

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

10 December 1947

UNITED STATES)

v.)

Case No. 12-946

Erich WIPPERMANN)

REVIEW AND RECOMMENDATIONS

I. TRIAL DATE: The accused was tried at Dachau, Germany, during the period 16-23 May 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars No. 1: In that Erich WIPPERMANN, a German national, did, at or near HILDEN, Germany, on or about 16 April 1945, wilfully, deliberately and wrongfully kill two members of the United States Army, believed to be 2nd Lt. Hugh L. McINNIS, ASN 0555568, and T/4 Robert K. WITTING, ASN 39194659, who were then unarmed and surrendered prisoners of war in the custody of the then German Reich, by shooting them with a gun.

Particulars No. 2: In that Erich WIPPERMANN, a German national, did, at or near HILDEN, Germany, on or about 16 April 1945, wilfully, deliberately and wrongfully, encourage, aid, abet and participate in the killing of a member of the United States Army, believed to be Pfc. Rex Sabin, ASN 17078210, who was then a surrendered and unarmed prisoner of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: On 16 April 1945, an American tank was set afire by enemy action near HILDEN, Germany. Three crew members surrendered to accused WIPPERMANN and members of his command. The three crew members were marched to the edge of a ditch near the burning tank. All three were shot by WIPPERMANN. One of the three who still showed signs of life was shot by Eberhard Hagenbuch.

IV. EVIDENCE AND RECOMMENDATIONS:1. Erich WIPPERMANN

Nationality: German

Age: 29
Civilian Status: Merchant
Party Status: None
Military Status: Second Lieutenant, German Army
Place: WC
Findings: G
Sentence: 20 years, commencing 27 April 1945

Evidence for Prosecution: Two witnesses stated in their extrajudicial sworn statements that on 16 April 1945 they saw an unknown German officer, accompanied by three or four German soldiers, march three surrendered tank crew members to the edge of a nearby ditch and that they saw the officer shoot two of the three tank crew members (R 28, 31B, 42; P-exs 6, 7, 10). One of the foregoing witnesses heard the officer order one of the soldiers to shoot the third tank crew member and saw the soldier carry out the order (R 28, 31a; P-exs 6, 7). A third witness stated in his extrajudicial sworn statement that he saw the bodies of the three tank crew members in a ditch on the day following the shooting, and that he was told by a Russian laborer that a German officer, accompanied by a few German soldiers, had lined them up and fired a shot into the head of each (R 48; P-ex 13). Two additional witnesses stated in their extrajudicial sworn statements that they saw the accused and Hagenbuch standing on the edge of a ditch containing the bodies of three American soldiers; that they heard one American moan; and that they saw Hagenbuch shoot the moaning American (R 44, 56; P-exs 11, 22).

Hagenbuch testified that he saw the bodies of the three Americans in the ditch; that he believed them to be dead; that he fired a shot at one of them; and that he did not see the accused at that time (R 236-238).

A witness testified that he was present when Hagenbuch was questioned a few days before the trial; that he heard Hagenbuch say he shot one of the Americans who was still moaning in the ditch; and that the accused was present at the shooting (R 241, 242, 244, 245).

The accused asserted in his extrajudicial sworn testimony that he shot three tank crew members as they jumped out of the ditch to attack him; that he ordered Bachmann, a soldier, to fire into the bodies of two of the three tank crew members to make sure of their death; and that Bachmann complied with his orders (R 52; P-Lx 18, pp. 4, 5).

Medical Department Form 528 relating to the three bodies shows that each body received one gunshot wound in the back part of the head, and one body received an additional gunshot wound in the face and that death was caused by such wounds (R 54; P-Lx 19-21).

Evidence for Defense: A witness testified that prosecution witnesses who furnished extrajudicial sworn statements (P-Lx 6, 7, 10) could not, from where they stood, have seen a man of ordinary height standing at the bottom of the ditch which contained the bodies of the three tank crew members (R 97, 104; D-Lx 5, 7). The accused testified that he was searching for three tank crew members when Bachmann shouted, "Attention Lieutenant"; that he saw a soldier jumping out of the ditch with a pistol in his hand; that he fired with a machine pistol at this soldier and two others who subsequently jumped up; and that his extrajudicial sworn statement (P-Lx 10) was correct except for the statement to the effect that Bachmann fired on the soldiers in the ditch (R 144, 145, 154).

Bachmann stated in his unsworn pretrial statement that he was about 80 meters from the ditch when he saw a soldier jump out of it; that he shouted, "Look out, Lieutenant"; and that the accused then fired with a machine pistol (R 191; D-Lx 12).

The witnesses testified that they later heard Bachmann claim to have saved the accused's life (R 196, 197).

An additional witness testified that he saw two tank crew members running away from the burning tank and that he later heard the accused say that he almost lost his life (R 213, 214, 226).

Sufficiency of Evidence: There is ample evidence to justify a conclusion by the Court that the accused deliberately shot the American soldiers at a time when they were surrendered and unarmed.

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

Petitions: Petitions for Review were filed by Chief Defense Counsel Captain Frank E. Morse, 26 May 1947, and 1 December 1947; and by defense counsel Captain Frank E. Morse, Major Alfred W. Wyatt, Sr., and Max Rau, 26 August 1947. A Petition for Clemency was filed by Wilhelm Walther, 26 May 1947. Attached to the last mentioned petition is a statement by Chief Defense Counsel Captain Frank E. Morse to the effect that the Allegations made by Walther in paragraph 2 of his petition are based on a misunderstanding of the circumstances.

Recommendations: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

Jurisdiction: The jurisdiction of the Court to try the accused was challenged on behalf of the defense (R 13-12). The first objection was on the ground that the accused was a prisoner of war and as such he was entitled to a trial by courts-martial, pursuant to Article 63, Geneva Convention of 27 July 1929, which provides that:

"Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power."

This question was thoroughly discussed in the Lautzenhausen Concentration Camp case, United States v. Lautzenhausen, et al., Opinion of DCA7C, February 1947. In the Lautzenhausen case, the question was resolved in favor of jurisdiction of the Court and reliance was placed on the Yamashita case, 37 Supreme Court Reporter 340, wherein it was stated:

"But we think examination of Article 63 in its setting in the convention plainly shows that it refers to sentence 'pronounced against a prisoner of war' for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant."

The second objection to jurisdiction of the Court was on the ground that the offense was committed in the British Zone of Occupation in Germany. War criminals, bandits, and pirates are the common enemies of all mankind and all nations have an equal interest in their apprehension and punishment for their violations of international law. Concerning this question, it

is stated in "Whiston's Law of Naval Law," Volume 1, Sixth Edition, at page 263, that every independent state has the judicial power to punish "piracy and other offenses against the common law of nations, by whosoever and wheresoever committed." Military Government Courts have jurisdiction over the nationals of any country who are in the United States Zone of Occupation, except as to certain classes of Americans and other nationals, e.g., military personnel, which are not pertinent to the jurisdictional question here involved. Concerning jurisdiction over war crimes, no limitation is imposed. (See Sections 5-200.2 and 5-200.3, Title 5, "Legal and Penal Administration," of "Military Government Regulations," published by Headquarters, US Forces, European Theater (13 December 1945). Concerning the general question of universality of jurisdiction over war crimes see "Universality of Jurisdiction over War Crimes," by Cooley, California Law Review, Volume XXXVI, June 1948, No. 2, pp. 177-216.

It may be the defense intended to attack the jurisdiction of the Court on the ground that the accused could not be tried in the United States Zone of Occupation unless certain administrative steps were taken as provided by Section 4, Article III, Central Council Law no. 10, which provides:

"4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article I) unless the fact of their apprehension has been reported in accordance with Section 1 (b) of this Article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned."

The defense failed to make a showing that the provisions in question were applicable to this accused even from an administrative point of view. In any event, the provisions in question are merely administrative and not jurisdictional. Failure to strictly comply therewith would not have

affected the jurisdiction of the Court. Section 2 of the same article of that law provides:

" 2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedures therefor shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of August 8, 1945."

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

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. Naval Forms Nos. 15 and 16 to accomplish this result are attached hereto, should it need with approval.

Having examined the record of trial, I concur,
this _____ day of _____ 1945.

THOMAS G. LEWIS
Major, Cavalry
Post Trial Branch

G. E. STANLEY
Lieutenant Colonel, JAGD
Deputy Judge Advocate
for War Crimes