

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

11 March 1948

UNITED STATES)

v.)

Case No. 12-1182-2

Karl OTTO)

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period 1-6 May 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

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

Particulars: In that Karl OTTO, a German national, did, at or near NECKARSULM, Germany, on or about 22 March 1945, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of a member of the United States Army, believed to be Sgt. Roscoe HARVEY, 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 Karl OTTO, a German national, did, at or near DURRENZIMMERN, Germany, on or about 24 March 1945, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of a member of the United States Army, believed to be Capt. S. K. ANDERSON, who was then and there a surrendered and unarmed prisoner of war in the custody of the then German Reich.

CHARGE 3: Violation of the Laws and Usages of War.

Particulars: In that Karl OTTO, a German national, did, at or near NECKARSULM, Germany, on or about 22 March 1945, deny proper and adequate medical aid and attention to a wounded member of the United States Army, believed to be Sgt. Roscoe HARVEY, who was then a surrendered and unarmed prisoner of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: On about 21 March 1945, a group of six American

prisoners of war was fired upon by members of the local Leadership Corps at Neckarsulm, Germany. Four were killed. The two survivors, one of whom probably being Sergeant Roscoe Harvey, were brought to the nearby army barracks commanded by the accused. During the early morning of 22

March 1945, while the prisoners were being escorted to a train which was to take them to Frankfurt, they were fired upon by the same individuals who had participated in the killing of the first four prisoners. Sergeant Harvey, who had sustained a stomach wound, was then brought to the guard room of the Caserne. The accused was advised, at about 0900 hours of 22 March 1945, that the wounded prisoner needed immediate surgery. Despite repeated requests and attempts of qualified medical personnel to have the prisoner removed to the hospital, the accused refused to comply and denied the patient any form of medical care. He did not allow the prisoner's removal until about 1900 hours that evening, in a truck from which he had barred a medical attendant. After departing from the barracks, the truck was held up and the wounded prisoner was shot to death by unidentified gunmen.

IV. EVIDENCE AND RECOMMENDATIONS:

Karl OTTO

Nationality: German

Age: 49

Civilian Status: None

Party Status: Member of Nazi Party 1930-1936

Military Status: Lieutenant Colonel, German Army

Plea: NG, Charges I, II, III

Findings: NG, Charges I, II; G, Charge III

Sentence: 5 years, commencing 27 March 1946

Evidence for Prosecution: The accused, a lieutenant colonel in the Wehrmacht, was commanding officer of the military post and barracks at Neckarsulm, Germany (R 54, 55, 179). Two American prisoners of war, believed to be Captain Sven Anderson and Sergeant Roscoe Harvey, were brought to the accused's post by an air corps escort detail at about 1800 hours, 21 March 1945 (R 55, 57). These two prisoners were the only survivors of an attempted killing of them and four comrades, surrendered prisoners of war, by local members of the Leadership Corps (R 88, 89, 164, 165). All six were flyers who had been brought from Italy on

route to Frankfurt (R 18; P-Ex 1 p. 2). Denner testified that the accused asked the technical sergeant in charge of the detail when he intended to continue his trip with the two Americans, and was told that they would get under way at about 0500 hours the following morning (R 58). Shortly after 0500 hours on 22 March 1945 while the prisoners were being marched to the railroad station, they were fired upon by the same individuals who had shot their four comrades (R 58, 60). Both were wounded. Anderson escaped, and Harvey, suffering from a stomach wound, was brought back into the guard room of the barracks (R 60; R 22, P-Ex 2 pp. 23, 24).

Kasche testified that he had been a qualified physician since 1926 and at the time of the incidents in question was the troop doctor at Neckarsulm (R 33, 34). At about 0830 hours of 22 March 1945, the witness at the request of Lieutenant Denner examined Harvey and found shot wounds of the upper thigh and stomach. There were no wounds in the chest. The witness determined that the chances of survival were good, providing a prompt operation was performed (R 36, 37). He testified further that he told the patient he would be taken to the hospital for an immediate operation (R 37). He thereupon had the flyer placed on a litter and loaded into an ambulance which, however, turned back. Upon calling the accused to ascertain why, he was told that the patient was not allowed to be hospitalized, that the kreisleiter had forbidden medical treatment, and that witness could wind up in trouble (R 39). Kasche and Lieutenant Walz went to the accused's apartment and asked to have the wounded man removed to the hospital. The accused referred Kasche to the local kreisleiter, Drauz. The accused, Kasche and Walz went to the kreisleiter's quarters. The three found the kreisleiter in his quarters. An air force officer and Ortsgruppenleiter Endress were also there. Drauz suggested feeding the patient liquid for his stomach wounds, and then recommended poison (R 40, 41). Endress offered to shoot the American down in the cellar, whereupon the accused stated he would not have that done in his house. Drauz then told witness that the prisoner would be removed, and witness left. At about noon, he again ordered an ambulance to remove the patient (R 42). At 1500 hours he

ascertained that this had not been done. The following morning he called at the dispensary and was told the wounded man had been duly admitted. He later learned, however, that the prisoner had been brought in dead, with three additional bullet wounds in the chest (R 43, 44).

Denner further testified that in March 1945 he was a first lieutenant in the Wehrmacht, serving under the accused (R 54). On the morning of 22 March 1945 he entered the guard house and saw a wounded American sitting there. Upon declaring the prisoner would have to go to the hospital, he was told that the accused had ordered the prisoner to be kept there. Denner then went to see Dr. Kasche and, with his consent, brought the wounded man to him (R 58, 59). Denner further testified that after he had brought the American to Dr. Kasche, he was summoned to the accused's apartment; that the latter yelled at him for disobeying an order, and told him he had no right to take the prisoner to the doctor; and that, when he explained his unwillingness to see a man die of neglect, the accused expressed an inclination to throw the witness into jail for disobedience (R 60, 61).

Schneider testified that he was a master sergeant in the Wehrmacht in charge of wounded at the Neckarsulm hospital, under the command of Dr. Kasche. At about 0800 hours on 22 March 1945, he was present at the dispensary when a wounded American was brought in for examination. The accused came to the dispensary during the examination and inquired whether the patient was in pain. On being informed that he was, the accused suggested the prisoner be relieved of his pain by giving him water to drink. This suggestion was refused by the witness who pointed out the danger of such treatment for stomach wounds (R 80, 81).

Both Schneider and Denner testified that following Dr. Kasche's orders the American and a wounded German were placed in a vehicle for transportation to the hospital and that, as they started to drive off, the accused opened a window and ordered the American taken back (R 62, 81, 82). This was admitted by the accused in his testimony (R 212). Schneider also testified that he and Dr. Kasche made repeated and persistent attempts to

obtain permission of the accused to remove the patient to the hospital, but were told it would be done later. The accused refused to see anyone during the afternoon. Consequently, it was impossible to obtain his signature for an ambulance trip ticket. Later, after a fruitless interview with the accused in his apartment, Schneider left for Neckarsulm and on returning learned the American had been shipped out at about 1930 hours in a truck from which a medical attendant had been barred by the accused (R 80-82). This was admitted in Court by the accused (R 169). Schneider later learned that the prisoner had arrived at the hospital dead, with two bullet wounds in his chest (R 86, 87). The prisoner was an American from Brooklyn named Roscoe Harvey (R 79, 80, 99A).

The accused admitted in Court that he was familiar with the Geneva Convention; that he knew a wounded prisoner of war is entitled to prompt care and attention (R 181); and that he was informed by Dr. Kasche on the morning of 22 March 1945 that the American needed an operation (R 182).

Buerger, a German lawyer, qualified as an expert and testified that in his opinion, on 20 July 1944, a gauleiter had no authority over the internal administration of army units and had no legal right to order the commanding officer of a military post to refuse medical care to a wounded prisoner of war (R 115). The accused admitted during his testimony his failure to comply with the Geneva Convention (R 208).

Evidence for Defense: The accused, a professional soldier (R 162), testified that in the evening of 21 March 1945 the two survivors of the original shooting were brought at his orders into the guard room, where they remained until the following morning (R 165); and that, shortly after the prisoners had left the caserne the next day, he heard shots and was then informed by a guard that one prisoner had escaped (R 166). The two local Ortsgruppenleiter arrived shortly and informed him they had shot the other prisoner during an escape attempt. A guard later informed him that the other American was still alive. However, the accused did not send him to the hospital because he did not want the two Ortsgruppenleiter to be given another opportunity for violence. Thereafter, following a telephone call to the gauleiter made by one of the two Ortsgruppenleiter, the accused

Commissioner of the area (R 167). The Kreisleiter suggested poison, but the accused refused to allow the Kreisleiter to see the flyer. When Dr. Kasche called, the accused promised to send the patient to a hospital. However, when he saw the truck leaving with the American, he had the prisoner brought back because he was still afraid that the Ortsgruppenleiter intended to shoot the flyer (R 168). Several phone calls were received from Endress during the day inquiring as to whether the patient had been removed. These calls increased his suspicions. Nevertheless, he informed Endress the flyer would be removed in the evening. The accused ordered a truck from the motor pool at 1900 hours for the purpose of transporting the patient. He did not assign a medical attendant merely because he thought the driver and one rider were sufficient to handle the situation. He learned later that the car had been stopped and the patient shot, but denied sending out a patrol to do the shooting (R 169, 170). The accused further testified that even a guard of 20 men would have been unable to protect the flyer against the Ortsgruppenleiter. The gauleiter could interfere in the internal administration of an army post (R 185, 186). The accused denied ordering that the American be refused medical care, but admitted that he had ordered all persons to stay away from the prisoner (R 194). He denied recommending water for the prisoner (R 197, 198) and maintained that his violation of the Geneva Convention was not motivated by any bad intentions (R 208).

Sufficiency of Evidence: The evidence established a clear case of deliberate mistreatment of a wounded American prisoner of war. It is also clear that the accused knew that the victim was in dire need of prompt medical attention. The evidence to support the professed fear of the Leadership Corps on the part of the accused is not persuasive. The accused willingly co-operated with the Nazi officials.

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

Petitions: No Petitions for Review nor 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 person of the accused and of the subject matter.

Legal Sufficiency of Charge and Particulars: A question not raised during the course of the trial, but which merits discussion, is whether Charge III and the particulars thereunder are legally sufficient. It is not alleged in the particulars in specific terms that the acts of the accused were "illegal" by actual use of that word or words of similar import, such as "wrongful" (United States v. Becker, et al., opinion DJAWC, May 1947, commonly known as the Flossenburg Concentration Camp Case).

It might be contended that any such deficiency in the particulars is cured by (1) the recital "Violation of the Laws and Usages of War" in the title of the charge, or (2) the use of the words "deny proper and adequate medical aid" in the particulars under the charge. It is not believed that the first contention would be of much merit. As to the second possible contention, it is pointed out that an affirmative obligation is imposed upon the accused by the law of war to furnish proper and adequate medical aid and attention to a wounded prisoner of war in his custody.

Article 1 of the Geneva (Red Cross) Convention of 27 July 1929 provides in part as follows:

"Officers, soldiers, and other persons officially attached to the armies who are wounded or sick shall be respected and protected in all circumstances; they shall be humanely treated and cared for without distinction of nationality by the belligerent in whose power they are

"Subject to the care that must be taken of them under the preceding article, the wounded and sick of any army who fall into the power of the other belligerent shall become prisoners of war, and the general rules of international law in respect to prisoners of war shall become applicable to them."

Article 14 of the Geneva (Prisoners of War) Convention of 27 July 1929 provides in part:

"Prisoners affected with a serious illness or whose condition necessitates an important surgical operation, must be admitted, at the expense of the detaining Power, to any military or civil medical unit qualified to treat them."

...to be seen with the particulars, by the use of the phrase "deny proper and adequate medical aid and attention" to a wounded prisoner of war, allege a violation of the provisions of the law of war quoted above, which violation was of necessity illegal.

The Supreme Court of the United States in the case of *In re Yamashita*, 66 Supreme Court Report 340, stated:

"Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment. Cf. *Collins v. McDonald* ...258 U. S. 420, 42 S.Ct. 328, 66 L. Ed. 692."

Section 5-338, Title 5, "Legal Penal Administration" of "Military Government Regulations", published by Office of Military Government for Germany (US), 27 March 1947, provides:

"The proceedings shall not be invalidated, nor any finding or sentence disapproved, for any error or omission, technical or otherwise occurring in such proceedings, unless in the opinion of the Reviewing Authority, after an examination of the entire record, it shall appear that the error or omission has resulted in injustice to the accused."

It is apparent from admissions made by the accused in his testimony that he realized that his denial of the much needed medical aid and attention was a violation of the law of war. Irrespective of niceties of pleadings, it appears that the accused was fully apprised of the offence with which he was charged and that no injustice resulted to him in this connection.

Documentary Evidence: Defense counsel objected to the admission in evidence of a number of prosecution exhibits on the ground that they did not appear to be "sworn statements" on the face thereof. The objection was properly overruled. All of the documents challenged by the defense clearly showed that the witness had had an oath administered to him prior to the taking of the testimony, and all were properly signed before the officer taking the testimony. No prejudice was suffered by the accused.

Examination of the entire record fails to disclose any error or omission in the conduct of the trial which resulted in injustice to the accused.

VI. CONCLUSIONS:

1. It is recommended that the findings and sentence be approved.
2. Legal Forms Nos. 13 and 16 to accomplish this result, are attached hereto, should it meet with approval.


HERMAN PLATT
Attorney
Post Trial Branch

Having examined the record of trial, I concur, this 9th day
of April 1948.


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