UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic MANUEL MARMOLEJO
United States Air Force

ACM 33950 (f rev)

25 August 2003

Sentence adjudged 10 November 1999 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: James L. Flanary (sitting alone). Ann D. Shane (*DuBay* hearing).

Approved sentence: Dishonorable discharge and confinement for 42 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Shannon J. Kennedy.

Before

BRESLIN, STONE, and ORR, W.E.
Appellate Military Judges

OPINION OF THE COURT
UPON FURTHER REVIEW

ORR, W.E., Judge:

On 26 March 2002, our superior court remanded this case for our determination of whether trial defense counsel submitted a request for waiver of forfeitures on appellant's behalf. This remand also specified that if we found that trial defense counsel did not submit the request, we were to review whether counsel was deficient for not doing so, and if so, whether the appellant was prejudiced thereby.

We have reviewed the record of proceedings from the fact-finding hearing ordered pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) to determine whether trial defense counsel submitted a request for waiver of forfeitures on the appellant's behalf. The hearing officer found that "it's not possible to say with any certainty what ultimately happened to the request," but reluctantly concluded that trial defense counsel failed to submit it. The appellant now renews his argument that his trial defense counsel provided ineffective post-trial assistance and asks that we return the case to the convening authority for new post-trial processing. The government concedes error and concurs with the request for corrective action.

The evidence is legally sufficient to support the military judge's conclusions and we find that her findings of fact were not clearly erroneous. However, by her own admission, the military judge determined that this was a "close call." We agree. As a result, we are reluctant to conclude on these facts that the trial defense counsel was deficient in his representation of his client. Nevertheless, we find that corrective action is appropriate.

The convening authority's action is set aside. The record of trial will be returned to the convening authority for new post-trial processing under Article 60, UCMJ, 10 U.S.C. § 860. Thereafter, Article 66(c), UCMJ, 10 U.S.C. § 866(c), shall apply.

OFFICIAL

HEATHER D. LABE
Clerk of Court