

DEPUTY JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
EUROPEAN COMMAND
APO 407

WRC/vmm

9 February 1948

UNITED STATES)

v.)

Willi WERNER, et al.)

Case No. 000-50-5-5

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 21-23 July 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that WERNER, Willi, SCHMIDT, Bruno, German nationals or persons acting with German nationals, acting in pursuance of a common design to subject the persons hereinafter described to killings, beatings, tortures, starvation, abuses, and indignities, did, at or in the vicinity of the Mauthausen Concentration Camp, at Castle Hartheim, and at or in the vicinity of the Mauthausen Sub-camps, including but not limited to Ebensee, Gros-Raming, Gunskirchen, Gusen, Hinterbrühl, Lambach, Linz, Loiblpass, Melk, Schwechat, St. Georgen, St. Lambrecht, St. Valentin, Steyr, Vienna, Wiener-Neudorf, all in Austria, at various and sundry times between January 1, 1942, and May 5, 1945, wrongfully encourage, aid, abet, and participate in the subjection of Poles, Frenchmen, Greeks, Yugoslavs, Citizens of the Soviet Union, Norwegians, Danes, Belgians, Citizens of the Netherlands, Citizens of the Grand Duchy of Luxembourg, Turks, British Subjects, stateless persons, Czechs, Chinese, Citizens of the United States of America, and other non-German nationals who were then and there in the custody of the then German Reich, and members of the armed forces of nations then at war with the then German Reich who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich, to killings, beatings, tortures, starvation, abuses and indignities, the exact names and numbers of such persons being unknown, but aggregating thousands.

III. SUMMARY OF EVIDENCE: Camp Oberillzschlo, a subcamp of Mauthausen Concentration Camp, was commanded by accused WERNER from 1943 to 1945 and had 70 inmates until February 1945 when 50 were transferred, leaving 20. Accused WERNER, using iron rods and other instruments, slapped and beat inmates of different nationalities; i.e., Polish, French, Belgian, Dutch, Czechoslovakian, Yugoslav and German. In September 1944 accused

bring them back alive. The guards did as ordered.

The accused SCHMIDT, a guard at Oberilzmuehle, was acquitted of the charge and particulars.

Prosecution's Exhibit P-Ex 2 is a certified copy of the charges, particulars, findings and sentences in the Mauthausen Concentration Camp case (United States v. Altfuldisch, et al., 000-50-5, opinion DJAWC, 25 February 1947, hereinafter referred to as the "Parent Case"; see Section V, post; R 6).

IV. EVIDENCE AND RECOMMENDATIONS:

1. Willi WERNER

Nationality:	German
Age:	52
Civilian Status:	Gardener
Party Status:	Member Nazi Party from 1 May 1933
Military Status:	Allgemeine SS, Waffen SS Master Sergeant
Plea:	NG
Findings:	G
Sentence:	10 years, commencing 25 May 1945

Evidence for Prosecution: The accused was identified by five former inmates, two former employees, and one former guard, as a detail leader and camp commander at Passau, Camp Oberilzmuehle, a subcamp of the Mauthausen Concentration Camp (located near Castle Hartheim, Austria) from 1943 to 1945 (R 8, 9, 26, 32, 41, 47, 53, 61, 69, 70, 85; P-Ex 5A). The camp had 70 inmates, 50 of whom were transferred in February 1945 and 20 of whom remained (R 39). The accused joined the Nazi Party on 1 May 1933 and was a member of the Allgemeine SS. He advanced to the grade of Waffen SS Master Sergeant (R 106, 107).

Rehn testified that while confined at Oberilzmuehle, he saw the accused beat three or four Polish and German inmates for stealing potatoes (R 9).

Lindner, a former inmate, testified that he saw the accused beat a Polish inmate with a heavy locksmith tool, causing injuries which required

head bandaging for weeks and a severe ear injury. In addition, the witness saw the accused beat four or five inmates, i.e., one Dutch, one German, and the other Poles (R 26, 27).

A third witness, a former inmate, testified that this accused often beat inmates for small incidents (R 32), and that he saw the accused beat the same Polish inmate mentioned by Lindner, two or three different times with a wooden plank and an iron rod. The accused beat this Polish inmate to the floor and while he was on the floor. He further testified that he saw the accused beat at least 10 inmates, i.e., Yugoslav, French, Belgian, Dutch, Czechoslovakian, and German (R 33).

Former inmate Farde testified that the accused beat the Polish inmate, mentioned above, with an iron rod and injured his right ear, and that the accused beat other Polish inmates in the smithy and water plant with his hand (R 48).

The accused admitted in his testimony that he did slap four or five inmates in the face (R 107).

Five prosecution witnesses and one defense witness testified, and the accused himself admitted that when three Polish inmates escaped from the camp in September 1944, the accused lined up the inmates and the guards, telling the latter that he did not want the escaped inmates brought back alive (R 10, 18, 27, 33, 42, 48, 86, 108). These Polish inmates were killed by the guards who were sent out to find them and all of the inmates had to view the corpses when they were returned to the camp. The inmates were warned that the same would happen to all who tried to escape (R 12, 25, 28, 30, 34, 42). Three witnesses testified that the accused instructed the guards to use their weapons without first calling to the escapers (R 27, 33, 48). The accused testified that his last order to the guards was for them to bring the three escaped inmates back dead (R 120).

Five prosecution witnesses testified that the accused shot and killed a German medical orderly named Biermann in the month of October 1944 while the orderly was in the apartment of the accused (R 16, 17, 29, 30, 35, 45, 48).

Evidence for Defense: Hoehn testified that the accused was military

and strict; that he had many friends among the inmates; and that none of the inmates ever complained of unjust treatment by the accused (R 86). This witness and the accused testified that many inmates went around loose on parole; some went to work at 0500 or 0600 hours and returned in the evening without guard. There were no fences nor any barbed or electrically charged wire around this camp. Food at the camp was good and inmates were not mistreated (R 82, 107).

The accused testified that he freed the inmates just before liberation, without orders, gave them civilian suits and remained in camp until arrested on 3 May 1945 (R 115). The accused testified that when he slapped the four or five inmates, he did so because they were stealing potatoes. The punishment by slapping was given to avoid sending these inmates to Mauthausen Concentration Camp for assignment to a punishment company (R 107, 108). The inmates so slapped were grateful to him for not sending them to Mauthausen (R 116).

A former guard at this camp testified that when the three Polish inmates tried to escape, the accused called the whole camp together. He instructed the guards to call to the escapers to halt and that if the escaped inmates refused to halt, they were to be shot (R 70, 71, 76, 80).

The accused testified that he gave orders to shoot the three Polish inmates because he did not expect them to be caught, since they had escaped seven to eight hours before, and he wanted to deter other attempts at escape (R 108). He testified that one Steinke, a guard, told him that the escaped inmates were found at a camp site and that they fled in three different directions when discovered, refusing to stop (R 109, 110).

The accused testified further that he had a secret order from Mauthausen Concentration Camp that too many inmates were escaping and committing depredations on neighboring villages, including crimes of murder and pillage (R 110). He also testified that the guards were not promised cigarettes to shoot these Polish inmates (R 120, 121).

The accused testified that he shot the medical orderly Biermann in self-defense (R 111).

The accused, in his extrajudicial sworn statements, stated that he

was the camp commander at Oberitzmuehle from 1943 to 1945 and gave substantially the same testimony in reference to the incidents of the three escaped Polish inmates and the German medical orderly as he gave in his testimony in court (R 7, 53; P-Exs 3A, 5A).

Sufficiency of Evidence: It is clear from the evidence that the accused as a subcamp commander participated in the alleged common design as established by the judgement of the Court in the Parent Case. This participation in the "common design" as described in the particulars to the charge was further confirmed by proof of the accused's individual responsibility for the beating and killing of non-German inmates.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: No Petition for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and the sentence be approved.

2. Bruno SCHMIDT

This accused was acquitted (R 144).

V. QUESTIONS OF LAW:

Jurisdiction: The Court had jurisdiction of the person of the accused and of the subject matter.

German Nationals as Victims: The defense objected to the testimony adduced regarding the shooting of the medical orderly Biermann, a German national (R 43, 44). The objection was not fully stated but would appear to have been based upon an assumption that the Court was without jurisdiction to receive evidence relating to acts committed against German nationals (R 43).

The question is thus presented as to what legal significance should be attached, in the trial of an accused alleged to have aided, abetted and participated in a concentration camp mass atrocity, to the fact that the evidence concerning the nature and extent of an accused's participation therein, aside from evidence as to his general participation by virtue of position held, shows that one of the victims of a specific individual act of atrocity by the accused was a national of Germany. More specifically,

is it appropriate for a war crimes tribunal to consider such individual acts of atrocity in determining the extent of the penalty to be imposed?

It is well established that jurisdiction to try such an accused attaches by virtue of his participation in the mass atrocity operation, one of the dominant objectives of which was to subject nationals of United Nations and stateless persons to killings, beatings, tortures, etc. Evidence showing that a participant in a concentration camp mass atrocity operation tortured, beat, or killed inmates who were nationals of Germany, or its co-belligerents, also establishes that, through example by such acts of cruelty committed against the inmates of the camp, he encouraged other participants to commit similar acts of cruelty against inmates without regard to nationality and thus maintained and furthered, pursuant to the prescribed or accepted practices there obtaining, the overall objectives of the operation. The effectiveness of such encouragement by example and overt acts was in every way equal to what it would have been had the victim of his individual act of atrocity been a national of the United Nations. The effectiveness was not to any degree lessened by virtue of the coincidence that the victim was a national of Germany. The consideration of such evidence is appropriate and it is emphasized that the charge is not based upon illegal beatings or killings, etc., of nationals of Germany or its co-belligerents, but on participation in a prescribed common design.

Parent Case: The Court was required to take cognizance of the decision rendered in the Parent Case, including the findings of the Court therein that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, subjected persons to killings, beatings, tortures, etc., and was warranted in inferring that those shown to have participated knew of the criminal nature thereof (Letter, Headquarters, United States Forces, European Theater, file AG 000.5 JAG-AGO, subject: "Trial of War Crimes Cases", 14 October 1946, and the Parent Case). The convicted accused was shown to have participated in the mass atrocity and the Court was warranted by the evidence adduced,

either in the Parent Case or in this subsequent proceeding, in concluding as to the said accused, that he not only participated to a substantial degree but that the nature and extent of his participation were such as to warrant the sentence imposed.

Examination of the entire record fails to disclose any error or omission which resulted in injustice to the accused.

VI. CONCLUSIONS:

1. It is recommended that the findings and sentence be approved.
2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

WILLIAM R. COHEN
Major Inf.
Post Trial Branch

Having examined the record of trial, I concur, this _____
day of _____ 1948.

C. W. PHIFER
Lieutenant Colonel, USAF
Acting Deputy Judge Advocate
for War Crimes