

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Winfred F. MONTGOMERY Z-996845

DECISION OF THE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2238

Winfred F. MONTGOMERY

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and Title 46 CFR 5.30-1.

By order dated 18 March 1980, an Administrative Law Judge of the United States Coast Guard at New York, New York, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleged that while serving as Electrician on board SS MORMACARGO under authority of the document above captioned, on or about 29 October 1979, Appellant had in his possession a controlled substance, to wit: marijuana.

The hearing was held at Philadelphia, Pennsylvania, on 20 December 1979.

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 the testimony of two witnesses and four documents.

Appellant offered no evidence in defense.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant revoking all documents issued to Appellant.

The entire decision was served on 29 April 1980. Appeal was timely filed and perfected on 18 August 1980.

FINDINGS OF FACT

On 29 October 1979, Appellant was serving as Electrician on board the United States flag vessel SS MORMACARGO and acting under authority of his document while the vessel was in the port of Philadelphia, Pennsylvania.

On the date in question, Customs Officers of the United States conducted a boarding and search of the MORMACARGO. A drug detection team consisting of a trained canine and a handler were part of the enforcement unit. The dog "alerted" on Appellant's room and on several objects therein. A pair of trousers in the room also caused the dog to alert. Three cigarettes were found in a pocket of the trousers. These were seized by the officers and the Master was notified.

Two officers awaited Appellant's return to the vessel, for 30 to 45 minutes, on the pier adjacent to the vessel. When Appellant arrived he was carrying a briefcase. The officers approached Appellant and asked him to identify himself. This he did. The officers requested that Appellant open the case for inspection. While the case was being searched Appellant moved to the edge of the pier. He removed a cigarette package from his pocket and hurled it into the river. While one officer restrained Appellant the other sought to recover the package. With the assistance of a third party, the customs officer retrieved the package. During its time in the river the officer lost sight of the package for only brief intervals, and no other debris appeared in the vicinity of the package. The recovered cigarette package was dry on the inside, although somewhat wet on the exterior, because of its brief stay in the water. Inside were five hand-rolled cigarettes which field tested positive for marijuana. A laboratory analysis of all

eight cigarettes seized by the officers was performed by the Philadelphia Police Lab. The resulting analysis established that the substance in the cigarettes was marijuana, a Schedule I controlled substance under Federal law.

BASES OF APPEAL

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

1. The Administrative Law Judge erred in denying Appellant's motion for reopening of the hearing;

2. The search of the vessel was illegal and evidence seized as a result of the illegal search should have been suppressed; and

3. The evidence adduced did not as a matter of law show that Appellant possessed a controlled substance on a vessel.

APPEARANCE: Ralph J. Mellusi, Esq., of Tabak, Steinman &
 Mellusi, New York, New York (on appeal only).

OPINION

I

Appellant sought to reopen the suspension and revocation hearing to present evidence in mitigation of the offense in order to take advantage of 46 CFR 5.03-4. However, the brief filed in support of the motion and the brief on appeal implicitly recognize that the proffered evidence is not "newly discovered." In order for an Administrative Law Judge to reopen a hearing, 46 CFR 5.25 requires that there be "newly discovered evidence." Thus the refusal of the Administrative Law Judge to reopen the proceedings was proper.

I note that Appellant has raised allegations on appeal to the effect that his counsel at the R.S. 4450 proceeding was somehow remiss in not presenting evidence which might have led to a more favorable decision. I do not find this argument persuasive. Appellant and the attorney then representing him were fully advised

by the Administrative Law Judge concerning the provisions of 46 CFR 5.25. Additionally, leave was given for preparation of a memorandum of law on a search and seizure issue raised by Appellant. It is therefore clear that sufficient time and opportunity existed for evidence in mitigation to be adduced if desired. I can only conclude that Appellant and his freely retained counsel decided not to exercise the option to do so. I have held before, and reiterate herein, that the performance of selected counsel may not be "second-guessed" merely because the wisdom of tactical decisions is subsequently questioned on appeal. See Appeal Decision [2159](#), and [1790](#).

II

The initial search which led to the seizure of the marijuana in this case occurred aboard a seagoing vessel moored at an international port facility. Customs officers, acting without search warrants, have the authority to conduct reasonable searches of vessels, vehicles, and persons located at such facilities. *NTSB Order EM-20*, 1 NTSB 2292 and cases cited therein. There is nothing in the record in this case to suggest that the search of MORMACARGO was not reasonably conducted under the attendant circumstances. The testimony of the officers involved revealed that they entered Appellant's room on the vessel only after the dog alerted on the room. From the behavior of the trained canine it was reasonable for the suspicions of the officers to be aroused and for them to enter the room and conduct a thorough search. The contraband located was sufficient to justify the subsequent detention and search of Appellant on the pier adjacent to the vessel. *United States v. Beck & Murray*, 483 F.2d 203 (3rd Cir. 1973), *cert. denied* 94 S.Ct. 873 (1974). I therefore conclude that the search of which Appellant complains was within the authority of the customs officers. There can be no question that the evidence seized was admissible in these proceedings.

III

Appellant's argument concerning the lack of evidence that he possessed a controlled substance on the vessel is founded on a misapprehension of the standard of proof in R.S. 4450 proceedings. These are administrative not criminal proceedings. As such, the standard enunciated in 46 CFR 5.20-95(b) controls in order to

justify any findings. Proof beyond a reasonable doubt has no place here, where the proper standard contemplates substantial evidence of a reliable and probative character. Possession of the contraband on the vessel need not have been "personal and exclusive" as that term is customarily used in criminal proceedings. Neither is the doctrine of "constructive possession" apropos in R.S. 4450 proceedings.

Since the issue of illegal search and seizure has already been resolved it is enough to state here that this charge does not require that Appellant possessed a controlled substance on the vessel. However, since Appellant couched this point of his appeal in those terms I have addressed it similarly. It should be borne in mind however that the essence of the offense, for R.S. 4450 proceedings involving narcotics, is possession of the substance while serving under authority of a seaman's document. Thus the possession on the pier, alone, would have sufficed to justify the conclusion of the Administrative Law Judge.

I am satisfied that the regulatory standard of proof was satisfied by the evidence of the customs officers, presented at the hearing. The officers testified that they gained admission to Appellant's cabin and located hand-rolled cigarettes which subsequently proved to contain marijuana. They also took from the river a packet of cigarettes containing additional marijuana which Appellant had attempted to rid himself of during the shore-side search. In the absence of any evidence to the contrary, the Administrative Law Judge could properly conclude that the charge and supporting specification were proved.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 18 March 1980, is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D.C. this 4th day of March 1981.

***** END OF DECISION NO. 2238 *****

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