

HEADQUARTERS THIRD ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
WAR CRIMES BRANCH
APO 403 US ARMY

18 May 1946

THE UNITED STATES

vs

ALFRED BRACHT, FRITZ KROLL,
HUBERT MOHLEN and THEODOR
SCHILLINGS,
GERMAN NATIONALS
Case No. 12-2067

REVIEW AND RECOMMENDATIONS OF STAFF JUDGE ADVOCATE

1. TRIAL:

The accused were tried at a joint trial at Ludwigsburg, Germany on 4 and 16 April 1946, by an Intermediate Military Government Court appointed by Par. 15, Special Order No. 84, Headquarters Seventh United States Army, Western Military District, APO 758, dated 28 March 1946.

2. CHARGES, PLEAS, FINDINGS AND SENTENCE:

Charge and Specification

Charge: Violation of the Laws of War

Pleas Findings

NG NG

(As to Mohlen (As to Mohlen)
and Bracht)

G G

(As to Schil- (As to Bracht,
lings & Kroll) Schillings &
Kroll)

Specification:

NG NG

(As to all of (As to Mohlen)
the accused)

G

(As to Bracht,
Schillings &
Kroll)

In that ALFRED BRACHT, FRITZ KROLL, HUBERT MOHLEN, and THEODOR SCHILLINGS, German nationals, did, at or near Dusseldorf, Germany, on or about 18 February 1946, wilfully, deliberately and wrongfully encourage, aid, abet and participate in assaults upon an unknown member of the United States Army Air Forces, who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich.

Sentence:

The Court by at least two-thirds vote of the members present at the time the vote was taken sentenced:

THEODOR SCHILLINGS: To imprisonment for a term of two years commencing 4 May 1945 at such place as may be designated by competent military authority.

ALFRED BRACHT: To imprisonment for a term of two years commencing 4 May 1945 at such place as may be designated by competent military authority.

FRITZ KROLL: To imprisonment for a term of eighteen months commencing 4 May 1945 at such place as may be designated by competent military authority.

The Court by at least two-thirds vote of the members present at the time the vote was taken concurring found the accused HUBERT MOHLEN Not Guilty and acquitted the accused of the particular and charge.

3. DATA AS TO ACCUSED:

ALFRED BRACHT, a male, German citizen, civilian, 48 years of age, married, no children and a resident of Dusseldorf, Germany. (R-3,44) Accused is a gardner by profession. He joined the NSDAP in 1931 and the SA in 1933, being a nominal member in 1931, and held the rank of Hauptsturmfuehrer in the SA at the time of the commission of the offense. (R-44) Accused was arrested on 4 May 1945 and has been imprisoned at all times since said date. (R-46)

FRITZ KROLL, a male, German citizen, civilian, 48 years of age, married, no children, and a resident of Dusseldorf, Germany. (R-4, 47) Accused is a farmer by occupation and served 13 days in the German armed forces in World War II and was released because of physical disability. He joined the NSDAP April 1941. Accused was arrested 5 May 1945 and has been in prison at all times since said date. (R-47)

HUBERT MOHLEN, a male, German citizen, civilian, 62 years of age, married, one child, who was killed in the present war, and a resident of Dusseldorf, Germany. (R-3, 30,31) At the time of the commission of the alleged offense, accused was an administrator with the government. He joined the NSDAP in 1933. His home was completely bombed in 1944. Accused was arrested on 4 May 1945 and has been in prison at all times since said date. (R-31)

THEODOR SCHILLINGS, a male, German citizen, civilian, 39 years of age, married, one child, and a resident of Dusseldorf, Germany. Accused is a farmer by occupation. Accused has never been a member of the NSDAP nor any of its affiliates. His home was bombed on four different occasions and he has lost nine relatives through bombing attacks. He was arrested on 7 May 1945 and has been in prison at all times since said date. (Arrest Report, Book II)

4. EVIDENCE:

- a. For the Prosecution: On or about the middle of February 1945 an American flyer parachuted from a plane and landed in the

city of Dusseldorf, Germany. (R-11, 12, 17, 22; Ex. 5) The pilot immediately surrendered his pistol (R-13, 18), then released himself from his parachute. There were outcries against the pilot from the townspeople who gathered after he landed and these outbursts continued as he was led by a soldier and other civilians through the streets to the police station bunker. (R-13, Exh. 5) The pilot was sitting on the ground when the accused Mohlen came over and grasped the pilot by the shoulder and lifted him up and struck him once with his right fist on the right side of his jaw. (R-16, 18) Accused was the first one of the townspeople to strike the pilot. (R-12, 15) It was a light blow and delivered with a half-clinched fist and it may have been an accident. (R-16, 17) Another witness states "The pilot was heavy and strongly built. It looked like his hand slipped from the shoulder and brushed across the cheek." (R-16, 21) As the airman was being escorted to the police bunker accused Schillings "Came up and struck the pilot in the nose and mouth. He jumped between us like a wild man and attacked the flyer making his face bleed badly." (Exhibit 5, p. 2) The pilot's nose was bleeding. (R-22, 25) Schillings stated shortly afterwards, "I gave the pilot one on the nose." (R-22) (The record is too vague to determine the exact chronology of events, but sometime during the march to the police station a Feldwebel struck the pilot across the bridge of the nose with his pistol causing it to bleed severely) (R-14, 19) As the pilot and his escorts proceeded along the street, accused Bracht "***continually struck the flyer in the legs with his bicycle. It was difficult for the flyer to walk because of the continual ramming by the bicycle." (Exhibit 5, p. 3) Accused Bracht "Did this once." (R-19) "Two or three times." (R-14) "Several times." (Exhibit 5, p. 3) Bracht was told to leave the pilot alone to which he replied, "Go away, I got my own score to settle with the English and Americans." (Exhibit 5, p. 3) The pilot was then delivered to a lieutenant of police at the police station bunker. (R-20; Exhibit 5) While there a German doctor washed and bandaged the wound of the pilot. (R-20) An examination of the pilot's identification tag disclosed his name to be Nikolaus Voigtler. (R-14, 20) A short time after the pilot was taken to the bunker a car from the Luftwaffe called for and took the pilot away. (R-20; Exhibit 5, p. 5) As the pilot was climbing in the car a "Young man kicked him so that he collapsed." (Exhibit 5, p. 3) Another witness identifies this perpetrator as accused Kroll and stated that said accused kicked him once in the "rump" but the pilot "Could stand up." (R-27)

b. For the Defense:

1. As to HUBERT MOHLEN: Accused testified as follows: In the middle of February 1945 during an air raid over Dusseldorf, a pilot parachuted to earth in the vicinity of the city. "***he landed diagonally, that is, he didn't land upright on his feet. I took hold of him with my left hand on his right shoulder and tried to lift him up." (R-31) "***took hold of him three times and then I stepped back and I didn't do anything more, then he stood up by himself*** I did not strike him***my hand slipped and touched his face. If I wanted to hit him I would have used my right hand." (R-32) The defense introduced two exhibits pertaining to the physical condition of accused based upon a medical examination by two German civilian physicians. However, since the accused Mohlen was acquitted by the Court, it is not deemed necessary to set forth the

results in detail. These examinations revealed that accused Mohlen was suffering from a heart condition.

2. As to THEODOR SCHILLINGS: Accused testified as follows: On the day of the alleged incident there was an air raid over Dusseldorf and a pilot landed in the city. As I was going toward where he landed "I sprang over an iron gate*** and scratched my hand and sprained my ankle." (R-38) When I arrived the pilot was being taken away and the townspeople were divided into two factions, one "In defense, and the other against the flyer." The flyer stopped walking and I "Worked my way through the crowd to the flyer***and struck the flyer with my hand. I struck his cheek***then a young boy of 18 or 19 grabbed me by the left shoulder and drew me back brusquely and struck the flyer with his hand. It happened in a time lapse of ten seconds." (R-38)

3. As to ALFRED BRACHT: accused testified as follows: On the day of the alleged incident there was fighter-plane activity over Dusseldorf and I saw a flyer parachuting to earth. I immediately put on my SA uniform coat and started by bicycle in the direction of where I saw a house smoking, as it was part of my official duties to report to the scene of an accident. En route I met a crowd of people gathered about and following a pilot. The pilot's mouth was bleeding. The crowd was talking violently for and against him and I tried to pacify some of the people. The crowd passed through me and I then turned around and as I "Got near the flyer where the crowd was very thick, a boy stood in my way and I couldn't travel any further and I had to support myself on one leg on the ground. Then I got back on the bicycle and went back past the left side of the crowd." (R-45) The closest I came to the pilot was within "Three rows of people" (R-45) and I never touched the pilot's body with my bicycle. (R-46) Shortly thereafter I turned off on one of the intersecting streets and left the group. Accused denies knowing a man by the name of Hermann Schidor whose statement was introduced in evidence and who claimed he had a conversation with accused Bracht in which the latter is alleged to have stated, "Go away, I got my own score to settle with the English and the Americans." (Exhibit 5, p. 3) The brother of accused Bracht testified as follows: I was in the garden and noticed there were several planes in the sky which were raiding and straffing Dusseldorf, one plane crashed and the pilot parachuted to the ground. (R-39) My brother and I then pedaled by bicycle in the direction of where the plane crashed and en route we met a pilot walking in the street surrounded by several of the townspeople. The witness denied that his brother at any time contacted the pilot by ramming him with his bicycle but admitted that he did notice a middle aged man strike the pilot by ramming him with his bicycle. (R-41)

4. FRIEZ KRÖLL: Accused testified as follows: On the day of the incident I was at work and saw a pilot bail out of his plane and thought no more about it until some one came by on a bicycle and said the plane had crashed near my house. I returned home and discovered that the plane had crashed two or three houses from mine. After talking to my wife a few minutes, I went toward the police station bunker where the flyer had been taken. In my excitement I kicked the pilot once with my right foot as he was about to get into the wagon. He did

spots on his face which appeared to be the same as those which a boxer receives after a few rounds." His nose was bleeding but he had no other injuries. The doctor did not put any tape on the pilot's face as he had no open wounds. (Exhibit E)

5. JURISDICTION AND PROCEEDINGS:

- a. The Intermediate Military Government Court which heard this case was properly constituted and had jurisdiction over the subject matter and of the accused. (Par. 7, Field Manual 27-10, Rules of Land Warfare; letter, Headquarters, United States Forces, European Theater, dated 16 July 1945, AG 000.5-2, subject: "Trial of War Crimes and Related Cases.") It is well recognized that the offense in the instant case, assaults by German civilians of a member of the United States Armed Forces who was then a surrendered prisoner of war, is a violation of the laws of war and properly triable by a Military Court having custody of the accused. Sentences were legally within the power of the Court to impose.
- b. In letter Deputy Theater, Judge Advocate Office, War Crimes Branch, United States Forces, European Theater, dated 22 January 1946, AG 000.5, subject: "Case of United States vs. Alfred Bracht, et al, trial by an Intermediate Military Government Court was directed. The Charge and Particular against each accused was preferred by H. F. Brasee, Colonel, CMP and referred to trial by C. B. Bard, Colonel, JAGD. The Charge Sheet was served on each accused. Six members of the Court panel were present throughout the trial. The accused were represented by an American officer, an attorney, who announced that he was ready for trial. There was no conflict in interest which prejudiced the substantial rights of any of the accused by having only one defense counsel. Each of the accused waived his right to having German civilian defense counsel. Challenges for cause were permitted.

6. DISCUSSION:

- a. Counsel for the accused objected to the admission in evidence of a statement of a German civilian witness presently residing in the British territory taken by an American officer. (R-7, 10) The Court did not err in admitting the statement and proper proof was introduced in evidence establishing that the officer who took the statement was an officer officially appointed to investigate war crimes and no further authentication was necessary. (Military Government, Germany, Technical Manual for Legal and Prison Officers, 2nd Ed., Par. 9, p. 43. Letter Deputy Theater Judge Advocate's Office, War Crimes Branch, United States Forces, European Theater, dated 6 October 1945, AG 000.5, subject: "Admissibility of Reports of Investigating the Trial of Suspected War Criminals.") No new questions of law and no unusual or difficult questions of fact exist in the instant case. The offense for which each of the four accused has been charged and the three accused convicted and sentenced is a war crime approximating the common law offense of simple assault and battery. The offense committed by each is distinct and isolated from the other in that none of the offenses are part of one plan, conspiracy or plot. It is a case of four typical German civilians during the latter days of the war satisfying their vent and emotion by committing an assault and battery upon a captured American airman. There is no need to

- b. Mohlen was the first accused in the chronology of the occurrence of the offenses to strike the pilot. There is a conflict in the evidence whether it was an intentional striking or an accidental brushing of the cheek as he attempted to lift the airman to his feet. There was sufficient evidence upon which the Court could have found the accused guilty as charged, however, the weight to be given the evidence is a matter for the Court. The Court acquitted accused Mohlen of the Particular and Charge and it is not the function of the reviewer to substitute his judgment for that of the Court in weighing the evidence. It should be noted that the defense brought out as part of their case as to each of the accused that they were arrested in May 1945. This and other background material is proper, providing it is introduced after the finding and before sentence as an aid to the Court in determining a fair and just sentence. It is neither proper nor material in determining whether the accused is guilty of the offense charged by the Charge and Particular.
- c. The evidence supports the findings of the Court on the charge and particular against accused Schillings, that he struck the pilot on the nose or face with his fist or hand. There is no evidence indicating that more than one blow was struck which caused the pilot's nose to bleed.
- d. There was sufficient competent evidence to support the Court's finding as against accused Bracht on the charge of ramming the bicycle from behind between the legs of the pilot as he was walking along. Bracht testified denying the allegation, and his testimony was corroborated by the testimony of his brother who stated further that the pilot was so assaulted by a middle aged man. It was the proper province of the Court to determine which witnesses were telling the truth. There was no abuse of discretion in the Court's findings on the Charge and Particular.
- e. There is no dispute in the evidence that accused Kroll kicked the pilot with his foot once in the "rump" as the pilot was getting into the car. There is substantial proof on every essential element of the offense as to each accused. There is sufficient evidence of probative value that the accused was an American. The findings of the Court on the Charge and Particular as to each accused was supported by substantial evidence.
- f. In each case the reviewer is confronted with the problem of determining whether the sentence imposed by the Court is fair and just and whether it should be modified. The task is not a difficult one when the war crime approximates a common law murder for the degree of punishment for such an offense does not vary much as between civilized nations. The task becomes more difficult when the offense for which he is convicted is a minor one. The reviewer knows of no express or written policy from higher authority for determining the fairness of the sentence. The reviewer is not so presumptuous as to believe that it is his prerogative to substitute his judgment for that of the Court as to the amount of punishment. Neither does he believe that his duty has been discharged by recommending a modification of the sentence in only those cases where the sentence is illegal. It is his belief that the sentence in each individual case should be reviewed in the light of the certain general standards and guides so that there may be some degree of uniformity in the sentences imposed by the respective Courts. The only policy of which this reviewer is aware is of

the factors or guides to be used in determining the fairness and justice of sentence is that suggested verbally by the Staff Judge Advocate of the United States Third Army a few weeks ago. It was his suggestion that the table of maximum punishment set forth in the Manual for Court Martials be used as a guide. He further stated it did not necessarily mean that the accused should receive the maximum or that the punishment be limited to the maximum but that it should be used as a guide only. Winthrop in his discussion of the Sentence of Military Commission states that imprisonment for a term of years is "Sometimes, and properly, assimilated to the term prescribed for similar offenses by the local law." (Winthrop's Military Law, Pre. 2d Ed., 1920, reprint, p. 843) In the instant case the War Crime for which each accused has been charged and convicted approximates a simple assault and battery. The maximum punishment under the table of maximum punishments is confinement for six months. Each of the accused has already been confined for a period exceeding one year. This fact raises the question as to whether the accused should be given credit for the time he has been in confinement prior to trial. The reviewer is aware of no policy of the War Crimes Branch in this regard. The Court sentenced accused Schillings and Bracht to two years imprisonment and accused Kroll to eighteen months imprisonment and the term of each commencing on 4 May 1945. The Court, by the date of commencement of the sentence, indicates that they believe each accused should be given credit for the time served prior to trial. Using the table of maximum punishments as a guide, it is believed a sentence two times greater than the sentence imposed for an offense approximating an assault and battery under our own system of Military Law would accomplish the true purpose of war crimes trials and be a more proper administration of justice. And it is further believed that each accused should be given credit for the time he has been imprisoned. It is therefore recommended that the sentence as to each accused be modified by reducing the sentence as follows:

SCHILLINGS and BRACHT to be imprisoned for a term of 14 months, commencing 4 May 1945.

KROLL to be imprisoned for a term of 12 months, commencing 4 May 1945.

The reviewer appreciates that by recommending a reduction in the sentence imposed by a Court for any war crime that he is not following the apparent majority public opinion, which desires collective punishment and some degree of vengeance. The popular solution is an easy one, that is, recommending approval of any sentence that does not exceed the Court's jurisdiction. However, history tells us that justice is more frequently based upon courage, individual punishment and humanness than following public opinion.

7. PETITION FOR REVIEW:

No petition for review has been filed in behalf of any of the accused and they have affirmatively instructed their attorneys in writing not to file a petition for a review.

8. CLEMENCY:

4. Two pleas for clemency in behalf of accused Bracht have been received. One was filed by one Theodor Deisinger of the

other was signed by nine individuals who state they are masters of horticulture for the District of Dusseldorf and plead mercy for their former district branch leader, Alfred Bracht. No new facts were set forth in either of these pleas warranting a mitigation of the sentence.

b. The complete personnel data as to each accused is set forth in detail in Paragraph 3. All of these facts are self-explanatory and need no further comment.

9. RECOMMENDATION:

It is recommended that the findings as to each accused and so much of the sentence as provides for imprisonment for a term of 14 months as to Theodor Schillings and Alfred Bracht, and one year as to Fritz Kroll, commencing the 4th day of May 1945 be approved. The proper order for carrying out this recommendation has been appended for signature of the reviewing authority.

/s/ M. C. Setzekorn
/t/ M. C. SETZEKORN
Civilian
Chief of Trial Section

I concur.

/s/ Charles E. Cheever
/t/ CHARLES E. CHEEVER
Colonel JAGD
Staff Judge Advocate