

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

Ludwigsburg, Detachment

14 May 1946

THE UNITED STATES

vs

Wilhelm Foerster, a
German National

Case No. 12-932

REVIEW AND RECOMMENDATIONS OF STAFF JUDGE ADVOCATE

1. TRIAL:

Accused, a German civilian, was tried on 19 April, 1946, at Ludwigsburg, Germany, before an Intermediate Military Government Court appointed by par. 4, Special Orders 86, Headquarters Third U.S. Army, dated 4 April, 1946.

2. CHARGES, PLEAS, FINDINGS AND SENTENCE:

Charges and particulars	Plea	Finding
Charge One: Violation of the Laws of War	NG	NG
Particulars of Charge One:	NG	NG

In that Wilhelm Foerster, a German national, did, at Ebernburg, Germany, in or about September, 1944, wilfully, deliberately and wrongfully attempt to kill an unknown member of the United States Army, who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich by shooting at him with a rifle.

Charge Two: Violation of the Laws of War	NG	G
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Particulars of Charge Two:	NG	G
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In that Wilhelm Foerster, a German national, did, at Ebernburg, Germany, in or about September, 1944, wrongfully commit an assault upon an unknown member of the United States Army, who was then an unarmed, surrendered prisoner of the then German Reich by hitting him on the head with the butt of a rifle.

Sentence:

The court in closed session, at least two-thirds of the members present at the time the vote was taken concurring therein, sentenced the accused to imprisonment for a term of two (2) years commencing January 23, 1946.

3. JURISDICTIONAL MATTERS:

a. it is settled law that civilian nationals of one belligerent nation may be tried and punished before the duly constituted tribunals of another belligerent nation for violations of international law governing land warfare. When a civilian wrongfully commits an assault and battery upon a person who has fallen into his hands as a prisoner of war it is an offense falling within this rule. (par. 348, FM 27-10)

b. The Intermediate Military Government Court which tried this case was duly and legally appointed by the Commanding General of the Third United States Army, by par. 4, Special Orders 86, Headquarters Third U.S. Army, dated 4 April, 1946. These charges were first referred to a Military Government Court appointed by the Commanding General of the 7th U.S. Army and the present court was appointed to take the place of the 7th Army Court by reason of the deactivation of the 7th U.S. Army. The charges were preferred by Howard F. Brages, Col., CMP, and referred to trial by C. R. Bard, Col., JAGD. The charges were served on the accused on April 16, 1946. Accused was properly represented by counsel and announced ready for trial. (R 3) The jurisdictional number of three members of the court panel were present throughout the trial. This court was vested with full power and authority to try the accused for the offense alleged. The sentence was legally within the power of the court to impose. (art. III, MGO 3)

4. EVIDENCE:

a. For the Prosecution: In September, 1946, an American flier landed by parachute near the water works of Hornburg, Germany. (R 6, 7, 10, 11, 12 & 13) The accused, Wilhelm Foerster, was standing next to his house and saw the American flier land in a beet field some 200 meters away. (R 15 & 16) The accused picked up a rifle which was lying near the house and proceeded to run toward the place where he had seen the flier land. (R 16, 17) The flier got up from the place where he had landed and started diagonally across the field. Accused caught up with him at the edge of the forest. (R 18) As the accused approached the flier he asked the flier "are you an American?" to which the flier replied "Yes". (R 19) Accused then proceeded to hit the flier in the face with the butt of his rifle. The flier reeled back and accused observed that his face was covered with blood. (R 13, 19) A Mr. Rudolph Rabe who had also seen the flier parachute to the ground came to the place where the accused and the flier were standing. As Rabe approached he saw the accused striking the flier with the butt of his rifle, whereupon Rabe quickened his step and shouted: "Wilhelm, cut that out!" (R 7) Two Polish displaced persons, a man and a woman who had been working in the field nearby, also saw the flier parachute to the ground and observed the accused running towards him. "While these people were watching they saw the accused strike the flier with the butt of his rifle and observed that the flier was bleeding as a result of the blow (R 10, 11) Accused then told the flier to come with him and proceeded down the hill to the highway. A German soldier appeared and accused turned the flier over to the custody of the soldier. (R 20)

f. For the accused: accused admits seeing the flier parachute to the ground and states that he ran to the place where he saw the flier hit the ground. He then proceeded to pursue the flier across the field to the edge of the forest, where he overtook him. As he approached the flier the latter put his hands in front of him. The accused took the rifle butt and proceeded to prod the flier along. (R 18, 19) Accused denies striking the flier in the face with his rifle butt. (R 19) He did notice that the flier was bleeding from a tear in the skin on the right cheek. (R 20) He admits making statements to a Polish man by the name of J. Sikorski, but his statements were made in order to get out of prison. (R 22) accused admitted on cross-examination that the flier was unarmed. (R 26)

5. DISCUSSION:

a. All of the elements of proof necessary to establish accused guilty of the offense of which he was found guilty were introduced into evidence. It was established that near Hornburg, Germany, in September, 1944, accused, a German national, committed an assault upon an unknown member of the U.S. Army who was then an unarmed, surrendered prisoner of the then German Reich, by hitting him in the head with the butt of a rifle. (R 2, 7, 10, 11, 18, 19) The identity of the victim as an American flier who was then an unarmed prisoner of the Third Reich was properly established. (R 19, 20, 26)

b. There is a slight variance between the evidence and the particulars as contained in the charge sheet. The particulars state that the victim was an unarmed prisoner of the then German Reich. The evidence shows that the victim was actually being apprehended as a prisoner of war and that the assault herein was committed while he was in the process of being taken into custody. The allegations in the charge and particulars in War Crimes Cases need not be stated with the same precision as is necessary in the case of a common law indictment. So long as the variance does not exceed that standard which can be reasonably imposed under the circumstances it cannot be said that the variance is one which prejudices the rights of the accused. (in re Yamashita, U.S. Supreme Court, case Nos 61, misc. and 673).

c. Prosecution's Case rests entirely on statements of witnesses which were contained in the file which was forwarded to this Trial Section when the case was sent from the office of the Deputy Theater Judge Advocate, War Crimes Branch, for trial. (R 4, 5, 7) Some of these statements were not properly signed and authenticated. There is nothing in the file which indicates that the person who took such statements was duly authorized to take such statements. These statements do not comply with the requirements as set out in the letter of the Deputy Theater Judge Advocate, dated 6 October, 1945, which provides that statements given to an officer investigating an alleged war crime should be admitted into evidence when such are properly authenticated by an officer who was actually appointed to investigate the particular war crime. However, under the provisions of Rule 12, Rules of Procedure applicable in Military Government Courts, the court could admit such statements without proper authenticity so long as the court believed that such statements had some value as proof. Inasmuch as the statements are so strongly corroborated by the admissions made by the accused himself as a witness it cannot be said that the court abused its discretion in admitting such statements into evidence over the objection of the defense counsel.

d. After a careful consideration of all the evidence presented, it appears to this reviewer that this case resolved itself into a question of fact. The court could have accepted the contention of the prosecution that the accused hit the flier in the face with the butt of his rifle or, on the other hand, could have accepted the contention of the accused that he merely used the butt of his rifle to prod the flier along. The court chose the former contention. In all cases of question of fact the findings of the court should be upheld unless the record clearly discloses that there was no evidence adduced before the court from which such findings could be made. Such is not the case presented here.

e. The sentence imposed by the court was within its authority to impose. (Arts. III, 1000-1001) The evidence indicates that the accused administered this assault and battery upon his victim with the butt of a rifle, using sufficient force in delivering the blow to cause the victim to bleed from the face as a result of the blow. In view of all the circumstances the court could have properly considered the assault committed herein equivalent to an assault with the intent to do great bodily injury with a dangerous weapon. (Arts. 149a, 1000-1001) Considering the table of maximum punishments, as set out in the Manual for Courts Martial, as a guide, the sentence imposed by the court was adequate to punish the accused for the crime of which the court found him guilty.

f. After careful examination and consideration of the entire record, no errors or irregularities have been found which prejudice the rights of the accused herein.

6. DATA AS TO ACCUSED:

Accused is 43 years old; a German civilian; married, with a grown son, and his last residence was at Hornburg, Germany. (R 2, 14) Accused was a supervisor of the Motor Works of Hornburg, Germany, and had lived in the plant for eleven years. (R 15) He has been a member of the NSDAP since 1932. He was one of the oldest collaborators in the Nazi Party in Hornburg. He became Zellenleiter (the next to the lowest official in the party; he had four or five block leaders under him) in the Party in 1934 and held this position until 1944 (R 13) He was first put in custody by the Polish people who took over the town and was released after three or four days. He was later taken into custody on 23 January 1946, and held for trial. (R 23)

7. PETITION FOR REVIEW:

No petition for review was filed on behalf of the accused.

8. CLEMENCY:

No petition for clemency was filed in behalf of the accused herein.

9. RECOMMENDATION:

It is recommended that the findings and sentence of the court be approved and the sentence duly executed. The proper order for carrying out this recommendation has been appended for the signature of the reviewing authority.

/s/ M. C. SETZKORN
M. C. SETZKORN
Capt. Inf
Chief of Trial Section

I concur:

/s/ Charles E. Cheever
CHARLES E. CHEEVER
Col. JAGD
Staff Judge advocate