

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

18 December 1947

UNITED STATES)

v.)

Otto BEHME, et al.)

Case No. 12-658

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 4-5 November 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Otto BEHME and Waldemar FELDMEIER, German nationals, did, at or near HELMSTEDT, Germany, on or about 30 May 1944, 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: On about 30 May 1944, an American flyer, believed to be Staff Sergeant William K. Forsythe, ASN 13126702, landed by parachute uninjured near the town of Lelm, Germany. He was mistreated by members of a German bomb disposal squad, but received only minor injuries and was taken to the office of accused BEHME, who was mayor and Ortsgruppenleiter. Accused BEHME and policeman Timmer then took the flyer by automobile to the Landrat's office at Helmstedt, Germany, where the Landrat and a Gendarmerie Captain Crome ordered accused FELDMEIER to follow a police car carrying policeman Timmer and the flyer on a road toward nearby Marienthal airport and to kill the flyer in a forest along the way. This order was executed by accused FELDMEIER by ordering the flyer to walk along a forest path and, with a pistol, shooting him from behind. He then fired two or more shots into the body on the ground. Accused FELDMEIER then delivered the corpse to the airport.

Accused BEHME was acquitted. Accused FELDMEIER relied entirely upon the defense of superior orders.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Otto BEHME

This accused was acquitted (R 154).

2. Waldemar FELDMEIER

Nationality:	German
Age:	37
Civilian Status:	Merchant's Employee
Party Status:	Member of Nazi Party with position of Kreis Organization Leader
Military Status:	None
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: Schmidt testified that on 30 May 1944 in the vicinity of Lelm, Germany, he saw three flyers parachute from a disabled plane; that he went to the one who landed nearest his house; and that this flyer was mistreated by accused BEHME and by members of a bomb disposal squad, but received only minor injuries and was taken away on foot toward Lelm, Germany (R 8-10).

Former policeman Timmer identified the accused in Court (R. 17) and testified that he saw a flyer parachute from a plane on 30 May 1944 and on the way to the field where the flyer landed, he met a crowd of people taking the flyer to accused BEHME's apartment (R 18). Later the witness went with accused BEHME in his car to take the flyer to Helmstedt, Germany, where the flyer was registered by the Landrat office. The witness was then instructed to accompany the flyer to Air Corps Headquarters (R 21) and was told he would travel in a truck used as a personnel carrier and that another man would follow in his own car (R 24). When the witness left Helmstedt, the accused and accused BEHME followed with BEHME driving and on the way both cars stopped at a signal from the car behind (R 25, 27). The car in which the witness and the flyer were riding was driven 50 to 80 meters into a side road and stopped again (R 27). This was in a forest. The accused appeared and ordered the witness to walk along the road with the flyer and after about 20 paces the accused shot and killed the flyer from about five

paces behind (R 28). The accused then fired two or more shots into the body (R 29). The corpse of the flyer was then loaded into the truck and the accused told the witness that the body would be taken to the air base (R 30). This witness admitted on cross-examination that he had moments when he could not remember details clearly (R 35).

Dreier, former police clerk at Helmstedt, identified the accused in Court and testified that in May 1944 he recalled that a flyer was brought in by policeman Timmer (R 54) and that the occasion was on 30 May 1944. The witness testified that he registered the flyer who was an American. The witness identified the paper on which he registered the flyer and which bore the flyer's signature as Staff Sergeant William K. Forsythe and the serial number 13126702. The witness further testified that he instructed Timmer to take the flyer to Marienthal airport (R 55, 56; P-Ex 6); and that the accused was not a policeman, but was frequently at police headquarters and always showed particular interest when American flyers were brought in (R 58).

Mueller identified the accused in Court (R 65) and testified that he was an auxiliary policeman in May 1944 and was ordered to drive a car to pick up a flyer at the Landret office and was told by Captain Crome that the accused would be the transport leader (R 66); that after the policeman and the flyer got into his car the accused came and told him to drive along and that he, the accused, would follow in a passenger car (R 67); that the witness drove ahead and accused followed him by 50 to 60 meters; that during the trip the policeman in the back signaled him to stop (R 68); and that the policeman and the flyer got out of the car and the accused and his driver got out of their car (R 69). The policeman with the flyer turned out on a dirt road into the forest and the accused with his driver followed them. A short time later he heard several shots. The witness then got out of the car, but met the policeman who told him to back the personnel carrier into the forest road. This was done and the witness saw the flyer lying on the ground and the accused stood near the body with his driver a little farther away. The witness identified accused BURME as the driver (R 70). The witness further testified that the accused had a pistol in

his hand; and that then the accused and BSEME loaded the flyer's body onto the personnel carrier (R 71). The accused got into the car with the witness and told the witness to drive to Marienthal airfield. The flyer's body was unloaded by soldiers outside the airport. There had been no sound or movement from the body which had been in the car about 30 minutes. The witness saw no sign of life in the body after it was unloaded (R 72, 73).

Accused BSEME stated in his extrajudicial sworn testimony that the accused shot the flyer twice, and that the flyer did not run (R 80; P-Ex 7 pp. 2, 6). Accused BSEME gave substantially the same testimony at the trial (R 127), and also testified that he helped to load the body of the dead flyer on the truck (R 135).

The accused stated in his extrajudicial sworn testimony that he killed the flyer with a pistol shot through the heart from the back as the flyer walked along the forest path. He fired two more shots into the body as it lay on the ground and he then delivered the corpse to the airport (R 82; P-Ex 8A pp. 6, 7). The accused testified that he killed the flyer in the forest off the road from Helmstedt to Marienthal airfield (R 103-108).

After the findings were announced, the prosecutor stated to the Court that there was evidence of a prior conviction and sentence to life imprisonment of the accused by a General Military Government Court (R 155) for the offense of participating in the killing of four Allied airmen in the case of United States v. Dregger, et al., Case No. 12-3205. The offense for which the accused was convicted in the prior case involved a different incident than that in the instant case.

Evidence for Defense: The accused stated in his extrajudicial sworn testimony that his superior, Captain Crome, ordered him to shoot the flyer as a reprisal act because of some local people who had been shot by low flying planes. He further stated that Crome said that the order came from Higher Headquarters. He further stated that Crome arranged for the shooting and designated the place where the flyer must be shot, and that if he had not obeyed the order he would have been tried by a military court (R 82; P-Ex 8A pp. 3,4).

Higher Headquarters, and police officers (A 99-101); that he was ordered to report to Gendarmerie Captain Crome each time that an air raid alarm

was sounded; that he reported under such orders on 30 May 1944 (R 102); that Crome ordered him to shoot the flyer as a reprisal and that the flyer should be shot on the road from Helmstedt to Marienthal (R 103); that he was ordered to have the flyer walk in front and to shoot him through the heart from behind at a distance of from five to ten meters; and that he first saw the flyer at the Landrat's office in the custody of Timmer (R 104). The Landrat wrote some kind of an order for the shooting which the accused was allowed to glance at and was to deliver to the military authorities after the shooting (R 106, 107). The accused further testified that he picked up quite a few other flyers, but that this was the first case in which he killed one; that after the shooting he delivered the document from the Landrat to an officer at the airport and delivered the corpse there according to orders (R 109); and that he then reported to the Landrat and Captain Crome (R 110).

After the Court had announced its findings, the accused made a statement to the Court in which he declared that he had told the whole truth and that he was convinced that the orders he had received were legal and that if he had not carried out the orders he would have been severely punished (R 155).

Sufficiency of Evidence: The evidence for the prosecution and the admissions of the accused are amply sufficient to support the findings of guilty. With regard to the evidence offered in support of superior orders, there was no evidence to corroborate the testimony of the accused, and it was clearly shown that the killing was not done in the presence of any superior of the accused; that the orders relied upon by the accused were those of the Landrat and a police captain at a distant point; and the Court, if it believed that the accused had in fact received such orders, might well have concluded from the evidence that the accused willingly killed the American flyer; that his desire to please his superiors was stronger than other considerations; that he did not act under immediate compulsion; and that he failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

is not excessive.

Petitions: A petition for Review was filed by Chief Defense Counsel, Major William A. Oates, 21 November 1947.

No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

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

Superior Orders: Accused FRIEDMANNER sought to justify his actions by offering evidence to show that he was acting in compliance with "superior orders". Compliance with superior orders does not constitute a defense to the charge of having committed a war crime (Trial of Henry Wirz, 40th Congress, 2nd Sess., House of Representatives, Ex. Doc. No. 23, page 812; Vol. II, Sixth Edition, Oppenheim, "International Law", paragraph 253, page 453; Llandovery Castle Case, 16 American Journal of International Law, page 708; United States v. Thomas, opinion DJATC, December 1945; and United States v. Klein, et al., (Hadamar Murder Factory Case), opinion DJATC, February 1946; and French Republic v. Wagner, et al., Court of Appeals (France), July 1946). This rule is followed in Anglo-American jurisprudence (Mitchell v. Harmony, 13 How. 115, and "Manual for Courts-Martial, U.S. Army", 1928, paragraph 148).

Compliance with superior orders may, under certain circumstances, be considered in mitigation of punishment. However, an accused who seeks relief on such grounds assumes the burden of establishing (a) that he received an order from a superior in fact, directing that he commit the wrongful act, (b) that he did not know, or as a reasonably prudent person, would not have known that the act which he was directed to perform was illegal or contrary to universally accepted standards of human conduct, and (c) that he acted, at least to some extent, under immediate compulsion. Having satisfactorily established these elements, the amount to which his sentence should be mitigated depends upon the character and extent of the immediate compulsion under which he acted. (See London Agreement of 8 August 1945, Concerning Prosecution and Punishment of Major War Criminals

of the European Axis; FM 27-10, War Department, U.S. Army, "Rules of Land Warfare", paragraph 345.1, Change No. 1, 15 November 1944; Oppenheim, "International Law", supra, and the Llandoverly Castle Case cited therein; "Manual for Courts-Martial", supra; "Report to the President of United States", 7 June 1945, by Mr. Justice Jackson, U.S. Chief Counsel for the Prosecution of Axis Criminality; Extract from Goebbels' "The Air Terror of Our Enemies", found in footnote, page 53, "Military Occupation and the Rules of the Law", by Ernst Fraenkel; United States v. Bury, et al., opinion DJAWC, September 1945; United States v. Thomas, supra; and United States v. Beck, et al., opinion DJAWC, December 1946).

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 Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

V. H. McCLINTOCK
Attorney
Post Trial Branch

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

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