

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

REF/vmm

20 November 1947

UNITED STATES)

v.)

Case No. 12-2409

Heinrich FRANKE)

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period 18-22 September 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Heinrich FRANKE, a German national, did, at or near Engenhahn, Germany, on or about 18 March 1945, wrongfully kill 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 17 March 1945, an American flier was delivered to the SS police battalion in Idstein, Germany. Major Bundke, the commanding officer of the battalion, deciding to send him to the prison camp at Oberursel, had him lodged for the night at the local police station. The next day the accused FRANKE was sent to the office of Zimpelmann, the acting mayor, to pick up the flier with orders to march the flier to Oberursel. The accused shot and killed the flier on the road from Eschenhahn to Engenhahn.

IV. EVIDENCE AND RECOMMENDATIONS:

Heinrich FRANKE

Nationality:	German
Age:	48
Civilian Status:	Farmer
Party Status:	Member Nazi Party
Military Status:	SS Corporal
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: On about 17 March 1945, an American flier was brought to the SS police battalion, of which Major Bundke was commanding officer, in Idstein, Germany. Bundke, after deciding to send the flier to Oberursel, had him placed in the police station in the City Hall (R 6; P-Ex 2A). The next day the accused was sent to the office of Zimpelmann, the acting mayor, to pick up the flier (R 19, 32, 6, 12; P-Exs 2A, 9A) with written orders to march the flier to Oberursel, a distance of 25 kilometers (R 16-17, 32, 7, 29; P-Exs 3 p. 4, 18A p. 4). At Eschenhahn, the flier requested a drink of water from Mrs. Hansan, and over the accused's objection, she gave it to him (R 23, 24; P-Exs 10A, 11A). Hilfrich, a bystander, asked the accused where he was going and received the answer, "to Oberursel". Hilfrich told him that he was going in the wrong direction and that he should go in the opposite direction. The accused replied, "We will get there where we want to go" (R 24; P-Ex 11A). Shortly thereafter the flier was found shot to death and lying on the forest road between Eschenhahn and Engenhahn (R 33-34, 23, 24, 25, 29; P-Exs 10A, 11A, 12A, 18A p. 4). The accused, in admitting killing the flier, stated in his extrajudicial sworn statement that he shot the flier from close range with the pistol only a few centimeters from the back of the flier's head. The accused also stated therein that the flier was trying to escape, but admitted he did not call "Halt" or fire into the air before he shot the flyer dead (R 29; P-Ex 18A p. 4).

The flyer was buried at Engenhahn cemetery (R 25; P-Ex 13A). The body was exhumed and the pathologist gave as his opinion that the cause of death was a gunshot wound with entry in the back of the neck and exit at the nose (R 26; P-Ex 14).

The accused testified regarding the details of the circumstances of the killing to the effect that the flyer "wanted to run towards the forest"; that there was only a ditch between the road and the forest; that the flyer was six to eight meters ahead of the accused when the accused started to run after him; the accused could not remember whether he called out to the flyer to stop; that he caught up to within two meters of the flyer with the flyer continuing to run when he stopped and shot;

and that he intended to fire a warning shot but hit the flyer (R 34, 35). He shot the flyer in the back of the neck and the flyer fell into the ditch because the flyer had just started to jump across the ditch. He repeated that the flyer was still running when he fired the shot, and also that the flyer "ran into the forest" and "He wanted to run towards the forest" (R 36). By way of repetition the accused further testified that the flyer was six to seven meters from him when he first observed the flyer running (R 39); and that he had closed the distance to two meters when he fired the shot (R 40, 44).

At the occupation by the American Army the accused fled to the French Zone and lived under an assumed name until finally arrested in August 1947. He admitted that he killed an English flyer on 3 February 1945 under circumstances which he described with striking similarity to his version of the killing in this case (R 29; P-Ex 18A p. 2-4).

Former Mayor Zimpelmann testified that sometime after the killing the accused came to him and told him that nothing was to be said about a SS man having picked up the flyer (R 20). The accused told witness that this was on order (R 22).

Note: - A perusal of a German map of the area, including Idstein, Oberursel, Eschenhahn, and Engenhahn, shows the following: - (1) Oberursel lies almost directly east from Idstein, (2) Eschenhahn lies directly south from Idstein, and (3) Engenhahn lies south of Eschenhahn.

Evidence for Defense: The accused testified that when they stopped in Eschenhahn, he and not the flier requested water for the flier; that he took the road to Engenhahn from Eschenhahn because there was more opportunity to take cover from fliers on that road and that there was more traffic and a better chance to catch a ride in going by way of Weisbaden (R 33). The accused allowed the flier to remove his heavy boots and carry them over his shoulder. After walking one or one and a half kilometers, the accused stopped on the side to relieve himself. At that time the flier threw his boots down and ran away. The accused called "Stop", and meant to give the flier a warning shot, but the shot hit the flier (R 34). The accused could not grab the flier because he ran into the forest and also

because he, the accused, had no strength in his left hand. The accused continued on the way to Engenhahn and reported to the mayor there that he shot the flier while escaping (R 36).

Sufficiency of Evidence: The accused was the only eyewitness to the actual killing, and he contended in his extrajudicial sworn statement and at the trial that the flyer was killed to prevent an escape. His testimony, however, contained many contradictions and impossibilities. He contended that the flyer tried to run into the forest and at one place said that the flyer had run into the forest. He said that only a ditch separated the road from the forest; that the flyer at first was six to eight meters ahead and that he had closed the distance to two meters, which with both men running as testified by the accused must have required considerable distance into the forest. Yet the flyer fell into the roadside ditch when the accused shot him. There is no indication that the flyer was injured. Under these circumstances, it is not probable that the accused, who was toward 50 years of age, could out run him. A witness found the body lying on the road. The accused attempted to influence a witness to conceal evidence of his connection with the killing. He also fled and lived under an assumed name, indicating an attempt to avoid apprehension.

The Court might well have concluded from the evidence that there was no attempt on the part of the flyer to escape, and that the killing was premeditated.

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

Petitions: No Petitions for Review were filed.

Petitions for Clemency were filed by Dr. May, 4 October 1947; accused's wife, Elisabeth Franke, 8 October 1947; and by Captain William A. Gordon, defense counsel, 22 October 1947.

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.

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.

h. h. Welch
ROBERT E. WELCH
Attorney
Post Trial Branch

Having examined the record of trial, I concur, this 18th day
of February 1948.

E. E. Straight
E. E. STRAIGHT
Lieutenant Colonel, JAGD
Deputy Judge Advocate