IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1041528 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Frederick Innis Wood Ingham

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1578

Frederick Innis Wood Ingham

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-5.

By order dated 2 December 1965, an Examiner of the United States Coast Guard at New York, New York, revoked seaman's documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as a deck maintenance man on board the United States SS FLYING ENTERPRISE II, under authority of the document above described, on or about 29 May 1964, Appellant wrongfully had a quantity of marijuana in his possession aboard the ship.

A second specification, dismissed by the Examiner but mentioned here because of its bearing on the appeal, was that Appellant, while so serving, had wrongfully purchased marijuana in Panama on 25 May 1964.

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

The Investigating Officer introduced in evidence depositions of several witnesses taken in San Juan, Puerto Rico, in the presence of Appellant's counsel.

In defense, Appellant offered nothing by way of affirmative evidence.

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

The entire decision was served on 3 December 1965. Notice of appeal was timely filed on 13 December 1965, and final action by Appellant was taken on 29 March 1966.

*FINDINGS OF FACT*

On 29 May 1964, Appellant was serving as a deck maintenance man on board the United States SS FLYING ENTERPRISE II and acting under authority of his document while the ship was in the port of San Juan, Puerto Rico.

Customs agents boarded FLYING ENTERPRISE II on that date and, in the course of a search of the room occupied by Appellant and another seaman named Johnson, they discovered a paper package taped to the back of the middle drawer of a desk.

Appellant admitted that he used that desk.

Chemical analysis of the contents of the package proved it to be 6.88 grams of marihuana.

Residue and gleanings taken from pockets of Appellant's clothing contained traces of marihuana.

After the tests, Appellant admitted to the Customs Agent-in-Charge that the package was his. He had also admitted to another agent that he had used marihuana for a long time.

*BASES OF APPEAL*

Appeal, by counsel, makes four points.

POINT 1

"GOVERNMENT EXHIBITS 1, 2, 3, 4 (REPORTS OF CHEMICAL ANALYSIS WERE NEVER PRODUCED AND MADE PART OF THE OFFICIAL RECORD."

POINT 2

"OBJECTION MADE ON THE RECORD DURING DEPOSITION WERE NEVER RULED ON BY THE HEARING EXAMINER."

POINT 3

"BOTH SPECIFICATIONS 1 AND 2 MUST STAND OR FALL TOGETHER. THE HEARING EXAMINER'S DECISION IS ILLOGICAL AND ARBITRARY."

POINT 4

"HEARING EXAMINER PRE-JUDGED THE PERSON CHARGED AND CONSIDERED EVIDENCE NOT IN THE RECORD. THE TESTIMONY GIVEN IS VAGUE, CONTRADICTORY AND TOO INCONSISTENT TO SUBSTANTIATE AND ORDER OF REVOCATION."

Appellant's first three points are supported in the appellate brief by several specific references to the record. The fourth point, which actually contains three distinct arguments, has no specific references in the brief.

The specifics will be discussed in the Opinion.

APPEARANCE: Zwerling & Zwerling, of New York, by Irving and Sidney Zwerling, Esquires

OPINION

I

Appellant's first point deals with four documents, two of which were reports of analysis of substances by two Customs chemists, the other two being reports by the same chemists of the destruction of contraband. Appellant states that the four reports, which were introduced during the testimony, on oral deposition, of two Customs chemists at San Juan, Puerto Rico, were marked as Government Exhibits 1, 2, 3 and 4, and were supposed to have been attached to the appropriate exhibits, but were *not*. It is pointed out in the argument that the record (R-15) shows that counsel called the Examiner's attention to the fact that the exhibits were not attached to the depositions and that the Examiner did not have them.

Further proof that they were not in evidence, it is urged, is found in the fact that the exhibits appended to the record of hearing, and numbered Government Exhibits 1 through 7 are transcripts of the oral depositions taken in San Juan--Exhibits 1 through 4 are not Customs chemists' reports.

The record on appeal shows that Appellant claims that the reports were not given to him at any time prior to his filing the appeal. It also shows that he was given copies of the seven depositions which formed the seven exhibits at the hearing, and that for purposes of appeal he was furnished a complete transcript of the proceedings, less the exhibits, which he had already (with the possible exception of the four chemists' reports).

Assuming, without admitting, that Appellant did not have in his exclusive possession copies of the chemists' reports at any time, for use at the hearing or for preparation of his appeal, it is necessary to consider whether the use actually made of them in this record resulted in any prejudice to him.

(It must be noted here that the record sent up for review contained the four chemists' reports, two accompanying Exhibit 6 and two accompanying Exhibit 7, the exhibits being the depositions of the chemists. The chemists' reports are physically marked G.E. #1 through G.E. #4. Those marked G.E. #1 and #2 accompany Exhibit 6, the deposition of Graham A. Castillo; those marked G.E. #3 and #4 accompany Exhibit 7, the deposition of Jose Martinez Mateo.)

The grounds for appeal on the question of these reports present immediately an unusual situation. Appellant concedes that the reports were to have been attached to their respective depositions. At the point of the hearing record to which he refers (R-15), he complained that the documents were not so attached to the depositions. But on appeal he complains that the Examiner had considered them, evidence not in the record, in reaching his decision!

Unusual as this position is, it is best to examine the whole proceeding to see whether merit may somehow have attached to it.

Appellant was represented by the same firm of counsel at all stages of the proceeding--at the opening of the hearing in New York, by personal appearance in San Juan at the taking of depositions, again at the hearing in New York, and now on appeal. The member who appeared when depositions were taken is the same one who followed the case thereafter through appeal.

When the deposition of the two chemists were taken in San Juan, the reports in question were produced. It was agreed by counsel that photocopies of then could be substituted for the originals and attached to the transcripts of the deposition which were sent to the Examiner in New York. When the hearing reconvened in New York, the seven deposition were offered in evidence by the Investigating Officer, each individually, and were received in evidence by the Examiner with explicit statements of "No objection" by counsel in each case. (R-12 through R-14). The Investigating Officer rested.

After some colloquy, the question of the non-attachment of the chemists' reports to the appropriate depositions was raised by counsel. NR-15) Because of its significance, the record of hearing from that point to the point of adjournment for the day is quoted in full.

> "COUNSEL:I think you will note, too, that on the chemists' depositions Commander Curyy was supposed to have made photostats of their reports which are not attached. On Page 5 of Exhibit 6, Mr. Castillo's deposition, Lieutenant Commander Curry said if counsel for the person charged had no

objection he would put a photocopy of the customs form--he would have a copy made and attach it, but they are not attached. That is Customs Form 4618.

"EXAMINER:You did concur?

"COUNSEL:Yes.

EXAMINER:I don't see Customs Form 4618.

"COUNSEL:I don't either. They were supposed to be attached. Commander Curry said he would attach them rather than read them into the record.

"EXAMINER:Here is the laboratory report marked 'GE No. 3' or 6E No. 3". This is Government Exhibit 3, Laboratory Report 827, and will be forwarded by Commander Curry and made part of the deposition of Mr. Castillo.

(Off-the-record discussion.)

"EXAMINER:Let the record show that photostatic copy of Bureau of Customs Order to Destroy and Certificate of Destruction for Forfeited, Abandoned, or Unclaimed Merchandise, dated March 18, 1965 and designated 'Government exhibit 2' is somewhat illegible with respect to quantity and description of merchandise. Counsel for the person charged and the Investigating Officer agree that the language which *should* be stated reads as follows: '6.88 grams of marijuana wrapped in a piece of paper and a piece of adhesive tape'.

(Off-the-record discussion.)

"EXAMINER: The argument on the motion of the person charged is deferred for the purpose of allowing the Hearing Examiner to study the depositions. The hearing is adjourned to Thursday, 30 September 1965 at 2 p.m. We stand adjourned."

Review of this portion of the record shows that Counsel looked over his copies of the deposition and found at this point that the chemists' reports had *not* ben "attached." Counsel and the Examiner exchanged a brief colloquy about the absence of the reports. Then the Examiner announced: "Here is the laboratory report marked G.E. No. 3 . . ."

An off-the-record discussion occurred (length not stated). When the on-record proceedings *were* resumed, the Examiner made an announcement that the copy of the Customs document designated "G.E. #2" was rather illegible and that counsel and the Investigating officer had agreed as to the wording to be understood.

After another off-the-record activity, the Examiner adjourned. From that point on to the conclusion of the hearing, the question of what may for convenience be called "missing exhibits" was never raised by Counsel or anyone else.

From the portions of the record to which I was referred by Counsel, as well as those immediately following, I am convicted that the first dialogue cited by Counsel (R-15) meant that the chemists' reports had not been immediately affixed to the documents which formed the depositions later entered as Exhibits 6 and 7. But the next statement of the Examiner proves conclusively that at least one of the reports was immediately picked up and identified as G.E. #3.

This was when the "off-the-record" proceeding occurred. (Bottom of R-15).

When the hearing reopened (top of R-16) the Examiner was prepared to announce that a stipulation as to the contents of "G.E. #2" had been reached by Counsel and the Investigating Officer. This was a report different from the one mentioned before the off-record colloquy.

Before commenting on the management of the record, I may better proceed to the obvious meaning of this activity.

After Counsel had noted that the chemists' reports were not

attached physically to the deposition documents, the Examiner found the report marked as "G.E. #3." Proceedings then went "off-record."

When the proceeding went back on the record, the Examiner was talking about the report marked "G.E. #2," a different document; but one of the four. Not only was he talking about the report, he was stating an agreement reached off-the-record between Counsel and the Investigating Officer as to the wording of part of that report obscured by the reproduction process.

Since from that point on to the conclusion of the hearing no reference was made by anyone to "missing" chemists' reports, and since two reports from two different witnesses had been sighted and identified on the record I conclude that all four reports were available for inspection by Counsel at the time the depositions were admitted in evidence.

Counsel saw the four reports when they were admitted as part of the depositions at San Juan. Having noted that they were not "attached" to the depositions when proceedings were resumed at New York, having heard comment on the record about two of the four reports, having entered an agreement as to the text of one poorly duplicated copy, and having made no further comment on any "absence" of these reports from the record before the Examiner, Counsel may not be heard for the first time an appeal to complain that the reports should be in the record, are not in the record, but were *used* by the Examiner as though they in the record.

Further to buttress this line of thinking, if it be needed, is the fact that Counsel heard the Investigating Officer's argument and made his own argument. At no point did he challenge the proof that the substances involved in the seizures were marijuana. If he *did not believe* that the chemists' reports were part of the record, surely Counsel would have been the first to have argued before the record was closed, that there had been no proof that the substances were in fact marijuana.

At the hearing level he never so argued. I believe that he never so argued because the argument was without foundation. The documents that are complained of were before the Examiner, and were

properly there in evidence and Counsel knew it.

One final fillip of the appeal on this point must be noted. It is that which deals with the numbering of the exhibits.

Appellant now says that the documents marked as Government Exhibits 1 through 4 are not so marked in the record of hearing, but four *different* documents are so marked.

The answer to this argument is simply that it is a quibble. There is no question that the documents were marked, on deposition, as "G.E. 1-4." There is no question but that they were to be attached to the depositions of Castillo and Mateo.

When these depositions came into the record as Exhibits 6 and 7, the reports came in with them. The fact that the reports had been initially numbered 1 through 4 in San juan is irrelevant.

It must be admitted that the way these reports were handled at the hearing left much to be desired. The record shows that just when the documents in question were found. the Examiner went off the record. while the duration of this off-the-record discussion is not known, the subject was obviously the chemists' reports, and when the record was resumed a stipulation had already been arrived at with respect to entries on an imperfect photocopy of one of the reports. It is noteworthy that immediately after the Examiner's statement that the agreement had been reached the proceedings went off-the-record again, with neither of the parties having assented *on the record* to the Examiner's statement of the agreement.

Transparent as the effort is to utilize this gap in the record to support an argument on appeal that the chemists' reports *were* not before the Examiner, the effort itself serves as warning that matters of record should be clearly on the record, so that no distortion of the proceedings may be attempted.

Whether it be true that Counsel was not provided with personal copies of these documents during the off-the-record proceedings, the facts are that he saw them in San Juan on original production, he saw copies in New York when the depositions *were* entered in evidence, and he never once, until the date his appellant rights

were to expire, voiced a complaint in the matter.

The holding on Appellant's contention must necessarily be that "Government Exhibits 1, 2, 3, 4, (Reports of chemical Analysis)" were produced and were made part of the record.

II

When the Examiner authorized the taking of oral depositions in San Juan, it *was* expressly stated that objections should be registered at the time of taking testimony but that rulings would be made by the Examiner when the completed depositions should be received in New York.

Appellant's counsel was present at the taking of the depositions. He objected seven times to individual questions.

It is argued now that the Examiner did not rule on these objections and that therefore the findings should be set aside.

When the depositions were returned to the Examiner at New York, copies were given to the parties. Later, as mentioned before, each deposition was offered separately in evidence. To each, individually, Counsel was given opportunity to object. On each offer he replied, "No objection." (R-12 through R-14).

From that point on to the conclusion of the hearing, including the points at which the Investigating Officer rested and Appellant rested, no question was raised as to the Examiner's rulings on the objections. On the last day of record, 30 September 1965, two weeks after the depositions had been received and copies distributed to the parties, and one week after the depositions had been received in evidence, the Examiner heard final argument and reserved decision. (No reason appears for the decision's not having been given on the record). After final arguments had been heard, the Examiner specifically inquired of Counsel for Appellant whether he wished to file proposed findings, conclusions, brief or memorandum.

It was obvious that no further proceedings were to be held on the record.

Not only did Appellant fail to renew his objections to questions on the depositions, he expressly offered no objection to the entry of each one in evidence. He permitted the Investigating Officer to rest his case without mention of his objections. He rested his own case without further mention of objections. He permitted the Examiner to announce the close of proceedings on the record without mention of objections.

No matter what may have been the intent of the Examiner's original statement that he personally would rule on objections in the depositions, any claim by Appellant to have been entitled to, and to have been deprived of the privilege of, such rulings, was effectively waived by:

(1) his failure to object to the admission of any of the depositions;
(2) his failure on the record to call attention to the absence of rulings on his motions when the Investigating Officer rested;
(3) his failure to mention the objections before he rested;
(4) his failure to mention the objections when it was clear that the Examiner was closing the record.

In this case, the appellant record makes clear, the Appellant was given the opportunity to show what prejudice, if any, would have occurred had the Examiner specifically overruled each of the seven objections made on the depositions. Appellant declined to offer a showing of prejudice under these conditions.

The grounds for appeal in this area are therefore considered frivolous and specious, but Examiners can be warned, by this effort, that due diligence should be taken in the compiling of the record that no such opportunity for specious and frivolous appeals may be afforded.

III

The third area of grounds for appeal has to do with the Examiner's dismissal of the original second specification, that alleging purchase of marijuana in Panama.

When the Investigating Officer rested, Appellant moved for a dismissal of both specifications. On the question of the purchase of marijuana in Panama, the Investigating Officer stated on the record that the only evidence as to this was Appellant's admission and that this admission had been made in a written confession given to Customs Officers, which writing was not in evidence. Upon this concession by the Investigating Officer, the Examiner dismissed the "purchase-in-Panama" specification but denied the motions as to the "possession in San Juan" specification.

Appellant argued at the hearing, and urges again upon appeal, that since acknowledgement by the Investigating Officer that there was not evidence as to purchase-in-Panama because the written confession was not in evidence led to dismissal of the second specification, the first specification should have been dismissed also because the written confession also covered that offense.

This argument contains two fallacies.

The first is that the acknowledgement of the Investigating Officer may have been wrong. The fact is, and the Examiner recognized after he had the depositions, that there was evidence, apart from the alleged written confession, that Appellant had bought the marijuana in Panama. There was evidence that he had so admitted orally before the written statement was made.

The second specification may well have been dismissed improperly. But the ruling for dismissal as to the second specification is not controlling as to the first specification. The evidence as to the first specification, the possession of marijuana at San Juan, was different from and stronger than the evidence as to purchase at Panama.

As to possession in San Juan, there are three separate pieces of evidence from Customs Officers as to the admissions of Appellant that the marihuana was his. These were oral admissions.

One need not speculate whether the findings of marihuana gleanings in Appellant's pockets would, alone, have been sufficient to establish his possession of the package of marihuana found in his room. Three agents on at least two occasions heard his oral admission that the package was his.

It must be noted here that there is absolutely no evidence in the record to counter the testimony as to these admissions.

Thus, whether or not the "purchase-in-Panama" specification was properly dismissed, there in substantial evidence that a package of marihuana was found in Appellant's room aboard the ship, that gleanings were found in pockets of his clothing, and that he admitted ownership of the package.

IV

(Appellant's fourth point, as noted before, actually urges three distinct arguments with no specific references in the brief. The three arguments are treated separately.)

(a)

The assertion that the Examiner prejudged the case is unsupported by any specific statement by Appellant. Pre-judgment by an Examiner would be prejudice. Assertions of prejudice must be supported by some specification. None is offered here. The naked allegation of prejudgment needs no comment.

(B)

The second assertion of Appellant's fourth point is that the Examiner considered evidence not in the record in arriving at his findings. Since no specifics are offered on this assertion, I can only conclude that Appellant refers to the use of the chemists' reports. This matter has already been dealt with.

(c)

As to Appellant's third argument under his fourth point, the question is not whether the character or the evidence will substantiate an order of revocation. The question is whether the evidence supports the Examiner's findings of fact; if it does, the order of revocation is appropriate.

While Appellant does not specify this in the brief, it appears

that he urges that the testimony of the five Customs Officers who had to do with the search, seizure, and interrogation revealed conflicts. These conflicts had to do with minor details of observation and recollection. They had to do with who was in whose room on board the ship at what time, who else was present when such and such was done or said, and at what times certain actions might have occurred. Considering the length of time between the events discussed and the hearing, some obscurity of recollection on the part of the witnesses is to be expected. All in all, the convincing factors in their testimony are that the marihuana packet was in fact found in Appellant's room, that his pockets contained gleanings, that chemical tests established the identity of the substance, and that Appellant admitted that the marihuana was his.

Flat contradictions by prosecution witnesses on essential elements may give rise to a feeling of disbelief. This would still be a matter for the trier of facts to decide.

Such contradictions might be the ground work for a defense attack on a theory, possibly, of "frame." No such attack was launched here.

Appellant contends, in essence, that the mere existence of conflicts in testimony on collateral, or merely peripheral, matters, requires as a matter of law that solid, substantial evidence on the main issue must be disregarded. This view cannot be accepted.

The underlying agreement of these witnesses on the essential facts cannot be ignored. The absence of any evidence in the record to challenge this substantial agreement means only that there is no reason not to accept it. The Examiner did accept it. The appellate record gives no reason to disturb his findings.

*ORDER*

The order of the Examiner dated at New York, New York, on 2 December 1965, is AFFIRMED.

P. E. TRIMBLE
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 17th day of August 1966.

INDEX



***** END OF DECISION NO. 1578 *****

Top