

DEPUTY JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
EUROPEAN COMMAND
APO 178

26 June 1947

UNITED STATES)

v.)

Case No. 14-1993

Otto PESCHKE and Josef SCHMITZ)

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 2 - 3 April 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

PARTICULARS: In that Otto PESCHKE and Josef SCHMITZ, also known as Ecco SCHMITZ, German nationals, did, at or near FURTH, Germany, on or about 13 September 1944, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of a member of the United States Army, believed to be Stephen J. ANDREWS, USF 32756036, who was then and there a surrendered and unarmed prisoner of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: On 13 September 1944, a member of the United States Army Air Corps, then a prisoner of war who had been captured by members of the German Army in the vicinity of Furth, Germany, was there interrogated by a Lieutenant Jacques, also spelled variously in the record as Jacques and Sobank, etc., commanding officer of a section of a Wehrmacht artillery regiment, in the presence of SCHMITZ, then a lieutenant, and PESCHKE, then a corporal, and several other soldiers. Lieutenant Jacques ordered PESCHKE to shoot the prisoner. PESCHKE and these other soldiers protested that an existing order of higher authority directed that prisoners be delivered to Division Headquarters. Lieutenant Jacques, however, repeated his order to PESCHKE, who, accompanied by two other soldiers, led the prisoner away and shot him to death.

IV. EVIDENCE AND DISCUSSION:

1. OTTO PESCHKE

Nationality:	German
Age:	25
Military Status:	Private
Party Status:	Not shown
Military Status:	Corporal, later Sergeant
File:	17
Findings:	C
Sentence:	Life imprisonment

Evidence for Prosecution: On 13 September 1944, 2nd Signal section of Lineal Artillery Regiment 100 was attached to the division at Furth, Germany, under the command of Captain August Jacobs (R 1, 13, 60, 68, 59, 66). PESCHKE was then a corporal in this section (R 31, 32, 34, 38, 67). On 13 September 1944, an Allied flyer, believed to have been a member of the United States Army, shown by the evidence to have been a uniformed member of the United States Army, was not positively identified in the evidence, was captured by members of the German Army in the vicinity of Furth and was interrogated by Lieutenant Jacobs (R 7, 8, 10, 31, 37, 38, 42, 44, 45, 48, 52, 55, 57, 58, 61, 62). This prisoner of war was unarmed, offered no resistance, and made no attempt to escape (R 8, 38, 37, 41, 48, 51). Lieutenant Jacobs, in the presence of SCHMITE, several soldiers and several witnesses, ordered PESCHKE to take the prisoner away (R 8-10, 25). Then PESCHKE, armed with a machine pistol and walking immediately behind the prisoner with two other soldiers, both unarmed and walking beside the prisoner, escorted him down a road (R 11, 29, 31, 35, 43; R-12 1a). After the group had gone a short distance, PESCHKE shot the prisoner in the back with a burst of fire from the machine pistol (R 20-23, 28, 30, 34, 35, 43, 47, 48, 52; R-12 1b). The prisoner fell (R 36, 15, 16, 19; R-12 1c). PESCHKE then fired two

more bursts into the prisoner's head with the machine pistol. The shooting occurred about noon (R 20, 47). The prisoner's body was then buried a short distance away from the place of shooting, near a road and under a cherry tree (R 12, 13, 24, 45, 49, 52; P-Ex 1a). Three days later the body was removed and buried in a local cemetery (R 13, 24, 45, 52, 53). There was no Allied plane attack and no Allied bombing at Furth or its vicinity in September 1944 (R 13, 26, 39).

A stipulation was entered into among PESCHKE, SCHMITZ, the defense counsel and the prosecution and made of record that the individual shot by PESCHKE was dressed in the uniform of the United States Army (R 54).

Evidence for Defense: The above-stated evidence for the prosecution was not contradicted by the evidence for the defense in any material particular. PESCHKE testified that Lieutenant Jacques first ordered him to search the prisoner for weapons, that he did so, found no weapons on him and reported this to Lieutenant Jacques; that the latter then asked what was to be done about the prisoner (R 61, 65, 66; P-Ex 1a); that he (PESCHKE) then knew that existing orders of a higher command directed that prisoners of war be delivered to Division Headquarters (R 71, 75); that he and three other soldiers told Lieutenant Jacques that the prisoner should be taken to the Division so that he could be transferred to a prisoner of war camp, but that Lieutenant Jacques replied, "Nonsense, we have no gasoline. Peschke, shoot the man" (R 62, 75; P-Ex 1a, D-Ex 1a); that PESCHKE and the three other soldiers protested to Lieutenant Jacques against shooting the prisoner, saying, "The man cannot be shot; he has to be taken away, taken to the Division," but that Lieutenant Jacques repeated his order, adding, "Hurry up" (R 62, 63, 66, 71, 73-75, 80; P-Ex 1a, D-Ex 1a); that he (PESCHKE) then, unwillingly, carried out the order of Lieutenant Jacques, and afterwards reported to the latter the fact that he

had done so (R 63, 71; 2 35 1a); that Lieutenant Jacques was reported to have died after 13 September 1944 (R 78). PASCHE testified further that prior to 13 September 1944 he had heard that Reichsminister Goebbels had had an announcement made by radio that all captured American flyers were to be shot (R 72).

Sufficiency of Evidence: There is no material conflict in the evidence. With respect to the defense of accused PASCHE that he acted in obedience to superior orders and the evidence offered in support of that defense, his own testimony shows that he was aware that the order given him by Lieutenant Jacques that the prisoner was illegal. PASCHE, himself, testified that he had knowledge of an existing order of higher authority which required that prisoners of war be delivered to Division Headquarters, and that he, PASCHE, with three other soldiers proceeded to Lieutenant Jacques that this was what should be done. Therefore, the evidence establishes that accused PASCHE had clear knowledge that the order of Lieutenant Jacques that the prisoner be shot was itself a violation and disobedience of an existing order of higher command in the German Army. The Court must be presumed to have given full consideration to the fact that the accused PASCHE killed the prisoner in execution of an order given directly to him by his commanding officer, that the shooting took place at a distance of several hundred meters from and was directly out of the view of the superior, and that he knew of the possible consequences to himself of disobedience of that order. That the Court did so is indicated by its imposition of a sentence of life imprisonment instead of the death penalty (See Section V, cont.).

Petitions: A Petition for Review GDS # 23 April 1947, 2D filed after the date of conviction, 3 April 1947, was filed by Claudio D'Alcala, attorney for accused PASCHE, on the ground that the sentence of life imprisonment is excessive in that GDS accused

acted under direct order of superior officer and his action and conduct did not warrant the heavy sentence pronounced by the Court." The measure of responsibility to which the accused PESCEFF should be held for his illegal act was proper for the Court to determine in fixing the sentence. That the Court fully weighed the elements on the basis of which the Petition for Review was filed must be presumed and is indicated by the fact that the Court did not sentence the accused PESCEFF to the death penalty, as has been pointed out above. Therefore, the Petition for Review is not concurred in. There are no Petitions for Absconder.

3. JOSEF SCHWITZ

This accused was acquitted (R 97).

V. QUESTIONS OF LAW:

Superior Orders: This accused PESCEFF acted under an order of his superior officer, Lt. Colonel Jackson, was not presented as a legal defense, as he held but only in extenuation, as has been pointed out above. Again, it is noted that, in respect of extenuation, the Court gave this element full consideration and weight in the circumstances concerned.

Compliance with superior orders does not constitute a defense to a charge of having committed a war crime (Trial Henry Wirz, 40th Congress, 2d. Sess. House of Representatives, Ex. Doc. No. 23, p. 512; Oppenheim, International Law (1907 ed.) Vol. II, p. 159, par. 253; Llandovery Castle Case, 16 Int. Jour. of Int. Law, p. 708; United States v. Deminibus Thomas, Dec. 1945; United States v. Alfons Klein et al. (Hadamar Murder Factory Case), Vol. 1946). This rule is followed in Anglo-American jurisprudence (Michell v. Harmony, 13 How. 115; Manual for Courts-Martial, U.S. Army (1938), par. 148).

Examination of the entire record fails to disclose any error or omission which resulted in injustice to the accused. It also appears the Court had jurisdiction of the persons of the accused

and of the subject matter.

VI. CONCLUSIONS:

1. It is recommended that the findings and sentences be
accused Otto PISCONE be approved.

2. Legal Forms Nos. 12 and 13 be accomplished this result are
attached hereto, should it meet with approval.

10/ Raymond J. Weisman
Raymond J. Weisman
1934, Inf.
Post Trial Branch

Having examined the record of trial, I concur:

10/ C. F. Straight
C. F. STRAIGHT
Deputy Judge Advocate
for War Office