

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

WCT Report
586

10 December 1947

UNITED STATES)

v.)

Erich WIPPERMANN)

Case No. 12-946

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: 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. WHITING, 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 17078810, 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
Plea: NG
Findings: G
Sentence: 20 years, commencing 27 April 1945

Evidence for Prosecution: Two witnesses stated in their extra-judicial 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, 31B; 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).

.. 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-Ex 18, pp. 4, 5).

Medical Department Form 52B relating to the three bodies shows that each body received one gunshot wound in the back part of the head, that one body received an additional gunshot wound in the face and that death was caused by such wounds (R 54; P-Exs 19-21).

Evidence for Defense: A witness testified that prosecution witnesses who furnished extrajudicial sworn statements (P-Exs 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-Exs 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-Ex 18) 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-Ex 12).

Two 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 R. Myatt, 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 10-12). 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 Mauthausen Concentration Camp case, United States v. Hans Altfuldish, et al., Opinion of DJAWC, February 1947. In the Mauthausen case, the question was resolved in favor of jurisdiction of the Court and reliance was placed on the Yamashita Case, 66 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, brigands, 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 "Wheaton's International Law," Volume I, Sixth Edition, at page 269, that every independent state has the judicial power to punish "piracy and other offenses against the common law of nations, by whomsoever 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 American 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 5-300.2 and 5-300.3, Title 5, "Legal and Penal Administration," of "Military Government Regulations," published by Headquarters, US Forces, European Theater, 30 November 1945). Concerning the general question of universality of jurisdiction over war crimes see "Universality of Jurisdiction over War Crimes," by Cowles, California Law Review, Volume XXXIII, June 1945, No. 2, pp. 177-218.

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, Control 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 IV unless the fact of their apprehension has been reported in accordance with Section I (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 the law provides:

" 2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedures thereof 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 8 August 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. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

THOMAS C. WARMON
Major, Cavalry
Post Trial Branch

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

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

HEADQUARTERS
EUROPEAN COMMAND

AG 383 JAG

AFO 757
26 Jan 1948SUBJECT: Execution of Sentence in the Case of the United States vs.
Erich WIEHERANN (Case No. 12-966)TO : Commanding General
First Military District
AFO 1, US Army

Reference is made to letter, Hc USFET, 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 Erich WIEHERANN.

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, AIO 407, US Army.

BY COMMAND OF GENERAL CLAY:

/s/ George W. Iope
/t/ GEORGE W. IOPE
Colonel, AGD
Adjutant General

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

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 31 January 1948 1947, at 0900.

/s/ Lloyd A. Wilson
(Signature and Rank)
/t/ LLOYD A. WILSON, Capt. C1F
War Criminal Prison Landsberg
(Organization)

/s/ David A. Oakley
(Countersignature and Rank of
Witnessing Officer)

/t/ DAVID A. OAKLEY,
1st Lt. C11 C
Assistant Prison Officer

MILITARY GOVERNMENT COURT
MILITÄRGERICHT

Order on Review
Verfügung nach Ueberprüfung

Case No. 12-966 Order No.
Strafsache Nr. 12-966 Verfügung Nr.

Whereas one Erich WIFFERMANN
(Name of Accused) (Name des/der Angeklagten)

was convicted of the offence of participation in killing surrendered
prisoners of war
wegen der folgenden strafbaren Handlung Teilnahme an der Tötung von
Kriegsgefangenen die sich
ergeben hatten

by the General Military Court at Dachau, Germany
vom Oberen Militaergerichte in Dachau, Deutschland
(Address of Court)
(Anschrift des Gerichts)

and sentenced to imprisonment for twenty years, commencing 27 April 1945
schuldig erkannt und zu zwanzig Jahren Gefaengnis verurteilt mit
Wirkung ab 27 April 1945

by Judgment dated the 23 May 1947
durch Urteil vom 23 Mai 1947 1947 and
Date Datum

Whereas the case has now come before me by way of review and after
Diese Strafsache ist mir zur Ueberprüfung vorgelegt worden und

due consideration and in exercise of the powers conferred upon me, I
nach entsprechendem Studium des Sachverhaltes und in Ausübung der mir

hereby order:
uebertragenen Befugnisse verfüge ich:

That the findings and sentence are approved. The Commanding
General, First Military District, will confine Erich WIFFERMANN in
War Criminal Prison No. 1, Landsberg, Germany, for a period of twenty
years, commencing 27 April 1945.

Dass der Befund und das Urteil Bestaetigt werden. Der Kommand-
ierende General, vom Militaerbezirk I, wird die Inhaftierung von Erich
WIFFERMANN im Kriegsverbrechergefaengnis Nr. 1, Landsberg, Deutsch-
land, fuer die Dauer von Zwanzig Jahren, mit Wirkung ab 27 April 1945.

Dated this
Gegeben am 22 Jan 1948

/s/ J. L. Harbaugh, Jr.
Signature of Reviewing Authority
Unterschrift der nachprüfenden
Behoerde
/t/ J. L. HARBAUGH, JR.
Colonel ACD
Judge Advocate
Title Titel

20 January 1948

SUBJECT : US v. Erich WIPPERMANN (Case No. 12-966)

586

MEMORANDUM TO: Colonel Barbaugh

1. An examination of the record of trial in the subject case reveals the following data:

- a. A copy of the charges was served on the accused on 8 January 1947.
- b. The case was referred for trial on 14 May 1947.
- c. The personnel of the prosecution and the defense were appointed on 9 January 1947.
- d. Trial was had 16-21 May 1947.

2. I concur in the recommendation of the Deputy Judge Advocate for War Crimes and War Crime Board of Review No. 2.

Howard F. Breese

HOWARD F. BRESEE
Colonel AGD

Chief, War Crimes Board of Review Branch

23