

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	ACM 37598
Appellee)	
)	
v.)	
)	ORDER
Airman First Class (E-3))	
JOSE R. SALDANA IV)	
USAF,)	
Appellant)	Panel No. 2

On 11 September 2009, contrary to the appellant's pleas, a general court-martial consisting of officer members convicted the appellant of three specifications of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928. The convening authority subsequently approved the adjudged sentence of a dishonorable discharge, confinement for 2 years, and reduction to E-1.

On 16 September 2010, the appellant submitted an assignment of errors challenging the legal and factual sufficiency of the evidence and claiming that he had been denied a fair and impartial trial due to the president of the panel's failure to disclose his military magistrate training and experience. On 17 November 2010, the Government filed an answer to the assignment of error. On 2 August 2011, this Court granted the appellant's request for oral argument, which was held on 11 August 2011.

In determining whether a party is entitled to a new trial in light of an incorrect voir dire response, our superior court follows the test set by the United States Supreme Court: (1) did a member fail to honestly answer a material question during voir dire, and (2) would a correct response have provided a valid basis for challenge for cause. *United States v. Sonego*, 61 M.J. 1, 4 (C.A.A.F. 2005) (citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)). Whether a panel member answered honestly during voir dire is a question of fact that this Court reviews de novo. *Sonego*, 61 M.J. at 4; see also *United States v. Humpherys*, 57 M.J. 83, 95-96 (C.A.A.F. 2002). In attempting to satisfy this first question of the *McDonough* test, where an appellant makes a "colorable claim" of juror dishonesty, he is "entitled to an evidentiary hearing at which he can fully develop the answer." *Sonego*, 61 M.J. at 4.

In the instant case, it is uncontested that, during voir dire, the president of the panel, Colonel (Col) MC, responded in the negative to the military judge's question, "Has anyone had any legal training or experience other than that generally by military members of your rank and position?" It is also uncontested that Col MC had been previously appointed and briefed on his duties as a military magistrate. Thus, the

appellant argues that Col MC's negative response to the military judge's question was dishonest, whereas the Government argues that there is insufficient evidence of deliberate dishonesty.

The appellant requests a hearing because "[t]here is no discernible reason why he failed to disclose his specialized training as a military magistrate and his experience in authorizing two searches." In response, while presuming no deliberate dishonesty, the Government acknowledges that there could have been "a number of legitimate and innocuous reasons Col [MC] responded negatively." In fact, the Government offered several possible explanations for Col MC's negative response, including faulty memory or an interpretation of the question that "did not necessary invite an affirmative response." However, like the appellant, the Government cannot provide a direct answer to the question of why the member answered as he did. With differing interpretations regarding the nature of the military magistrate role and training, we are reluctant to make a determination as to Col MC's honesty without further investigation, if such facts are available. Therefore, to the extent that the appellant is attempting to present a *McDonough* challenge that requires demonstrated dishonesty by the panel member as its first prong, the appellant is entitled to a post-trial evidentiary hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

Accordingly, it is by the Court, on this 9th day of January 2012,

ORDERED:

That the record of trial be returned to The Judge Advocate General for referral to an appropriate convening authority for the purpose of directing a post-trial hearing in accordance with *DuBay*, 37 C.M.R. at 413. The military judge conducting the hearing shall have broad authority to hear testimony, receive evidence, and enter findings of fact concerning the appellant's claim of juror dishonesty in Col MC's failure to disclose the scope of his training and experience as a military magistrate.

The military judge will be provided with the record of trial as well as all appellate pleadings and subsequent documentary attachments in this case. The record of this post-trial hearing and the military judge's findings of fact will be returned to this Court no

later than 9 March 2012. Requests for an extension of time will be addressed to this Court through appellate Government counsel.

FOR THE COURT

OFFICIAL



Angela E. Dixon
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Deputy Clerk of the Court