

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
YOB, GALLAGHER, KRAUSS
Appellate Military Judges

UNITED STATES, Appellee
v.
Inmate SOLOMON E. SMITH
United States Army, Appellant

ARMY 20110706

Headquarters, US Army Combined Arms Center and Fort Leavenworth
Jeffery R. Nance, Military Judge
Colonel Fred P. Taylor, Staff Judge Advocate

For Appellant: Colonel Patricia A. Ham, JA; Captain Jack D. Einhorn, JA (on brief).

For Appellee: Lieutenant Colonel Amber J. Roach, JA; Major Robert A. Rodrigues, JA; Captain Steve T. Nam, JA (on brief).

31 July 2013

SUMMARY DISPOSITION

KRAUSS, Judge:

A military judge sitting as a general court-martial, convicted appellant, contrary to his pleas, of mutiny, damaging military property, and assault consummated by a battery in violation of Articles 94, 108, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 894, 908, 928 (2006) [hereinafter UCMJ]. Appellant was acquitted of kidnapping, disobedience, and two other specifications of assault consummated by a battery. The convening authority approved the adjudged sentence to twenty-five months confinement.

This case is before the court for review under Article 66, UCMJ. Appellant assigns two errors, one of which merits brief remark and relief.

Appellant asserts that the evidence is legally and factually insufficient to support his convictions for damaging military property and assault consummated by a battery. The government concedes that the evidence is insufficient to support

appellant's conviction for damage to property but sufficient to support the battery conviction. We accept the government's concession but also find the evidence factually insufficient to establish that the battery at issue was accomplished with a metal table leg. *See generally United States v. Washington*, 57 M.J. 394 (C.A.A.F. 2002). *See also United States v. Savage*, 72 M.J. 560, 567 (Army Ct. Crim. App. 2013).

In accordance with above, and after reviewing the entire record and the parties' briefs, the finding of guilty as to Charge IV and its Specification is set aside and dismissed. The court affirms only so much of the finding of guilty of Specification 3 of Charge V, as finds that appellant did, on or about 12 August 2010, assault SPC A.K., who then was and was then known by the accused to be a person then having and in the execution of military police duties, by striking him in the face. The remaining findings of guilty are AFFIRMED. Reassessing the sentence on the basis of the errors noted, the entire record, and in accordance with the principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), and *United States v. Moffeit*, 63 M.J. 40 (C.A.A.F. 2006), to include the factors identified by Judge Baker in his concurring opinion in *Moffeit*, the sentence is AFFIRMED.

Senior Judge YOB and Judge GALLAGHER concur.



FOR THE COURT:

A handwritten signature in cursive script that reads "Anthony O. Pottinger".

ANTHONY O. POTTINGER
Chief Deputy Clerk of Court