

DEPUTY THEATER JUDGE ADVOCATE'S OFFICE
WAR CRIMES BRANCH
UNITED STATES FORCES, EUROPEAN THEATER

U N I T E D S T A T E S

23 April 1946

v.

Case No. 12-1182-1

Richard Drauz, a German
National

REVIEW AND RECOMMENDATIONS OF
THE DEPUTY THEATER JUDGE ADVOCATE

1. TRIAL: The accused was tried at Dachau, Germany, on 11 December 1945 by a General Military Government Court appointed by Paragraph 1, Special Orders No. 329, Headquarters, Third U.S. Army and Eastern Military District, APO 403, dated 27 November 1945.

2. <u>FINDINGS</u> : The offense involved was:	<u>Pleas</u>	<u>Findings</u>
CHARGE: Violation of the Laws of War	NG	G

Particulars: In that Richard Drauz, a German National, did, at or near Durrensimmern, Germany, on or about 24 March 1945, willfully, deliberately and wrongfully, encourage, aid, abet and participate in the killing of an unknown member of the United States Army who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich.

NG G

3. SENTENCE: The Court, by at least a two-thirds vote of the members present at the time the vote was taken, found the accused guilty and sentenced him to death by hanging at such time as higher authority may direct. The sentence was upheld by the Reviewing Authority on the 20th day of February 1946. The record of trial has been forwarded to the Commanding General, United States Forces European Theater (paragraph 5e, letter, Headquarters, United States Forces, European Theater, AG 000.5-2 GAP, 16 July 1945, subject: "Trial of War Crimes and Related Cases"; Article VII, Ordinance No. 2, Military Government Courts, contained in Handbook, "Military Government Germany, Technical Manual for Legal and Prison Officers, 2nd Edition", page 30).

4. DATA AS TO ACCUSED: The accused is 51 years of age and a civilian and has been a resident of Heilbronn, Germany, since

October 1932. From the 1st of January 1938 until the occupation of Germany he was the official kreisleiter of Heilbronn (R. 62, 63).

5. RECOMMENDATION: That the action of the Military Government Court as approved by the Reviewing Authority be confirmed.

6. EVIDENCE: The evidence in the record may be briefly summarized as follows:

a. On or about 21 March 1945, six American flyers were taken prisoner and brought to Neckarsulm, Germany, under armed guard (See record of trial, United States vs. Heinz Endress, 13 November 1945; opinion of DTJA, dated 22 January 1946). Thereafter one of the prisoners, an unknown American flyer (assumed from the record to be Captain Anderson, but not positively identified), was on the 23rd of March 1945 confined as a prisoner of war in the local jail at Brackenheim, Germany. During the night of the 23rd of March 1945 a Gestapo man, named Karl Josef Huber, telephoned to Richard Drauz, the accused, that the American flyer was then in custody at Brackenheim. Drauz stated that he thought this was the flyer he had been searching for and one who had escaped from his guards.

On 24 March 1945, accused, Link, Otto, Huber, and Endress departed from Heilbronn by motor. They went first to Durrenzimmern, where the accused, Drauz, and Endress waited while Link, Otto and Huber went to Brackenheim for the American prisoner. When Link, Otto and Huber returned, they drove through Durrenzimmern to a woods outside of the town, where they met the accused and Endress. While they were in this woods the flyer was killed by two pistol shots fired into his head. The evidence in the record shows that Drauz was seen a few seconds after the first shot was fired with a gun in his hand. He claimed that he did not shoot, but that he took the gun from Link, who was, at the time of the investigation and trial, reported to be dead. The court found Drauz guilty of the crime.

b. In greater detail, the evidence discloses the following facts: Josef Huber, Criminal Secretary of the Gestapo at Heilbronn, on the 23rd of March 1945 received a call from Friedrich Schwop, a State policeman, advising Huber that an American flyer had been confined in the local jail (R. 23, 24, 34, 35, 45). Huber was not responsible to Kreisleiter Drauz, but the Gestapo had been directed to notify the Kreisleiter concerning arrests (R. 46). Huber attempted to call the Wehrmacht but the switchboard operator connected him with accused at Heilbronn (R. 34). It was about 9 p.m. when Huber advised accused that the flyer had been captured (R. 34 and 35). Accused stated that the flyer was probably the one who had escaped at Neckarsulm (R. 55). Accused advised Huber that he would call Lieutenant Colonel Otto and would call him back later. He did call him back within the half hour and advised Huber that they would go after the flyer in the morning (R. 35). Huber asked to go along for the reason that he had some business to take care of at Durrenzimmern (R. 35 and 36). The next morning, 24 March 1945, Heinz Endress, who was the Ortsgruppenleiter at Neckarsulm, in which position he was a subordinate of the accused, went to accused's office in Heilbronn (R. 87). Endress accompanied accused to Huber's house. It was between 9 and 10 o'clock (R. 37). The car was driven by Karl Link who was accused's assistant and leader of the labor front in Heilbronn (R. 25, 32 and 55). Colonel Otto was also in the automobile (R. 36), so that the group was made up of accused, Link, Huber, Endress and Lieutenant Colonel Otto. During the trip to Durrenzimmern there were several air raid alarms, and the group was forced to stop several times in order to take cover (R. 8, 37, 47). During the trip they conversed about unimportant matters and not about the flyer (R. 37, 48). They arrived shortly before noon at Durrenzimmern (R. 8). Huber alighted from the car and went to the City Hall for the purpose of taking care of his business (R. 9, 24, 37). Accused also got out of the car, but Endress was not certain if accused accompanied Huber to the City Hall (R. 9, 24). When Huber

returned accused stated that they had talked the matter over while he was in the City Hall and had agreed that Link, Huber and Otto would go after the flyer (R. 37).

Huber testified that when he returned Endress and Draus were no longer there (R. 48); he also testified that he, Otto, and Link drove towards Brackenheim and left accused and Endress behind; accused had remarked, "Well, you know where I will meet you" (R. 37, 48). Endress testified that all five drove toward Eilbronn on the Durrenzimmern-Brackenheim Road (R. 9, 13, 21, 24), and that after they had proceeded one kilometer out of Durrenzimmern the car stopped (R. 9). Accused said to Endress, "Come on, let's get out" (R. 31). Accused and Endress got out of the car and started walking (R. 9 and 32). According to Endress, he did not know where they left the car, and he was not certain that they had not walked to the spot (R. 9, 24, 13). Link, Otto and Huber drove the car on to Brackenheim where Huber, himself, obtained the American flyer from the local jail (R. 37, 38; Prosecution's Exhibit B, Page 3). The flyer was handcuffed (R. 13, 16, 39). Otto and Link sat in the front of the car and Huber and the flyer in the rear. They drove back towards Durrenzimmern, and as they reached the town, Huber asked where they were to meet accused and Endress. Link remarked that he knew, and without slowing down, drove through the center of the town (R. 13, 16, 38, 39 and 49). At the time there were several airplanes overhead and Otto gave the order to halt (R. 39 and 49). Link stated, "We are going to drive into the woods here" (R. 39). Otto left the car and Link drove off the main road to the left onto a country road until he reached a little path, where he stopped the car under some trees (R. 11, 39, 49, 50). Link made the remark, "Let's get out. Let's go into the woods" (R. 50). After alighting from the car Huber was on the flyer's left and led him towards the path into the woods (R. 13, 39, 50, 31, 20, 16;

Defendant's Exhibit No. 2). This path was approximately one and one-half meters wide (R. 25, 26). The party walked about 15 or 20 meters up the path when they met accused and Endress, who had taken cover from the fighter bombers in the same woods (R. 9, 39). Huber stated that he saw accused coming towards him and that Endress was coming to the path from the left. Accused asked if the prisoner was the flyer, and Endress directed the prisoner and Huber to walk on a little ways. Endress denied that any conversation occurred. They walked for about 5 or 6 meters when a shot was fired (R. 39, 40). The flyer, who had been looking straight ahead, fell forward to the left (R. 40, 42, 55; Defendant's Exhibit No. 2). The blood streamed from the left side of the flyer's face (R. 12). Accused was behind Huber and the flyer and Endress were behind accused (R. 39). Huber turned around after the shot had been fired and saw accused 3 or 4 meters behind him and a little to his right, with a pistol in his hand, which he was at the time lowering from his waist to his side (R. 40, 42). At that time Endress was 4 to 5 meters behind accused (R. 42, 52). Link was on Endress' left and a little closer to the flyer (R. 43 and 52). Endress then came up where the flyer lay and shot him as he lay upon the ground (R. 40, 42). Endress stated that he fired the gun into the forest in order to test it. Accused then asked if the flyer was really dead, and Huber heard another shot but did not know where it came from as he was then looking for Otto, who did not come into the forest (R. 40, 43). The prisoner was handcuffed at the time of the shooting and Huber was leading him, with his right hand holding the flyer's pants pocket; Huber had his gun in his left hand (R. 14, 19, 40, 43). Endress was looking at the planes, which were above, when he suddenly heard some shots fired. He immediately looked to the front where he saw accused with a pistol in his hand at his side; the muzzle of the pistol pointed towards the ground. Endress had not seen a weapon in Drauz' hand before. The gun was not

smoking, however, because the weapon was a Walther, which does not smoke upon firing (R. 12, 13, 14, 17, 21 and 25). The flyer had not been trying to escape and was still handcuffed, with his hands in front of him. He had been shot in the back of the head and had fallen forward on his face (R. 14, 13, 14, 16, 17, 19, 21, 56). Accused at the time was about two paces back of the flyer, either directly or slightly to the flyer's right. Endress stood a little behind and to the left of accused. Link was behind accused, but Endress did not know where Colonel Otto may have been (R. 14, 18, 19 and 26). Accused made the statement, "Come on, let's go." Huber stated that the flyer should be buried, and accused replied, "That is out of the question. We are going to leave him here, somebody will find him". Huber stated that he was going to report the matter to the police station at Durrenzimmern, to which accused made no objection. The group then proceeded to Durrenzimmern where Link and Huber went to the police station and reported the death (R. 13, 40, 41, 43, 51).

c. Evidence for the Defense. The accused elected to testify in the case. He stated that he and Endress agreed to remain behind at Durrenzimmern, because he believed there would have been too much of a stir if five people were to go to Brackenheim in order to get one man, and that it was reasonable for Link to drive Colonel Otto and Huber to receive the prisoner from the local police station. (R. 67). It was understood that accused and Endress would walk on the Durrenzimmern Road towards Heilbronn and that the party would meet again on that road. There is a little woods about one and one-half kilometers down the road, so if the planes flew over the party could stay there somewhere; they had not agreed to meet in the woods where the shooting occurred. Accused and Endress walked for about 10 minutes when planes began to attack in the area, so they took cover in the woods. Accused sat upon a tree stump, Endress walked on down the path; they had been sitting for 15 or 20 minutes when he

saw his car on the main road. The car turned and proceeded up to a path in the woods (R. 68).

Accused, who was about 50 meters up the path, walked towards the car. Huber and the flyer walked past him on the path and nothing was said. Accused went up to the car and asked Link about the flyer and wanted to know if he were the same flyer who had escaped at Neckarsulm (R. 68, 69, 70). Link stated that it was the same flyer. At that time Huber and the flyer were about 30 meters up the path; Link and accused started into the path to take cover from the planes and watched Huber and the flyer after having gone about 60 or 70 meters into the woods (R. 70). Accused did not have his pistol, since he had given it to Link at Durrenzimmern when Link went to get the flyer. Huber had his pistol in his right hand when accused was 4 or 5 meters away from Huber and the flyer; accused claimed that Link suddenly fired at the flyer and that he, accused, grabbed for the gun with his left hand. Link fired a second shot about one-half to three quarters of a second after the first shot (R 71, 72). Accused grabbed the pistol away from Link with his left hand and placed it in his right hand and put it on "Safety". The flyer had fallen forward with his head to the right after the second shot. When Huber turned around three quarters of a minute or a minute after the second shot accused already had the pistol. Accused went up to the flyer and saw that one shot had come out on the right side of the flyer's temple. Accused testified that he said, "Now, look what a mess we got". Link admitted to accused that he had acted negligently but claimed that he had no intention to shoot.

Accused stated that he believed Link (R 72, 73). He denied that he had shot the flyer or had told Endress to kill the flyer. He stated that he had no conversation on 31st March 1945 with Endress, but admitted that he did talk with him about an escaped

flyer before the 24th of March 1945 (R. 75, 81),

7. JURISDICTION: The offense alleged against the accused is the murder of a captured and unarmed American soldier. It was a violation of the laws of war and was properly triable by a General Military Court having custody of the accused. A general discussion of the jurisdiction of such military courts, with appropriate citation of authorities, is contained in prior reviews of confirmation cases written by this Branch, and need not be repeated here. No additional jurisdictional question is involved in the instant case (See: UNITED STATES V. CLEMENS WIEGAND, review dated November 1945).

8. LEGAL SUFFICIENCY: This case requires some discussion concerning the evidence, for the reason that most of the testimony offered during the trial as to who fired the shot is, in a sense, circumstantial. It is, however, very strong circumstantial evidence. The accused was charged with willfully, deliberately, and wrongfully encouraging, aiding, abetting and participating in the killing of an unknown member of the United States Army, who at the time was an unarmed and surrendered prisoner of war in the custody of the then German Reich. The killing of the soldier was clearly violative of the laws of war, and international law. The prisoner was handcuffed and heavily guarded. There appears nowhere in the record any evidence that he attempted to escape. The accused was the Kreisleiter, and was the highest ranking authority present at the time the American flyer was killed. There is no evidence from anyone who was actually an eye witness as to who fired the shot, and the record is otherwise silent as to who did fire it, but the circumstances are, indeed, very strong against the accused, Drauz. Within a short space of seconds immediately after the shot was fired, two witnesses testified that accused was holding the gun. The accused places the blame on Link, who at the time of the investigation and the trial was reported to have been dead. There is no doubt that Endress, being as close to Drauz as he was and looking at the planes

overhead, did look straight at Drauz immediately or within a few seconds after the shot had been fired and did see accused with the gun in his hand. Huber, likewise, looked around and saw accused lowering the pistol from his waist to his side. Accused's testimony claiming that he had jerked the pistol from Link's hand with his left hand and placed it in his right hand and put on the "safety" is not very convincing because the evidence discloses that Link was close to Endress and some distance from accused. It appears likely from the evidence that if Link had been at the side of accused, and had fired the shots, Huber and Endress would have at the time observed accused taking the pistol, or at least transferring it from his left hand to the right.

The pathologist's report, which was made approximately three months after the killing, revealed two gunshot wounds in the head. One of the bullets entered the center of the back of the head and left at the right frontal region. This possibly could have been the first shot, as the record discloses that the second bullet had entered the left side of the head and come out at the point above the right ear. The evidence places accused directly behind the flyer, possibly a little to his right, and at the time the shot was fired the flyer's head had probably been turned by the first bullet. In accused's position it is possible and believable that he did fire the shots. Taking the evidence as a whole there is an almost certain indication that accused, Link, Huber and Endress and Otto had planned to kill the flyer. The evidence indicates beyond a doubt that they had agreed to meet in the forest where the killing took place, since Link knew the exact location where to drive. He had, as the record discloses, stated that "he knew where to meet Drauz". The evidence shows that he went directly to the path in the woods where accused and Endress were, and in the conversation he had with accused, he asked explicitly if this was the flyer.

The Court had the witnesses before it and observed them during their testimony, and after deliberation, concluded that the accused was the person who actually fired the shot. It is true that the evidence is circumstantial in that there is no one who testified that he saw Drauz fire the pistol, but having regard for all the evidence, the circumstances indicate beyond any reasonable doubt that Drauz is the guilty person.

The testimony of accused is a general denial that he fired the shot. He stated that Link did not have a pistol in his hand and that neither did he, when they left the car; that he loaned his pistol to Link that morning at Durrenzimmern; that when he was talking to Link at the car he did not ask for it to be returned; that Link had fired a shot from behind him; and that when the first shot was fired the accused immediately turned around and grabbed for the pistol with his left hand. While he was grabbing for the pistol, Link fired the second shot; the first shot caused the flyer to fall to the ground and at the time the pistol was in the hands of Link. The accused stated that he took the pistol and didn't remember which hand he used; that it was a mechanical move, and that when Huber turned around he, accused, had the pistol in his hand. The accused in his testimony stated that Link told him that "he had negligently aimed at the flyer but apparently didn't have the safety on, and that it was not his intention to shoot the flyer." Accused stated, "I believe up until today what Link said." Accused denied any conversation about taking the flyer to the cemetery for burial, but stated that Huber suggested that they report the incident. He also denied that there was any prearrangement or conversation as to what disposition would be made of the flyer.

We think, however, that the conviction in this case can be sustained even if the record showed that accused did not fire a shot. The inference is unavoidable that this entire transaction was criminal, that the purpose of the expedition into the woods was to

kill the flyer, and that, consequently, anyone joining in the enterprise—particularly the highest ranking person present—must have known what was afoot, and thereby participated in such a manner as to bring him within the particulars of the charge.

9. CLEMENCY: The accused through his attorney filed a Petition for Review, contending strongly that there was no positive testimony in the record that accused committed murder, and contending further that the uncontroverted testimony and evidence reveals that Link was the man who fired the shot that killed the flyer; that accused did not have the gun himself at the time of the shooting; and that no eye witness actually observed or saw accused fire the gun. These contentions have already been considered in detail. Accused also objected to the statement of Hans H. Geber (Ex. D) being admitted in evidence. "Rule 12 (3)" of the "Rules of Procedure in Military Government Courts", and paragraph 9 of the Guide to "Military Government Courts", permits the introduction of the statement. Therefore the objection was properly overruled.

A petition for clemency dated 30 January 1946, was filed by the accused's wife, in which she relates that the accused was married and had children, was a good man to his family, that his friends all respected him, and he was honest in carrying out his work and duties.

On 17 April 1946, Dr. Georg Thüsing, of Wiesbaden, Germany, attorney for Mrs. Drauz, filed an amended petition for review of his case on behalf of accused. In this petition, Dr. Thüsing re-asserts objections to the court's finding, advances reasons for the extension of clemency and suggests that because the finding is based upon circumstantial evidence, the death sentence should be at least commuted. To this petition there are attached a written statement by Heinz Endress, an affidavit of Mrs. Drauz concerning statements made to her by Link, three statements in the nature of

character evidence by acquaintances of accused, and a roughly drawn plat of the scene of the crime, made by Dr. Thüsing.

Endress makes the statement that he now can remember that Drauz turned over to Link and took a pistol out of his (Link's) hand. Afterwards I was very excited, and when I asked him who had shot he did not reply", and that "it certainly had not been intended to kill the airman". The foregoing is contrary to Endress' previous testimony before the court.

Assuming for the purpose of argument that Endress is now telling the truth, the fact remains that accused was present at the scene of the crime, and that as the highest ranking official present he must bear his share of responsibility for the acts of members of the group. As indicated above, he cannot be considered less than a participant in an enterprise which had as its purpose the killing of the flier.

Cläre Drauz, wife of the accused, states that Link told her, on or about 24 March 1945, that he had killed an American airman, and that her husband, the accused, had torn the pistol from his hand; that Link was angered because of the air attacks and that he did not approve of accused's action in taking the pistol from his hand.

Dr. Rauscher, Lotte Marbach and Mrs. Lisa Schmalzbauer all make statements as to accused's good reputation. The attached plat drawn by Dr. Thüsing, the attorney, is in support of his contention as to the physical positions of the parties at the time of the murder. Reference to this plat shows that Dr. Thüsing is attempting to prove that the bullet must necessarily have been fired by someone who stood at the flier's left and behind him, while it appears from the evidence in the record that accused was either directly behind the flier, or a little behind and to the flier's right. The location of the wounds, however, can equally well be explained by the

assumption we have previously made that the flier's head had been turned by the impact of the first bullet (See page 9, Supra).

These petitions have been carefully considered and reviewed, in connection with the record of trial. We believe that they do not contain any material facts which if produced at the trial would have brought about a different finding or which would serve as a basis for a recommendation of clemency in a case of this character.

Reviewing the record of trial the evidence establishes conclusively that each of those present actively contributed to the death of the airman. They were motivated by a common design and legally are all principals in the perpetration of the murder. It matters not that some assumed a more active position or role than the others. "All who join in a common design to commit an unlawful act, the natural and probable consequence of the execution of which involves the contingency of taking human life, are responsible for a homicide committed by one while acting in pursuance of or in furtherance of the common design, although not specifically contemplated by the parties, or even forbidden by the defendant, or although the actual perpetrator is not identified" (29 Corpus Juris, Sec. 45, P.1073). The findings in this case are sustained, and the sentence is justified by the evidence (See US vs. Hartgen, et al., opinion of DTJA, 29 Sept. 1945).

10. CONCLUSION: The record of trial reveals no errors or irregularities prejudicial to the substantial rights of accused. It is believed that the sentence should be confirmed. Forms of action to accomplish this result are attached hereto.

25 April 1946

/s/ George R. Taylor
GEORGE R. TAYLOR
Attorney

Having examined the record of trial, I concur.

/s/ C. B. Mickelwait
C. B. MICKELWAIT
Colonel JAGD
Deputy Theater Judge Advocate