narcotics-heroin, cocaine and other controlled dangerous substances.

5. At about 2215, 8 October 1976, Officers VENTIMIGLIA and GILSON, together with JAMES TOMAINI, an Investigator assigned to the Office of the Monmouth Country Prosecutor and two other law officers entered the stated residence. At that time the Respondent and a young lady were seated on a couch in the living room. Office VENTIMIGLIA placed them under arrest and then gave the Respondent the full MIRANDA warning by reading from a card which he carried with him. When asked, the Respondent stated he understood the warning. At the time of entry, there was another man present in the resident but no charges were brought against him, since the Respondent stated that this man had just chanced to be there while walking his dog. Respondent also stated at this time that the "stuff" belong to him, the Respondent.

6. Officer VENTIMIGLIA is a graduate of the Police Academy and of the Basic Narcotics School conducted by the New Jersey State Police. Officer GILSON on the day in question had four years experience as a police officer and had special training in criminal investigation at a school conducted by the New Jersey State Police. Investigator TOMAINI had five years experience as a police officer in Long Branch, N.J. and during this period he was assigned for one year to the Narcotics Office of the Long Branch Police. For the

last five years Mr. TOMAINI has served as an investigator in the office of the Prosecutor for Monmouth County. Mr. TOMAINI attended courses in drug enforcement conducted by the Federal government and the New Jersey State Police. In addition, he has attended various seminars on narcotics conducted by a number of different agencies.

7. At the time of the search, Respondent's eyelids were droopy, his eyes were glassy, the pupils of his eyes were contracted, his speech was slurred and he was snivelling.

8. At the time the Respondent was wearing a shirt with long sleeves. Officer VENTIMIGLIA asked the Respondent to roll up his sleeves and he complied. There were a number of black and blue needle marks on both forearms from the inside of the elbow to the wrist. Investigator TOMAINI at one point informed the Respondent that they were looking for heroin. The Respondent replied that he was on heron but that "he shot it all up", or words to that effect.

9. The following items were found on a search of the said residence and were seized by the police officers: (a) one syringe, needle, two burnt one-half teaspoons and a cup or jar lid to heat heroin, (b) two bottles of a pink liquid, (c) 21 blue capsules, (d) 80 dark green tablets.

10. The Respondent admitted to the police officers that the pink liquid contained in the two bottles was methadone and stated that he was trying to get off heroin.

11. The items described in paragraph 9 above were documented by Officer GILSON and were taken to police head quarters where they were kept in a locked locker. On 1 November 1976 these items were transported to the Bureau of Identification of the New Jersey State Police in Trenton, N.J..

12. The State Police Laboratory submitted a report dated 6 December 1976 as follows: (a) the two bottles of pink liquid was positive for methadone, a controlled dangerous substance, (b) the syringe and needle contained an insufficient quantity of matter for analysis, (c) the blue capsules and the dark green tablets were negative for a controlled dangerous substance.

13. At the time of the said search of his residence on the night of 8 October 1976, the Respondent was under the influence of a narcotic drug. From his home, the Respondent was taken to the police station and later was placed in jail. Subsequently, Mr. TOMAINI notified the U. S. Coast Guard since he was aware that the Respondent operated the SUPER CAT. The Respondent has not used narcotic drugs since a time shortly after 8 October 1976.

14. By the decision dated 26 January 1977, the Superior Court of New Jersey for Monmouth County in a criminal proceeding against the Respondent ruled that the search warrant was issued on a fatally defective affidavit. The Court further held that the

warrant was not a valid instrument for permitting the search and seizures in question and granted Respondent's motion to suppress the evidence seized pursuant to the said warrant.

15. During the pendency of the Investigating Officer's direct case the Respondent filed a petition pursuant to 46 CFR 5.20-27 for an order requiring the Respondent to submit to an examination by the U. S. Public Health Service to determine his physical and mental condition with respect to current and future use of narcotic drugs. There being no objection from the Investigating Officer, the Administrative Law Judge duly entered an order requiring the Respondent to submit to this examination at a specified time at the U. S. Public Health Hospital, Staten Island, N.Y..

16. In accordance with the stipulation of the parties, the examining physician was furnished with Respondent's medical history as background material for the stated examination. This material consisted of copies of Exhibits 3 and 4 and information that the Respondent did use heroin on 8 October 1976; he used heroin on and off since the summer of 1975 as a result of emotional problems attendant upon his separation from his wife and his association with persons involved in drugs; his level of use has been, in his own words, "dibbing and dabbing"; Respondent abstained from drug use from November 1975 through February 1976 while he was once again living with his wife, but returned to it when they once again separated; Respondent was shaken and frightened by the search of his house and his arrest on 8 October 1976 and the subsequent Coast Guard proceedings against his license and has since ceased to abuse drugs; Respondent is now making an effort to reconcile with his wife and to avoid association with persons involved in illicit drugs, and Respondent has not undergone any previous treatment for the use of narcotics

17. In accordance with the said order, the Respondent was examined as an inpatient at the said hospital from 11 January to 14 January 1977. Upon admission, the Respondent was given a complete physical examination and no significant abnormalities were observed.

18. In accordance with the usual practice at the hospital, the Respondent was kept in a closely supervised area with other patients for 72 hours which commenced on 11 January and ended on 14 January 1977. During this time, the Respondent was observed for symptoms of detoxication. The examining physician, Dr. MARIA SARRIGIANNIS, Chief, Psychiatry Department, interviewed the Respondent for almost an hour on the first day and had further discussions with the Respondent on the following days. On Friday, 14 January 1977, the Respondent left the hospital on a pass with instructions to telephone Dr. SARRIGIANNIS the following week. While at the hospital the Respondent exhibit no evidence of drug dependence or addiction (Exs. A and B). Dr. SARRIGIANNIS informed the Respondent before he left the hospital on this day that a

further stay at the hospital was not indicated, since no matter how much additional time he stayed she could not predict whether or not he would abstain from the use of narcotics in the future. The Respondent was able to contact Dr. SARRIGIANNIS by telephone 19 January 1977, at which time he was formally discharged as fit for duty.

19. Dr. SARRIGIANNIS received a medical degree in Athens, Greece and she joined the U. S. Public Health Service in 1955; in 1962 she was assigned as the Assistant Chief of the Psychiatric Clinic; in 1963 she received her board certification in psychiatry and since 1975 she had been serving as Chief, Psychiatry Department of the Staten Island Hospital.

20. Dr. SARRIGIANNIS testified as the Administrative Law Judge's witness at a session of the hearing held on 8 February 1977 with the parties being afforded the opportunity of conducting cross-examination.

21. After the initial use of a narcotic drug, cure requires total abstinence for a long period of time, the length of which cannot be more precisely defined. The Respondent is not cured of the use of narcotic drugs. Since the Respondent was a mature individual when he first used narcotics, his chances of effecting a cure in the future are better than if first use commenced at an earlier age. The Respondent may effect a cure in the future if he is motivated to do so and if he enters a regulated community drug program involving other narcotic users.

22. The MV SUPER CAT is an inspected passenger carrying vessel under 100 gross tons which is licensed to carry up to 150 passengers. The vessel is a catamaran with aluminum hulls, about 82 feet in length, and is powered by two 16 cylinder diesel engines. The vessel was constructed in 1972 and since that time has been operated as a party fishing boat, carrying passengers who pay for their passage. The vessel is owned through a family corporation by Respondent's father.

23. The SUPER CAT operates an average of about 300 days during the year, making either one trip or two trips each day. On Saturday and Sunday during the summer season the vessel carries up to 300 passengers, if it makes only one trip per day. Many more passengers are carried, if more than one trip per day is made. The Respondent has served as the principal operator of this vessel since it has been in operation and he served as operator on approximately 55 trips since 8 October 1976.

24. The Respondent's reputation in the local party fishing boat community is good.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. The bases of appeal, formulated in numerous "exceptions" to findings in the initial decision, amount to these stated grounds:

- (1) evidence obtained as a result of a search by New Jersey police authorities on a warrant that was later determined to have been improperly procured should have been suppressed at this hearing;
- (2) evidence obtained in the course of Appellant's conduct of his defense via subjection to medical examination should have been suppressed because Appellant was coerced into undertaking a defense by the improper receipt into the record of the evidence discussed in (1) above;
- (3) Appellant established that he had been cured within the meaning of 46 U.S.C. 239b; and,
- (4) the proceeding was invalid because there was no evidence connecting the "condition" alleged with the necessary element of safety at sea, with Appellant being unconstitutionally punished for a condition rather than an act.

APPEARANCE: Kisloff, Hoch, & Flanagan, Boston, Massachusetts, by F. Dore Hunter, Esq.

OPINION

I

Appellant's complaint that there is no connection between the specific allegation of the charges and service aboard a vessel for which he is licensed and that he is being "punished" for a condition and not for a wrongful act is based on a double misconception.

The requirement for a connective, when specific acts are the matter of the charges, between the acts and the service for which a license or certificate is an essential qualification, is a factor only in those subjects of suspension and revocation proceedings under R.S. 4450 (46 U.S.C. 239) for which there is a statutory condition of "acting under the authority" of the seaman's document. The authority for the instant proceeding is different, section 2 of the Act of July 15, 1954 (46 U.S.C. 239b), and that Act does not concern itself with action under authority of a seaman's certificate but deals directly with three states or conditions which the Congress has seen fit to declare a bar to qualifications for service under a seaman's license or certificate. The states or conditions are, of course, conviction in a court of proper jurisdiction of a narcotic drug law violation, and the use of or addiction to narcotic drugs.

Appellant professes to see a constitutional objection to this on the lines of *Robinson v. California* (1962), 370 U.S. 660, in which it was held that a State statute which by its broadness of language would punish as a crime a condition which had preexisted in an individual before his entry into the state and which involved no antisocial act within the state was unconstitutional. Here the difference is immediately apparent; the Act of Congress does not purport to make a state or condition of an individual a crime nor is it made "punishable." Congress has acted simply to declare that the interests of safety at sea require the disqualification for service in the merchant marine of those of who use or are addicted to narcotic drugs. Since the proceedings under this statute are remedial in purpose the constitutional theories in criminal law do not apply.

If it is Appellant's contention that the Act of Congress is criminal in nature and that it is therefore somehow unconstitutional, his protest is in the wrong forum. It is not for an administrative agency to pass upon the constitutionality of the very statute which authorizes and directs its action.

II

Appellant did not, as he asserts, established that he was "cured" within the meaning of 46 U.S.C. 239b. The Administrative Law Judge did, as Appellant points out, make a specific finding that Appellant had, since his arrest on 8 October 1976 and the subsequent Coast Guard proceedings (instituted on 28 October 1976) "ceased to abuse drugs." Appellant asserts on appeal "Respondent has testified that he has not used drugs since October 8, 1976 and the Administrative Law Judge has so found." This is not correct. The finding speaks for itself: that Appellant had ceased "to abuse," a statement of entirely different import.

Aside from this, however, is the fact that the medical expert, as the initial decision made clear, furnished the standards by which the U. S. Public Health Service would test "cure" for the condition of Appellant and the Administrative Law Judge properly found that on those terms "cure" had not been established while the "use" had been established. There was no error here.

III

Turning now to the evidence which Appellant urges should have been "suppressed" at hearing, we see that the basis for the contention is the "exclusionary rule" founded on an application of Fourth Amendment principles. The theory advanced is that the product of the search of Appellant's premises was obtained through execution of a search warrant improperly secured, and so held by the New Jersey court having jurisdiction. The initial decision had

provided an analysis of the opinion in *United States v. Janis* (1976), 428 U.S. 433, and has applied its rationale to the instant proceeding. In that case, there were two different jurisdictions involved, State and Federal, and the Court pointed out that the reasons for the application of the "exclusionary rule" did not hold for the situation under review. The Administrative Law Judge here reasoned that the stated purposes of the "exclusionary rule" would not bear, either; on this case involving two sovereigns.

I do not think that we must necessarily go even that far to uphold the admissibility of the evidence in this case. Very briefly, the opinion of the Supreme Court noted that, "In the complex and turbulent history of the rule, the Court has never applied it to exclude evidence from a civil proceeding, federal or state." (at 447). (The court carefully distinguished the situation in *Plymouth Sedan v. Pennsylvania* (1965), 380 U.S. 193, which was held to involve a penal proceeding and in which the issue was the forfeiture of an article, used in violation of a criminal law, which had been improperly seized.) It is clear that if the "exclusionary rule" does not operate in a civil court proceeding even under a single sovereign it does not operate in an administrative remedial proceeding.

It is acknowledged here that Appellant objects that even though the instant proceeding is an administrative action (not even a judicial civil action) it is somehow a criminal action since it is "penal in effect." We need not theorize on the potential differences between the vague connotations available in the use of the phrase "penal in effect" and "penal law." Even monetary penalties imposed by Congress are recoverable in civil proceedings, not criminal (28 U.S.C. 2461), and the action here does not involve a forfeiture. Any remedial action, such as those contemplated by R.S. 4450, will upset the party whose conduct is found actionable, but this does not convert the proceeding to a criminal case in which the rules of criminal procedure and evidence must be followed.

Since the evidence, such as it was, clearly admissible under the principles expressed in *United States v. Janis*, cited above, there is no need to explore the distinctions that might become relevant supporting the admissibility and probative effect of the statements made by Appellant while in custody after a proper "custodial warning" of his rights and of the evidence provided after Appellant's *sua sponte* submission to medical examination.

CONCLUSION

It is concluded that the evidence plainly supports the finding that Appellant was a user of a narcotic drug, as charged.

ORDER

The order of the Administrative Law Judge dated at New York,
New York, on 29 April 1977, is AFFIRMED.

R. H. Scarborough
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

Signed at Washington, D. C., this 3rd day of November 1978.

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