

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-513535-D2
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Frank PREVOST

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1746

Frank PREVOST

This appeal has been taken in accordance with Title 46 United States Code 239(b) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 1 July 1968, an Examiner of the United States Coast Guard at San Francisco, Calif., revoked Appellant's seaman's documents upon finding him guilty of the charge of "conviction for a narcotic drug law violation." The order was conditioned upon affirmation by the Commandant, U. S. Coast Guard, of the Examiner's ruling that dismissal action under section 1203.4 of the California Penal Code does not set aside a conviction for all purposes. The specification found proved alleges that on or about 20 December 1967, Appellant, in the Municipal Court for the Oakland-Piedmont Judicial District, County of Alameda, State of California, a court of record, was convicted of a violation of Section 11556 of the Health and Safety Code, a narcotic drug law of the State of California.

At the hearing held 24 June 1968, Appellant was represented by professional counsel. Counsel entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence Certified Abstract of Record (criminal) No. F2981-Dept. No. 7 of the Municipal Court for the Oakland-Piedmont Judicial District, County of Alameda, State of California.

In defense, Appellant offered in evidence a copy of a Petition and Order for Release from Penalties and Dismissal under Section 1203.4 of the California Penal Code.

The Examiner on 1 July 1968 entered an order revoking all documents issued to Appellant, but conditioned as mentioned above.

The entire decision was served on 9 July 1968. Appeal was timely filed on 17 July 1968.

FINDINGS OF FACT

On 20 December 1967, Appellant in the Municipal Court for the Oakland-Piedmont Judicial District, County of Alameda, State of California, a court of record, pleaded guilty to and was convicted of the misdemeanor offense of violating Section 11556 of the Health and Safety Code of the State of California, a narcotic drug law. Section 11556 states: "It is unlawful to visit or to be in any room or place where any narcotics are being unlawfully smoked or used with any knowledge that such activity is occurring." On the same day, the Court awarded the Appellant, as stated in the Certified Abstract of Record, Coast Guard Exhibit #1 in the hearing under review, "six months court probation - 90 days county jail judgment suspended 6 months."

On 15 March 1968, Appellant, pursuant to Section 1203.4 of the California Penal Code, petitioned the Municipal Court for the Oakland-Piedmont Judicial District, County of Alameda, State of California, with respect to the aforesaid offense for "permission to withdraw the plea of guilty or that the verdict of finding of guilty be set aside and that a plea of not guilty be entered and that the court dismiss this action..." On 28 March 1968, that Court determined Appellant to be eligible for the relief provided by Section 1203.4 and ordered "that the plea/verdict/finding of guilty in the [case of the People of the State of California vs Frank Prevost No. F2981 - Dept. No. 7] be set aside and vacated and

a plea of not guilty be entered; and that the complaint be and is hereby dismissed pursuant to Section 1203.4 of the Penal Code of the State of California."

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Counsel states the following:

- (1) the court which permitted Appellant to withdraw his guilty plea and dismissed the complaint against him as indicated above was aware of the Coast Guard revocation proceedings and consented to advance the consideration of the petition presented pursuant to Section 1203.4a of the California Penal Code on its calendar for the specific purpose of shortening and terminating the Court probation from six months to three months so that its action under section 1203.4a would meet the criteria of being an unconditional dismissal or setting aside, and the revocation of the Appellant's seaman's document would therefore not be mandatory;
- (2) the Examiner reasoned that the dismissal under Section 1203.4 is not unconditional because of the last phrase of that section which states that the prior conviction may be placed and proved in any subsequent prosecution for any other offense. Since the conviction under Section 11556 of the Health and Safety Code is a misdemeanor there is not, as a practical matter, any other offense for which it could be appropriately charged as a prior conviction to increase the gravamen of the crime or enhance its punishment upon a conviction. The provisions of Division 10 of the Health and Safety Code, in specifying that prior convictions may be pleaded and proved, refers to prior *felony* convictions and not to misdemeanor convictions. Therefore, the net effect of expunging a misdemeanor narcotics conviction under Section 11556, pursuant to Section 1203.4a is unconditional for all purposes, and meets the criteria of Paragraph 137.03-10(b) of Sub-chapter K of Title 46, Code of Federal Regulations. Section 1203.4a is not in the nature of granting of clemency or similar relief, but

rather causes the entire case to be dismissed;

- (3) a revocation of the Hearing Examiner's proposed ruling in this case would promote the interest of justice, and to permit the Appellant to continue to sail under his document would not be a threat to the safety of life or property.

APPEARANCE: Gayden and Chaffee of Berkeley, California, by
 Donald K. Gayden , Esq.

OPINION

I

Counsel in his memorandum brief makes repeated reference to a petition filed by the Appellant and an order granted with respect to him under Section 1203.4a of the California Penal Code. It is clear from the record that the petition and order were filed and granted pursuant to Section 1203.4. Section 1203.4a relates to persons who are convicted of misdemeanors and not granted probation. As Appellant was granted probation on 20 December 1967, he was not eligible for relief under Section 1203.4a.

Although there is no evidence in the record to the effect that the court which granted the Appellant's petition for relief pursuant to Section 1203.4 of the California Penal Code did so in contemplation that revocation of his seaman's document by the Coast Guard would not be mandatory, I will assume for purposes of this appeal that this was the intent of the court. Definite, objective standards, however, have been set out with respect to remedial action by the Coast Guard in cases involving convictions for narcotic drug law violations. See 46 U.S.C. 239b and 46 CFR 137.03-10 and 137.30-190(b). As the intention, motivation, or wish of the judge who sets aside a narcotics conviction is not among the criteria to be considered under these sections, I find that the belief of the judge that his action pursuant to California Penal Code Section 1203.4 would meet the requirements of being an unconditional dismissal and that revocation of Appellant's seaman's documents would not be mandatory to be of no consequence in the revocation proceeding here under review.

II

46 CFR 137.03-10 provides at subsection (a) that after proof of a narcotics conviction by a court of record has been introduced before an examiner he shall enter an order revoking the document of the seaman so convicted. Subsection (b) thereof states in part, "an order of revocation will be rescinded by the Commandant if the seaman submits satisfactory evidence that the court conviction on which the revocation is based has been set aside for all purposes..." The Examiner's opinion cited as a ground for his conclusion that relief under Section 1203.4 did not set aside the Appellant's conviction for all purposes the proviso of Section 1203.4 of the California Penal Code which reads "...that in any subsequent prosecution of such defendant for any other offenses, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." Counsel's argument that since the conviction under Section 11556 of the Health and Safety Code is a misdemeanor it cannot as a practical manner be pleaded and proved is not well taken. I agree that violation of section 11556 is a misdemeanor. California Health and Safety Code Section 11716. I further recognize that Section 11715.6 of the California Health and Safety Code provides that the sentence of certain stated narcotics *felony* convictions shall not be suspended if the convicted party has been previously convicted of narcotics felony. (Emphasis added) I am aware, however, of two offenses in the prosecution of which a previous conviction under Section 11556 may be pleaded and proved. Section 11540 of the California Health and Safety Code states:

"Every person who plants, cultivate, harvests, dries or processes any plant of the genus *lophophora* also known as peyote or any part thereof shall be punished by imprisonment in the county jail for not more than one year, or in the state prison for not more than 10 years. "If such a person has been previously convicted of any *offense described in this division* or has been previously convicted of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as *an offense described in this division*, the previous conviction shall be charged in the indictment or information and if

found to be true by the court, upon a trial, or is admitted by the defendant, he shall be imprisoned in the state prison for not less than two years nor more than 20 years." (Emphasis added)

As section 11540 and section 11556 are both in Division 10 of the Health and Safety Code, I find that a conviction under 11556 may be pleaded and proved as a previous offense in a prosecution under Section 11540. The same reasoning may be applied to prosecution under Section 11557 which relates to opening or maintaining any place for the purpose of unlawfully selling, giving away or using any narcotics.

III

There is additional support for the conclusion that the order of court pursuant to section 1203.4 did not set aside the Appellant's misdemeanor narcotics conviction for all purposes. The California Business and Professional Code provides that conviction of a felony or any offense, misdemeanor or felony, involving moral turpitude may be a ground to deny, suspend, or revoke licenses to practice medicine or dentistry irrespective of any order issued pursuant to section 1203.4 of the Penal Code relating to the convictions. Business and Professions Code 2383 and 1679. Section 13400 of the California Education Code provides that conviction of a felony or of any crime involving moral turpitude is a ground for suspension of a permanent employee of a school district. Section 12910 of the Education Code further provides that dismissal of a charge under section 1203.4 shall not affect a conviction for purposes of Section 13408.

Section 10562 of the Business and Professional Code provides that conviction of a felony or a crime involving moral turpitude is a ground for the suspension, revocation or denial of a license as a mineral, oil and gas broker or a mineral, oil and gas salesman irrespective of any action with respect to the conviction pursuant to section 1203.4 of the Penal Code. Section 1960 of the Business and Professional Code provides that conviction of a felony or any offense involving moral turpitude may be a ground for the revocation, suspension, or denial of a license as a psychologist, and Section 2363 provides that action under 1203.4 does not eliminate convictions for purposes of Section 2960.

As a violation of section 11556 of the Health and Safety Code is an offense involving moral turpitude it is seen that Appellant's conviction thereunder has the effect of denying him entrance to many professions and cannot be said to have been "set aside for all purposes."

IV

The use of a conviction dismissed under Section 1203.4 has been approved by California Courts independently of any specific statutory authority. *Meyer vs Board of Medical Examiners*, 34 Cal. 2d 62(1949), concerned the revocation of a physician's license for reason of his having been convicted of a crime. At the time of the decision the California code was silent with respect to the effect of a dismissal of conviction under 1203.4 as to the revocation of a physician's license. The California Supreme Court stated that Section 1203.4 does not "...obliterate [e] the fact that the defendant had been finally adjudged guilty of a crime and was not intended to purge him of the guilt inherent therein or to wipe out absolutely and for all purposes the dismissed proceedings as a relevant consideration and to placed the defendant in the position which he would have occupied in all respects as a citizen if no accusation or information has ever been presented against him."

The California Supreme Court in *In Re Phillips*, 17 Cal. 2d 55 (1941), also independently of statute, approved the consideration of a conviction dismissed under section 1203.4 of the Penal Code in disbarment proceedings against an attorney. The court stated, at 61, that "...action in mitigation of the defendant's punishment should not affect the fact that his guilt has been finally determined according to law.... That final judgment of conviction is a fact, and its effect cannot be nullified for the purpose here involved, either by the order of probation or by the later order dismissing the action after judgment."

The District Court of Appeal, 2d Dist., Div. 2 stated in *People vs Taylor* 3 cal Rptr 186 (1960), at 188:

"The rulings in the Phillips and Meyer cases stem from the Supreme Courts interpretation that section 1203.4 was not intended by the Legislature to relieve those convicted of crimes from the sanctions imposed by the professional licensing statute; in other words, that the penalties of suspension or revocation of professional licenses are independent of the conviction and are not expunged by a release under the probation section."

Ready vs Grady, 52 Cal Rptr 303 (Dist. Ct. App. 1st Dist. Div 2 1966), indicated that suspension or revocation of a license to practice a profession is not a penalty or disability of which a convicted person is relieved under Section 1203.4 of the Penal Code since the purpose of an administrative proceeding to revoke a license is to protect the public and not to punish the person charged. This reasoning which was also stated in *Copeland vs Department of Alcohol beverages Control Board*, 50 Cal Rptr 452 (Dist. Ct. of App. 2nd Dist., Div. B 1966), clearly applies to the remedial proceeding here under consideration.

Under 8 U.S.C. 1251(a)(11) an alien is subject to deportation if he is convicted of certain stated narcotic drug offenses. The Ninth Circuit has held that a narcotic conviction dismissed under Cal Pen. Code section 1203.4 may be considered as a conviction in deportation proceedings. *Garcia-Gozales vs Immigration and Naturalization Service*, 344 FF 2d 804 (1965) and *Brownrigg vs United States Immigration and Naturalization Service* 356 F 2d 877 (1966). The court said in *Garcia-Gonzales*, supra, at 808, "It is sheer fiction to say that the conviction is wiped out or expunged [by 1203.4]. What the statute does is reward the convict for good behavior during probation by releasing certain penalties and disabilities."

V

As the Appellant's conviction may be pleaded and proven in prosecutions for certain narcotics law violations, since his conviction may determine his eligibility for certain licenses, and since the viability of convictions dismissed pursuant to Sections 1203.4 has been recognized by California and federal courts alike, it cannot be said that the Appellant's narcotics conviction of 20

December 1967 has been set aside for all purposes.

VI

Counsel's final argument is that dismissal of the revocation of Appellant's seaman's documents would promote the interest of justice and that to permit the Appellant to continue to sail would not be a threat to the safety of life and property. It has been determined by the Coast Guard however that permitting a person who has had association with drugs would be clearly a threat to the safety and life and property. 46 CFR 137.03-5. The order of revocation was required by 46 U.S.C. 239b.

VII

It has been noted that the Examiner entered a conditional order, subject to affirmation by the Commandant. Under the terms of the purported order, it was merely interlocutory and would apparently have required action by me even if an appeal had not been filed.

This provision seems to have been based upon a misunderstanding of 46 CFR 137.20-190(b). This subsection reads: "When the proceeding under the provisions of Title 46, U.S.C., section 239b, is based on a narcotics conviction as referred to in 1537.03-10, 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. The Commandant reserves the personal right to make the determination in such case."

The Examiner has constructed this to mean that he could not render an initial decision which would become final under subsection (a) of the same section, in the absence of appeal.

But subsection (b) applies only to a case in which an examiner has already revoked a seaman's documents for conviction of violation of a narcotic drug law, and the claim is later made that the conviction has been unconditionally set aside for all purposes. The effect this subsection is to preclude a reopening of the hearing before the examiner, with all power to act reserved to the

Commandant.

In the instant case, the Examiner correctly found that the conviction had been proved. He also correctly held that the conviction had not been unconditionally set aside "for all purposes," especially nor for purposes of actions under 46 U.S.C. 239b. The order should have been one of unconditional revocation.

Technically, perhaps, it could be said that the Examiner's order should be set aside and the case remanded for entry of proper, unconditional order. This would serve no useful purpose however, since all the substantive questions raised by Appellant have already been decided against him.

CONCLUSION

The Examiner's order should be modified to eliminate its conditional character.

ORDER

The order of the Examiner dated at San Francisco, California, on 1 July 1960 is MODIFIED to read: That Merchant Mariner's Document and all other licenses and documents issued to Frank Prevost, Z-515535-D2 by the United States Coast Guard, be, and the same hereby, REVOKED, and , as MODIFIED, is AFFIRMED.

W. J. Smith
Admiral, United States Coast Guard
Commandant

Signed at Washington, D.C., this 18th of December 1968.

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