**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Senior Airman JERRY J. TILLMAN**
**United States Air Force**

**ACM S30596**

**18 November 2005**

Sentence adjudged 25 February 2004 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Barbara E. Shestko (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, and Major L. Martin Powell.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Major John C. Johnson, and Major Lane A. Thurgood.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignment of error, and the government's answer. The appellant contends the evidence is factually and legally insufficient to sustain his conviction for striking a member of the Air Force Security Forces in the jaw with his head, in violation of Article 128, UCMJ, 10 U.S.C. § 928. We agree, modify the findings, and reassess the sentence.

Contrary to the appellant's plea, the military judge found the appellant guilty of one specification of failure to obey a lawful order, in violation of Article 92, UCMJ, 10 U.S.C. § 892; and two specifications of assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928, including Charge I, Specification 1, striking a member of the Air Force Security Forces in the jaw with his fist and his head. Although the evidence supports the

appellant's conviction for striking with his fist, there is no evidence to support a conviction for striking with his head. Accordingly, we except the language "and his head" from Charge I, Specification 1. The finding of guilty as to that language is set aside and the words are dismissed.

Because we have modified the findings, we must now determine whether we can reassess the sentence in accordance with the criteria set forth in *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986). We are convinced beyond a reasonable doubt that even absent the error the military judge would have sentenced the appellant to at least a bad-conduct discharge, confinement for 6 months, and reduction to E-1. The appellant struck one Security Forces member so hard he chipped his tooth. He blackened the eye of another. It made no difference to the gravamen of the offense whether he used his head or his fist as the instrument of assault. Accordingly we find the approved sentence appropriate under Article 66(c), UCMJ, 10 U.S.C. § 866(c). *See United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994).

The remaining findings of guilty and the sentence, as reassessed, are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, as modified, and sentence, as reassessed, are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court