

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD

vs.

LICENSE NO. 799030

Issued to David G. Cibulka

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: DECISION OF THE
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: COMMANDANT
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:
: ON APPEAL
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: NO. 2611
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This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By an order dated June 25, 1997, an Administrative Law Judge (ALJ) of the United States Coast Guard at Houston, Texas, revoked Appellant's above-captioned license, upon finding the charge of "*conviction for a dangerous drug law violation*" proved. The supporting specification that was found proved alleges that Appellant, "being the holder of the captioned license, [was] on March 25th, 1997, processed by the County Court at Law of San Patricio County, Texas and [was] issued an order of deferred adjudication of guilt after pleading *nolo contendere* to the misdemeanor offense of possession of marijuana on or about December 7, 1996."

A hearing was held on May 22, 1997 in Corpus Christi, Texas. Appellant appeared with counsel and entered a response denying the charge and specification. The Coast Guard Investigating Officer (I.O.) introduced seven exhibits. Appellant introduced four exhibits and chose not to testify. There were nine (9) Joint Selected Procedural Exhibits.

The charge was found proved, and Appellant's license was revoked.

The ALJ's Decision and Order (D&O) was served on Appellant on July 2, 1997. Appellant filed a timely notice of appeal on July 28, 1997. On September 8, 1997, Appellant requested additional time to obtain a copy of the transcript for submission with Appellant's brief. This request was sent to the ALJ Docketing Center in Baltimore, MD. On September 25, 1997, the Legal Assistant to the ALJ who issued the D&O sent the original appeal transcript and one copy to the ALJ Docketing Center. The Legal Assistant stated in the memorandum accompanying the transcripts that neither the Appellant nor his attorney had requested a copy of the transcript. On September 29, 1997, Appellant requested, via ALJ Docketing Center, another extension of time. Because the Appellant had not yet received a copy of the

transcript from the court reporter, the Appellant's request for an extension of time was granted by order of the Chief ALJ. It was further ordered that Appellant's appeal brief be filed on or before October 3, 1997. The Appellant perfected this appeal on October 3, 1997. This appeal is properly before me.

APPEARANCE: Les Cassidy, Attorney at Law, Woolsey & Cassidy, P.C., 1020 Nations Bank Center North, 500 North Water Street, Corpus Christi, Texas 78741, for Appellant. The United States Coast Guard Investigating Officer (I.O.) was Lieutenant Junior Grade Shane D. Montoya.

FINDINGS OF FACT

At all relevant times, Appellant held the above captioned license. His license authorized him to serve as captain or "Operator of uninspected passenger vessels as defined in 46 U.S. C. § 2101(42) upon or near coastal waters not more than 100 miles offshore." (Investigating Officer's Exhibit 1; hereinafter "I.O. Ex.").

On March 25, 1997, Appellant was issued an "Order of Deferred Adjudication of Guilt" by the County Court at Law of San Patricio County, Texas, after appellant pled *nolo contendere* (No Contest), to a misdemeanor offense of possession of marijuana. (I.O. Ex. 7). The possession took place on or about December 7, 1996. Id.

The Order Deferring Adjudication of Guilt Terms and Conditions of Community Supervision ordered, among other things, that Appellant be placed on community supervision for a period of six (6) months beginning at the time the order was signed (March 25, 1997), pay a fine in the amount of \$500.00 and Court costs of \$295.00. Id. This record also states that "[t]he Court, having heard said plea [*nolo contendere*] and having heard the evidence and which was submitted, including stipulated evidence, and the argument of counsel, and having duly considered the same, finds that the evidence substantiates the Defendant's guilt and it being the Court's opinion that the best interest of the defendant and of society will be served by deferring further proceedings without an adjudication of guilt." Id. It was further ordered and adjudged that "no final adjudication of the guilt or innocence of said Defendant be entered by this court .)" Id.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the ALJ:

1. The ALJ erred when he found the charge and specification based upon a plea of *nolo contendere* (no contest) proved, as this charge does not satisfy requirements of a final conviction pursuant to 46 C.F.R. §5.59(b).
2. Appellant's plea of *nolo contendere* does not substantiate an admission of guilt for the reason that Federal law has long recognized that such pleas are not admissible in a civil proceeding.
3. Revocation of Appellant's license based on a conviction after a plea of *nolo contendere*,

where there was not an evidentiary hearing, is a violation of the Appellant's Fifth Amendment right to due process.

OPINION

I find that Appellant's issues are without merit and AFFIRM the ALJ's Decision.

I

Appellant contends that the Order of Deferred Adjudication does not constitute a final conviction for the purposes of a 46 CFR Part 5 hearing. Appellant entered a plea of *nolo contendere* (no contest) and received an order of deferred adjudication as authorized under the Texas Criminal Procedure Code, Annotated § 42.12 (5). This procedure constitutes a state expungement scheme such that Appellant's record will not reflect a conviction if he abides by the conditions of the community supervision (probation). See Tex. Crim. P. Code Ann. §42.12(5)(c). Correspondingly, 46 C.F.R. Part 5, which establishes policies and procedures for administrative actions against mariners licenses, states in § 5.547 (c) that "if as part of a state expungement scheme the respondent pleads guilty or no contest or is required by the court to attend classes, make contributions of time or money, receive treatment or submit to any manner of probation or supervision. . .the respondent will be considered, for the purposes of 46 U.S.C. § 7704, to have received a final conviction." Thus, because Appellant pled *nolo contendere*, was required to make a contribution of money (\$500 fine) and was under community supervision for six months pursuant to Texas expungement scheme, the order of deferred adjudication constituted a final conviction for the purpose of 46 C.F.R. part 5.¹ See Appeal Decision Nos. 2435 (BABER) and 2355 (RHULE).

II

Appellant contends that evidence of a no contest plea is inadmissible in a 46 C.F.R. Part 5 hearing. Appellant mistakenly classifies these proceedings as "civil procedures" and attempts to invoke Federal Rule of Civil Procedure 410 which prohibits the use of a *nolo contendere* plea in a civil trial. Hearings under 46 C.F.R. Part 5 for the suspension and revocation of mariner's licenses are administrative procedures. Evidence of a *nolo contendere* plea and subsequent deferred adjudication of guilt may be admitted in administrative procedures in Texas including proceedings against state professional licenses, similar to the Federal license at issue in this case. See Turton v. State Bar of Texas, 775 S.W.2d 712 (Ert. 1989) (law); Tex. Rev. Civ. Stat. art. 4512e (physical therapy); Tex. Rev. Civ. Stat. art. 4542a (pharmacy); Tex. Rev. Civ. Stat. art. 6573a (real estate); 22 Tex. Adm. Code § 511.167 (certified public accountant). Further, under Texas law, the fact that a person received a deferred adjudication may be introduced in the penalty phase of a criminal trial. See Tex. Crim. P. Code Ann. § 42.12(5)(a); Davis v. State, 968 S.W.2d 368 (Tex. 1998). Just as Texas law allows admission of a *nolo contendere* plea in a licensing administrative action, so does the Coast Guard. 46 U.S.C. §7704(b), 5 C.F.R. §5.547(c).

Thus, when Appellant entered his plea of *nolo contendere* and the court accepted that plea and placed

him on community supervision, he was "convicted" for similar purposes under Texas Law. Accordingly, an Order of Deferred Adjudication under Texas Criminal Procedures Code Annotated § 42.12 (5) satisfies the jurisdictional predicate for revocation of Appellant's license under 46 U.S.C. § 7704(b). See Appeal Decision Nos. 2435 (BABER) and 2355 (RHULE).

III

Appellant claims that because there was not an evidentiary hearing before his conviction and deferred adjudication, the present proceeding violates his Fifth Amendment right to due process. Appellant raises this issue inappropriately in this forum. The purpose of these proceedings is remedial in nature and intended to maintain standards for competence and conduct essential to the promotion of safety at sea. See 46 U.S.C.

§ 7701; 46 C.F.R. § 5.5. Suspension and Revocation procedures are conducted in accordance with regulations promulgated under the Administrative Procedures Act (5 U.S.C. § 552 et seq.) and as set forth in 46 C.F.R. Part 5. Those regulations specifically detail the authority of the ALJ at the hearing level and the Commandant at the appellate level. The use of a judgment of conviction in these proceedings is set out in 46 CFR

§ 5.547(c) which states that "if as part of a state expungement scheme the respondent pleads guilty or **no contest** or is required by the court to attend classes, make contributions of time or money, . . . the respondent will be considered, for the purposes of 46 U.S.C. § 7704, to have received a final conviction." (emphasis added)

That which Appellant requests is clearly beyond the purview and authority of Suspension and Revocation Proceedings. Neither the ALJ nor the Commandant are vested with the authority to decide constitutional issues; that is exclusively within the purview of the federal courts. See Appeal Decision Nos. 2546 (SWEENEY) and 2560 (CLIFTON).

It is significant to note, however, that Texas law provides that the judge may only order deferred adjudication and community supervision after "hearing the evidence, and finding that it substantiates the defendant's guilt." See Tex. Crim. P. Code Ann.

§ 42.12(5)(a). This provision is included on the Appellant's Order of Deferred Adjudication, which is signed by Appellant.

See I.O. Ex. 7.

Appellant may, after three years of compliance with the revocation order, apply for the issuance of a new license under 46 C.F.R. § 5.901(a). Under certain circumstances the three-year waiting period may be waived. 46 C.F.R. § 5.901(b).

CONCLUSION

The charge and specification alleged are supported by substantial, reliable and probative evidence in accordance with 46 C.F.R. § 5.63. In addition, a review of the record reveals no clear errors or novel

policy considerations. The hearing Appellant received was fair and in accordance with the requirements of the applicable regulations. Therefore, the finding of *proved* as it relates to the charge and specification is AFFIRMED.

ORDER

The Decision and Order of the Administrative Law Judge dated June 25, 1997, is AFFIRMED.

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J. C. CARD
Vice Admiral, U. S. Coast Guard

Acting Commandant

Signed at Washington, D.C. this 16th day of August, 1999.

¹46 C.F.R. Part 10 establishes a comprehensive policy of determining the qualifications a person must possess to be eligible to hold a license. Section 10.201 states in part that "no person who has been convicted by a court of record of a violation of the dangerous drug laws of the United States¹ is eligible for a license." Section 10.103 further defines a conviction such that "if an applicant pleads guilty or no contest, is granted deferred adjudication, or is required by the court to attend classes, make contributions of time or money, receive treatment, submit to any manner of probation or supervision¹ then the applicant will be considered to have received a conviction."