

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

UNITED STATES)

15 September 1947

v.)

Case No. 12-1885

Franz WEISS)

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period 12-13 June 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Franz WEISS, German national, did, at or near EBNET, Germany, on or about 27 February 1945, wilfully, deliberately and wrongfully kill a member of the United States Army, believed to be Sgt. Felix W. KOLASINSKI, ASN 35331002, who was then and there a surrendered and unarmed prisoner of war in the custody of the then German Reich, by shooting him with a pistol.

III. SUMMARY OF EVIDENCE: During the afternoon of 27 February 1945, in the vicinity of Ebnet, near Freiburg, Germany, an American flyer, identified as probably being Sergeant Felix W. Kolasinski, parachuted from a disabled plane. After landing safely he surrendered to a German national. While being escorted to Ebnet, the accused WEISS, without provocation, twice shot the flyer. Death resulted from the wounds.

IV. EVIDENCE AND RECOMMENDATIONS:

FRANZ WEISS

Nationality:	German
Age:	47
Civilian Status:	Constructor of Houses
Party Status:	Unknown
Military Status:	Master Sergeant
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: On 27 February 1945, sometime during the afternoon, a four-engined airplane was abandoned by its crew after

of the crew parachuted safely into a woods a short distance outside the little town of Ebnet, Germany (R 9; P-Ex 2, R 31). Three men, a woodcutter named Anton Pfaff, a Pole and an unidentified third person were working near the spot where the aviator landed (R 31). The aviator raised his hands to these men in token of surrender (R 24; P-Ex 6, R 31) and was then searched and found unarmed (R 41). The flyer, Anton Pfaff and the Pole then started walking toward Ebnet (R 31, 32). While proceeding along the Ebnet road this group met the accused and a Sergeant Menzel, both of whom were stationed in Ebnet, approaching from the opposite direction (R 32, R 10; P-Ex 3, R 24; P-Ex 6, R 21; P-Ex 5). At the time the flyer was carrying his cap and gloves in one hand and a cigarette in the other (R 31, 32, 35, 40). When the accused was within about 15 to 20 meters of the captured flyer (R 32, 37) he aimed his pistol at the prisoner and fired, the bullet striking him in the head. The victim had done nothing to provoke this action (R 21; P-Ex 5). Upon being hit the wounded flyer fell forward (R 32, 44). The accused and Menzel both ran up to examine the body and Menzel asked the accused if the man was dead (R 32). The accused then fired another shot into the back of the flyer's head (R 32, 43, 21; P-Ex 5, R 24; P-Ex 6). In answer to the woodcutter's query as to why he had shot the flyer the accused responded, "He didn't deserve anything else" (R 32). It became common knowledge in Ebnet that the accused had shot the flyer (R 16).

The flyer's body was buried that night in the Ebnet cemetery (R 20; P-Ex 4, R 34). On 5 April 1946 the same body was exhumed and an autopsy performed (R 26; P-Ex 7, R 29; P-Ex 11). The conclusions contained in the autopsy report disclose that two gunshot wounds were found in the skull and the bone of the thumb on the right hand was shattered (R 26; P-Ex 7). An identification tag and a ring (R 28; P-Ex 10) taken from the body (R 29; P-Ex 11) indicated that it was that of Sergeant Felix W. Kolasinski.

The prosecution's case consisted of the oral testimony of two witnesses, Anton Pfaff and Fritz Klehr, and considerable documentary evidence.

Evidence for Defense: The accused, testifying under oath, admitted that he made the statement marked Prosecution's Exhibit 3 (R 10; P-Ex 3) and that this statement was in the main correct (R 47). His explanation of the shooting was in substance as follows: Walking with Menzel along the road from Ebnet he saw the flyer and the wood-cutter, Pfaff approaching. When at a distance of about three to five meters from the flyer he fired wounding him in the shoulder. He did this because he feared the flyer would shoot and hit him in the stomach (R 48). He then placed the wounded man in the custody of a Corporal Stark and left the scene to search for the parachute (R 49, 50). Upon his return he found that the flyer had been shot again through the head and was dead (R 48, 51). The accused learned that during his absence the flyer had moved and Corporal Stark, fearing the flyer would escape, fired at him and missed. At the same time another person, whose name the accused did not know, came out of the forest, shot the wounded flyer and killed him (R 51, 52).

Petitions for Clemency, hereinafter described, indicate that the victim did not die immediately from the shots inflicted by the accused. It appears therefrom that a third person subsequently came upon the scene; that the victim was seen to slightly move his head and that this third person fired a shot at the victim which may or may not have struck the flyer. The report of the autopsy performed on the victim's body indicates that, while a third shot may possibly have entered the body, the evidence almost conclusively shows that one of the two bullets which entered the head passed first through the thumb of the victim's hand, which was then being held in front of the head. The testimony of the witnesses before the Court, together with the conclusions in the autopsy report, established that the shots fired by the accused were sufficient to cause death. If a third shot actually was fired into the body, this could have been no more than a contributing cause of death, if in fact the flyer was not already dead.

Sufficiency of Evidence: The evidence is sufficient to establish that WEISS, without any semblance of justification or excuse, caused

in such a manner that to have drawn a weapon would have been impossible. The proof establishes all the essential elements of deliberate murder.

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

Petitions: A Petition for Review was filed by Robert M. Donihi, Chief Defense Counsel, on 13 June 1947. Petitions for Clemency were filed by Wilhelm Berboth, 9 September 1947; by Andreas Siebenhaar, two on 14 September 1947 and one on 18 September 1947; and by Karl Knoll, 19 September 1947. These will be discussed under Section V, post.

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.

Petitions for Review: As grounds for the Petition for Review there are set out six alleged errors. An examination of the record discloses that they are without merit. Reference is made to the claimed admission of improper evidence. It would appear the basis of this particular allegation was the presenting to the Court, prior to the trial, of a dossier which contained a copy of the charge and particulars and a statement in summary form of the evidence (R 2, 3; D-Ex 1). The ruling made by the Court to defense counsel's objection in this connection was proper. The dossier was in the nature of opening statement by the prosecution and intended as a guide for the assistance of the Court in considering evidence. Its use is provided for at page 401 of the "Manual for Trial of War Crimes and Related Cases", 15 July 1946.

The other grounds of the Petition for Review are likewise without merit. The accused was not denied counsel of his choice (R 2); nor is there any showing in the record that he was arbitrarily denied the appearance of any available witness. The Court's rulings both on questions of law and evidence, resulted in no injustice to the accused.

Petitions for Clemency: The evidence contained in the Petitions for Clemency is, on the whole, cumulative of the evidence before the Court concerning the possible intervening shooting. It is not shown whether, where or how a third bullet struck the victim's body. Under this evidence the Court would have been warranted in concluding that no intervening shot did in fact enter the body of the victim (cf United States v. Ernst Mueller, Case No. 12-485, 12 July 1946). The evidence is clear enough that, even if a third shot actually entered the body, the wounds inflicted by the accused would have caused death. Under such circumstances a person who inflicts the first injury may be found guilty of illegal killing, if it appears that the injury or wound inflicted by him would have caused death had there been no intervening act by another. (See 26 American Jurisprudence, title Homicide, Section 50, note 2.) On the basis of both logic and principle this is the rule which should be applied in cases of this character. It follows, therefore, that viewing the evidence and all possible inferences to be drawn therefrom in a light most favorable to the accused, there is no basis for setting aside the Court's findings and sentence.

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.

/s/ Anthony J. Albert
/t/ ANTHONY J. ALBERT
Attorney
Post Trial Branch

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

/s/ C. E. Straight
/t/ C. E. STRAIGHT
Lieutenant Colonel, JAGC
Deputy Judge Advocate
for War Crimes

AG 383 JAG

APO 757

13 February 1948

SUBJECT: Execution of Sentence in the Case of the United States vs.

Franz WEISS (Case No. 12-1885)

TO : Commanding General
First Military District
APO 1, US Army

Reference is made to letter, Hq USPET, AG 383 JAG-AGO, 26 February 1947, subject: "Designation of Prisons for War Criminals," and to the inclosed copies of the Order on Review in the above entitled case as to accused.

Franz WEISS

Upon compliance with the Order on Review the Certificate below will be completed and returned to the Deputy Judge Advocate for War Crimes, 7708 War Crimes Group, APO 407, US Army.

BY COMMAND OF GENERAL CLAY:

1 Incl:
1 Form No. 13 (in dup)

/s/ JOHN A. KLEIN
Colonel AGD
Adjutant General

Frankfurt 7175

CERTIFICATE OF COMPLIANCE

The sentence covered by the above described Order on Review was carried into execution at War Criminal Prison No. 1, Landsberg, Germany, on _____ 1947, at _____
(Date) (Hour)

(Signature and Rank)

(Organization)

(Countersignature and Rank
of Witnessing Officer)

PO NOT from