

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class DOUNGCHAY P. SIVILAY
United States Air Force

ACM S31248 (f rev)

12 December 2008

Sentence adjudged 14 December 2006 by SPCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Charles Wiedie (sitting alone) and Don M. Christensen (*Dubay* hearing).

Approved sentence: Bad-conduct discharge, confinement for 1 month, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Christopher L. Ferretti, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Major Jeremy S. Weber, Captain Jason M. Kellhofer, and Captain G. Matt Osborn.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

UPON FURTHER REVIEW

This opinion is subject to editorial correction before final release.

PER CURIAM:

The appellant was tried at Elmendorf Air Force Base, Alaska before a military judge alone. Consistent with his pleas, he was convicted of three specifications of attempted larceny and four specifications of larceny. The charges all stem from the appellant's discovery of an inadvertently abandoned purse and the use of credit cards found in the purse to purchase or attempt to purchase over \$1,000.00 worth of

merchandise. His crimes were charged as violations of Articles 80 and 121, UCMJ, 10 U.S.C. §§ 880, 921. The adjudged and approved sentence consisted of a bad-conduct discharge, reduction to E-1, and one month of confinement.

The appellant initially raised one issue on appeal. He claimed he was denied effective assistance of counsel during the post-trial processing of his case because his counsel failed to sufficiently “inform and assist” him in submitting matters in clemency to the convening authority. On 18 July 2008, we ordered a *Dubay*¹ hearing to address the claim of ineffective assistance of counsel. The *Dubay* hearing was conducted on 12 September 2008. After the *Dubay* hearing, the military judge made findings of fact, which are fully supported by the record. The most significant of those findings are the military judge’s conclusions that the appellant was properly advised of his post-trial rights to submit matters in clemency to the convening authority, and that his defense counsel did attempt to assist the appellant in submitting matters to the convening authority. Finally, the military judge found that the appellant made no effort on his own to submit clemency matters, despite having both the knowledge and opportunity to do so. Upon completion of the *Dubay* hearing, the appellant resubmitted his case before this Court on its merits.

Conclusion

Considering the entire record, to include the post-trial *Dubay* hearing, the approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.² Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL



STEVEN LUCAS, YA-02, DAF
Clerk of the Court

¹ *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967).

² The Court notes that the appellant’s rank was incorrectly stated in both the Court-Martial Order and the Action, dated 25 January 2007. Finding no prejudice, the Court directs the convening authority to properly reflect the appellant’s rank, Airman First Class, in the final court-martial order.