In the Matter of Merchant Mariner's Document No. Z-756557-D1 and All other Seaman Documents
Issued to: JOVITO DIAZ

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1195

JOVITO DIAZ

This appeal has been taken in accordance with Title 4l United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 19 August 1959, an Examiner of the United States Coast Guard at Long Beach, California revoked Appellant's seaman document upon finding him guilty of misconduct. The specification found proved alleges that while serving as a cook on board the United SS PRESIDENT COOLIDGE under authority of the document above described, on or about 15 August 1958, Appellant wrongfully had a quantity of heroin in his possession.

At the hearing on 20 August 1958, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice. Counsel entered a plea of not guilty to the charge and specification on behalf of Appellant.

The Investigating Officer introduced in evidence the testimony of three United States Customs employees and several documentary

exhibits. The witnesses testified concerning heroin found in Appellant's locker on the ship.

In defense, Appellant offered in evidence his testimony. He denied ownership of the heroin and he denied ever having seen the paper in which the heroin was wrapped. Appellant testified that he had never seen heroin, but admitted telling the Customs officials, while he was confused and nervous, that a Chinese boy in Hong Kong gave this package of heroin to Appellant.

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

The decision was served on 24 August 1959. Appeal was timely filed on 15 September. Appellant was furnished a hearing transcript on 15 March 1960 and the appeal was completed by the filing of a brief on 25 May 1960.

FINDINGS OF FACT

On 15 August 1958, Appellant was serving as assistant cook on board the United States SS PRESIDENT COOLIDGE and acting under authority of his Merchant Mariner's Document No. Z-756557-D1 while the ship was docked at Wilmington, California.

During a routine search of the ship on this date, two Customs officers were in Appellant's room. Neither Appellant nor his roommate were present. Appellant's locker was locked with a padlock. Appellant did not always lock it. One of the officers found the key to Appellant's locker under a tube of tooth paste on a ledge by the medicine cabinet in the room. He opened the locker and found a yellow waxed paper packet, approximately one-eighth by three-eights inches, on a shelf among some papers belonging to Appellant. The paper contained a white powder which the Customs officer suspected was a narcotic substance. Consequently, everything was replaced until Appellant arrived. When the yellow paper was again taken out of the locker and Appellant was asked if it belonged to him, he not only disclaimed ownership but stated he had never seen it before this time. Appellant stated that he could

not explain why the packet was among his papers. After Appellant was taken off the ship, he told the Customs officials that a Chinese boy in Hong Kong had given him this packet. No evidence of narcotics was found in any of Appellant's clothing.

Subsequent analysis disclosed that the contents of the yellow paper consisted of about one-half grain of heroin hydrochloride. The local United States Attorney declined prosecution. (The record does not disclose the reason.)

Appellant has no prior record.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the presumption of wrongful possession was not established by substantial evidence because Appellant's locker was readily accessible to others. Even if this presumption was established, it was rebutted by Appellant's repeated denials that he had knowledge of the physical possession of the substance. If Appellant knew there was heroin in his locker, he would not have left the key where it could easily be found by anyone.

The one year delay by the Examiner in rendering his decision is prejudicial to the Appellant especially with respect to the Examiner's recollection of Appellant as he testified at the hearing.

Appellant prays that the Commandant will reverse the order of revocation and reinstate Appellant's document because the burden of proof has not been met by substantial, probative and competent evidence.

APPEARANCE ON APPEAL: Sheldon Tabak, of New York City by T. Lawrence Tabak, Esquire, of Counsel

OPINION

It is my opinion that the record contains the required

reliable, probative and substantial evidence to support the allegation that Appellant had conscious, knowing, and therefore wrongful, possession of the heroin found in his locker.

A prima facie case of wrongful possession of narcotics was made out against Appellant by the rebuttable presumption of fact of conscious and knowing possession of heroin arising from the proof of physical possession of it. *Commandant's Appeal Decision* Nos. 810, 1163, 1165; 46 CFR 137.21-10. As stated by the Examiner, access to the location of the narcotic need not be exclusive in order to invoke this presumption. *Commandant's Appeal Decisions* Nos. 1081, 1163.

The decision of the Commandant have stated that the presumption is not rebutted unless the Appellant produce evidence which convinces the Examiner either that Appellant did not have any knowledge of the actual physical possession of the substance (*Appeal* Nos 810, 1081, 1163) or that he did not know the character of the substance admittedly known to be in his possession. (*Appeal* Nos. 827, 1165, 1178)

It is not clear in which of these two categories the present case falls. At first, Appellant told the Customs officials that he had never before seen the yellow paper. Later, Appellant said a Chinese boy gave it to him. However, at the hearing, Appellant testified that he had never seen the packet until the Customs officer shoved it to him; and he did not know what the white powder was. Appellant's testimony implies that due to his very confused and nervous condition when apprehended, he made up the story the Chinese boy giving it to him. Thus, it appears that Appellant is attempting to utilize both the defense that he did not know the substance was in his locker; but if he did know it was there, he did not know what it was.

The Examiner stated that he was convinced that Appellant knew of the presence of the substance and that he knew it was heroin. Hence, the Examiner rejected Appellant's testimony with respect to both possible defenses. Under circumstances where a defendant's knowledge of the presence of the narcotic in his physical possession is material, the weight to be attached to the denial of a defendant is for the jury to determine. *Gee Woe v. United*

States (C.C.A. 5, 1918), 250 Fed. 428, cert. den. 248 U.S. 562. It is also an in something under his control. *Woo v. United States* (C.C.A. 4, 1934), 73 F. 2d 897, cert. den. 294 U.S. 714. Similarly, as indicated above, the weight to be given Appellants's denials in this administrative action is for the Examiner, as the trier of the facts, to determine.*Commandant's Appeal Decisions*. Nos. 712, 810, 1081.

Since the Examiner did not accept Appellant's denials concerning the heroin, the presumption based on proof of physical possession was not rebutted. Therefore, this evidence was sufficient to support the conclusion that the specification alleging wrongful possession of heroin was proved. I agree that this is this is the most reasonable inference to be drawn from the evidence. In reaching this conclusion, the Examiner considered the factors that Appellant did not have exclusive access to the locker where the narcotic was located, but that it was under his predominant control; and that the heroin was found among papers admittedly belonging to the Appellant. The evidence meets the test that it must be substantial: "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. N.L.R.B*. (1938), 305 U. S. 197.

There is no explanation for the long delay by the Examiner in rendering his decision. Nevertheless, there is no indication that Appellant was prejudiced by this delay. The Examiner's decision indicates that he had a clear recollection of Appellant's testimony at the hearing and evaluated it, as to credibility, accordingly.

ORDER

The order of the Examiner dated at Long Beach, California, on 19 August 1959, is AFFIRMED

J. A. Hirshfield
Vice Admiral, U. S. Coast Guard
Acting Commandant

Dated at Washington, D. C., this 11th day of October 1960.

***** END OF DECISION NO. 1195 *****

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