

In the Matter of License No. 76000 Merchant Mariner's Document No. Z-29877-D3 and all other Licenses, Certificates, and Documents
Issued to: FRANK WILLIAM WHITE

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

954

FRANK WILLIAM WHITE

This appeal has been taken in accordance with Title 46 United States Code 239a-b (Public Law 500, 83d Congress, 68 Stat. 484) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 31 July 1956, an Examiner of the United States Coast Guard at Long Beach, California, revoked the seaman documents of Appellant based upon proof of a specification alleging in substance that, on or about 26 August 1954, he was convicted for violation of the narcotic drug laws of the State of California.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the two possible results of the hearing - revocation of his documents or dismissal of the specification. Although advised of his right to be represented by counsel of his own choice, Appellant voluntarily elected to waive that right and act as his own counsel. The Examiner entered a plea of "not guilty" to the charge and specification on behalf of Appellant.

Thereupon, the Investigating Officer and Appellant made their opening statements. the Investigating Officer introduced in

evidence certified copies of the record of Appellant's conviction as alleged in the specification.

It was agreed that Appellant's opening statement would be accepted as testimony. Appellant stated that he was not guilty and had been convicted without a fair trial. Appellant also introduced two letters attesting to his prior good work at sea and his improvement since the time of his arrest on 18 May 1954.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and having considered the proposed findings and conclusions submitted by Appellant, the Examiner announced his decision and concluded that the specification had been proved. He then entered the order revoking Appellant's License No. 76000, Merchant Mariner's Document No.Z-29877-D3 and all other licenses, certificates and documents issued to Appellant by the United States Coast Guard or its predecessor authority.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 9 June 1954, an information was filed against Appellant in the case of *The People of the State of California V. Frank W. White* in the Superior Court of the State of California in and for the County of Los Angeles, a court of record, for a violation of section 11500 of the State Health and Safety Code. The information alleged that Appellant had committed a felony by unlawfully having heroin in his possession on 18 May 1954.

On 16 June 1954, Appellant appeared with court appointed counsel before the court and entered a plea of "not guilty" to the above information. The jury-waived trial was held on 29 July 1954 and Appellant was found guilty as charged in the information. This constituted violation of the narcotic drug laws of the State of California.

On 26 August 1954, the judgment of the court was entered. Appellant was sentenced to imprisonment for one year. Executive of the sentence was suspended and Appellant was placed on probation on

condition that he serve 120 days of said probationary period in the County jail.

Official notice is taken of the fact that Appellant's prior record consists of four prior suspensions, one of which was incurred by Appellant's failure to perform his duties as Boatswain on the basis that he was not given an injection of morphine.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that:

POINT I. It was the obvious intent of Congress that 46 U.S.C. 239a-b (P.L. 500, 68 Stat. 484), which became effective on 15 July 1954, should not be applied to offenses committed prior to the effective date of this statute even though the date of conviction followed the effective date of the statute. This is shown by the fact that another part of the statute specifically limits action against a user of narcotics to use after 15 July 1954. Also, no action could have been taken against Appellant's documents if he had entered a plea of guilty and had been convicted prior to 15 July 1954. Hence, the Coast Guard lacks jurisdiction and Appellant has been deprived of life, liberty and property, without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. As applied herein, this statute is in violation of Article I, section, Clause 3, of the Constitution which states: "No Bill of Attinder or ex post facto law shall be passed."

POINT II. The "conviction" for the alleged offense occurred on 29 July 1954 rather than on 26 August 1954 as alleged in the specification.

POINT III. This application of the statute violates the provisions of the Ninth and tenth Amendments to the Constitution.

T/POINT IV. The decision is void for lack of jurisdiction because Appellant was not the holder of the aforesaid documents at the time of the Examiner's decision.

POINT V. Appellant requests that counsel be appointed to further prosecute his appeal due to the fact that Appellant does not have sufficient funds to employ counsel.

OPINION

Appellant's points III, IV and V will be dealt with first since they seem to have little or nothing to do with the more serious contentions raised on appeal.

Point III refers to the Ninth and Tenth Amendments to the Constitution. Without setting forth any reason for the statement, Appellant claims that the present application of the statute (46 U.S.C. 239a-b) violates the provisions of these two amendments which pertain to rights and powers reserved to the States and the people. In the absence of greater specificity and since no basis for such a claim occurs to me, this contention is disposed of without further comment.

Point IV denies that Appellant had possession of the above described documents at the time of the Examiner's decision. In answer to this, it is adequate to state that both of these documents were originally issued to Appellant but they had been surrendered and were in the custody of the Coast Guard at the time of the hearing. Hence, there is no question but that the Coast Guard had jurisdiction to proceed the documents issued to Appellant. If Appellant previously and permanently had surrendered all title to license No. 76000 and the license became invalid, then he cannot be injured by directing this action against his former license as well as his Merchant Mariner's Document. Obviously, such action is a nullity so far as a void license is concerned.

Point V states that the Government should have appointed qualified counsel to represent Appellant. There is no provision for appointing counsel to represent the Appellants in these proceedings. It is significant that, except on extremely rare occasions, the Investigating Officers do not submit briefs in opposition to the Appellant's appeal. In addition, a careful review of the record convinces me that the points raised by Appellant on appeal encompass all the arguments which reasonably could be brought up on appeal.

The above disposes of Points III, IV and V. The more difficult problems are presented by the two remaining contentions.

POINT I

The gist of this exception is that the statute (46 U.S.C. 239a-b) is a bill of attainder and is ex post facto in its application, and therefore unconstitutional, if it is utilized to apply to a case where the offense is committed prior to the effective date of the statute and the conviction for the offense is subsequent to the effective date of the statute. This is such a case. The pertinent portions of the statute read as follows:

"The Secretary may

(b) take action, based on a hearing before a Coast Guard examiner, under hearing procedures prescribed by the Administrative Procedure Act, as amended, to revoke the seamen's document of

(1) any person who, subsequent to July 15, 1954, and within ten years prior to the institution of the action, has been convicted in a court of record of a violation of the narcotic drug laws of the United States, the District of Columbia, or any State or Territory of the United States, the revocation to be subject to the conviction's becoming final;
. . ."

A bill of attainder is a legislative act which inflicts punishment against a named individual or an easily ascertainable class of persons without a judicial trial. *Cummings V. State of Missouri* (1866), 71 U.S. 277. The section of the statute in question certainly does not partake of the nature of a bill of attainder since it provides for action "based on a hearing" at whichd evidence of a prior narcotics conviction by a court of record must be produced before the seaman can be deprived of the right or privilege to use his seaman's document. Hence, there must be a trial.

An ex post facto law is one which imposes a punishment for an

act which was innocent at the time it was done or imposes additional punishment to that which was prescribed for the act when it was committed. *Cummings V. State of Missouri*, supra. Obviously, this is not a statute which imposes a punishment for a previously innocent act since revocation of a seaman's documents, under this statute, must be based upon a conviction, after 15 July 1954, for an act which necessarily would have to have been a violation of the narcotic drug laws, at the time of the act for which he was convicted, in order to obtain a legal conviction. The remaining question is whether this statute is one which imposes additional punishment and unlawfully "alters the situation of the accused to his disadvantage." *Thompson V. Utah* (1898), 170 U.S. 343.

There is one accepted qualification to the above language. This exception is well stated, in general terms, in *Bauer V. Achson* (D.D.C. 1952) 106 F.Supp. 445:

"But a statute which makes the right to engage in some activity in the future depend upon past behavior, even behavior before the passage of the regulatory act, is not invalid as a bill of attainder or ex post facto law if the statute is a bona fide regulation of an activity which the legislature has power to regulate and the past conduct indicates unfitness to participate in the activity."

Specifically on this point, the Supreme Court upheld the validity of a New York statute which forbade any one who had been convicted of a felony from thereafter practicing medicine, even though the conviction was prior to the date of the New York statute. *Hawker V. New York* (1898), 170 U.S. 189. The court clearly indicated that the test, by which the validity of a statute of the kind herein under consideration may be determined, is not the form of the legislation but its substance, and that if the statute is substance inflicts and additional punishment for a past offense, it is an ex post facto law. But if the reasonable regulation to safeguard the public welfare and interests, it is not an ex post facto law even though persons may be deprived of engaging in previous pursuits on the basis of their behavior before the passage of the regulatory act. In this manner, the court distinguished between an increase in punishment for the felony and

the restraint imposed for other than punitive reasons. This case also establishes that conviction of a crime may be made the conclusive test of past behavior.

A somewhat similar situation is presented in the case involving the application of the Federal Firearms Act which makes it unlawful for any person, who has been convicted of a crime of violence, to receive firearms shipped in interstate or foreign commerce. The courts have held that the Firearms Act is not ex post facto as applied to a person who had been convicted of a crime of violence before the passage of the Firearms Act. The theory, as stated in *Cases V. United States* (C.C.A. 1, 1942), 131 F2d 916, cert. den. 319 U.S. 770, is that this is not an additional penalty for the crime of violence because Congress sought to use reasonable means to protect the public by preventing possession of firearms by those who, by their past conduct, had demonstrated their unfitness to be entrusted with such dangerous instrumentalities.

According to these standards it is my opinion that the present application of 46 U.S.C. 239a-b is not unconstitutional. Surely, the public health and interest are involved when action is taken to remove from the ships of our Merchant Marine Service a seaman who has been convicted of a narcotics offense. The actual and potential evils of narcotics are well known to everyone in this country and Congress has recently increased the already severe penalties for such offenses. The legislative history of this statute (46 U.S.C. 239a-b) shows that one of the purposes of the Act is to eliminate seamen who "are now able to serve in the United States merchant marine to the detriment of shipboard safety, morale, and discipline because we are unable to proceed against them for narcotics offenses [committed] ashore." This is consistent with the statutory duty of the Coast Guard to protect the lives of passengers as well as other seamen on the ships. A seaman associated with narcotics is potentially much more dangerous in the close confines of shipboard life where every life depends to some extent upon the proper performance of duties by every member of the crew. Hence, the present application of this law is a reasonable restraint upon Appellant's activities rather than an additional punishment for the act for which he was convicted.

The intent of Congress is expressed by the clear and unambiguous wording of the statute under consideration. The fact

that the date of conviction was intended to be the controlling factor is emphasized by comparison with the wording of the portion of the statute which refers to action against users of narcotics. The latter type of action is limited to user after 15 July 1954. As pointed out in the Examiner's decision, Congress could easily have stated that revocation should be predicated upon the date of the act of the seaman, rather than the date of his conviction, occurring after 15 July 1954 if Congress had so intended. In the absence of any ambiguity in the wording of the statute, we are not permitted to construe it to mean that which it does not say. "Where the law is free and clear from ambiguity, the letter of it is not to be disregarded on the pretext of pursuing its spirit." 82 *C.J.S. Statutes* sec. 325.

The most that can be said for Appellant's contention, that this action could not have brought if his conviction had occurred prior to 15 July 1954, is that he is perfectly correct in this respect. In any event, the record shows that Appellant was afforded a fair hearing and there is no basis for his contention that he was deprived of his right to due process of law.

For the above seasons, it is my conclusion that Appellant's point I is without merit.

POINT II

Appellant contends that there was a fatal variance between the specification and the proof. It is urged that the "conviction" occurred on 29 July 1954 (the date of the trial) rather than on 26 August 1954 (the date the judgment of the court was entered) as alleged in the specification.

First, it is noted that if there was such a variance it would not be fatal in this administrative proceeding since there was no element of surprise involved and Appellant was not prejudiced in the preparation of his defense. *Kuhn V. C.A.B.* (C.A., D.C., 1950), 183 F2d 839.

Secondly, it is not believed that there is a variance. The numerous judicial citations contained in the Examiner's decision support the view that Appellant was not "convicted," within the

meaning of the statute, until the judgment of the court was entered on 26 August 1954.

Ordinarily, a conviction means the establishment of a person's guilt by verdict or plea; but in its more technical legal sense, the word conviction is used to denote the final judgment of the court which conclusively establishes the person's guilt in a criminal prosecution. The reason for the latter interpretation is that prior to the time when the person is sentenced by the pronouncement of the court's judgment, a plea or verdict may be set aside or a new trial granted for various causes. 24 *C.J.S. Criminal Law* sec. 1556, note 44.

Where a "conviction" is made the ground from which some disability flows, the technical meaning applies and the "conviction" includes the entry of the court's final judgment in a criminal case. *In re Ringnalda* (D.C.Calif., 1943), 48 F.Supp. 975 (citing State court decisions to the same effect); 16 *Corpus Juris* 1267; 9 *Words and Phrases* 6069 (Although it is not material herein, *In re Ringnalda*, supra, has been modified to the extent that a judgment is final even though imposition of sentence is stayed and the person is placed on probation by the court. *Korematsu V. United States* (1943), 319 U.S. 432.) These citations make it clear that the technical meaning applies in such case as this, where the word "conviction" is used to describe the effect of the guilt of the accused, as judicially proved in one cause, when presented in evidence in another case.

CONCLUSION

The Coast Guard had jurisdiction to proceed in this case. The evidence supports the allegations contained in the specification. The Examiner properly revoked Appellant's documents and the order will be sustained.

ORDER

The order of the Examiner dated at Long Beach, California, on 31 July 1956, is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 8th day of March, 1957.

***** END OF DECISION NO. 954 *****

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