

9 May 1946

THE UNITED STATES

VS.

OTTO SUKOPP and KURT KIEHNE,
German Nationals

Case No. 12-1851

REVIEW AND RECOMMENDATIONS OF STAFF JUDGE ADVOCATE

1. TRIAL:

The accused were tried at a joint trial at Ludwigsburg, Germany, on 9 April 1946, by a General Military Government Court appointed by Par. 3, Special Orders No. 96, Headquarters Third United States Army (Western Military District), APO 403, 4 April 1946.

2. CHARGES, PLEAS, FINDINGS AND SENTENCE:

Charge and Specification	Plea	Finding
Charge: Violation of the Laws of War	NG (As to each accused)	G (As to each accused)
Specification: In that Otto SUKOPP and Kurt KIEHNE, German nationals, did, at or near Gross Dentke, Germany, on or about 28 September 1944, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of a member of the U.S. Army alleged to be Almo W. Dennerle, who was then an un-armed, surrendered prisoner of war in the custody of the then German Reich.	NG (As to each accused)	G (As to each accused)

Sentence:

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

OTTO SUKOPP to be imprisoned for a term of twelve (12) years commencing 13 March 1946, at such place as may be designated by competent military authority.

KURT KIEHNE to be imprisoned for a term of five (5) years commencing 13 March 1946, at such place as may be designated by competent military authority.

3. DATA AS TO ACCUSED:

OTTO SUKOPP: Accused is a male German citizen, a

civilian, 47 years of age, married, two children ages 1 and 8 years, and a resident of Gross Stueckheim, Germany (R 3, 31). Accused is a farmer by occupation and at the time of the commission of the offense herein he was employed as a minor clerk in the office of the Landrat in Wolfenbittel (R 31). He joined the NSDAP in 1941 and held the position of Sturm-fuehrer in the NSFK at the time of the commission of the offense (R 31, 69). Accused served in the German Armed Forces from 1917 to 1918, and sustained a severe brain injury, the effects of which he claims still bother him (R 36, 41). He was arrested in May 1945, released 3 December 1945, and re-arrested 13 March 1946 (R 45, 46).

KURT KIEMPE: Accused is a male German citizen, civilian, 34 years of age, and a resident of Gross Dentke. He is a farmer by occupation (R 58; Exhibit 4). He has never been a member of the NSDAP or any of its affiliates. He served in the German Armed Forces from 16 January 1942 to 17 January 1945, and rose to the rank of Private First Class (R 56, 58; Exhibit 4).

4. EVIDENCE:

a. For the Prosecution:

1. As to accused SUKOPP: On or about mid-day on the 28th of September 1944, certain American pilots parachuted to earth in the vicinity of Gross Dentke. Accused was working in the Landrat office at Wolfenbittel and one of his duties was to search for and take into custody enemy pilots who had landed in the vicinity. On this day he left the Landrat office on a motorcycle accompanied by the First Sergeant of police, Rudolf Meyer, in the direction of Wendessen, Gross Dentke (R 4, 31). Enroute to Gross Dentke they passed three American fliers on the road and when they reached a point a short distance from Wendessen they learned that a wounded American pilot was in a near-by field (R 4, 31). The two men left the motorcycle along the road and then walked to a straw pile in a field adjoining the road, where they found the wounded pilot. He was surrounded by several female farm workers (R 5, 31). The pilot had parachuted to earth a short while before and had been carried to the haystack by two German civilians (R 21). The accused Sukopp states the pilot was still living, but was very badly injured, when they arrived (R 31). Meyer turned the pilot's head to one side as "blood was flowing from his eyes and mouth" and he felt "he would suffocate because he was gurgling in his throat". Both legs were badly injured and one was "completely shot to pieces", the bone sticking out from beneath the knee. Accused Sukopp states Meyer attempted to move the pilot for the purpose of taking him to the hospital in the motorcycle, but discovered his back was broken (R 5, 11, 12, 31). The pilot was still breathing, but was unconscious, and Meyer was unable to feel any pulse and felt he was dying (R 5, 11, 12, 18, 22). Meyer then chased the women and children, some of whom were crying, behind the haystack and while he was behind the stack Sukopp fired the first shot with his service pistol into the head of the victim and almost immediately thereafter fired a second shot into his head (R 6; 7, 12, 17, 23, 31). Meyer saw the accused fire the second shot and said to him, "What have you done?" to which accused replied, "I have released him, I couldn't look at him any longer, I have put an end to his

suffering and his misery***I would have done that to my wife or to my children" (R 6, 13, 31). ***Meyer then knelt down, parted the hair in the flier's head and determined "both shots had gone into the top of the head *** and no blood was visible" (R 7). From Meyer's observations, made alongside of the pilot and the fact he was not breathing, it was his opinion the pilot was dead after the second shot (R 7, 8, 14). Meyer then removed the pilot's personal effects, which included one identification tag, leaving the other on the body, and subsequently turned the effects into the office of the Kreisleiter (R 7). The accused Sukopp and Meyer then left the scene of the incident and had no further conversation regarding this incident. As Meyer was approaching the motorcycle he noticed one Ohlhoff, county policeman, and the accused Kurt Kiehne, the two men being about 30 meters apart, coming toward the haystack where the pilot was lying (R 7, 31). Meyer then returned and talked with Ohlhoff, asking him to remain at the scene and saying he would send a vehicle there and have the body removed. When Meyer left the scene, Ohlhoff and accused Kiehne were "directly next to the dead flier" (R 8). Sukopp and Meyer then searched the adjoining woods for other parachutists and drove back in the direction of Gross Dentke (R 9). Accused Sukopp had no further contact with the victim.

2. As to accused KIEHNE: The Prosecution introduced a confession taken by an American officer on 5 April 1946, in question and answer form which states in substance the following (R 30; Exhibit 4): I pedalled into the countryside by bicycle after I had noticed some pilots parachuting to earth. While I was on this expedition I turned one pilot over to the Landwacht. As I was returning home I saw a group of people standing near a haystack in a field adjoining the road. I approached this group and discovered a pilot laying on the ground. His legs were badly wounded, blood was coming out of his mouth, and he had two gun-shot wounds in his head. I turned him over and found his vertebrae had been wounded. I then told Mr. Ohlhoff that he should shoot the pilot as we could not transport him away any more. I then came to the conclusion that Ohlhoff wasn't capable to do this. "I then still waited a little while. One had told me that a carriage was going to come and get the body. It is my opinion before I shot the pilot was already dead as he gave convulsive movements. I am convinced the pilot was dead because he didn't make any noises any more and when the pilot is unconscious he mostly speaks or groans and this man was not groaning or speaking any more. I was of the opinion that the way the man was fixed up we could not transport him anywhere any more. I then decided to give the pilot coup de grace with my pistol in his heart." I borrowed a pistol from Ohlhoff and fired a shot into his heart (Exhibit 4). A vehicle approached shortly thereafter to remove the body and I assisted in loading it on the wagon. Several months after the shooting accused Kiehne told Ohlhoff he had fired a shot into the heart of the victim because he thought he "wasn't quite dead" (R 9). The pilot upon being removed was taken to the cemetery, the identification tag removed, which was subsequently delivered to the community officer where it was registered (R 27; Exhibit 3). The record indicates the name of the victim was Almo W. Dennerle, ASN 35519869 (Record 28; Exhibit 3).

b. For the Defense:

1. As to accused SUKOPP: Sukopp testified as follows: I was employed in the Landrat office at Wolfenbittel on 28 September 1944, when the air raid sounded. Meyer and myself left by motorcycle for Gross Dentke in pursuance to instructions given us by the Captain of police at Rasser. Enroute to Gross Dentke we passed two American fliers and when we reached a point beyond Gross Dentke we found a flier laying on a straw pile in a field adjoining the road. He was unconscious, breathing hard, had a rattle in his throat and was groaning (R 47, 48, 50). Both of the pilot's legs were badly injured, the bones sticking out from below the knee. Meyer turned the flier's head to one side so that the blood would run out of his mouth. Meyer inquired if he could put the flier on the motorcycle and I "picked the flier up a little but it seemed that his back was broken" (R 52) and I told Meyer we could not squish him in the motorcycle (R 48). Meyer then chased the women and children away and I again took hold of the pilot and blood ran out of his mouth (R 49, 52). I don't know how I came to do it, but I then fired two or three shots "to relieve him of his death agony". The next thing I knew I heard someone calling and Meyer was standing next to me. I don't recall much after that, I do not know whether I had any conversation with Meyer or if he accompanied me to the motorcycle. I did not realize until I was alone in the woods that I had killed someone.

The defense called a German civilian physician, a Dr. Frank, who testified at length regarding certain medical opinions and conclusions based upon a personal history given by accused Sukopp of an old brain injury received in the first World War, resulting in attacks of apoplexy which extended over a period of years and the doctor's personal observation of the accused (R 34 to 44, inclusive). The doctor states it is his opinion that accused Sukopp at the time of the incident "acted in a short-circuited reaction and it is known that people with his medical background, when they are suddenly excited, do things which people with normal intelligence, normal inhibitions, would not do" and his responsibility at the time was severely diminished (R 37, 38, 39). The doctor states he did not consider him responsible like a normal person, however, he was sane and knew the difference between right and wrong the same as anyone else normally, but when he was affected by one of these reactions his responsibility was greatly diminished (R 42 to 44, inclusive).

2. As to accused KIEHNE: Accused Kiehne testified as follows: I was home on leave from the German Armed Forces on or about 28 September 1944. On this day I noticed dog fights in the air and several parachutists were coming out of the skies and I then took my bicycle and pedalled toward the furthest pilot. Enroute I found an American airman sitting in a ditch. I examined his papers and then delivered him to the county police officer (R 51). As I was returning home I noticed a group of people standing about a haystack in an adjoining field and approaching the group, discovered a seriously wounded American pilot laying on the straw. Both of the pilot's legs were badly injured, foam and blood was coming out of his mouth, and I observed two gunshot wounds in his head. I picked him up and noticed he had a broken back. I turned the pilot over and opened the zipper on his coveralls, but could find no more wounds (R 51). I inquired if a vehicle was coming to take the pilot away and was told one was expected any moment. I asked Ohlhoff to give a mercy shot to the pilot and then realized he could not shoot the pilot, so I asked Ohlhoff for his pistol and gave the "pilot a coup de grace through the heart, a mercy shot". When the vehicle arrived, we loaded the body

in the wagon where it was taken to the morgue and my father subsequently buried it in the cemetery with two other Americans (R 57). I was at the scene where the pilot lay for approximately one-half hour before I fired the shot and it was my "opinion the man was already dying" for the reason he had "lost a great deal of blood and was no longer able to make any movement. There was however a convulsive motion in his body from time to time." This convulsive movement repeated it self every two or three minutes. I believed it my duty as a soldier to relieve him from his pain (R 58). It is customary in the Wehrmacht to deliver a coup de grace to soldiers who are badly wounded or expected to die (R 59). Accused Kiehne repeated that when he fired the shot the pilot was not breathing, just twitching, and he believed he was in his last death struggle and the nerves were being overtaxed and that was why he twitched (R 60).

5. JURISDICTION:

a. The General Military Court which heard this case was properly constituted and had jurisdiction over the subject matter of the accused (Field Manual 27-10, Rules of Land Warfare; letter, Headquarters, United States Forces, European Theater, dated 16 July 1945, AG 000.5-3, subject: "Trial of War Crimes and Related Cases"). It is well recognized that the offense in the instant case, the willful killing 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 Commission having custody of the accused. The sentence was legally within the power of the Court to impose.

b. In letter, Deputy Theater Judge Advocate's Office, War Crimes Branch, United States Forces, European Theater, dated 29 October 1945, AG 000.5, subject: "Case of United States vs. OTTO SUKOPP", the trial of accused Sukopp by General Military Government Court was directed. Trial of accused Kurt Kiehne by a General Military Government Court was subsequently directed by telephonic communication from USFET (See Discussion, Par. 6). The joint charge and particular against accused were preferred by an American officer, Cecil L. Fisher, Captain, AG. A copy of the Charge Sheet was served on each accused prior to trial. Six members of the Court panel were present throughout the trial. The two accused were represented by an American officer, an attorney, who announced he was ready for trial. There was not sufficient conflict in interest between the two accused to prejudice the substantial rights of either of the accused to prevent either from having a fair, just and full trial (See Discussion, par. 6). Challenges for cause were permitted.

6. DISCUSSION:

In letter, Deputy Theater Judge Advocate's Office, War Crimes Branch, United States Forces, European Theater, dated 29 October 1945, AG 000.5, subject: "Case of United States vs. SUKOPP" the trial of accused Sukopp by a General Military Government Court was directed. Independent investigation indicates that in the preparation of the case for trial the incident involving accused Kiehne was again brought to the attention of the members of the War Crimes Branch. The incident involving accused Kiehne was originally investigated by an American officer, a member of a War Crimes investigating

detachment, and it was his opinion that though accused Kiehne may have been technically guilty of a war crime it was not such an offense that he should stand trial. A reconsideration of this incident by the Ludwigsburg detachment and verbal confirmation by the War Crimes Branch, USFET, result in preferring charges against accused Kiehne and the drafting of a new charge and particular joining accused Kiehne and Sukopp in one charge and particular. The new charge was preferred by an American officer and no error or irregularity is present in this regard. In 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 stated: "Charges will be referred to the Court for trial by the Army-Military District Commander or at his discretion by his Staff Judge Advocate." In the instant case the charges were referred to trial by the Chief of the Trial Section of the Ludwigsburg detachment. The irregularity appearing on the face of the Charge Sheet is more one of form than of fact since the order of reference to trial emanated from the Deputy Judge Advocate, War Crimes Branch, USFET. There was not only substantial but actual compliance with the provision of the letter and no irregularity exists which affects the substantial rights of accused Kiehne.

There was no evidence and no claim by the Prosecution that the two accused were conspirators, accomplices, or engaged in a common design, or that the one "procured, counseled or commanded" the other. From the evidence the two offenses are separate and distinct. If we follow as a guide the procedure in court-martials, it would have been better practice to have drafted a separate charge and specification for each accused and it would still have been possible to have tried the two accused in a common trial. No objection was made by either accused to being tried jointly. No error resulted which prejudiced the substantial rights of either accused by the joint charge and the joint trial.

One experiences some difficulty at first glance in following the Court's reasoning in finding each accused guilty of killing when the offense of each was separate and distinct both in character and in time. The evidence is undisputed that when accused Sukopp shot the victim he was breathing and in the opinion of both the accused Sukopp and Meyer, was alive. The pilot was severely and possibly mortally wounded when accused Sukopp fired the two shots into his head. Witness Meyer believed the pilot was dead after these shots were fired. Accused Kiehne states when he approached the airman he was not breathing and the only sign of life was a convulsive movement of the muscles. Accused Kiehne was at the scene for approximately one-half hour before he fired the shot into his heart. There is sufficient evidence that there was still life in the victim when accused Kiehne fired this shot into his heart to support the finding and sentence. Kiehne admitted out of court he thought the pilot was not yet dead when he fired this shot. It is a common and accepted practice among medical doctors that before they certify to the death of a human being they must certify there is no respiratory, heart, or reflex action existing. In the instant case there was still reflex action remaining in the pilot when the accused Kiehne fired the fatal shot. The fact that two shots were fired into the brain of the pilot does not necessarily mean that he would be killed instantly, but is

contingent upon where the bullets entered the brain. There is sufficient evidence to substantiate the Court's finding and sentence as to each accused. There was sufficient evidence from which the Court could reasonably have inferred that the injuries inflicted by each accused accelerated the death of the victim. Considering this fact and the fact the pilot may have died in the immediate future from injuries received prior to the gunshot wounds by the accused, the nature of the offense as to each accused is not changed for "to accelerate the death of a person already mortally wounded or diseased is homicide" (Wharton's Criminal Law, Vol. I, 12th Edition, Par. 179). The evidence is rather strong and the sentence of the Court indicates that the probable motive as to each accused for killing the victim was predominantly one of mercy or, as it is popularly called, a "mercy killing". It may be helpful to distinguish two types of mercy killing though neither is recognized in American-Anglo Saxon law. The first, where the victim has been killed upon "serious and definite" request, and the second, where the motive for killing by the perpetrator is one of pity or mercy. Section 216 of the present German Criminal Code, in effect at the time of the commission of the offense herein and also in effect prior to the Hitler Regime, recognizes a killing upon request under certain circumstances as a separate crime and the minimum sentence that may be imposed by the Court is imprisonment for three years. Section 213 of the German Criminal Code provides generally for mitigating circumstances and in substance states where the perpetrator has been induced to the deed not through his own fault, but by the mistreatment or serious abuse from others, the minimum sentence shall not be less than six months. Some German legal scholars argue the latter provision covers the case where the killing is motivated by noble motives. The accused Kiehne testified that soldiers in the German Armed Forces frequently have killed their comrades on the battlefield from such a motive. These facts are cited only to show that it is understandable from the background of each accused why the crime was not considered as containing the moral turpitude as in the usual pilot case and why the Court may have imposed a lighter sentence than is customarily imposed in the killing of American pilots. However, under American-Anglo Saxon law the nobleness of the accused's motives in no way changes the fact that the offense for which each accused was charged, convicted and sentenced was a deliberate and willful taking of human life. The usual penalty among civilized nations for such an offense is life imprisonment or death. As just stated, the Court must have taken into consideration the motive of the accused when they imposed sentence and one hesitates to condemn the Court for mixing the human element of mercy with a strict legalistic approach to the offense charged. The ends of justice and the purpose of war crimes trials are both accomplished by the imposition of a lighter sentence in this case.

The record indicates "all members" of the defense appointed by the Special Orders were present (R 1), however, as one reads the record it is fairly clear that only one member of defense counsel was present and represented the two accused. It is the belief of the reviewer that the interest of accused Kiehne may have been better represented if he had had his own individual defense counsel. Unconsciously, the cause of Kiehne may have been used as a wedge to obtain a more lenient sentence for accused Sukopp, however, no error

resulted in such justice to either accused that a new trial is justified.

All the essential elements of the offense against each accused has been established by sufficient competent evidence. It is not considered necessary to restate and discuss the relatively simple facts. No new or original points of law have been raised in the instant case which have not been discussed at length in previous reviews. No errors occurred in the proceedings which resulted in injustice to either accused and which would warrant a new trial.

7. PETITION FOR REVIEW:

A petition for review in behalf of the accused Sukopp has been filed by his American defense counsel. The petition charges the sentence imposed by the Court is too severe for the reason the accused Sukopp did not have a "murderer's instinct", his criminal responsibility was not that of a normal person because of an old brain injury, and in comparison to the five year sentence of Kishne the sentence of twelve years' imprisonment for Sukopp was too severe and therefore the petitioner asks for reconsideration. The first two grounds of the petition have been discussed under Paragraph 6 and the third basis of the petition shall be discussed in Paragraph 8. No petition for review was filed in behalf of accused Kishne.

8. CLEMENCY:

No petition for clemency in behalf of either accused has been filed.

The history of each accused relative to the captured airman on the day of the incident and their relation with American pilots in the immediate past indicates that neither possessed a "murderer's instinct" toward American pilots generally. The evidence is strong that the killing of the victim was motivated by the emotions of pity and mercy rather than one of hatred and ill will. The accused's motive is neither a defense nor a proper legal mitigating circumstance under the American-Anglo Saxon law. It is quite evident from the sentence imposed by the Court that this factor was taken into consideration. Speaking from a strictly legal viewpoint, the Court might properly be criticized for the leniency of the sentence. No further reduction in the customary sentence for a war crime approximating common law murder is believed warranted as to either accused. Counsel for the defendant raises the question that accused Sukopp cannot be judged with the same standard applicable to other normal human beings. As previously pointed out in the discussion, he was not so judged as it is shown by the sentence imposed by the Court. No special circumstances other than those set forth in Paragraph 3 and Paragraph 6 are known which may be properly considered coming under the subject of "Clemency".

9. RECOMMENDATION:

It is recommended that the findings and sentence of the Commission as to each accused be upheld and approved. The

forms of action designed to carry this recommendation into effect are attached hereto for the signature of the reviewing authority.

/s/ M. G. Setzekorn

M. G. SETZEKORN

Capt. Inf

Chief of Trial Section

I concur.

/s/ Charles E. Cheever

CHARLES E. CHEEVER

Colonel JAGD

Staff Judge Advocate

HEADQUARTERS
THIRD UNITED STATES ARMY
APO 403

GENERAL MILITARY GOVERNMENT)

COURT ORDER NUMBER 10)

8 June 1946

Before a general military government court which convened at Ludwigsburg, Germany, on 9 and 10 April 1946, pursuant to paragraph 3, Special Orders No. 86, this headquarters, 4 April 1946, were arraigned and tried:

Otto Sukopp and Kurt Kiehne, German Nationals

CHARGE: Violation of the Laws of War

Specification: In that Otto SUKOPP and Kurt KIEHNE, German Nationals, did, at or near GROSS DENTKE, Germany, on or about 28 September 1944, wilfully deliberately and wrongfully encourage, aid, abet and participate in the killing of a member of the U.S. Army alleged to be Almo W. Dennerle, who was then a unarmed, surrendered prisoner of war in the custody of the then German Reich.

PLEAS

(As to each accused)

To the Specification of the CHARGE:	Not Guilty
To the CHARGE:	Not Guilty

FINDINGS

(As to each accused)

Of the Specification of the CHARGE:	Guilty
Of the CHARGE:	Guilty

SENTENCES

(Otto Sukopp)

To be imprisoned for a term of 12 years commencing March 13, 1946, at such place as may be designated by competent military authority.

(Kurt Kiehne)

To be imprisoned for a term of five years commencing March 13, 1946 at such place as may be designated by competent military authority.

The sentences were adjudged 10 April 1946.

The findings and sentences are upheld and approved and will be duly executed. Bruchsal Central Prison, Bruchsal, Germany is designated as the place of confinement.

BY COMMAND OF LIEUTENANT GENERAL KYTES:

W. R. SCHMIDT
Major General, General Staff Corps
Chief of Staff

/s/ W. G. Caldwell
W. G. CALDWELL
Colonel, Adjutant General's Department
Acting Adjutant General

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