

In the Matter of Merchant Mariner's Document No. Z-666493-D1 and
all other Seaman Documents
Issued to: ARTHUR SAENZ

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1223

ARTHUR SAENZ

This appeal has been taken in accordance with Title 46 United States Code 239b and Title 46 Code of Federal Regulations 137.11-1.

By order dated 29 February 1960, an Examiner of the United States Coast Guard at San Francisco, California revoked Appellant's seaman documents upon finding him guilty of the charge of "conviction for a narcotic drug law violation." The specification found proved alleges that, on or about 27 November 1959, Appellant was convicted by the Superior Court of the State of California in and for the City and County of San Francisco, a court of record, for a violation of the narcotic drug laws of the State of California (section 11530 of the State Health and Safety Code-possession of marijuana).

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

The Investigating Officer introduced in evidence a properly certified document from the records of the above Superior Court stating that Appellant was "duly convicted" as alleged, he was

ordered to be imprisoned for one year, execution of sentence was suspended and Appellant was placed on probation for a period of five years.

No evidence was submitted in defense but counsel submitted an extensive argument that this is not a final conviction because Appellant was placed on probation.

At the end of the hearing, the Examiner rendered the 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.

BASES OF APPEAL

On appeal, the argument is reiterated that this is not a final conviction as required by 46 U.S.C. 239b and 46 CFR 137.04-15(a) because the decisions of the California courts hold that a judgement of conviction is not final when probation has been granted. This is so in view of the provision in the California Penal Code, sec. 1203.4, which permits the court to set aside a plea or verdict of guilty and dismiss the action after the defendant has completed his probation, and provides for his release from all penalties and disabilities resulting from the crime for which a probationer was convicted. *Fahs v. Martin* (C.A. 5, 1955), 224 F. 2d 387, holds that the state law should be followed as to state interests when no federal statute or policy controls. Therefore, the question as to what constitutes a conviction by a state court should be determined by the California court decisions.

In *Pino v. Landon* (1955), 349 U. S. 901, an attempt to depart from this rule, in a deportation case requiring a conviction, was reversed as the result of a Massachusetts conviction where the sentence had been revoked after termination of probation and the case placed on file. (The case could be called up at any time for sentencing or other disposition.) The Supreme Court stated it was "unable to say that the conviction has attained such finality as to support an order of deportation * * *."

It is also contended that the legislative history of Public Law 500 (46 U. S. C. 239a-b) indicates it was intended to prevent

the smuggling of narcotics into the United States. Therefore, as applied here, the statute is unconstitutional because it is an unjustified interference with the lawful pursuit of Appellant's occupation as a seaman.

APPEARANCE: McMurray, Walker and Tepper of San Francisco,
California, by Rubin Tepper, Esquire, of Counsel.

Opinion

It is my opinion that this is a conviction within the meaning of 46 U.S.C. 239b and 46 CDR 137.04-15.

The California Penal Code, sec. 1203.4, in addition to stating that a person who "has been convicted" may later be released from all penalties and disabilities resulting from the offense, provides:

"* * * that in any subsequent prosecution of such defendant for any other offense, such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed."

Title 46 CFR 137.04-15 provides that revocation based on a conviction shall not be rescinded unless a conviction is unconditionally set aside for all purposes; and that the conditional setting aside of a conviction will not bar subsequent revocation of a seaman's document based on the conviction. Hence, it is clear from these regulations that a conviction is considered to be a final judgement for the purpose of these proceedings regardless of the possibility that the conviction might be, or has been, conditionally set aside under a technical procedure permitted by the California law. This opinion was previously stated in *Commandant's Appeal Decision* No. 852. Under such state laws, the conviction is not expunged from the record in the literal sense of the word that it is obliterated or erased. In California, it is available for use against the person if he is ever again prosecuted for any offense.

The propriety of this regulation (46 CFR 137.04-15) is supported by *Wood v. Hoy* (C.A. 9, 1959) 8 266 F. 2d 285, which

distinguishes the case of *Pinto v. Landon*, supra, where action was taken after probation had been completed, and holds that a conviction of robbery by a California court, where the defendant was placed on probation after his sentence was suspended, was final for the purpose of satisfying a conviction requirement in a deportation proceeding. There had been no action taken under the California statute to remove the conviction. The court discusses the significance of the section of the California Penal Code quoted above. A similar result was reached in *Tanzer v. United States* (C.A. 9, 1960), 278 F 2d 137, dealing with a federal court conviction, where the Court stated:

"It is the fact of conviction with which we are concerned."

Relative to situations where there has been action taken to remove the effect of the conviction after completion of probation, it is apparent that there is no state interest which conflicts with these revocation proceedings. The fact of conviction by a state court is simply utilized as a matter of expediency in administering a federal statute. The technical, conditional expungement of the conviction, which is the product of a state procedure wherein the merits of the conviction have no place, should not permit a person to escape the usual consequences of a narcotics conviction since this subject has been a continuing and serious federal concern. Congress has progressively strengthened the laws dealing with persons involved with narcotics. This is the position of the Attorney General in ruling that there is a clear national policy against the abridgement of the term "convicted" in narcotics cases; and, therefore, action under section 1203.4 of the California Penal Code after narcotics convictions has no effect in deportation cases. 29 *Law Week* 2534 (February 7, 1961). For this reason, when there has been a conviction in the normal sense in which it is used in federal law, the question as to what constitutes a conviction should be determined by federal law (see *Tanzer v. United States*, supra) without regard to any subsequent state action such as is provided for under the California law.

Concerning the contention that Public Law 500 was enacted to prevent smuggling, it is sufficient to point out that the law is not so limited. In part, it states:

"Any person who * * * has been convicted in a court of record of a violation of the narcotic drug laws * * *."

This language is clear and unambiguous. The conviction was by a court of record. *Commandant's Appeal Decision* No. 1139.

ORDER

The order of the Examiner dated at San Francisco, California, on 29 February 1960, is AFFIRMED.

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

Signed at Washington, D. C., this 20th day of March 1961.

***** END OF DECISION NO. 1223 *****

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