IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1240545 AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Timothy W. WEBER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1790

Timothy W. WEBER

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

By order dated 22 January 1969, an Examiner of the United States Coast Guard at Seattle, Washington revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as an ordinary seaman on board SS COUNCIL BLUFFS VICTORY under authority of the document above captioned, on or about 4 January 1969, Appellant wrongfully had marijuana in his possession on board the vessel at Seattle, Washington.

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

The Investigating Officer introduced in evidence the testimony of two officials of the Bureau of Customs and that of one of Appellant's roommates. He also introduced certain real evidence, objects of a seizure made by a Customs agent and documentary

records. An itemized documentary record of the seizure was later substituted for the real evidence.

In defense, Appellant offered in evidence the testimony of his other roommate and his own testimony.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 24 January 1969. Appeal was timely filed on 17 February 1969 and perfected on 5 June 1969.

FINDINGS OF FACT

On 4 January 1969, Appellant was serving as an ordinary seaman on board SS COUNCIL BLUFFS VICTORY and acting under authority of his document while the ship was in the port of Seattle, Washington.

About noon of that date, a Customs agent boarded the vessel which hade just arrived in port. The agent went to Appellant's room where Appellant was dressing to go ashore. He told Appellant that he wished to search Appellant's locker. Appellant told him to "go ahead" and identified the locker for him. In the locker the agent found a bottle of tablets labeled "Ritalin" which he recognized as a prescription, although non-narcotic, drug. Appellant admitted that he had no prescription for the drug; he threw the bottle overboard on advice of the agent.

The agent then examined a blue jacket belonging to Appellant, which he saw on Appellant's bunk. In a pocket he found gleanings of a substance which appeared to his visual observation to be marijuana.

Then the agent removed Appellant's life preserver from the top of the locker. Behind it he found a gunnysack, which contained, among other things, four bottles of Ritalin tablets, ten plastic bags, and a newspaper wrapping. The contents of the ten plastic bags and the wrapper appeared to be marijuana.

Laboratory analysis proved all the suspected marijuana to be in fact marijuana.

The total quantity of marijuana seized amounted to 473.334 grams, of which 0.005 grams came from the jacket.

BASES OF APPEAL

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

(1) all the marijuana received in evidence in this case was improperly accepted, over objection, because it was the product of an unlawful search;

(2) the identification of the substance involved as marijuana was insufficient because the witness was not qualified as an expert;

(3) the Examiner did not see the contents of the seized packages;

(4) the substance found in Appellant's pocket was irrelevant to the proceeding because its quantity was so small that it could not have been used as marijuana is used; and

(5) the evidence does not support a finding that the gunnysack found atop Appellant's locker was in Appellant's possession.

In addition it is urged that the order of revocation is peculiarly unusual in this case because in the ordinary case of revocation a seaman "can return to his former occupation", while Appellant cannot because his former occupation was "as a ship fumigator".

APPEARANCES: Leo 4. Peden, Esq., Seattle, Washington, at hearing, and Eric J. Schmidt, Esquire, San Francisco, California, on appeal.

OPINION

I

Appellant's objection to the admission into evidence of the seized marijuana on grounds of an unlawful search is both untimely and misconceived.

It is untimely because the issue was not raised before the Examiner. Even on a criminal proceeding the raising of the issue must be timely. This opinion is not to be construed as implying that the Fourth Amendment is applicable to a proceeding that is not penal but remedial, or how the issue could properly be raised. All that is noted here is that Examiner should have had opportunity to consider the question first. Failure to present the matter to him is a waiver of whatever benefits Appellant might have claimed.

It is true that certain real evidence was admitted by the Examiner "over objection". (Appellant's brief refers to objections made at pp 8 and 11 of the transcript.) The objections made on those occasions were not, however, based upon grounds of illegality of the search, but were based instead upon alleged irrelevance of the evidence because no foundation had then been laid to connect the results of chemical analysis to substances formerly in the possession of Appellant. The evidence was admitted "subject to connection", and the connection was later firmly established.

As a matter of hearing procedure it might have been better if the testimony of the searcher had been taken first and the testimony of the analyst later, but on the whole record it can be seen that no question of the legality of the search was ever presented to the Examiner. The testimony of the searcher who connected the findings of the analyst to the seized property was not objected to on Fourth Amendment grounds.

Since the question was not raised, even by professional counsel, before the Examiner, it is untimely to raise it now.

Aside from the question of timeliness, there is other good

reason for rejecting Appellant's argument.

While admitting that the search powers of officers of the Customs are broad, and are not limited by the circumscriptions around searches of persons or places ashore, he relied on *United States* v. *Roussel*, D.C. Mass. (1968) 278 F. Supp. 908, to argue that a Customs search cannot be a merely "random act", and upon testimony of the Customs agent in this case to support his view that the search here was a "random act". The testimony cited is this (on cross-examination):

"Q. You just picked him out by a matter of lot, chance, or...

"A. Just a matter of chance, yes sir." (R-35)

The fact is that the decision cited, in the "Roussel" case does not hold that a "border search" may not be a random act. Since the court upheld the legality of the search, the decision does not stand for any negative holding. Whatever projections from the "Roussel" decision Appellant might wish to make, however, the record is clear in this case that Appellant consented to the search. R-71.

II

The qualification of the witness who identified the substances involved as marijuana was sufficient. It was established that the witness was a "chemist employed by the Alcohol Tax Division of the United States Treasury Department". The qualifications and functions of such an officer (a "Customs `lab' analyst") are proper objects of official notice by an Examiner and by myself. Like anything appropriate for judicial or official notice, the matter is subject to controversion.

Appellant now argues that the identification of the witness did not specifically cover marijuana *expertise*, and complains that his counsel at hearing demonstrated incompetence in failing to "*voir dire*" the witness. (Brief, p. 3)

In view of my opinion expressed above as to "official notice"

I find the argument irrelevant, but I must also express the view that an Appellant who has consciously chosen professional counsel for his hearing and has chosen a different counsel for his appeal may not attack the competence of his earlier counsel. An appellant counsel who did not participate in the hearing may well have conducted the case in a different fashion at the hearing level, but this is not the forum in which to attack the competency of an attorney selected by Appellant himself for hearing.

III

The fact that the Examiner did not personally inspect the contents of any of the packages admitted into evidence (argument in Brief, p. 4) is not error. The documentary report accepted as a substitute for the real evidence, with consent of counsel, is ample to support the finding that the substance was marijuana. Personal inspection by the Examiner would not have added to the identification by the laboratory analyst or by the Customs agent who is trained to make examination based upon visual inspection.

IV

Appellant's next point is purely technical. It is that evidence of the marijuana found in Appellant's jacket pocket was "irrelevant" in that the amount of marijuana found was insufficient to be used as "marijuana", i.e. to be smoked or otherwise enjoyed. This argument may be based upon earlier holdings that mere gleanings of insignificant quantities of marijuana in a pocket are not enough, without more, to constitute evidence of wrongful possession of marijuana. (See Decisions on Appeal Nos. 745, 746.) There are two things to be noted here. The earlier decisions allowed that gleanings alone could support a finding of wrongful possession of marijuana if there was other evidence to take the case out of the conditions specified in those cases. The second consideration is that evidence of gleanings has not been held to be inadmissible.

Without considering whether possession of 0.005 grams of marijuana in a jacket pocket is sufficient to establish possession of marijuana under the earlier decisions, I hold here that the evidence of such possession was admissible at the hearing. Since the evidence was admissible for consideration by the Examiner, it

was available to him to use in determining whether the other large quantity of marijuana was in Appellant's possession.

V

This leads, then, to Appellant's primary assertion on appeal, that the evidence was insufficient to support a finding that the marijuana found atop his locker behind his life preserver was in his possession. Appellant urges that he had roommates and that his room was usually open to access by others to support the theory that the Examiner should have found that the evidence did not support a finding that the marijuana was in Appellant's possession.

The theory presented is that so many other persons had access to the area that a finding that Appellant had marijuana in his possession is unreasonable.

Even if it is accepted that Appellant often left his jacket on a hook in the passageway outside his room, such that other persons could use it, the fact is that the jacket when seen and searched was on Appellant's bunk. To hold the Examiner's findings unreasonable it would be necessary to find that there was so much evidence in the record that someone else had placed the marijuana in Appellant's jacket that it was arbitrary and capricious for the Examiner to have found as he did.

There was no evidence that someone else had done so; it was shown, at most, that someone else might have done so. The evidence submitted to the Examiner as to the marijuana found in Appellant's jacket was, therefore, substantial evidence.

Other elements are involved when the marijuana on the locker top is considered. The two persons having most frequent access to the space, the other two occupants of the room, both denied ownership, possession, or knowledge of the gunnysack. From one roommate this testimony was elicited by Appellant on cross-examination. The other roommate was Appellant's own witness.

Appellant attempted to explain his possession of the bottle of Ritalin tablets by stating that he had found it in his room a few days earlier. This was implicitly rejected by the Examiner and his opinion, that "the presence of the Ritalin tablets in ...

[Appellant's] locker, coupled with finding four such bottles in the gunnysack on top of his locker, appears ... to be more than just coincidence", is eminently supportable. It is unlikely that a person who accidentally finds a stray bottle of unknown tablets in his room will reduce it to possession by storing it in his locker. It is notable also that even on his own version of events he appropriated the tablets without seeking to ascertain whether they belonged to one of his roommates.

While the possession of Ritalin was not involved in the charge of misconduct in this case, its presence in the locker ties Appellant more strongly to the package concealed on top of his locker behind his life preserver, and, by reasonable inference, the large quantity of marijuana in the plastic bags becomes related to the gleanings in Appellant's pocket.

VI

Appellant's argument that the order of revocation is unusually severe in his case does not merit serious consideration. This is not the form in which to decide whether loss of his Merchant Mariner's Document will affect Appellant's employability in his former occupation as a ship fumigator.

The point is that many a seaman whose document has been suspended or revoked has no former employment to return to anyway.

CONCLUSION

The allegation was found proved upon substantial evidence, and no procedural error appears.

ORDER

The order of the Examiner dated at Seattle, Washington, on 22 January 1969, is AFFIRMED.

C. R. BENDER
Admiral, U. S. Coast Guard

Commandant

Signed at Washington, D. C., this 26 day of June 1970.

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