

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

11 December 1947

UNITED STATES)
))
) v.)
))
Oskar Wilhelm KOCH)

Case No. 12-2013

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period 25 September 1947 to 1 October 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE 1: Violation of the Laws and Usages of War.

Particulars: In that the accused Oskar Wilhelm KOCH and Heinrich FRANKE, German nationals, did, at or near BAD SCHWALBACH, Germany, on or about 3 February 1945, wrongfully encourage, aid, abet and participate in the killing of a national of a nation then at war with the then German Reich, who was then and there a surrendered and unarmed prisoner of war in the custody of the then German Reich.

CHARGE 2: Violation of the Laws and Usages of War.

Particulars: In that the accused Oskar Wilhelm KOCH, a German national, did, at or near KEMEL, Germany, on or about 10 February 1945, wrongfully encourage, aid, abet and participate in the killing of a member of the United States Army, who was then and there a surrendered and unarmed prisoner of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: About 3 February 1945, a surrendered and unarmed English flyer, who had been captured in the vicinity of Bad Schwalbach, Germany, was shot and killed by a German policeman who reported that the flyer attempted to escape.

On about 10 February 1945, one Otte, a German policeman, while escorting a captured American flyer, believed to be Cecil Allen ASN 38529143, from Neuroth to Kemel, Germany, shot and killed the flyer and stated that he killed the flyer pursuant to an order from accused KOCH, a Kreisleiter, as relayed to him by Ortsgruppenleiter Doenges.

alleged killings, accused KOCH had made speeches at Party meetings and at police meetings concerning the "Himmler Orders". It was generally understood that he desired that all enemy flyers apprehended in his Kreis be killed. His speeches incited the people and the police to kill flyers.

KOCH denied having made speeches to incite the killing of flyers and denied having ordered that any flyer be shot. Doenges denied having relayed to Otte any order of KOCH to kill a flyer.

The accused was charged herein under two charges and particulars, but was acquitted as to Charge 1 and the particulars thereunder. The evidence mentioned hereinafter relates to Charge 2 and the particulars thereunder.

Items referred to herein as "Statements", unless otherwise indicated, are in the form of extrajudicial sworn testimony.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Oskar Wilhelm KOCH

Nationality:	German
Age:	40
Civilian Status:	Manager of Commercial Firm
Party Status:	Nazi Party Member, Leadership Corps
Military Status:	Air Corps Corporal and District Leader of Volketurn
Plea:	NG Charge 1; NG Charge 2
Findings:	NG Charge 1; G Charge 2
Sentence:	10 years imprisonment, commencing 9 May 1945

Evidence for Prosecution: It was stipulated "*** that on or about 10 February 1945, a surrendered American flyer was killed in the vicinity of Neuroth, Germany, in the kreis of the accused; that Heinrich Otte was tried for the killing of the American flyer and sentenced to death; that the statement of Otte may be introduced in evidence and, while not admitting the truthfulness of the statement, the defense stipulates that, if the said Otte was present, he would testify as his statement" (R 7). In

accused, as Kreisleiter and Reich Defense Commissioner, was his superior and was the superior officer in the district; that on three separate occasions he received orders from the accused to the effect that no flyer was to leave the district alive; that at a meeting in January 1945 the accused repeated such order and displayed his pistol for emphasis. Otte further stated that, on 10 February 1945, he received a direct order from the accused, relayed to him over the telephone by Ortsgruppenleiter Doenges, to pick up a flyer at Haurath and to shoot him dead. Otte stated that he did carry out that order; that the reason he killed the flyer was the order from the accused; that the flyer was buried in Kemel cemetery; and that the name of the flyer whom he killed was Cecil Allen (R 8; P-Ex 6 pp 1-5).

The pathologist's report of the disinterment of the body, believed to be that of Cecil Allen ASE 38529143, from the Kemel cemetery, states the cause of death as "Gun shot wound in head" (R 9; P-Ex 7).

In his statement, Metz stated that the accused personally encouraged him to mistreat flyers and that the accused said to him "One should not deliver an Allied flyer alive". He further stated that at several meetings of the Ortsgruppenleiters held during the latter part of 1944 and early in 1945, the accused, as Kreisleiter, gave definite orders that all flyers were to be killed (R 9; P-Ex 8 pp 2-4).

Dieffenbach identified the accused (R 11) and testified that about 11 or 12 February 1945, Otte reported to him that he had killed an American flyer while he was trying to escape, and that he entered the name of the flyer in the death records (R 15).

Mons, a former policeman, identified the accused and testified that, at a meeting of all the police forces held in December 1944 or January 1945, he heard the accused call attention to the "Hitler Order" (R 19, 20).

Former Ortsgruppenleiter Doenges stated in an unsigned and unsworn pretrial statement (Doenges having committed suicide before the notes on the interrogation were transcribed) that the accused was his superior in

the Party; that he heard the accused several times say in meetings that he did not want any flyers brought alive to Bad Schwalbach. Doenges further stated that on one occasion toward the end of 1944, the accused told him by telephone to have a flyer shot. He relayed the order to the mayor in Kemel, where the flyer was being held, but the mayor refused to carry out the order (R 138; P-Ex 10 pp 1-2).

Former Police Chief Bauschus stated in his statement that "It was common talk all around that the kreisleiter did not want the pilots to be delivered alive." He further stated that the accused, as Kreisleiter, held meetings every four weeks and always talked about flyers at the meetings and that, though the accused did not directly order that the flyers be killed, his speeches were such as to incite the people to kill flyers (R 140; P-Ex 11 p 5).

Evidence for Defense: Although it is not shown that he had reason to know, Dierffenbach testified that he did not know upon whose order the American flyer had been killed (R 14). He testified that Otte reported to him that the flyer was shot while escaping (R 15).

Mens, a former police officer, testified that the accused had no direct power or command over the police (R 24). He further testified that the "Hitler Order", referred to by the accused in the police meetings, was to the effect that the police should not interfere to protect a flyer from attack by civilians and that nobody spoke about an order to kill flyers (R 28-30). The defense read into the record excerpts from a report of investigation and from the record of the case of United States v. Heinrich OTTE, et al. No. 12-1968-1, as follows: The conclusion from the report of investigation dated 4 October 1945 by Major Fulton C. Vowell was that "(a) Heinrich Otte is guilty of murder of Cecil Allen without cause or provocation." Statements of Tiffenbach, Lang, Klaerner, Anna Marie Otte, Recke, Metz and Seidel, introduced in the Otte case, were all to the effect that the shooting was the entire responsibility of Otte. Seidel stated that he was the next superior of Otte and that he knew nothing of an order issued by the accused to kill flyers and that

would have been in the police chain of command. Doenges denied that he ever talked with Otto or that he telephoned Otto on a Saturday evening in 1945 and told him that the accused wanted the flyer killed. Otto stated that he got his order through the Gestapo and that he did not get any order from the accused. He stated that disobedience was punishable by the SS and in the police courts. He further said that he received the secret order from Seidel. Juse and Klaner stated that it was Otto and Seidel who had given out information in meetings about the secret order to kill flyers. Roes testified that he had heard speeches by the accused and never heard him say that flyers should be shot. Testimony of Mueller and Mall was to the same effect. Seidel testified that the accused, when he spoke at police meetings, only talked about Party matters and never attempted to give orders about flyers (R 38-45).

Jordan, a former Kreisleiter, testified that a Kreisleiter could not give orders to the police (R 46), also that it would have been impossible for a Kreisleiter to punish a policeman for disobedience of his orders (R 47-48). He further testified that the accused "is a simple upright idealist" (R 50). Both Jordan and Hofer, a former Gauleiter, testified that it was impossible that the accused, as Kreisleiter, could have been a State Defense Commissioner since such office was of the Gau level (R 47, 72-73). Hofer quoted directives to show that under the law the accused, as Kreisleiter, could have had no authority over the police or over the Landrat (R 73-74). He further testified that in practice police and SS would have permitted no interference by a Kreisleiter (R 77). Franka testified that he was under sentence of death for having killed a flyer in the Kreis in which the accused was Kreisleiter. He identified the accused in Court. He testified that he never received an order from the accused to kill a flyer (R 91-92) and never heard the accused refer to the "Bormann Order" and that, as a member of a SS battalion, he was not subordinate to the Kreisleiter (R 99-100). In an unsworn pretrial statement, Stuckart, a former State Secretary for Internal Affairs in

had no police authority; that, if he had attempted to give orders to the police, such interference would have been reported to him; and that no such report was ever received concerning the accused (R 101; D-Ex 3A).

In his testimony, the accused denied that he was ever Defense Commissioner (R 109) or a deputy (R 110). He denied also that he had any police or civilian administration and that he was a superior of the landrat (R 110). He testified that he had no jurisdiction over and never issued any orders to the police (R 111). Six flyers were killed in his kreis, but all were killed by the police and none by Party members. He denied that he ever, in any speeches, encouraged the people to kill flyers (R 112, 113); that he ever waved a pistol during any speeches (R 114); and that he ever received any report from Otte regarding the killing of a flyer (R 115).

In his unsworn pretrial statement, Doenges stated that the accused did not call him by telephone about a flyer shot by Otte and denied that he relayed such an order to Otte (R 138; P-Ex 10 p 3).

The accused testified that he was mistreated at the time he signed the Statement introduced by the prosecution as Exhibit 9; that two American soldiers stood with machine pistols pointed at him; that the interpreter held him by the collar; that the Statement, after being written in final form, was not translated to him at that time; that the Statement does not recite the testimony as he gave it; and that many sentences are missing, and wrong impressions are created (R 144).

Certificates as to the accused's good character by the Town Council of Langenscheid (R 104; D-Ex 6A); parson Siatz (R 104; D-Ex 7A); Klemann (R 105; D-Ex 8a); and teacher Ernst Goebel (R 154-155) were introduced.

Sufficiency of Evidence: It was for the Court to determine under all the circumstances as to whether the accused's Statement, P-Ex 9, was voluntary and whether it was procured under circumstances which might have induced the accused to state untruths therein. In any event, the find-

Petitions: A Petition for Review was filed by Major A. R. Myatt, Jr., Chief Defense Counsel, 12 November 1947.

No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

2. Heinrich FRANKE

This accused was neither served nor tried.

V. QUESTIONS OF LAW:

Jurisdiction: It is clear that the Court had jurisdiction of the person of the accused and of the subject matter.

Procurement of Extrajudicial Sworn Statements: The accused asserted that he was mistreated by American investigators at the time he signed the statement introduced in evidence as Prosecution's P-Ex 9 (R 138, 144; P-Ex 9). If the accused were in fact mistreated by the American Major conducting the interrogation, such action should be most strongly condemned. However, it is of interest that the accused considered a portion of the report of this investigator as favorable to himself and he introduced in evidence an excerpt from such report (R 38). In any event, the applicable rule is that such extrajudicial sworn statements are admissible without foundation evidence establishing that they were voluntarily procured and it is for the Court to determine under all the circumstances their probative value (Subparagraph c (4), Section 270, "Manual for Trial of War Crimes and Related Cases", 15 July 1946, as amended 1 February 1947; United States v. Stroop, et al., Opinion DJAC, September 1947).

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 the sentence be approved.
2. Legal Forms Eoc. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

V. E. McCLINTOCK
Attorney
Post Trial Branch

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

C. E. STRAIGHT
Lieutenant Colonel, JAGC
Deputy Judge Advocate
for War Crimes