E. T. O.

BOARD

OF

REVIEW

OPINIONS

CM ETO 9421

CM ETO 10578

VOLS. 21-22

HOLDINGS AND OPINIONS

# BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

# EUROPEAN THEATER OF OPERATIONS



## VOLUME 22 B. R. (ETO)

## CM ETO 10002 - CM ETO 10578





OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, D.C.

Judge Advocate General's Department



Holdings and Opinions

B O A R D  O F  R E V I E W

Branch Office of The Judge Advocate General

EUROPEAN THEATER OF OPERATIONS

Volume 22 B.R. (ETO)

including

CM ETO 10002 - CM ETO 10578

(1945)

Office of The Judge Advocate General

Washington : 1946

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY CARL E. WILLIAMSON, LT. COL.,
JAGC, ASS'T EXEC. ON 20 MAY 54

CONTENTS FOR VOLUME 22 B.R. (ETO)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887



BOARD OF REVIEW NO. 1

5 JUN 1945

CM ETO 10002

| | |
|---|---|
| U N I T E D S T A T E S | V CORPS |
| v. | Trial by GCM, convened in vicinity of Neuwied, Germany, 31 March 1945, and in vicinity of Volkmarsen, Germany, 7 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Private WILLARD L. BREWSTER (37624717), Company A, 112th Engineer Combat Battalion | |

---

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Willard L. Brewster, Company A, 112th Engineer Combat Battalion, did, at Reimerzhoven, Germany, on or about 18 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Lorenz Simons, a human being by shooting him with a rifle.

(2)

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence is clear, succinct and uncontradicted that accused deliberately killed a German civilian, one Lorenz Simons, at the time and place alleged in the Specification. The evidence does not disclose even a shadow of excuse or justification for the homicide. Accused was a trespasser at the time he shot the deceased who had ariseh from his bed to greet accused at the kitchen door. After his demand for liquor had been refused, he raised his rifle and shot his victim. While undoubtedly accused was intoxicated to some degree, the evidence is clear that he was not sufficiently under the influence of alcohol to destroy his mental capacity to entertain the general criminal intent, which is a necessary element in the crime of murder (MCM, 1928, par.126a, p.135). He had walked two miles to the home of his victim (R49). After the homicide he knew that he had "shot an old man" (R25). He was able to leave the scene of the crime and was apprehended a considerable distance from it (R24). The foregoing is substantial evidence that his intoxication did not rob him of the mental capacity to form a general criminal intent.

The Board of Review is entirely satisfied that accused's guilt of the crime of murder was proved beyond reasonable doubt (CM ETO 9424, George E. Smith, Jr.; CM ETO 6682, Frazier; CM ETO 438, Harold Adolphus Smith).

4. The charge sheet shows that accused is 27 years years 10 months of age and was inducted 18 September 1943 at Jefferson Barracks, Missouri, to serve for the duration of the war plus six months. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

6. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B. Franklin Riter Judge Advocate

Wm. T. Sarrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3

7 MAY 1945

CM ETO 10003

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 95TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at |
| | ) | APO 95, U. S. Army, 9 March |
| Private KENNETH C. RENTZEL | ) | 1945. Sentence: Dishonor- |
| (33842463), Company B, | ) | able discharge, total for- |
| 378th Infantry | ) | feitures and confinement at |
| | ) | hard labor for life. United |
| | ) | States Penitentiary, Lewis- |
| | ) | burg, Pennsylvania. |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 64th Article of War.

Specification 1: In that Private Kenneth C. Rentzel, Company "H", 378th Infantry, did, at Jouaville, France, on or about 3 November 1944, lift up a weapon to wit: A M1 Rifle against 2nd Lt Warren M. Johnson, Jr., Company "H", 378th Infantry, his superior officer, who was then in the execution of his office.

(6)

Specification 2: In that * * * having received a lawful command from 2nd Lt Warren M. Johnson, Jr., Company "H", 378th Infantry, his superior officer, to move to the other side of the room and lay out his equipment, did at Jouaville, France, on or about 3 November 1944, willfully disobey the same.

CHARGE II: Violation of the 65th Article of War.

Specification: In that * * * did, at Jouaville, France, on or about 3 November 1944, threaten to strike Corporal Joe E. Perger, Company "H", 378th Infantry, a noncommissioned officer with his fist while said noncommissioned officer was in the execution of his office.

CHARGE III: Violation of the 58th Article of War.

Specification: In that * * * did, at Ensdorf, Germany, on or about 0001, 18 December 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty to wit: Engage in combat with an armed enemy in his capacity as rifleman and did remain absent in desertion until he was apprehended at Swansea, Wales, on or about 13 January 1945.

He pleaded not guilty and, all of the members of the court present when the vote was taken concurring, was found guilty of all specifications and charges. Evidence was introduced of one previous conviction by special court-martial for one month's absence without leave in violation of Article of War 61. All members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 95th Infantry Division, approved the sentence and forwarded the record of trial for action under the provisions of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place

of confinement and withheld the order directing the execution of the sentence pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that on 3 November 1944, while a member of Company H, 378th Infantry, accused, who had been drinking but was not drunk, became entangled in some Army telephone wires running through a barn at Jouaville, France, where his company was in the process of establishing its billet. Accused started to cut the wires with his bayonet. Corporal Joe E. Perger, of accused's company, told accused to stop, asking him what he thought he was doing. Accused replied that if Perger interfered, he - accused - would knock Perger's ears off (R9,10, 13,14,17,20). His platoon leader, Second Lieutenant Warren M. Johnson, Jr., then told accused to arrange his bed and lay out his equipment. Accused loudly and profanely announced his refusal to obey the order, at the same time pointing his M-1 rifle at Lieutenant Johnson's stomach, holding it thus at point for about two minutes, while cursing and berating the officer and reiterating his refusal to obey. He was finally relieved of his rifle by other soldiers who proceeded immediately to unload it (R9,14,17). Accused never did arrange his bed or lay out his equipment (R10,15).

About 15 November 1944 accused was transferred from Company H to Company B, 378th Infantry (R23). On 18 December 1944, Company B was at South Lisdorf in the vicinity of Ensdorf, Germany, on the west side of the Saar River, in sight of the enemy, and receiving small arms, artillery and mortar fire (R24,27,28). According to schedule, known to the members of the company, including accused, Company B on that date crossed the Saar River to relieve another company "on the line". It was on that date also that accused went absent without leave, returning to military control at Swansea, Wales, on 13 January 1945 (R24,26,27,31; Pros.Ex.B).

4. No evidence was presented for the defense. Accused, after having been advised of his rights, elected to remain silent.

5. The uncontradicted evidence sustains all findings of guilty. While accused's drinking was doubtless partly responsible for the unbridled irritability which characterized his first group of offenses, all witnesses testified that, in their opinion, he was not drunk. His subsequent offense of desertion to avoid hazardous duty was adequately established by the showing of absence without leave initiated

(8)

while his unit was being subjected to enemy fire, at a time when it was, to accused's knowledge, scheduled to cross the Saar River for the purpose of relieving another company on the front lines.

6. The charge sheet shows that accused is 19 years one month of age and that, with no prior service, he was inducted at Fort George G. Meade, Maryland, 28 February 1944.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Benjamin R. Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. C. Stacy Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 17 MAY 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private KENNETH C. RENTZEL (33842463), Company B, 378th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10003. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10003).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

---

(Sentence as commuted ordered executed. GCMO 176, ETO, 26 May 1945).

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

11 AUG 1945

CM ETO 10004

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 26TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at APO 26, U. S. Army, 13 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| | ) | |
| Private FREDERICK J. KEHOE, SR. (42105696), Company F, 101st Infantry | ) | |

---

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater.

2. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private Frederick J. Kehoe Sr, Company F, 101st Infantry, did, at Reichlange, Luxembourg, on or about 21 December 1944, desert the service of the United States by absenting himself without leave from his organization with

the intent to avoid hazardous duty and to shirk important service, to-wit: action against the enemy, and did remain absent in desertion until he was apprehended at Luxembourg, Luxembourg on or about 27 December 1944.

Specification 2: In that * * * did, at Hierheck, Luxembourg, on or about 7 January 1945, desert the service of the United States by absenting himself without leave from his organization with the intent to avoid hazardous duty and to shirk important service, to-wit: action against the enemy, and did remain absent in desertion until he was apprehended at Athus, Luxembourg, on or about 19 January 1945.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and both specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for eleven days in violation of Article of War 61. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 26th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in the case, commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. a. Specification 1:

At about daybreak on the morning of 21 December 1944, near Reichlange, Luxembourg, accused's squad leader received orders to move forward until the enemy was contacted. He found accused and informed him that the company would move out and ordered him to secure his equipment. Accused said his helmet was in the building where he had slept. The squad leader directed him to get it and stated that he could not "go into action" without it. Accused made his equipment ready

and left to secure his helmet. He did not return. The squad was in the area for at least an hour and a half thereafter. A competent morning report established his absence without leave until 29 December. The company was in heavy action during the period. Accused, in an unsworn statement, claimed that he returned to the company area to find that the company had departed; that he heard the company had gone to Luxembourg City and went there to find it; that he was apprehended 27 December; and that he was a rifleman who was assigned as a BAR man without training or experience. The proof here is that accused, having knowledge of impending hazardous duty brought home to him in the midst of the crucial phase of the Ardennes battle, departed from his command suddenly thereafter. The direction of Luxembourg City was, with respect to Reichlange, to the rear and away from the enemy. The court was justified in inferring the intent to avoid the imminent action with its accompanying perils and hazards of battle (CM ETO 6637, Pittala; CM ETO 7312, Andrew; CM ETO 11503, Trostle).

b. Specification 2:

Accused was returned to his company 7 January 1945 and assigned to a squad as a rifleman. He received orders at 1000 hours to move forward with the company and contact the enemy. He obeyed those orders and did move forward. When a fire fight began, he was present, but two hours later, at its conclusion, he was absent. The company strength was only 20 men. There was unobstructed observation of an open field of fire. His squad leader testified accused could not have been either wounded or captured, for he would have seen the incident. A check of the area and of the aid station did not result in his being found. He was not present again in the company until the day of trial. By unsworn statement, accused claimed he was not present at 1000 hours and did not begin the fire fight, or have any knowledge that combat was imminent. Witnesses testified they saw accused during the actual skirmish. Evidence was therefore before the court that his departure occurred during existing hazardous duty. Circumstances were proof that the absence was without leave. The court's inference of the cowardly intent was justified (CM ETO 8448, Tracy; CM ETO 8610, Blake; CM ETO 12951, Quintus).

4. The charge sheet shows that accused is 23 years eight months of age and was inducted 1 March 1944 at Newark, New Jersey, to serve for the duration of the war plus six months. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

(14)

6. The penalty for desertion in time of war is death or such other punishment as the court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B. Scott Link Judge Advocate

(SICK IN HOSPITAL) Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(15)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 11 AUG 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private FREDERICK J. KEHOE, SR. (42105696), Company F, 101st Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10004. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10004).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

---

( Sentebce as commuted ordered executed. GCMO 346, ETO, 26 Aug 1945).

(17)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

8 JUN 1945

CM ETO 10014

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 5TH ARMORED DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at Verviers, Belgium, 25 January 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for seven years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| Second Lieutenant JOHN T. O'TOOLE (O-1304432), Company B, 15th Armored Infantry Battalion. | ) | |

---

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 75th Article of War.

Specification: In that 2d Lt. John T. O'Toole, Company B, 15th Armored Infantry Battalion did, near Bilstein, Germany, on or about 1900, 20 December 1944, misbehave himself before the enemy by failing to advance with a carrying party taking supplies to Company B 15th Armored Infantry Battalion and Company C, 15th Armored Infantry Battalion, who were engaged with the enemy.



10014

(18)

CHARGE II: Violation of 96th Article of War.

Specification: In that * * * having received a lawful order from Major Emerson F. Hurley, 15th Armored Infantry Battalion, to follow in the rear and keep the members of a carrying party moving forward, the said Major Emerson F. Hurley, being in the execution of his office, did at Bilstein, Germany on or about 1900, 20 December 1944 fail to obey same.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the charges and specifications. No evidence of previous convictions was introduced. Two-thirds of the members of the court present when the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for seven years. The reviewing authority, the Commanding General, 5th Armored Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, "though wholly inadequate punishment for an officer guilty of such grave offenses", stated that "in imposing such meager punishment the court reflected no credit upon its conception of its own responsibility", designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The prosecution's evidence shows that:

On the evening of 20 December 1944, accused was an officer of Company B, 15th Armored Infantry Battalion, of which Major Emerson F. Hurley was acting executive officer. Company B with other troops was dug in on high ground in contact with the enemy (R5,8). About six o'clock on this evening, accused came to the battalion forward "C.P." with ten or eleven men with water and rations which were to be carried up to the company that night (R5,9). Major Hurley was in charge (R11) and pointed

out the direction they were to go, described the area to the group and directed accused to bring up the rear (R5,9) and "keep them coming forward" (R5). When Major Hurley arrived at a point about 200 yards from where the troops were dug in, he stopped the party and he went on and located the troops. Accused was missing from the group at that time. Some mortar fire was coming in 300 or 400 yards away (R7). Major Hurley was at the head of the column and accused some 50 yards away at the rear, the men being three or four yards apart (R8). Major Hurley testified he did not again see accused until about three days later back in the assembly area after they had been relieved by other troops. He asked accused what happened that night and accused stated that he started out with the group and 300 or 400 yards out mortar fire started coming and "he hit the ground" and when he got up again the group was out of sight. One fragment had gone through his clothing (R5). The group (supply section) made three trips that night, Major Hurley accompanying them on two, and they brought a wounded man back on the first trip (R6,11). The distance was about 1700 yards across open ground (R6) and it was a pretty dark night (R6,9). When the party returned to the starting point, accused was already there (R9,11,12) and he remarked

> "that it was foolhardy to go back that way. We should not make any more trips".

He did not accompany them on the second and third trips (R11).

4. For the defense, accused testified that Major Hurley told him to follow the column and keep the men moving but that he did not know where they were going and that he carried out this order to the best of his ability. He had proceeded possibly 500 yards when mortar fire fell at the rear of the column and the man in front of him fell to the ground. Accused found that the man was not injured and sent him back to the area, then started to catch up with the column (R13) when mortar fire again knocked him to the ground and when he got up his left hip was paining him so he could hardly walk.

> "I knew that was no place for me there and I was rather dazed from the shock and I looked around to get myself oriented and I looked for the members of the party and was unable to locate anyone of the party so I came back".

He saw Major Hurley when the first carrying party returned and asked him about the wounded man but did not receive any further orders from him. He did not reach the company on this trip as ordered nor did he report his ailment to the "medics" (R14) as this injury to his hip had occurred a year and a half previous in an automobile accident before he went in service and the doctors said there was not much to be done for it.

> "I have had it before and I knew what it was and the Medical Officers were busy at that time and I figured it was best for me not to go over to see them".

He did not make the second and third trips because he could not walk well enough but he did not bring these facts to the attention of any officer in the vicinity senior to him (R15).

As a defense witness, a member of the carrying party on this night testified that he was ahead of accused and had proceeded 500 or 600 yards when he was knocked down by mortar fire (R16). Accused came to him, asked what was wrong and if he could get back to the half-track. When he next saw accused the latter was leaning on the ground, and then got up, went towards the men and then turned back. It was just getting dark (R17).

Accused was examined by an officer of the Army Medical Corps 1 January (1945) who testified as a defense witness:

> "I went into the man's history and from that history I made the examination and found that Lieutenant O'Toole had pain of a certain type on motion of the left lower extremity, the same injury causing pain when moving the thigh or lower extremity of the body".

There was no evidence of a physical injury (R18).

5. "Any officer or soldier who, before the enemy, misbehaves himself, runs away * * * shall suffer death or such other punishment as a court-martial may direct" (Article of War 75)

"Misbehavior is not confined to acts of cowardice. It is a general term and as here used it renders culpable under the article any conduct by an officer or soldier not conformable to the standard of behavior before the enemy set by the history of our arms. Running away is but a particular form of misbehavior specifically made punishable by this article" (MCM, 1928, par.141a, p.156).

"This offense may consist in * * * going to the rear or leaving the command * * * when under fire * * * ".

"Misbehavior before the enemy is often charged as 'Cowardice'; but cowardice is simply one form of the offense, though not infrequently the result of pusillanimity or fear, may also be the result of negligence or inefficiency. An officer or soldier who culpably fails to do his whole duty before the enemy will be equally chargeable with the offense as if he had deliberately proved recreant * * *" (Winthrop's Military Law and Precedents, Reprint 1920, pp.622-623).

Here accused was given the duty of bringing up the rear of the column of men carrying water and rations for the last 1500 to 1700 yards to the troops forward facing the enemy. It was across open ground exposed to enemy fire with darkness as their only protection. His was the essential duty to see that the party was kept on the move and arrived with the supplies. He did start but when shelling began he stopped and then turned back after directing another member of the party to also return. On the return of the group from the first trip, he remarked within the hearing of at least one of them that it was foolhardy to go back that way and that no more trips should be made and although two additional trips were made, he did not accompany them. His excuse was, on his return from starting on the first trip, that he could not find the party in the darkness after being knocked down by mortar fire and that he was physically unable to perform his duty with the supply party thereafter. However, if he actually was incapacitated, he failed to report any such condition to his superior officer although he stated he spoke to Major Hurley, nor did he consult any medical

personnel. He made no attempt to accompany the party on the second and third trips. On the evidence, the court was warranted in finding that accused failed to do his full assigned duty before the enemy (CM ETO 1663, Ison, Jr.; CM 243319, Tzencalis; CM ETO 1249, Marchetti; CM ETO 1659, Lee).

Whether accused was prevented from performing his duty by a genuine disability was a question of fact which the court resolved against him.

The evidence clearly shows and accused admits his failure to obey the order to go with the carrying party. The reasons he gives as his excuse for so doing are the same reasons set out in the first part of paragraph 5. Both offenses charged grow out of the same facts but are separate offenses and he was properly convicted of both.

6. The charge sheet shows accused to be 26 years of age and that he entered active duty 17 December 1942 after serving as an enlisted man from 7 February 1941.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 8 JUN 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Second Lieutenant JOHN T. O'TOOLE (O-1304432), Company B, 15th Armored Infantry Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10014. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10014).

E. C. McNEIL
Brigadier General, United States Army
Assistant Judge Advocate General

---

( Sentence ordered executed. GCMO 214, ETO, 16 June 1945).

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3

27 JUN 1945

CM ETO 10015

| | |
|---|---|
| U N I T E D S T A T E S ) | 7TH ARMORED DIVISION |
| ) | |
| v. ) | Trial by GCM, convened at APO 257, U. S. Army, 31 January 1945. |
| ) | |
| First Lieutenant JOSEPH D. WALLACE (O-1295301), Company A, 38th Armored Infantry Battalion ) | Sentence: Dismissal, total forfeitures and confinement at hard labor for one year. |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review, and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of operations.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 75th Article of War.

Specification: In that 1st Lieutenant JOSEPH D. WALLACE, Company "A", 38th Armored Infantry Battalion, did at or near Coirlet, Belgium, on or about 24 December 1944, while before the enemy, shamefully abandon a certain road block position which it was his duty to defend.

10015

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, 7th Armored Division, although deeming the sentence imposed totally inadequate, approved it "in order that the accused not escape punishment for the serious offense committed", and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, although deeming the sentence wholly inadequate punishment for an officer guilty of such conduct and describing the meager punishment awarded in this case as reflecting no credit upon the court's conception of its own responsibility, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. For the prosecution, it was shown that on 24 December 1944 the 38th Armored Infantry Battalion, under the command of Lieutenant Colonel William H. G. Fuller, was in the vicinity of Grand Menil, Belgium, and about six or seven miles from the front lines. In accordance with directions received from the Commanding General of Combat Command B, Colonel Fuller designated two platoons from A Company to establish two road blocks to prevent the enemy from infiltrating any patrols or tank destroyers through that area. One of the platoons so designated was under the command of accused who was given general instructions at 1600 hours by Colonel Fuller to take his unit to a site on a ridge about 5,000 yards northwest of Grand Menil, establish a road block and await further instructions (R5-6, 9-10). Colonel Fuller learned from accused's company commander that the road block was in place at 2000, but did not receive any word or message from accused until 0100 hours on 25 December when the

latter reported in person at the battalion command post with the information that some stragglers from tank destroyer units had come through his road block position and told him that the friendly troops out in front had been shot up and were pulling back. Accused had brought back his whole platoon with him and left the road block position undefended (R7). His reason therefor was that

> "His company and platoon had been cut off before by the enemy in the vicinity of St. Vith due to the fact that other units had pulled out without his knowing about it and from the story of these people who came through, He gathered that something was happening as they stated the enemy were coming down the two roads and he didn't know what was happening" (R8).

It would have taken a runner about an hour or an hour and a half to carry a message from the road block established by accused to the regimental command post (R9). Colonel Fuller had not authorized him to abandon the position (R7).

4. For the defense, Staff Sergeant Charles T. Bregovy, of accused's platoon, testified that he was on the mission with accused on the night in question. They arrived at the vicnity of the proposed road block at about 1800 hours, put their mines out and their bazookas in position (R18). It was dark at 2100 hours when one of his men stopped a scout car. The lieutenant driving it told Sergeant Bregovy that the Germans were breaking through on their right. When accused received this information

> "He called for all us non-coms and told us that he had no radio and didn't know just what to do and he asked us what he should do. We waited for awhile and Lieutenant Wallace, after we explained to him that if it was true, it would be a good idea to save our tracks and men and go back to the battalion CP and we went back to the company and stayed there about 15 minutes and then went back to the position" (R19).

(28)

Colonel Fuller testified that he had known accused since 20 September 1944 and observed him to be a very conscientious, hard-working officer, well-liked by his men. He is one whom the commanding officer can always count on carrying out any mission that is given him. He has the respect of his men, there is no question as to his bravery and courage and he was out in front of his men all the time. He participated in the actions at Overloon and Meijel and in both engagements at St. Vith (R11-12).

It was stipulated between accused, defense counsel and the prosecution that Captain Walter H. Anstey, accused's company commander, was unable to appear at the trial because of a serious wound, but if present in court he would testify substantially as follows:

> "I was company commander of Company A, 38th Armored Infantry Battalion from approximately 15 November 1944 to 22 January 1944; that on 24 December 1944 at about 1600 hours, Lt. Colonel William H. G. Fuller, commanding officer of the 38th Armored Infantry Battalion had a conference with the officers of said Company "A"; that at that time he stated two road blocks were to be established in the vicinity of Manhay, Belgium and indicated their location on a map. Lieutenant Wallace was selected to establish one of the road blocks and I decided to accompany Lieutenant Wallace to the place indicated on the map. Lt. Colonel Fuller stated that I was to secure a 300 series radio for Lieutenant Wallace and that he would get in communication with the accused. There was no mention of time in connection with this road block. At the conclusion of this conference, I secured a radio (300 series) for the accused and immediately accompanied the accused to the proposed road block. We arrived at approximately 1730 and I left in about five minutes. Lieutenant Wallace has been in my company since October 10, 1944. I have had sufficient opportunity to observe his conduct as an officer and to know his character. From my own personal knowledge and from his general reputation, I know his character to be

> excellent. According to present military standards of efficiency I would not rate Lieutenant Wallace lower than "Excellent". I have observed his conduct in battle and find his bravery superlative. As to his leadership qualities, I consider him the best platoon leader in my company and have found that he takes care of his men and that they love him. He is a hard worker and a good clean shooter. I would not care to lose him as a platoon commander " (R12).

First Lieutenant Eugene M. Corbin, of accused's company, testified that accused was a very good officer. He had observed his conduct in battle and thought him

> "great under fire, especially small arms fire. Men in our company have a saying that he likes nothing better than a good small arms fight and likes to shoot them" (R13).

In the recent action at St. Vith, they lost their company commander on the second day. At the same time accused received a piece of shrapnel in his leg. Being the senior lieutenant in the company he took command, and without even getting his wound dressed or helping himself, he continued to lead the company and directed it into a defensive position. Only then did he allow himself to be taken back to the aid station (R13).

5. After his rights were explained (R14), accused testified regarding his establishment of the road block substantially in accordance with the prosecution's evidence and the testimony for the defense of Staff Sergeant Bregovy (R14-15). He denied abandoning the road block. He used his own initiative and went back for further orders. He took the platoon members with him because he "didn't want to move back without the platoon because if you go back the men lose confidence in you. I figured it was better to go back together". He did not send one vehicle back alone because he was afraid it would not get through - "We figured we might have been bypassed" (R16-17).

(30)

6. Each member of the court signed a clemency recommendation, attached to the record of trial, recommending that the entire sentence be suspended and describing therein accused's record of bravery, leadership and other evidence extremely favorable to his character and reputation. The court

> "was impressed with accused's conduct and behavior before it. His manner of speech, his honesty were consistent with the opinions expressed by the witnesses who had been closely associated with him".

7. Also included with the record of trial is a letter, dated 19 February 1945, from the Commanding General, 7th Armored Division, to the Commanding General, European Theater of Operations, and attached thereto is a certified true copy of a recommendation for an award of a Silver Star to accused for a specific act of gallantry therein described which accused rendered in action against the enemy at St. Vith, Belgium, on 22 January 1945. The letter recites that

> "In view of the fact that the recommendation was submitted by a friend of Lieut. Wallace, and further that it was dated after the conviction was announced, no award was approved by this headquarters".

8. Article of War 75 sets forth numerous offenses, the commission of any one of which constitutes misbehavior before the enemy:

> "Any officer or soldier who, before the enemy, misbehaves himself, runs away, or shamefully abandons or delivers up or by any misconduct, disobedience, or neglect endangers the safety of any fort, post, camp, guard, or other command which it is his duty to defend, * * * shall suffer death or such other punishment as a court-martial may direct " (AW 75).

10015

Thus, whenever an officer or soldier, being before the enemy, shamefully abandons a post which it is his duty to defend, he has violated this Article of War. Such an offense is here alleged.

The evidence clearly showed that accused was "before the enemy" and had a duty to defend the road block which he established as ordered. The only question that remains is whether under the circumstances his departure from the road block with his platoon to get further orders constituted a shameful abandonment of his post within the meaning of Article of War 75. Considering the evidence in the light most favorable to accused, his conduct was not governed by cowardice or timidity, but by his intention to prevent his men from being taken prisoners and their valuable equipment captured, which the rapid advance of the enemy, as reported to him, was likely to bring about. He had been surrounded and cut off by the enemy before. Later developments made it clear that his withdrawal from the road block was ill-advised and showed extremely bad judgment on his part, resulting fortunately in no advantage to the enemy. He started back with his platoon to the road block about 15 minutes after reporting to Colonel Fuller (R19). The position was left undefended, however, for about three hours.

> "Of this specific form of misbehavior before the enemy, it is to be said that whether or not the abandoning is to be regarded as 'shameful' will depend upon the circumstances of the situation. Generally speaking, a commander is justified in surrendering or abandoning his post to the enemy only at the last extremity, - as where his ammunition or provisions are expended, or so many of his command have been put hors du combat that he can no longer sustain an effectual defence, and, no prospect of relief or succor remaining, it appears quite certain that he must in any event presently succumb. Every available means of holding the post and repulsing the enemy should have been tried and have failed before a surrender or abandonment can be warranted, and, if the same be resorted to on any less pretext, the commander will be chargeable with the offence

> indicated by the Article. In time of war nothing indeed so fatally compromises the public interests, and nothing is so inevitably made the subject of investigation and trial, as the premature or unnecessary yielding up to the enemy of a fortified post; and when the periods of siege which have in many cases been withstood are recalled, it will be appreciated how possible it may be found to protract a defence under circumstances of extreme privation and difficulty" (Winthrop's Military Law and Precedents (Reprint, 1920), pp.624-625).

In its determination of whether or not accused did shamefully abandon his post the court could properly consider the entire tactical situation as disclosed by the evidence, including the reason for the road block in question. The purpose of the road block which he was ordered to establish "as quickly as he could" (R6) was to "to prevent the enemy from infiltrating any patrols or tank destroyers through that area" (R6). When he left the road block with his platoon about four hours after it was in position he left it undefended at the time when the event it was intended to prevent showed signs of being about to take place. In the opinion of the Board of Review this conduct unwisely and illogically taken by accused constituted a shameful abandonment of his post which it was his duty to defend within the meaning of Article of War 75 and the court's findings of guilty are fully supported by the evidence (Cf: CM ETO 6694, Warnock).

9. The charge sheet shows that accused is 29 years of age and was commissioned a second lieutenant 2 October 1942. He had prior enlisted service with the Regular Army from 1 October 1937 to 27 March 1940 and with the Army of the United States from 12 January 1942 to 2 October 1942.

10. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

11. The penalty for misbehavior before the enemy is death or such other punishment as a court-martial may direct (AW 75). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B F Avery Jr Judge Advocate

10015

(34)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 27 JUN 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant JOSEPH D. WALLACE (O-1295301), Company A, 38th Armored Infantry Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10015. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10015).

E. C. McNEIL
Brigadier General, United States Army
Assistant Judge Advocate General

---

[ Sentence ordered executed. GCMO 435, USFET, 22 Sept 1945).

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3 9 JUN 1945

CM ETO 10016

| | |
|---|---|
| U N I T E D S T A T E S | FIRST UNITED STATES ARMY |
| v. | Trial by GCM, convened at Saint Trond, Belgium, 24 January 1945. Sentence: HENRY: dismissal; KINAS, dishonorable discharge; both: total forfeitures and confinement at hard labor for nine years. Places of confinement: HENRY: United States Penitentiary, Lewisburg, Pennsylvania; KINAS: Federal Reformatory, Chillicothe, Ohio. |
| Captain CECIL B. HENRY (01113250) and Staff Sergeant HERBERT H. KINAS (36216360), both 501st Engineer Light Ponton Company | |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the officer and soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General, in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused were tried upon the following Charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Captain Cecil B. Henry, Five Hundred First Engineer Light Ponton Company, then First Lieutenant Cecil B. Henry, Five Hundred First Engineer Light Ponton Company and Staff Sergeant Herbert H. Kinas, Five Hundred First Engineer Light Ponton Company, did at

(36)

Battice Belgium, on or about 5 November 1944, conspire to commit an offense against the United States by securing under color of authority of the United States Army the unlawful release of Mlle. Rosalie Paape, alias Elly Paape, a Belgian citizen, from the internment camp at Queue du Bois of the Belgian Government, a co-belligerent in the present war, and in the execution of such conspiracy the said Captain Cecil B. Henry, then First Lieutenant Cecil B. Henry, did, at Liege, Belgium, on or about 5 November 1944 unlawfully pretend to A. Glesener, Substitute Auditeur Militaire of the Auditorat Militaire of the Provinces of Liege-Luxembourg and Namur, that the services of Mlle. Rosalie Paape were necessary to the operations of the United States Forces, well knowing that said pretences were false, and by means thereof did fraudulently obtain from the said A. Glesener an order for the release of the said Rosalie Paape.

Specification 2: In that * * * acting jointly, and in pursuance of a common intent, did, at Queue du Bois, Belgium, on or about 5 November 1944, wrongfully and fraudulently obtain the release from a Belgian internment camp of Mlle. Rosalie Paape, alias Elly Paape, a Belgian citizen.

Specification 3: In that * * * acting jointly, and in pursuance of a common intent, did, at Battice, Belgium, on or about 5 November 1944, wrongfully and unlawfully ask and accept from M. Guilliaum Paape, a Belgian civilian, the sum of fifty thousand (50,000) Belgian Francs, of the value of about eleven-hundred forty-two dollars and fifty cents ($1142.50) United States currency, as a consideration for having unlawfully obtained the release of Mlle. Rosalie Paape, alias Elly Paape, from a Belgian internment camp.

Specification 4: In that Captain Cecil B. Henry, Five Hundred First Engineer Light Ponton Company, then First Lieutenant Cecil B. Henry, Five Hundred First Engineer Light Ponton Company, acting for the United States in his official capacity as an officer of the Army did, at Battice, Belgium, on or about 5 November 1944, in violation of Section 117 of the Federal Criminal code, ask, accept and receive from

M. Guilliaum Paape, a Belgian civilian, the sum of about fifty thousand (50,000) francs, lawful money of the Government of Belgium, of the value of about eleven-hundred forty-two dollars and fifty cents ($1142.50) United States currency, with intent to have his decision and action on a matter then pending, viz. the release from custody of Mlle. Rosalie Paape, alias Elly Paape, influenced thereby.

Specification 5: In that Staff Sergeant Herbert H. Kinas, Five Hundred First Engineer Light Ponton Company, with intent to induce Captain Cecil B. Henry, then First Lieutenant Cecil B. Henry, an officer of the United States, to secure the release from a Belgian interment camp of Mlle. Rosalie Paape, alias Elly Paape, a Belgian citizen, in violation of his, the said Captain Cecil B. Henry's, then First Lieutenant Cecil B. Henry, lawful duty, did at Battice, Belgium, on or about 5 November 1944, in violation of Section 39 of the Federal Criminal Code, cause and procure Guilliaum Paape to promise to pay the said Captain Cecil B. Henry, then First Lieutenant Cecil B. Henry, for securing the release of the said Rosalie Paape.

Each pleaded not guilty to and was found guilty of the Charge and all specifications relating to him. No evidence of previous convictions was introduced. Accused were sentenced, Henry to be dismissed, Kinas to be dishonorably discharged the service, each to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for ten years. The reviewing authority, the Commanding General, First United States Army, approved both sentences but reduced the period of confinement, in each instance, to nine years. As to Henry, he forwarded the record of trial for action pursuant to the provisions of Article of War 48. As to Kinas, he designated the Federal Reformatory, Chillicothe, Ohio, as the place of confinement, but withheld the order directing the execution of the sentence pursuant to the provisions of Article of War 50½. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence as to Henry, although characterizing it as wholly inadequate punishment for an officer guilty of such grave offenses, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The evidence shows that accused Kinas was a friend of Rosalie Paape, who, in the latter part of October 1944, was interned by the Belgian government as a "presumed denouncer" of Belgian patriots (R9,16,19,44). On 4 November her father solicited Kinas' aid for the purpose of obtaining her release. Kinas stated that he himself could do nothing but promised to consult an officer. The next day he reported that Rosalie's release might be obtained but would cost a lot of money, characterizing as inadequate the sum of 10,000 francs mentioned by her father (R10).

Thereafter, on the same day, both accused visited the internment camp, where accused Henry, having demanded Paape's release, was informed it was impossible without authority (R16-18). In this connection, however, he was referred to one Glesener, a Belgian official in Liege, whither both accused proceeded and where they again demanded Rosalie's release, Henry falsely stating that she worked for his unit and that her services were required immediately (R6,18,23-25,41). Glesener finally agreed to release her if the accused officer would sign a written assumption of personal responsibility. Henry signed such an instrument with the name of "1st Lt. Joseph Anderson", whereupon he received from Glesener an order by virtue of which he secured Rosalie's release (R18-19, 25-26; Pros.Exs.2,3).

Both accused escorted her home and there received 50,000 francs from her father after stating that if such sum were not paid, Rosalie would go back to the internment camp (R11,14,40-41). Accused later divided the money, Henry receiving the equivalent of $410.00 as his share (R23; Pros.Ex.4).

4. After their rights were explained to them each accused elected to remain silent (R54-55).

5. Each specification alleges a separate and distinct offense of a nature to bring discredit on the military service and each offense so alleged was established by competent evidence. In addition, Specification 1 alleges a conspiracy between the two accused to commit an offense against the United States in violation of section 37 of the Federal Criminal Code (18 USCA 88); Specification 3, acceptance of a bribe by accused Henry in violation of section 117 of the Federal Criminal Code (18 USC 207); and Specification 5, procurement of bribery of a United States officer by accused Kinas, in violation of section 39, Federal Criminal Code (18 USC 91).

6. The charge sheet shows that accused Henry is 27 years old, that he was inducted at Fort McArthur, California, 18 February 1941, discharged 27 April 1943, and commissioned second lieutenant, Corps of Engineers, Army of the United States, 28 April 1943. His only prior service shown is nine months in the California National Guard. The charge sheet shows that accused Kinas is 28 years of age and that, with no prior service, he was inducted at Kenosha, Wisconsin, 21 June 1941.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and each sentence.

8. Penitentiary confinement is authorized by Article of War 42 and the above cited statutes for the offenses denounced thereby. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement of accused Henry is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b). As accused Kinas is over 26 years of age, the designation of the place of confinement in his case should be changed from the Federal Reformatory, Chillicothe, Ohio, to the United States Penitentiary, Lewisburg, Pennsylvania (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b; Cir.229, WD, 8 June 1944, sec.II, par.3a as amended by Cir.25, WD, 22 Jan. 1945).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. V. Harvey Jr. Judge Advocate

CONFIDENTIAL

(40)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 9 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Captain CECIL B. HENRY (O-1113250), 501st Engineer Light Ponton Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10016. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10016).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

---

( Sentence ordered executed. GCMO 224, ETO, 25 June 1945).

(41)

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2 18 AUG 1945

CM ETO 10018

| | |
|---|---|
| U N I T E D S T A T E S | 29TH INFANTRY DIVISION |
| v. | Trial by GCM, convened at APO 29, U. S. Army, 17, 18, and 19 March 1945. |
| Private TOWNSEND R. MATHEWES, JR. (34657559), Company B, 121st Engineer Combat Battalion | Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Townsend R. Mathewes, Jr., Company "B", 121st Engineer Combat Battalion, did, at Wickrath, Germany, on or about 2 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Klara Klein.

He pleaded not guilty and, all the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave from guard in violation of Article of War 61 and wrongful use of an Army vehicle in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to

forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution is substantially as follows:

Accused is assigned to Company B, 121st Engineers, which unit was billeted in Wickrath, Germany, on 2 March 1945. About 1700 or 1730 hours on the afternoon of that day, he and Private Lustig entered a house in this town where two young German Red Cross nurses, Klara Klein and Hubertine Gerhardt, on furlough to visit relatives, were present. One of these girls spoke English and after about 15 or 20 minutes conversation with the nurses, they returned to their company area (R6,7,8,13,64). About 1930 hours on 2 March 1945, accused called Technician Fifth Grade Harold Rankin out of his room in their billet and when they were outside accused said, "Come, go with me. I know where there are two girls" (R43). Private First Class Vincent K. Weismann made his fourth visit to this house about 2000 hours on that date and a few minutes after his arrival, accused and Rankin entered. It was agreed between the three soldiers that Weismann would leave and return a little later and in about five or ten minutes he departed (R13,13, 14,15,16,45).

Klara Klein is a 26 year old member of "Caritas", a religious organization of nurses. On 2 March 1945, she was at the home of Hubertine Gerhardt at Gaastrasse, Number 12, in Wickrath. She testified that she saw accused twice at this house on that date, the first time about 1600 hours, and again about 1900 hours. This last time her friend Hubertine Gerhardt, Weismann and Rankin were also present. About 10 minutes after accused and Rankin arrived, Weismann departed (R63-65). Accused and Rankin talked with the girls, particularly Nurse Klein, who spoke English, and nothing of a suggestive or immoral nature was said during this conversation (R44). Weismann returned about 2100 hours, which had been locked, but before he did accused arose and stated, "I'm going to leave, if he comes in". Rankin testified that upon entering Weismann asked him, "If I did any good", to which he replied, "Hell, no" (R45,46,47).

Nurse Klein further testified that shortly after Weismann returned accused went out into the hall. He first signaled her to follow him and when she remained in the kitchen, he returned and told her to come with him for a moment (R47,67,97). She went out into the front

of the hall where accused in a soft voice warned her that Weismann was a bad man. Continuing his warnings that Weismann was a bad man, accused led her down several steps toward the cellar, all the doors being open at the time. Nurse Gerhardt came and asked her to come in, to which she replied she would return right away. When they reached the bottom of the stairs Nurse Gerhardt called again and both accused and Nurse Klein answered that they were coming in a minute (R67,68,69,97,98). She testified that accused at this juncture placed his hands around her hips, held her tight and pulled her into the cellar room, closing the door and placed his back against it. She tried to open the door and when she was unable to do so, she screamed loudly. She heard her girl friend come down the stairs and could see a portion of her as she had managed to keep the door open a little bit. Accused then placed his hands on her throat, cutting off her breath and when she screamed again, he said he was giving her "the last chance or otherwise he would kill me". Accused then tore open her jacket, which was tied at the top, and ripped open her dress at the neck. She tried to hold her clothes together and keep his hands away. Her dress was ripped and the buttons torn off of it. He slipped the dress off over her head and pulled off her slip, brassiere and panties. She struggled with him during all this time and again he very angrily told her this was her last chance. She thought accused would kill her as he looked quite inhuman "and his eyes came out of his head". She could hear Nurse Gerhardt crying upstairs and believed the same thing was happening to her. She was then thrown on a bed that was in the cellar and in order to delay matters she arose and slowly took her shoes and stockings. Accused became displeased at this delay and again threw her on the bed. He opened his pants, exposing his sex organ, and although she covered her private parts with her hand, he succeeded in effecting penetration of her sexual parts. She had rolled herself together and crossed her legs, but all to no avail, as accused, by the use of his hand and knee, succeeded in uncrossing them. She tried to push him off of her and held her throat with one hand so that she could not resist. For a moment he raised himself up but again he placed his penis in her vagina, hurting her considerably. She still tried to resist and they struggled for a few minutes when suddenly accused jumped up and said in English, "It is no use". He demanded her watch, which she gave him, and then he hurriedly left the room. She wept profusely and at first continued to lie on the bed. She the got up and was looking for her clothes when Nurse Gerhardt and the military police arrived (R69-76).

Nurse Gerhardt testified she went out and saw accused pulling Nurse Klein down the cellar stairs. She returned to the kitchen and after a period of quiet she heard Nurse Klein cry out her name in a very loud manner (R98). Noises described as shuffling,

scraping of feet, a loud cry (R17,19,31,98,105,197,213)7 were heard coming through the hallway and at this she/excited and started screaming and making a good fuss" (R19,21,32). After hearing Nurse Klein cry out her name, she asked Rankin and Weismann to help her but they left at once as they feared becoming involved in something (R17,19,21,32,99). Rankin looked down at the open cellar door and while he did not see or hear anything he called out, "Mathewes, let's go" (R50,57,212). He got on a bike with Weismann and rode back to their company area (R21,50). She then heard Nurse Klein scream again but by the time she arrived in front of the cellar door she heard nothing. She tried to open the door but was unable to do so "because something was standing beside it". The door was open about one inch but she could not see anything through this opening. When she received no response to her call to Nurse Klein she went to the front door and called for help. She returned to the foot of the stairs, called Nurse Klein again and receiving no reply, ran down the street where she met two military policemen, who returned with her. They went down into the cellar where they found Nurse Klein naked, crying and hysterical (R99,100,101,116, 118,119). Her jacket and dress were torn (R101 and she told the military police a soldier took her to the cellar, threatened her life and "this happened" (R116,117). She was taken by the military police to an Army doctor (R76), who found her highly nervous. His examination did not disclose any marks or swellings on any part of the body with the exception of the vagina. There was a laceration at the lower angle of the vagina extending back to and including the hymenal ring. There was a fresh bleeding spot at this point, and evidence of fresh blood on her panties. In the opinion of the medical officer she was a virgin prior to this occurrence (R112). The next day Nurse Gerhardt observed a spot of blood about six inches in diameter on the bed in the cellar (R102).

In the meantime when Weismann returned to his company area, he discussed the situation with Private Murphy and with him returned to the house where they saw a military policeman and the two nurses in the cellar. Both nurses were upset and Weismann looked around the house, yard and several buildings for accused. Weismann and Murphy then returned to the company area (R21,22,23).

When Rankin saw accused the following morning, he asked him if he (accused) had done any good, to which he replied, "Yes, she took her pants off for me" (R51). That same morning when Private Lustig asked accused if he had returned to the nurses' house the preceding night, accused denied it (R9,10).

4. Accused, his rights having been explained to him by defense counsel (R123), was sworn and testified in substance as follows:

On 2 March 1945 he and Private Lustig, while looking for an automobile, stopped at a house where nurses Klein and Gerhardt were staying. After Lustig had a conversation in German with Nurse Klein, they left and returned to their company area. That afternoon he consumed a half bottle of wine but it did not affect his senses. He met Private Rankin in the living room of their billet and told him about the two girls. They returned to the house, arriving there about 1945 hours. Private Weismann was present when they entered and an agreement was made that he would leave and return in an hour. The girls prepared some food, everyone was laughing and talking and they didn't appear nervous. No suggestive conversation took place while Weismann was absent. Weismann returned about 2145 hours and in a few minutes accused got up and went into the hall. He motioned for Nurse Klein to follow him and when she failed to do so, he put his head back in the door and again motioned for her to join him. This time she complied and after first going outside, she followed him down the steps to the cellar. She offered no resistance during all this and when they reached the foot of the stairs he took her in his arms. She did not appear to be nervous, but rather a bit hesitant. She made no attempt to go back up the stairs and when they got in the cellar he kissed her and he thought she was returning them. He told her to undress and, with some help from him, she complied. When her clothes were removed she said, "What now" and he replied, "The bed, of course". She went over and sat on the bed and about this time Nurse Gerhardt came down, banged on the door and hollered. She was hollering "Klara" and Nurse Klein spoke three words in German and Nurse Gerhardt left. He then looked around the cellar steps to make certain no one was there and, having done so, he returned to the bed. Immediately, his penis got soft and, although he made several attempts to have sexual intercourse, he was unable to do so. He said, "It's no use, I can't do any good", and after they both agreed not to mention the incident to anyone, he left. At no time did she struggle or offer any resistance and when he left she was standing on the front side of the bed. She was not crying (R124-140).

While being cross-examined, he became very confused and finally stated that he had not been telling the truth but had fabricated the foregoing story in an effort to explain the damaging evidence that had been presented against him (R170). He then testified that after Nurse Klein followed him outside as he previously stated, he shook hands with her saying, "Take it easy and I might see you again". He then took a longer route back to his company area in order to avoid meeting anyone who might be on the streets at that time. He categorically denied ever having intercourse with Nurse Klein and said he was bragging, when the next morning he told Rankin that he had accomplished the act (R170-173). He attributed Nurse Klein's testimony to the face he believes her to be a saboteur, who still wanted to get back to the German army (R175).

Accused's platoon leader, squad leader and assistant squad leader all testified that accused had an exceptionally fine combat record and had always volunteered for the most dangerous missions. He had always completed three missions. He is very dependable out in the field and was awarded the Bronze Star with a cluster (R182-187).

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b, p.165). All the essential elements of this offense were established by the testimony of Nurse Klein and her version of the incident is corroborated by her physical condition immediately thereafter and by the testimony of the other witnesses as to the surrounding circumstances. Inasmuch as accused ultimately denied that he ever had sexual intercourse with her, an issue of fact was presented for the court, and their determination of that question against him will not be disturbed by the Board of Review (CM ETO 10715, Goynes). Accused's admission that he had not been telling the truth and his complete reversal of his version of the affair, fully justified the court's action in rejecting his explanation of the matter.

6. The charge sheet shows that accused is 27 years of age and was inducted 31 May 1943 at Fort Jackson, South Carolina. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b, (4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3

19 JUL 1945

CM ETO 10027

| | |
|---|---|
| U N I T E D S T A T E S | IX AIR FORCE SERVICE COMMAND |
| v. | Trial by GCM, convened at APO 149, U. S. Army, 23 January 1945. Sentence: Dismissal and total forfeitures. |
| Major LYLE B. WETHERFORD (O-312215), Headquarters and Headquarters Squadron, IX Air Force Advanced Depot Area Command (2) | |

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review which submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 85th Article of War.

Specification 1: (Findings of not guilty).

Specification 2: In that Major Lyle B. Wetherford, Headquarters and Headquarters Squadron, IX Air Force Advanced Depot Area Command (2), was, at AAF Station 169, on or about 15 September 1944, found drunk while on duty as medical supply officer.

10027

(48)

CHARGE II: Violation of the 94th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that * * * did, on or about 15 September 1944, knowingly and willfully apply to his own use and benefit one (1) quart of whiskey of the value of about 78¢, property of the United States intended for the military service thereof.

CHARGE III: Violation of the 95th Article of War.

Specification 1: (Finding of not guilty).

Specification 2: In that * * * was, at AAF Station 169, on or about 15 September 1944, to wit: AAF Station 169, drunk while in uniform.

CHARGE IV: Violation of the 96th Article of War.

Specification 1: In that * * * did, at AAF Station 169, on or about 28 August 1944 drink intoxicating liquor with thirteen (13) enlisted men of the Army of the United States who's names are unknown.

Specification 2: In that * * * did, at AAF Station 169, on or about 15 September 1944, drink intoxicating liquor with thirteen (13) enlisted men of the Army of the United States who's names are unknown.

Specification 3: In that * * * did, at Rheims, France, on or about 26 November 1944 wrongfully and in violation of par 3, Sec II, Circular 35, Hq European T of Opns, USA, dtd, 29 March 1944, during off duty hours carry a weapon, to wit: one (1) Ideal 7.65 mm automatic pistol, number 77605, among civilian population, while proceeding to and attending a social function, to wit:a dance at an Officers Club at 1 Rue Piper, Rheims, France.

Specification 4: (Finding of not guilty).

ADDITIONAL CHARGE I: Violation of the 94th Article of War.
(Finding of not guilty).

10027

Specification: (Finding of not guilty).

ADDITIONAL CHARGE II: Violation of the 96th Article of War.
(Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty. He was found guilty of Charges I, II and III and Specification 2 of each thereof, and of Charge IV and Specifications 1, 2 and 3 thereof; and not guilty of Specification 1 of each of Charges I, II and III, Specification 4 of Charge IV and Additional Charges I and II and Specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for one (1) year. The reviewing authority, the Commanding General, IX Air Force Service Command, approved the sentence, remitted so much thereof as related to confinement at hard labor, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the findings of guilty of Charge III and Specification 2 thereunder as involved a finding of guilty of drunk in uniform in violation of Article of War 96, confirmed the sentence, and withheld the order directing execution thereof pursuant to Article of War 50½.

3. Summary of evidence for prosecution:

a. Specification 1 of Charge IV

In the latter part of August 1944, Staff Sergeant Paul V. Grosh, 36th Medical Supply Platoon, entered the medical supply office and found accused and several enlisted men. Accused was passing a bottle around. When Grosh refused, accused ordered the other soldiers out and had a mild argument with Grosh (R46-49). Grosh's testimony was substantiated by seven soldiers present. One testified they (the soldiers) were drinking whiskey (R62-65); five testified they and accused were drinking whiskey (R77-78,106,124-125, 127,136,148-149,151,158-159,163,168-169); and one testified they and accused were drinking whiskey in honor of "Peg's birthday" - presumably the birthday of accused's fiancee or wife (R86-88).

b. Specification 2 of each of Charges I, II, III, IV

About the second week of September 1944, after the 36th Medical Platoon had unloaded some government whiskey, accused had

one bottle thereof opened. The whiskey was passed around and accused and the enlisted men drank thereof (R89-90,95,173-174). Its value was 78 cents (R121). Later in the evening, accused was in the office with the acting first sergeant. Whiskey was on the desk. They departed in a jeep taking two bottles of whiskey with them. They returned about 0230. At that time accused was drunk (R129-132,135, 137). The next morning he put in some telephone calls concerning back orders. He took the first call when it came through. When the second call came through, he was sprawled over the desk asleep. He could not be aroused. He was drunk (R68-70,73-76; 162,174).

c. Specification 3 of Charge IV

The court took judicial notice of Section 2, Cir.35, Headquarters, ETOUSA, 29 March 1944, providing that arms should only be carried when required in the performance of duty and should not be carried during off-duty hours among the civilian population (R43). On 26 November 1944, there was a dance at an officers' mess in Rheims, France. It was attended by officers and civilians. Accused was present but not on duty. About 2400 hours he was seen with a 7.65 caliber pistol of Spanish manufacture. When he waved it at an officer he was disarmed (R14-16,17-18,19-20,29-31; Pros.Ex.1).

4. Summary evidence for defense:

Three colonels, a lieutenant colonel, a major and a captain for whom accused had served testified as to his gentlemanly conduct and his excellence as an officer. He was variously rated from very efficient to "the most efficient medical supply officer I have met in the service" (R101,102,103,188,196,207-208). One officer testified it would have been reasonable to give men a bottle of whiskey after they had unloaded many cases after duty hours (R192). Another testified to the contrary (R204).

After his rights as a witness were explained to him, accused testified. He was commissioned in 1940 (R209). Prior thereto he had been an enlisted man for many years (R222). He was not drinking on or about 28 August (R212,213). "Peg's birthday" was 23 July. There was no celebration thereof (R216-217). He did not recall offering Sergeant Grosh a drink (R217). No shipment of whiskey came in in September (R211). He did recall a shipment coming in sometime prior thereto. After it was unloaded, he caused a bottle to be opened and passed among the men. He imagined he took a drink. Perhaps it was legally wrong to have taken the bottle, but he did not consider it morally so (R213). He tried to be considerate of enlisted men (R222). On other occasions he had had a drink with enlisted men but on neither of the times alleged (R218). On or about 15 September 1944 he did have a drink with Sergeant Roberts with whom he came in about 0200.

10027

He was not then drunk. The next morning he had a hangover and laid his head on the desk. He was not drunk (R212-213). Witness who testified he was drunk when the calls came through perjured himself (R219).

5. The record of trial does not commend itself. Some of the specifications appear to have been ill-advised and to border on multiplicity. The record contains 224 pages and much vague and ambiguous testimony. No purpose would be served in commenting upon the many irregularities. ost have been considered in the reviews of the Staff Judge Advocate and the Theater Judge Advocate. Suffice it to say none have been found to have injuriously affected the substantial rights of the accused.

6. a. Specification 1 of Charge IV

Under the allegation that the offense occurred on or about 28 August 1944, it was permissible to show the offense occurred in the latter part of August.

b. Specification 2 of each of Charges I, II, III, IV

Under the allegations that these offenses occurred on or about 15 September 1944, it was permissible to show they occurred about the second week of September 1944. As to Specification 2 of Charge III, while it does not affirmatively appear that accused was in uniform, the circumstances support the court's inference and finding that accused was, in fact, in uniform. Though Specification 2 of Charge II failed to allege the place of the offense, defense did not object thereto until prosecution had rested. Under the circumstances, this irregularity is not considered to have been material (CM 122281 (1918), Dig. Op. JAG 1912-1940, sec.428(12), p.297).

c. Specification 3 of Charge IV

The court properly took judicial notice of Cir. 35, Headquarters, ETOUSA, 29 March 1944, of which accused was charged with notice (CM ETO 3649, Mitchell).

7. The charge sheet shows that accused is 36 years four months of age and that he was "ordered to active duty" as a second lieutenant 27 July 1940. His prior service consisted of 13½ years as an enlisted man.

8. The court was legally constituted and had jurisdiction of

of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty, as confirmed, and the sentence.

9. The penalty for violating Article of War 85 by an officer in time of war is dismissal and such other punishment as a court-martial may direct. The penalty for violations of Article of War 94 and 96 by an officer is such punishment as a court-martial may direct.

B R Keeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B K Keeney Jr Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 19 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Major LYLE B. WETHERFORD (O-312215), Headquarters and Headquarters Squadron, IX Air Force Advanced Depot Area Command (2), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10027. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10027).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

---

( Sentence as modified by reviewing authority, ordered executed. GCMO 293, ETO, 27 July 1945).

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

8 AUG 1945

CM ETO 10053

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 84TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at Krefeld, Germany, 23 March 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| | ) | |
| Private ELDON E. MILLER (14025124), Company F, 333rd Infantry | ) | |

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Eldon E. Miller, then First Sergeant, Company "F", 333d Infantry, did, at Krefeld, Germany, on or about 5 March 1945, aid and abet Private First Class Frank E. Leonard, Company "F", 333d Infantry, in the willfull, deliberate, felonious and unlawful murder of one, Hans-Gunther Wieynk, a human being.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions

was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that the weapons platoon of Company F, 333d Infantry, of which company accused at that time was first sergeant, had moved into 9 Paul Schutz Street, Krefeld, Germany, early in March 1945. This move dispossessed Hans-Gunther Wieynk, a German civilian, who moved into Number 11, next door (R7-11, 49, Pros.Ex.B). Technical Sergeant Wolfson, of Company F, took Wieynk to his company command post at about six-thirty the evening of 5 March because the latter had returned home "with an Off Limits sign and a slip from the Military Government allowing him to be out in the street until six-five at night", and Wolfson, in doubt as to what this meant, wanted to "let the officers decide what was going to happen". At the command post, Wieynk talked with accused and some of the other men there. He "didn't like the way the American troops acted, and he also brought religion into the discussion, about not thinking the American Army would allow Jewish soldiers into their organization". When Wolfson brought the German in, he brought with him some pictures. Accused asked the civilian "why he didn't like the way American soldiers acted" and said, referring to the civilian, "That man ought to be tried as a spy and shot" (R10,11).

Hans-Gunther Wieynk was shot and killed that night near Number 13 Paul Schutz Street, Krefeld, by three bullets fired from a pistol by Private Frank E. Leonard, also a member of accused's company (R10). That evening, at about 10 o'clock, accused, Wolfson, Privates First Class Albert H. Walters and Willie R. Bond, and Privates Edwin C. Wichman and Frank E. Leonard, all of whom, members of Company F, testified, and four others were in the company supply room drinking and talking (R36,37,44,47,93). Leonard, who was tried and sentenced for his part in the killing that night (R98), testified that accused "started talking * * * about some German that had come down there [to the command post] and made a complaint about how the American troops were pushing him around, * * * and how he had found pictures on him or swastikas * * * when he had moved out of the house [taken over by the weapons platoon] * * * how he was a German soldier and we were SB-ing him and everything - cursing him up and down and how he ought to be taken out and shot" (R93). Bond listened to part of

this talk. He heard Leonard say, "He ought to be shot * * * Do you want me to go down and get him", and accused reply, "Wait, I want to go down to the weapons platoon anyway" (R47). At that time, Walters and Wichman heard "them", including accused, speak about going over to check on the German civilian (R37,45). Accused then left for the weapons platoon (Number 9) accompanied by Walters, Leonard and Thomas (R37,45). On the arrival of this group at the weapons platoon, at about 2300 or 2330 hours, accused stated that he wanted to see where Hans-Gunther Wieynk was in order "to check on him" (R11,27,37,53,57,63; Pros.Ex.B). The platoon leader told Sergeant Wolfson to "go over" and show accused where this German was. In this party were accused, Wolfson, Leonard, Walters and Staff Sergeant Luther M. Eads of Company F, who went along at the request of accused (R11,37,38,45,53,63). They went next door to Number 11 and went upstairs. Leonard and Wolfson entered the room where accused was in bed. The latter got up and dressed and went downstairs with the group which at that time included accused, Leonard, Wolfson and Walters. On the stairs, Walters gave Leonard a gun, a P-38 (R12,39, 54,64,73,74,95). Accused asked Wolfson if he "wanted the man". Wolfson said "No". Accused asked Leonard if he wanted him. Leonard answered in the affirmative, and accused said, "You know your orders. Take him to the corner" and "Do a good job on him" (R13,64,75,96). Sergeant John E. Yokum and Sergeant Wilford A. Gibson, both of whom at that time were members of Company F, were on duty as guards at the weapons platoon (R62,63). Both had observed accused when he came to that place that night at about 2300 hours. Gibson judged accused to be drunk and he heard him "talking about his hate for Germans"(R63,73). When accused and the others were in Number 9, these guards went there to investigate (R64,73). They saw Wieynk, accused, Leonard carrying a P-38 pistol, and others descend the stairs (R64,73,74). Gibson asked what was going on. Accused reprimanded Gibson for leaving his post (R13,74). After that, accused, Wolfson, Walters, Gibson and Yokum all returned to the weapons platoon. Then accused called Gibson into the command post and said to him: "I understand you have some objections". Gibson replied: "Yes, I object to murder" (R14,39,57,58,74,75,95). Gibson believed that beyond being reprimanded and sent back to his post by accused, he was given no other instructions (R75); but Wolfson and First Lieutenant William C. Kiley, Company H, who also was present at the weapons platoon command post that night, testified that accused at that time also told Gibson to keep quiet about what he had seen (R17,58). At about the same time, while accused was in the weapons platoon building, three shots were fired outside the building (R14,30,65, 74). Leonard shot Wieynk near the corner, in front of Number 13, just after he was seen by a guard at about 2330 hours, on his way to that spot in the company of a German civilian (R36,67,81,82,96;

Pros.Ex.A). After Leonard and the civilian passed the guard, the latter heard a shot; he turned and heard two more shots and saw their reflection. Apparently they were fired from a pistol which he saw in the hand of a soldier standing over the body of "This German civilian". The soldier was Leonard (R82,83). Leonard, himself, testified to his recollection of the shooting:

> "The next thing I remember was a report of a shot and there was a white piece of cloth in front of me as it went down. I presumed it was the shirt. I walked up to the body and there was a man lying there in front of me. He said to me, 'You didn't give me enough. Give me more', and I remember I shot that two shots then, but whether I shot the first shot I heard I can't say. I don't know whether my pistol was even pointing at the man at the time" (R96).

Immediately after the shooting, the guard who had witnessed the shooting (supra) talked to Leonard and he (Leonard) said something about "These damn Nazis" (R83). While the body was there and five or ten minutes later, accused told this same guard: "Don't say anything. I'll take care of this" (R83). The sequence of events shows that a little later the company commander "got Sgt. Miller [accused] awake and asked him what had happened". First Lieutenant William C. Kiley heard accused reply. He testified as to his recollection:

> "Sgt. Miller stated that they went into a civilian's house, and words to the effect - I couldn't positively say that, 'We dragged him out of bed and shot his ass off'. I wouldn't say it was 'we' - or, 'Pulled him out of bed', or words to that effect, 'They pulled him out of bed and shot his ass off'" (R59).

4. Accused, fully advised of his rights as a witness, elected to testify under oath (R102,103). He related that on the night in question he went to the supply room to check with the supply sergeant on some battle losses and dirty clothes and stopped to have a drink and conversation with the men there; that he remarked he had to go to the weapons platoon to learn the whereabouts of the German civilian and then check on him to see if he was where he was supposed to be; that he asked if anyone wanted to come with him and then went to the weapons platoon command post where he asked for the civilian, stating that he wanted to see if he was still where he was supposed to be;

that Sergeant Wolfson offered to show him where the civilain was and that he said to Eads, "Want to come along?"; that he, Wolfson and Eads, followed by Walters and Leonard, went to the civilian's house (R-103), where he went upstairs and into the wrong room; that Leonard went into the deceased's room, turned on the light and said "Here he is, Miller"; that he then entered the room and saw the deceased sitting up in bed; that he left the room and got Wolfson to help recognize the deceased and upon returning found that the deceased was up and dressing; that he went downstairs and met Gibson, the guard, who asked, "What's going on up there?"; and he asked Gibson why he had quit his post; that Gibson said he objected to murder; and he then asked, "Why, where did you hear anything about murder?"; that they then returned to the weapons platoon command post and he told Gibson to go inside and he said to Lieutenant Kiley, "Gibson, he objects to murder. Do you know where he has heard anything about murder?" and that lieutenant Kiley answered, "No"; that he then asked Gibson why he had gone over to the civilian's house and Gibson said that Lieutenant Kiley had told him to and that Lieutenant Kiley said that was not true (R104); that he then said to Gibson,

> "What do you mean by telling me that one of the officers told you to come over there when he didn't. Don't you have any more respect for the officers than that. You could be court martialed for telling officers and non-commissioned officers false remarks".

That soon thereafter he heard that a Jerry had been killed outside and he started out of the house and met Leonard at the door. Leonard said a German had been killed down on the corner and he went down to the corner where he saw several men standing around the body; that he then said, "Well, let's get back inside and not get tangled up in this", and told the guard, "I guess we can take care of it somehow". He then went into the first platoon "CP" and then to the company "CP" and to bed. Some time later that night the company commander awoke him and asked him what had happened and he answered that a German civilian had been killed and that he did not know who did it (R105).

The accused specifically denied that he had made any statement or heard anyone make a statement to the effect that the German civilian would be harmed or that he knew of anyone who intended to kill the civilian (R106). He further testified that the deceased was not threatened in any way in his presence (R107) and that nothing happened to lead him to believe that any harm was going to befall the deceased (R109).

5. Accused is charged with having aided and abetted Private First Class Frank E. Leonard in the murder of Hans-Gunther Wieynk at the time and place alleged in the Specification of the Charge.

The evidence is uncontradicted that Wieynk was shot and killed by Leonard. Leonard admitted this on the stand. Murder is the unlawful killing of a human being with malice aforethought (MCM, 1928, par.148a, p.162). The killing was without legal justification or excuse and was therefore unlawful (idem). The Specification in alleging the killing omits the words "with malice aforethought" but describes the conduct which accused is alleged to have aided and abetted as "willfull, deliberate, felonious and unlawful murder". This omission was harmless. Accused was fully apprised by the Specification of the crime with which he was charged. The intent to charge the accused with being an aider and abettor in the substantive crime of murder is clearly found in the language of the Specification. The offense in chief, the murder, is sufficiently specified. The time, place and identity of the victim are set out with unmistakable clarity. The allegation that the offense was "murder", as distinguished from any other offence, necessarily imposed upon the prosecution the burden of proving malice aforethought. The rights of the accused were fully protected by this Specification. Murder is legally defined and must be proved in every essential required by that definition. Military law does not concern itself with the superfluous. It would have been unnecessarily repetitious to have charged accused with aiding and abetting a murder, and then to add: "committed with malice aforethought". The Specification by its use of the word "murder" having clearly apprised the accused of the offense with which it was intended he be charged and there being nothing in the record to suggest that he was misled to his prejudice by the omission in the Specification of the words "with malice aforethought", this omission was not fatal (CM 221488, I Bull. JAG 21).

The Specification charges accused with aiding and abetting the substantive crime of murder. At common law aiders and abettors of others in the commission of crime were punishable as such. To aid and abet the commission of a felony was in itself a substantive offense (1 Wharton's Criminal Law (12th Ed., 1932) sec.245, pp.327, 328; Coffin v. United States, 162 U.S. 664, 40 L. Ed. 1109). The enactment of sec. 332 of the Federal Criminal Code (18 USCA 550) abolished the common law distinction between aiders and abettors and principals (CM 243674, III Bull. JAG 285) providing that:

> "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal".

The proof, in substantial abundance, showed that accused aided and abetted the murder, as alleged. With malice toward the victim, he was an active participant in the preliminaries. Although he left before the shooting occurred and did not accompany the killer on the last fatal march, he did go with the group to the home of the victim and was present while the deceased was being taken out of the house. By his presence and spoken word, he encouraged and fortified Leonard if he did not in fact actually instigate the commission of this murder. The prosecution fully established the guilt of accused as a principal in the crime charged (CM 243674, supra).

6. The killing of Wieynk by Leonard was an element, requiring competent proof, to establish the guilt of the accused in this case. On cross-examination of Leonard, it was revealed to the court that Leonard had been tried and convicted for the murder of the German, Wieynk. It cannot be said that this error was prejudicial because of the compelling nature of other competent evidence before the court (III Bull. JAG 185).

7. The charge sheet shows that accused is 25 years, 11 months of age. He enlisted on 26 September 1940 at Jackson, Mississippi. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized for murder (AW 42; sec.275, Fed. Criminal Code (18 USCA 454)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

3 AUG 1945

CM ETO 10054

| | |
|---|---|
| U N I T E D S T A T E S | 9TH INFANTRY DIVISION |
| v. | Trial by GCM, convened at Monschau, Germany, 14 February 1945. |
| Private ERNEST E. BROWN (33553281), Company F, 39th Infantry | Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 61st Article of War.

Specification: In that Private Ernest E. Brown, Company "F", 39th Infantry, then sergeant, Company "F", 39th Infantry, did, without proper leave absent himself from his organization located near Undenbreth, Germany, from about 8 November 1944, to about 25 November 1944.

CHARGE II: Violation of the 58th Article of War.

Specification: In that * * * did, at Elsenborn, Belgium, on or about 1 December 1944, desert the service of the United States by absentinting himself without leave from his organization with the intention of avoiding hazardous duty and shirking important service, and did remain absent in desertion until he surrendered himself at Verviers, Belgium, on or about 23 December 1944.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and their specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence was undisputed that on 8 November 1944, accused was a member of Company F, 39th Infantry, located at Undenbreth, Germany (R6). On that date, he was scheduled to return to his company from a 48 hour pass in Verviers, Belgium. He failed to return until 25 November 1944 when his organization was located near Kalterherberg, Germany and participating in a training program for action against the enemy. Accused was absent without leave from the 8th to the 25th of November (R6-7, 9,13-14; Pros.Ex."1"). He explained his absence by saying he was having too good a time to return. He was placed in arrest in quarters (R8). Thereafter until 1 December his company was engaged in small unit problems, such as taking fortified positions and pillboxes (R8,14). It was common knowledge among the men of the organization that this training was for anticipated action against the enemy at an early date. Accused broke arrest 1 December and absented himself without leave (R10,14-15).

On 5 December his company took part in an attack against the enemy (R12). Accused surrendered to military authorities at Verviers, Belgium on 20 December 1944 (R15).

4. For the defense, accused's company commander testified that he had known him since the organization was in Sicily and he had caused no trouble before this time, had been a good soldier and formerly held the grade of sergeant (R16). After his rights were explained, accused elected to remain silent (R19-20).

5. Under Charge I and Specification, accused's absence without leave as alleged was shown by substantial evidence.

6. Regarding Charge II and Specification, there was also substantial evidence from which the court was authorized to infer that accused knew of the prospective action of his organization against the enemy and deliberately left his place of duty to avoid prospective battle hazards. The court's findings of guilty were fully justified (CM ETO 7413, Gogol; CM ETO 5953, Myers; CM ETO 5293, Killen).

7. The charge sheet shows that accused is 22 years three months of age and was inducted 28 January 1943 at Baltimore, Maryland. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

[illegible] Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

15 JUN 1945

CM ETO 10057

| | | |
|---|---|---|
| UNITED STATES | ) | 8TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at |
| | ) | APO 8, U. S. Army, 27 March |
| Private ANTHONY MASTROPIETRO (12020266), Company K, 28th Infantry | ) | 1945. Sentence: Dishonorable Discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch United States Disciplinary Barracks, Greenhaven, New York. |

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Anthony Mastropietro, Company K, 28th Infantry, did, at Vicinity of Vossenack, Germany, on or about 5 December 1944, desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty to wit: combat duty against an armed enemy of the United States, and did remain absent in desertion until he was apprehended at or near Paris, France on or about 28 December 1944.

He pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of the Specification except the words "with intent to avoid hazardous duty, to wit: combat duty against an armed enemy of the United States", and guilty of the Charge. No evidence of previous convictions was

introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of guilty as involved a finding of guilty of absence without leave and his apprehension on the dates and at the places alleged in violation of Article of War 61, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution was substantially as follows:

Accused was a rifleman in Company K, 28th Infantry (R7,11). On 4 December 1944, he was returned from the hospital to his organization's kitchen (R11,12), and after being furnished overshoes the next day was to join his unit on the line (R5,12,14). The company was located in the vicinity of Vossenack, Germany (R5). Accused was seen on 4 December 1944 in the kitchen which was part of the field train, (R4,5,12) and the next day it was reported to the first sergeant that he had gone on sick call but he was not again seen in the company during the month of December (R5,10,13). He had not been given permission to be absent from the Company (R5,10,14). The company was engaged with the enemy on 5 December 1944, receiving mortar and small arms fire and heavy casualties were suffered (R5,14), and it was common knowledge among the men at the field train that the company was in contact with the enemy (R10). Accused knew that one of their platoon sergeants had been killed in action on 5 December (R6). The investigating officer testified that accused, after being advised of his rights (R16), made a voluntary statement in which he stated he had been returned to his organization as a straggler on or about 4 December and was to remain at the field train until he was completely equipped after which he was to go to his company. He further stated that he left the field train on 4 December 1944 without permission and went to Paris, France, where he was arrested on 28 December 1944. At the time he left the field train he knew the tactical situation of his company was "pretty hot" (R16,17).

4. After his rights as a witness were fully explained to him (R18), accused elected to remain silent and no evidence was introduced in his behalf.

5. As a result of the action of the reviewing authority the Board of Review is concerned herein only with the legal sufficiency of this case as a violation of Article of War 61. The prosecution presented ample proof of all the elements of this offense and they were admitted by the accused in his voluntary statement to the investigating officer (MCM, 1928, par.132,p.146; CM ETO 3991, Valdez). The circumstances under which

accused left his organization indicate that he might well have been found guilty of the offense charged.

6. The charge sheet shows that accused is 23 years of age and enlisted 24 October 1940. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence and the findings of guilty as approved.

8. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3

29 MAY 1945

CM ETO 10079

| | |
|---|---|
| U N I T E D S T A T E S | UNITED KINGDOM BASE, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | Trial by GCM, convened at Lichfield, Staffordshire, England, 21 February 1945. Sentence: To be hanged by the neck until dead. |
| Private ANICETO MARTINEZ (38168482), Headquarters Detachment, Prisoner of War Inclosure No. 2 | |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Aniceto Martinez, Hq Detachment, Prisoner of War Inclosure No. 2, did, at Rugeley, Staffordshire, England, on or about 6 August 1944, forcibly and feloniously against her will, have carnal knowledge of Agnes Cope.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The re-

viewing authority, the Commanding General, United Kingdom Base, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The evidence for the prosecution was as follows:

Mrs. Agnes Cope, a frail, 75 year old woman, weighing 112 pounds, resided alone in a small cottage at 15 Sandy Lane, Rugeley, Staffordshire, England (R8,10,12,20,21,42). Surrounding the dwelling was a six-foot hawthorne hedge (R12). About 0315 hours on 6 August 1944 while in her room on the second floor to which she had retired for the night, she heard someone on the stairs and then a man appeared in the doorway. She said, "Oh Dear Master, whatever do you want. If it is money you want, I haven't got it". The man replied, "I don't want money. You know what I want. It be a woman I want". He was a big man and wore khaki clothes and a hat with a black peak. His speech sounded American, but she did not see his face. After placing his hat on her bed and moving her to one side, he lifted her nightdress, took out his "privates" and inserted it in her "private part". She did not consent to his actions, but screamed and resisted him as best she could. He struck her, giving her a black eye and bruises. He finally left and she waited "for time to get on that I could get out and call someone" (R8-11). She arrived at the police station between 0730 and 0830 hours the same morning (R10,12) and at 1045 was examined by Dr. L. D. Roberts, police surgeon of Rugeley, a qualified medical practicioner. He found she had sustained a sprained thumb and minor bruises on her face and neck. There was a small bruise on the posterior vaginal wall, inside the passage, which was of recent origin, and the left side of her "private parts" was swollen and bruised, injuries consistent with recent intercourse (R19,20). Vaginal slides made from swabs taken from the upper and lower parts of the "private passage" revealed the presence of human spermatazoa (R20,21,32,33).

Accused's organization was Prisoner of War Inclosure No. 2, located at Rugeley, and a bed check made about 2400 hours on the night of 5-6 August 1944 disclosed that he was the only member of the organization then absent (R21,22). A service cap was found on accused's bed on 6 August, which he admitted he had borrowed from a friend and had worn the previous night (R13,14; Pros.Ex.1). A thorn sticking to this cap was similar to thorns on the hawthorne bush which surrounded the Cope dwelling and blue fibers adhering to it were similar to fibers in the blue portion of a quilt found on Mrs. Cope's bed (R13,14,15,31;Pros.Ex2 and 4). The quilt was described in Mrs. Cope's testimony as "a red one" (R10). A shirt and a pair of trousers which accused admitted wearing

on the night of 5-6 August were found in his possession (R41; Pros. Ex.3). White material found around the bottom two buttons of the trousers (R13) was shown to consist of cotton fibers and cotton threads similar to fibres and threads in Mrs. Cope's nightdress (R32; Prox. Ex 4). The lower portion of the shirt contained a seminal stain (R32).

On 6 August following a complaint made to him by Mrs. Cope , Police Inspector Horace J. Brooks of the Staffordshire County Police, stationed in Rugeley (R12), interviewed accused and "charged him first" by stating that he

> "was going to arrest him and then hand him over to the United States authorities, for that between eleven-thirty on the 5th and eight thirty on the 6th that he unlawfully raped one woman, Mrs. Cope".

He then asked accused,

> "Do you wish to say anything in answer to the charge? You are not obliged to say anything at all unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence".

Accused replied,

> "I did go in the house. I did not break the door open. I had connections with a woman. She was not forced. It was at a little house at the bottom of the hill near the pub. It happened last night. I had had some drink. I was not drunk. I was sick near the house" (R14).

On 7 August accused was interviewed by Harold F. Ford, Agent, 28th Military Police Criminal Investigations Department, who warned accused of his rights under Article of War 24, advising him that he had the privilege of remaining silent and that anything he said could be used either or or against him in the event the investigation resulted in a trial by court-martial (R25,26). No force was used, no reward promised, and no persuasive measures taken. Accused stated, in substance, that he went to Rugeley on the night of 5 August and visited two or three pubs where he had quite a few beers. He was feeling "high" but not drunk. The pub closed about 2200 hours. He left, walked around and finally came to a group of houses. He had talked to a lady in one of the houses on two prior occasions. About 2230 he entered, what he believed was the same house, by opening the door when

there was no answer to his knock. He turned to the right and walked halfway up the stairs. A lady then asked if he was looking for money. He replied, "No, I've got plenty of money, you know what I want". The lady responded, "Let's get it over so you can go back home". He placed his hat on the bed, sat down and pulled her down beside him. He was wearing a "peak hat" that night. After he unbuttoned his pants and shorts, she took his penis and put it into her private parts. He was on top of her only for a second and could not recall hitting her. "It wasn't any good" so he got up, grabbed his hat and went out the back door. He jumped over the hedge onto the road and proceeded back to camp (R26,28).

4. After his rights were explained to him (R34-35), accused testified in substance in accordance with his statement to Agent Ford. He also testified that he had been recommended to the Cope house two weeks previous to the night in question. He had then tried to enter the house but a woman had told him to come around another night (R35). He had previously seen soldiers and "numerous women" inside the house and had been ordered away from its vicinity by the military police (R35,36,37). However, he had never seen Mrs. Cope before (R37). He thought the number of the house was 18 or 15 and that he was going to the same place on 5-6 August. He believed it to be a house of ill repute. He had no money when he went to this house (R37). He denied that the hat, trousers and shirt, admitted in evidence, had been worn by him on the night of 5-6 August (R38,39; Pros. Ex. 1).

5. Major Chester W. Mebus, a member of the court, is shown as absent at the time the court met on 21 February 1945 (R2). However, the fact that he was then present is made certain by the question directed to him personally by the prosecution at the opening of the trial as to whether or not he had any inhibitions toward the imposition of the death penalty in the event of a finding of guilty. Major Mebus answered "None"(R4). It is therefore obvious that the indication in the record that he was absent when the court met is incorrect and that his name should have been included with the members of the court listed as present. The record of trial further recites: "Note: Major Mebus was then excused after challenge and before the court was sworn" (R4). Who instituted the challenge, what action was taken upon it by the court and whether or not Major Mebus then withdrew after being excused does not appear (MCM, 1928, par.58a,b,p.44-45). Further obscurity is added by the showing in the record of trial that after such challenge both the prosecution and the defense indicated they had no challenges either for cause or peremptorily (R3). Regardless of the circumstances concerning the challenge, it may properly be presumed that Major Mebus then withdrew upon being "then ex-

cused after challenge" and no substantial right of accused was injuriously affected by the irregularities above noted.

6. Every element of the offense of rape is amply proved by competent substantial evidence. The record of trial is therefore legally sufficient to support the findings of guilty reached by the court. While there is no evidence that accused inflicted serious bodily injury upon his victim apart from the violation of her person, nevertheless it is apparent that he accomplished his purpose by means of force while the elderly and frail woman of 75 years resisted to the utmost extent required by the circumstances in which he placed her. The case therefore falls squarely within the rules of law discussed by the Board of Review in CM ETO 3933, Ferguson and Rorie and CM ETO 4661, Ducote.

7. The charge sheet shows that accused is 22 years four months of age and was inducted 19 October 1942 at Santa Fe, New Mexico. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92).

Benjamin R. Sleeper, Judge Advocate

Malcolm C. Sherman, Judge Advocate

_____, Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 29 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U.S. Army.

1. In the case of Private ANICETO MARTINEZ (38168482), Headquarters Detachment, Prisoner of War Inclosure No. 2, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The rape is referred to as "heinous", "bestial", "sub-human" and "aggravated", because of the age of the victim, but it is unlikely the accused knew this because of the darkness and his intoxication. Aside from the age of the victim, the crime was not an aggravated rape.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial, which is delivered to you herewith. The file number of the record in this office is CM ETO 10079. For convenience of reference, please place that number in brackets at the end of order: (CM ETO 10079).

4. Should the sentence as imposed by the court be carried into execution, it is requested that a complete copy of the proceeding be furnished this office in order that its files may be complete.

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General

---

( Sentence ordered executed. GCMO 204, ETO, 9 June 1945).

10079

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1 — 29 MAY 1945

CM ETO 10097

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 89TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at Punderich, Germany, 2 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| Private CRUZ C. ROSAS (38122191), Company B, 314th Engineer Combat Battalion | ) | |

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

1. The record of trialin the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 93rd Article of War.

Specification: In that Pvt. Cruz C. Rosas, Co B, 314th Engr C Bn, did, at Punderich, Germany, on or about 17 March 1945, with intent to commit a felony, viz, rape, commit an assault upon Matilda Gerhard, by willfully and feloniously placing his arms about her and throwing the said Matilda Gerhard upon a bed.

CHARGE II: Violation of the 65th Article of War.

Specification: In that * * * having received a lawful order from Cpl Lawrence P. Malbrough, Co B, 314th Engr C Bn, a noncommissioned officer who was then in the execution of his office, to "get out of this house", did, at Punderich, Germany, on or about 17 March 1945, willfully disobey the same.

CHARGE III: Violation of the 96th Article of War. (Finding of not guilty)

Specification: (Finding of not guilty)

He pleaded not guilty, and was found not guilty of Charge III and its Specification, guilty of the Specification of Charge I, except the words "placing his arms about her and throwing the said Matilda Gerhard upon a bed", substituting therefore the words "holding with physical force the said Matilda Gerhard upon a bed", of the excepted words not guilty, of the substituted words guilty, guilty of Charge I, and guilty of Charge II and its Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for one hour and wrongfully taking and using without proper authority a ¼-ton truck in violation of the 61st and 96th Articles of War. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, but reduced the period of confinement to ten years, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Prosecution's evidence summarizes as follows:

On the afternoon of 17 March 1945 accused, together with Private Leslie J. Williams, was drinking wine with the Gerhard family and two other Germans, Mrs. Koenig and Miss Vetterlich in the Gerhard home in Punderich, Germany. After the group had consumed two bottles of wine (R12), Matilda Gerhard, one of the Gerhard daughters, went upstairs to her room (R8,13). Shortly thereafter, accused and Williams put their arms around Miss Vetterlich and drew her close to them. She cried for help and went outside (R16). Accused and Williams then went upstairs (R17) and told Matilda to stay in her room. She wanted to leave but wasn't permitted to do so (R12). She called for help from her father twice (R8,14). They shoved her and she fell on the bed. Accused wanted to grab her but she pushed him away. He did not attempt to disrobe her and touched only her garter (R9). He did not remove any of his clothing or expose any part of his body (R11).

The prosecutrix testified that she pushed him away and stood up and called for help again. Some American soldiers came up the stairs and grabbed accused and she went downstairs. As far as she could remember accused pushed her on the bed only once (R9,10).

Corporal Lawrence P. Malbrough and Private Dudley of accused's company went to the Gerhard house in response to a request for aid (R18). Malbrough testified as follows:

> "We went across the street and got to the entrance of the house. I heard this girl upstairs moaning and crying so we went upstairs. When I was about five steps from the top of the stairs, Private Rosas opened the door of the room and I told him, 'Private Rosas, come down. You have no business up there'. He answered, 'Leave me alone. I want to get some ass'. He went back into the room and I followed" (R18).

Witness told accused "to get out". When Malbrough came into the room, accused "threw the girl on the bed and was on top of her" and holding her. Witness caught accused by the shoulder and pushed him from the room. He then discovered that Williams and Dudley were fighting and when he released his grasp on accused "to see what was going on", accused reentered the room (R18-19). Witness found him on top of the girl a second time. He again grasped accused by the shoulder and pushed him from the room. Accused refused to leave the house and Malbrough knocked his helmet off and hit him. Accused then went outside and they returned to the company area.

Malbrough testified that accused "acted very drunk and he smelled" (R20). Mr. and Mrs. Gerhard also testified that accused was intoxicated (R15,17) as did the prosecutrix (R12).

4. Accused, after being warned of his rights, was sworn as a witness in his own behalf. In pertinent part his testimony as to the events of 17 March 1945 was:

> "In the morning when we got up we had to move. We started drinking wine. We kept drinking wine until we got here in this town. We then went out again, but the platoon lieutenant sent me back to my company. After that me and Private Williams went out of the house where we were supposed to sleep that night. We

had been drinking a lot and went to the other house where the girl was. When we got there we asked for wine, and after I drank a few glasses more I did not remember nothing. The next day they told me I tried to rape the girl. I don't remember nothing. * * * [I first arrived in Punderich] About twelve or one o'clock, around noon. We left the town and they went on a combat patrol. He said I was not good enough to go because I was too drunk" (R21).

5. The vital elements of the crime of assault with intent to commit rape have been succinctly set forth by the Court of Appeals for the District of Columbia:

"In order to make out a case of assault with intent to commit rape, it is essential that the evidence should show beyond a reasonable doubt (1) an assault, (2) an intent to have carnal knowledge of the female, and (3) a purpose to carry into effect this intent with force and against the consent of the female. Dorsey v. States, 108 Ga. 477, 34 S.E.135" (Hammond v. United States (App.D.C.1942),127 F.(2nd) 752,753).

The Board of Review is of the opinion that the above requirements must be rigorously applied and that no soldier should be convicted of the offense unless all elements are proved by compelling evidence in the record of trial. In this instant case the standard is clearly met. Aside from the testimony of the German civilians, the commission of the offense is graphically established by the testimony of Malbrough, an American soldier of accused's own organization (CM ETO 78, Watts; CM ETO 3749, Ward; CM ETO 3750, Bell; CM ETO 7202, Hewitt and Nash).

6. With respect to Charge II and its Specification, the evidence shows that Corporal Malbrough issued the order to accused substantially as alleged and that accused willfully refused to obey the same. His guilt of the offense was proved (CM ETO 1725, Warner).

7. The question as to whether accused's intoxication was so complete as to render it impossible for him to have entertained the specific intent to rape with regard to the Specification of Charge I and the intent to willfully disobey Malbrough's order with regard to the Specification of Charge II was within the province of the court. The court resolved the question against accused and the Board of Review, in view of the evidence, will not dis-

turb the findings on appellate review (CM ETO 1585, Houseworth).

8. The charge sheet shows that accused is 26 years of age and was inducted 6 July 1942 at Fort Bliss, Texas. He had prior service from 18 September 1940 to 27 September 1941 with Company E, 120th Engineers.

9. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

10. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

28 MAY 1945

CM ETO 10098

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 89TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at Loeffelscheid, Germany, 31 March 1945. |
| Private JEROME J. MOONEY (36745160), Headquarters Battery, 550th Antiaircraft Artillery Automatic Weapons Battalion | ) | Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

---

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Jerome J. Mooney, Headquarters Battery, 550th Antiaircraft Automatic Weapons Battalion (Mobile), did, at Loeffelscheid, Germany, on or about 18 March 1945, forcibly and feloniously against her will have carnal knowledge of Mrs. Stephanie Maldaner.

CHARGE II: Violation of the 93rd Article of War.

10098

(84)

Specification 1: In that * * * did, at Loeffelscheid, Germany, on or about 18 March 1945, with the intent to commit a felony, viz, rape, commit an assault upon Miss Elisabeth Ziefer.

Specification 2: In that * * * did, at Loeffelscheid, Germany, on or about 18 March 1945 commit the crime of sodomy, by feloniously and against the order of nature having carnal connection per os with Miss Elisabeth Ziefer.

Specification 3: (Finding of not guilty).

Specification 4: In that * * * did, at Loeffelscheid, Germany, on or about 18 March 1945, with the intent to do him bodily harm, commit an assault upon Johann Maldaner, by striking him on the head and on the arm with a dangerous weapon, to wit, a Sub-machine gun.

Specification 5: In that * * * did, at Loeffelscheid, Germany, on or about 18 March 1945, with the intent to do him bodily harm, commit an assault upon Josef Becker, by willfully and feloniously striking the said Josef Becker on the head.

Specification 6: In that * * * did, at Loeffelscheid, Germany, on or about 18 March 1945, with the intent to do her bodily harm commit an assault upon Helene Winzowski, by striking her on the head with a dangerous weapon, to wit, a Sub-machine gun.

Specification 7: In that * * * did, at Loeffelscheid, Germany, on or about 18 March 1945, with the intent to do her bodily harm, commit an assault upon Mrs. Stephanie Maldaner, by striking her on the head and on the arm with a dangerous weapon, to wit, a Sub-machine gun.

Specification 8: In that * * * did, at Loeffelscheid, Germany, on or about 18 March 1945, with intent to commit a felony, viz, rape, commit an assault upon Mrs. Susanna Becker.

Specification 9: In that * * * did, at Loeffelscheid, Germany, on or about 18 March 1945, by force and violence unlawfully enter the

dwelling of Johann Maldaner and Josef Becker with the intent to commit a criminal offense.

CHARGE III: Violation of the 63rd Article of War.

Specification: In that * * * did, at Loeffelscheid, Germany, on or about 18 March 1945, behave himself with disrespect toward Capt JOHN W. MILES, his superior officer, by saying to him, "Blow it out your ass", or words to that effect.

CHARGE IV: Violation of the 69th Article of War.

Specification: In that * * * having been duly placed in arrest in quarters at Loeffelscheid, Germany, on or about 18 March 1945, did, at Loeffelscheid, Germany, break his said arrest before he was set at liberty by proper authority.

CHARGE V: Violation of the 96th Article of War.
(Finding of not guilty)

Specification: (Finding of not guilty)

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found not guilty of Specification 3 of Charge II, and of the Specification of Charge V and Charge V, and guilty of all other charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution was substantially as follows:

On 18 March 1945 at about 2000 hours, accused came to the dwelling of Johann Maldaner and Josef Becker at 12 Main Street, Loeffelscheid, Germany (R7,8,17,23,25). Miss Helene

Winzowski, Mrs. Stephanie Maldaner, Mrs. Susanna Becker and Elizabeth Ziefer were the other occupants of this house (R7, 11,28,25). Accused entered the bedroom of Miss Winzowski armed with a gun and ordered her to "Come with me" (R8,10). Clad only in a nightgown and a little red jacket (R10) she went down into a field a little way with him and as she began to get frightened, she inquired where they were going or what she was to do. Accused then hit her on the side of the head with his gun, knocking her over. She immediately got up and accused tried to hit her again, but she succeeded in running into the house where she hid from accused who followed her (R8,9,12). He re-entered the house and asked where the girl was (R10) and, when told by Mr. Becker that he should leave the house or he would call the police, accused hit him (R24,25), knocking Mr. Becker to the floor (R21). Accused then entered the bedroom of Mr. & Mrs. Maldaner (R18) and ordered Mrs. Maldaner to "Come with me". She replied "No, I don't want to go. I would rather be shot. Rather than go with you shoot me" (R12). When her husband protested, accused held his gun up and pointed it right at him. Mrs. Maldaner put on her clothes and accompanied accused, who pushed her forward all the time with his gun. They went towards the field and accused hit her over the head with his gun, rendering her unconscious. When she regained consciousness, accused tore off her clothes and proceeded to penetrate her with his penis. He indulged in the act of intercourse four times. She tried to get away but at every attempt accused threatened to hit her with his gun if she got up (R18,12,13,15). When accused could no longer perform the act of intercourse, she caught up her clothes, put them on and went back to the house (R14).

After the accused took Mrs. Maldaner outside, Mr. Maldaner dressed and stood by the window waiting for his wife to return (R18). When she did come in the house, she asked for her husband and said to him, "You couldn't believe what's happened"(R19). He told her to be quiet and to go upstairs. He locked the door , undressed and went to bed. Shortly thereafter, he heard considerable noise, the breaking of glass in the door and accused reappeared in his room. He threw the covers off Mr. Maldaner and when he attempted to pull them back over him, accused hit him with his gun. When Mr. Maldaner made a further attempt to cover himself, accused again hit him on the arm and elbow, tearing the skin. He then laid still and in a few moments accused left the room (R19,20,24).

Accused then entered the Becker's room where Elisabeth Zieffer was in bed (R26). He spread her legs apart, placed his body between her legs and attempted to penetrate her with his penis. Not succeeding in this attempt, he placed his penis in her mouth (R26,27,28,30). Miss Zieffer offered no resistance be-

cause "I was afraid that he would do bodily harm to me or shoot me" (R28). Throughout these events, Miss Zieffer's sister, Mrs. Becker, was present in the room (R30). When accused finished with Miss Zieffer, he turned to Mrs. Becker and tore her pants and clothes off (R27,31) and got on her (R32). His sexual organ touched her but"it was weak" (R32). When he finished with her he said "sleep good" and left (R27,32).

Accused was identified by Captain John W. Miles as a private in the 550th Antiaircraft Artillery Automatic Weapons Battalion (R35). Captain Miles is Battery Commander of Headquarters Battery and on 18 March 1945, he was Battalion Officer of the Day. Sometime after 2100 hours on that day, accused entered his room stating that he was looking for another enlisted man. Captain Miles told him to leave the building, it was officers quarters and he had no business there and after a little conversation, he did leave the room. After leaving accused said, "You can blow it out your asshole" and the captain called him back, took his submachine gun away from him and placed him under arrest. Captain Miles then told him to report to his quarters and to remain there until he sent for him in the morning. Captain Miles noticed he had been drinking and asked accused if he knew he was being placed under arrest and he answered in the affirmative. After he left the room he said, "You can still blow it out your ass". Accused was again called back by Captain Miles and told he was under arrest and ordered to go to his quarters. Later when the corporal of the guard reported a disturbance in a nearby civilian home, Captain Miles dressed and went to this house. He heard talking in both English and German and as he opened the front door of the house, accused came down the front stairs. When asked what he was doing in the house, accused stated he was just talking to the German people. He was then placed under guard. Accused was not drunk but he had been drinking (R35,36).

Examination by an American Army medical officer on 19 March showed Mrs. Maldaner had lacerations of the head between the ear and the eye, on the arm and edema of the uretheral meatus which can be caused by excessive sexual intercourse (R33-34); Miss Winzowski had a rather deep laceration in the left eyebrow (R33); and Johann Maldaner had an inch-long laceration in the left frontal area of the head.

On the morning after 18 March 1945, Private First Class Davis asked accused why he was under arrest and "He said he got laid three times and blowed once" (R38).

4. The defense called the soldier who was guarding accused on the morning of 19 March 1945 and he testified that he heard the conversation between accused and Private First Class Davis

and it dealt entirely with the life of Private Davis when he was in the infantry. Accused was still under the influence of liquor (R40,41).

Accused, after his rights as a witness were fully explained to him (R44), was sworn and testified in substance as follows:

For the past ten years he has been a chronic drinker and has twice been reduced from the rank of noncommissioned officer for being drunk (R44,45). His wife divorced him and he was arrested in the states several times for the same reason. He has been told that when he is drunk he gets violent. On 18 March 1945, his unit arrived at Loeffelscheid about 1700 hours. On the way he was given a bottle of "schnapps", with about two or three inches in the bottle. He drank that and after arrival, when he was helping unload the kitchen truck, he found twelve or fourteen bottles of wine. He took them to his room and started drinking and the next thing he remembered he was down in the street looking for Davis. A guard pointed to a building so he went in it and found it was the officers' quarters. Here he met Captain Miles, but he doesn't remember what they talked about. The captain took his gun and told him he was under arrest. He must have forgotten this, because when he got outside, he saw a flashlight across the street and he thought that was the guilding he was looking for. He walked in, went upstairs and looked ina room. It was empty, so he looked in another room, and there were some civilians in a corner. He knew he was in the wrong room, so he walked out of the building and after taking four or five steps met Captain Miles, who put him under guard. He guessed the guard took him to bed and that's all he knew about that evening.

5. The record contains clear and persuasive evidence that on 18 March 1945, accused had sexual intercourse with Mrs. Stephanie Maldaner by force and without her consent. This constitutes the crime of rape as alleged in the Specification, Charge I (MCM, 1928, par.148b, p.165). That he had sexual connection by mouth with Miss Elisabeth Ziefer, as charged in Specification 2, Charge II is equally well shown by the evidence establishing the crime of sodomy (MCM, 1928, par.149k, p.177; CM ETO 4782, Long).

In Specifications 1 and 8, Charge II, accused is charged with assault with intent to commit rape upon the persons of Miss Elisabeth Ziefer and Mrs. Susanna Becker, respectively. "The intent to have carnal knowledge of the woman assaulted by force and without her consent must exist and concur with the assault" (MCM, 1928, par.149l, p.179). The record contains ample evidence that accused entertained this intent when he assaulted these defenseless women and the court was warranted in so finding (CM ETO 5012, Porter et al).

Concerning Specifications 4, 6 and 7, Charge II wherein accused is charged with assault with intent to do bodily harm with a dangerous weapon against the persons of Johann Maldaner, Stephanie Maldaner and Helene Winzowski, the record contains abundant proof that he struck these individuals with his sub-machine gun, a dangerous weapon. All the elements of these offenses are thus sustained by substantial evidence (MCM, 1928, par.149m, p.180; CM ETO 3366, Kennedy). Specification 5, Charge II alleges assault with intent to do bodily harm against Josef Becker. The record shows accused struck him with such violence that he was knocked to the floor. This unprovoked attack constitutes substantial proof of all the required elements of this offense (MCM, 1928, par.149n, p.180; CM ETO 5584, Yancy).

"Housebreaking is unlawfully entering another's building with intent to commit a criminal offense therein" (MCM, 1928, par.149e, p.169). All the elements of this crime as charged in Specification 9, Charge II were clearly proved.

The Specification of Charge III alleges that accused behaved himself with disrespect towards his battery commander. The uncontradicted evidence presented by the prosecution sustains all the elements of this offense (MCM, 1928, par.133a, pp.146,147; CM ETO 4053, Jordan). Finally, the Specification of Charge IV charges accused with breach of arrest. That he was outside of the limits of his arrest likewise proved by the unchallenged evidence and the accused's own admissions (MCM, 1928, par.139a, pp.153,154; CM ETO 6236, Smith).

Accused, Mooney, testified he drank heavily on the night in question and a defense witness stated he was still under the influence of liquor the following morning. Whether accused was so intoxicated as to be unable to entertain the specific intents requisite to the offenses alleged in the specifications of Charge II, was an issue of fact for the exclusive determination of the court. By its findings of guilty, the court resolved the issues against accused and inasmuch as said findings are fully supported by competent and substantial evidence, they will not be disturbed upon appellate review (CM ETO 3859, Watson).

6. The charge sheet shows that accused is 32 years and 10 months of age and was inducted 15 April 1943. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

10098

(90)

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567); upon conviction of assault with intent to commit rape and assault with intent to do bodily harm with a dangerous weapon by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

8 SEP 1945

CM ETO 10103

| | |
|---|---|
| U N I T E D S T A T E S | SEINE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| Private FORREST E. WASHINGTON (35113485), 3912th Quartermaster Truck Company. | Trial by GCM, convened at Paris, France, 20 January 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Forrest E. Washington, Private, 3912th Quartermaster Truck Company, did at 65 Route de Guerville, Mantes-la-Ville, Seine et Oise, France, on or about 25th of August 1944, forcibly and feloniously, against her will, have carnal knowledge of Miss Jeannine Lorho.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for failure to obey the lawful order of a superior officer in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the rest of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of

confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that at about 1900 hours on 25 August 1944, as Mademoiselle Jeannine Lorho, the nineteen year old prosecutrix, arrived at her home on Route de Guerville, Mantes-la-Ville, Seine et Oise, France, she saw accused and another negro soldier whom she called the "big one" standing at one of the doors to the house. After an exchange of greetings she entered the house and had started to make a fire when she saw accused and the "big one" in the corridor on the inside of the house. Looking in a book, they first asked about a girl who lived upstairs. Then they started into the room and prosecutrix told them to leave because her mother and father would arrive very soon. They asked if she wanted to spend the night with them and she refused. The "big one" then "took" her and put her on the bed. Accused took out his penis, but the "big one" pushed him away and told him to close the door and window. Accused bolted the door and closed one of the shutters of the window (R7-8,19). She testified that

> "it was the big one who started first. I fought with them and got my feet together. They took my feet asunder and hit me in the face. I was always fighting with him. * * * I screamed. I always drew my feet together and he always put them on his back. Then I screamed. He always put his hands on my mouth. He hit me very often in the face. When he had finished I wanted to get up but Washington came, so, he was pressing me very strongly when he was on me. I fought with him. I could not do anything because he was pressing me very much. * * * I was tired out then. I could not scream any more" (R29,31).

Accused put her legs on his back and penetrated her, but she did not know "whether he did entirely. It was just a matter of a moment". When she tried to take his penis out, he "got my hands away". He did not strike her. When he had finished the "big one" got on top of her again. She heard her little brother arrive and screamed for him, but accused went outside to meet him. When the "big one" finished the second time, she got up and put on her pants and combed her hair because she did not want to "make a scandal". They indicated by using the book that they would bring her chocolates and sweets and wanted to stay overnight with her, but she refused. She started to leave, and the "big one" grabbed her again. She screamed but he "made my mouth close". At about 1930 or 2000 hours her parents arrived and the "big one" ran from the house, followed by accused. She cried and told her mother what had happened (R29-37).

Prosecutrix' brother, aged 10, testified that when he came into the courtyard of the house, he heard his sister crying and calling him. Accused stopped him and prevented him from entering the house, and took some candy from him which an American had given him. He later found the candy on a table in the kitchen (R25-28).

Prosecutrix' mother and father both testified that upon their arrival at the house at 1900 or 2000 hours they noticed the window in the kitchen was closed, although it was usually kept open. Madame Lorho knocked on the window with her fist and opened it, and at that moment heard a cry of fear coming from the inside. A soldier, whom she could not identify, ran out of the room. Monsieur Lorho opened the door, which was bolted, and they found prosecutrix in the courtyard crying. Her face and eyes were red and her hair was "in disorder". They went into the house. Prosecutrix could not talk but "said two soldiers and pointed to the bed" so that her mother understood what had happened. Madame Lorho then ran to the abbey to ask for the police (R16-21,22-24).

After about five minutes, the large soldier returned and took his helmet from the bed and his rifle, which was leaning against a table. Prosecutrix left the house by the window when she saw him coming. Her father asked him what he had done, but the big soldier replied, "No compree". Monsieur Marcel Badie, a civilian who had heard prosecutrix crying and had come to the house, then asked the soldier in English what he had done to the young girl, whereupon the big soldier loaded his gun and pointed it at Badie and Lorho, both of whom ran away (R10-12,24-25).

Madame Dumonteil, while walking with some friends by the house, saw Madame Lorho knocking on the window and saw prosecutrix crying. She went into the house and saw that prosecutrix was "in disorder", frightened and crying, and heard her explain what had happened. She also saw the big colored soldier return for the rifle and helmet (R12-14).

A gendarme, who arrived at the house within five minutes after the offense was reported by Madame Lorho to the abbey, testified that prosecutrix was nervous and crying when he arrived (R7-9).

By stipulation, testimony given at a former trial by Dr. Georges Baulon, a French physician, was received in evidence, showing that he examined prosecutrix by candlelight about midnight on 25 August at the request of an American officer. The vulva was red and irritated, and the hymen was torn, but no blood or spermatozoa was found. In his opinion an attempt at penetration had been made, but he could not say whether it was a complete one. Prosecutrix seemed "depressed and tired out" (R37-38).

4. After his rights as a witness were explained to him, accused elected to testify (R39-40). He is 21 years old and completed 10½ years of school. At about 1400 hours on 25 August, he went to town and met Private Levisy and they drank "quite a lot", but he was not drunk. At about 1800 hours they went to the home of prosecutrix which he thought was

a house of prostitution because Levisy told him about having intercourse there that morning. As prosecutrix approached the house, he said "bon jour" to her, and Levisy talked with her outside the house, using a French book as a guide. Levisy "asked if he could spend the night with her and she was talking about the candy and soap". They all went into the house together. They asked her to have intercourse by saying, "Zig, zig, umm. Chocolate and cigarettes and she said yes". After starting to build a fire she sat on the bed. They gave her "a bar of candy and a pack of cigarettes and 'D' rations", which she accepted. Levisy went over to the bed and had intercourse with her while accused stood in the door about 12 feet away. Accused did not close the door or window and did not assist Levisy at all. When Levisy finished, prosecutrix lay on the bed with her hands clasped behind her head. After about two minutes accused went over to her. She did not resist him in any manner and did not cry. When Levisy had finished the second time, she got up and combed her hair and they talked about soap, candy and cigarettes. As she stepped into a corridor she screamed, and accused and Levisy ran from the house because they thought somebody was approaching and there might be trouble. Accused did not see prosecutrix' brother at any time (R40-52).

5. The evidence is undisputed that accused had carnal knowledge of prosecutrix at the time and place alleged in the Specification. Her testimony, which the court chose to believe, indicates that the act was accomplished by force, without her consent, and over her resistance, under such circumstances as to constitute the crime of rape (CM ETO 611, Porter; CM ETO 1202, Ramsey; CM ETO 4608, Murray; MCM, 1928, par. 148b, p. 165). Prosecutrix' testimony is strongly corroborated by that of her brother, her parents, two neighbors, a gendarme, and a French physician who examined her the night of the alleged rape. Accused's assertion that he thought he was in a house of prostitution, if believed, was clearly no defense to the charge of rape (CM ETO 4589, Powell et al).

6. The charge sheet shows that accused is 21 years of age and was inducted 3 June 1942. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a United States penitentiary is authorized upon conviction of the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designa-

tion of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir. 229, WD, 8 June 1944, sec. II, pars. 1b(4), 3b).

[signature] Judge Advocate

[signature] Judge Advocate

[signature] Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

24 APR 1

CM ETO 10131

UNITED STATES

v.

Private ANDREW J. SHELNUT (16000310), Company E, 18th Infantry

1st INFANTRY DIVISION

Trial by GCM, convened at Buren, Buren, Germany, 5 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

---

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. The charges were served on accused on 4 April 1945 and he was arraigned and tried at 1030 hours on the next day (R2,4). The record of trial shows that he personally stated in open court that he did not object to trial at that time (R2-3). Under such circumstances no prejudice to the substantial rights of accused is disclosed (CM ETO 8083, Cubley, and authorities therein cited).

3. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were commited during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

AGPO 2-45/19M/C504ABCD

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

14 AUG 1945

BOARD OF REVIEW NO. 2

CM ETO 10141

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 94TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at Baumholder, Germany, 30 March 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| | ) | |
| Technician Fifth Grade RAY F. DANIELS (37056030) and Private JAMES A. CAUDILL (35844035), both of Company C, 301st Infantry | ) | |

---

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

---

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were arraigned separately and with their consent were tried together upon the following charges and specifications:

DANIELS

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Grade 5 Ray F. Daniels, Company C 301st Infantry, did, at Leidstadt, Germany on or about 23 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Johnana Kreigree.

CAUDILL

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private James A. Caudill, Company C, 301st Infantry, did, at Leidstadt, Germany on or about 23 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Frau Johnana Kreigree.

Each accused pleaded not guilty and all of the members of the court present at the time the vote was taken concurring, each was found guilty of the Charge and Specification preferred against him. No evidence of previous convictions was introduced as to either accused. All of the members of the court present at the time the vote was taken concurring, each was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 23 March 1945, accused were members of Company C, 301st Infantry, which organization was located at Leidstadt, Germany (R16,17,21,22). Shortly after midnight on the evening of the 22nd, two American soldiers knocked on the door and window of, and demanded at the point of a pistol entrance into, the home of an elderly German woman, Frau Faterkiel. Other residents of this house on the evening in question included Fraulein Gertrude De Bus, Frau Johnana Kreigree and the latter's three young children (R7,14). After being admitted to the house the soldiers demanded wine. The "big one", identified as accused Daniels, carried a carbine while the "little blond", identified as accused Caudill, was armed with a pistol (R8,11). They were identified in court by the witnesses (R8,9, 14,17). After giving them some wine, the elderly woman left in search of help. Daniels prevented Frau Kreigree from leaving the house while Caudill went into a bedroom where Fraulein De Bus was sleeping. Shortly thereafter the latter called for help but Frau Kreigree could do nothing. When Caudill left the room to speak with Daniels, Fraulein De Bus escaped from the room by way of the window (R8,14). Both soldiers then went outside in search of her and Frau Kreigree locked the door behind them. Caudill reentered the house by climbing through the window. He pointed his pistol at Johnana and, as she was "yelling", gagged her by tying a handkerchief over her mouth (R9,12). He forced her to open the door to permit Daniels to reenter the house. He then removed the handkerchief (R12). Daniels pushed her onto the bed where she tried to protect herself by placing a pillow over her chest. He exposed his penis and kept pressing it into her hand. She "fought against it" but was forced to "take hold" of it (R9). She held one of her babies in her arm and

tried to push her assailant away with her hands. She defended herself as much as possible and resisted his advances, yet he pushed her panties aside and engaged in sexual intercourse with her (R9,11). After Daniels completed the act of sexual intercourse with Frau Kreigree, she remained on the bed and cried. About ten minutes later Daniels seized her and again engaged in sexual intercourse with her, following which he left the house (R8,9).

Caudill remained in the room during this time and after removing one of the children from Johnana's bed, he in turn engaged in sexual intercourse with her. According to her testimony, she "tried to defend" herself against him but by this time she was "so weak" that she "could not do very much" as she was "just about finished" (R10). She testified that she did not give her consent to either soldier to engage in sexual intercourse with her at any time (R10). Following satisfaction of his desires, Caudill fell asleep on Johnana's bed. She then "collected" her children and went to the house of relatives where she reported what had occurred. The following morning when curfew was lifted she reported the assaults to the town mayor (R10).

Sergeant Howard Libby, accused's squad leader, testified that on the night of 22-23 March 1945, upon request for a detail of men to report to battalion headquarters, he designated Daniels and Caudill for this duty, but finding that they were not in their quarters, ordered another soldier to perform this assignment and went on duty as a guard himself. While walking guard in front of a row of houses, he overheard someone speaking English and recognized the voice as that of Daniels who was talking about wanting to engage in sexual intercourse "one more time" (R17,20). Shortly thereafter a group of excited women came down the street but he could not understand what they were saying, as they spoke German. He reported to the first sergeant what he had heard and observed (R18). A search of the houses was made and in one of them Caudill was found lying across a bed in a stupor, with his pants down (R18), and Daniels was found in the next house asleep in a chair with his pants unbuttoned and his penis out (R18,20). Libby was present at an identification parade held the following morning when Frau Kreigree picked out both Daniels and Caudill as her assailants (R11,20,21).

4. Accused, after their rights as witnesses were explained to them, each elected to be sworn and testify in his own behalf (R22,23,25).

Daniels testified that on the evening in question he and Caudill went across the street from their quarters into a building where they drank a "few" glasses of wine. At about 10:00 pm o'clock, Caudill left and did not return. He waited for him some time but fell asleep and remembered nothing until he was awakened and put in arrest in quarters (R24,25).

(102)

Caudill corroborated Daniels's statement that they had been drinking wine during the evening in question and added that he left the house where they were visiting and went outside in search of a latrine. Upon his return he discovered that Daniels had departed. He then lay down on a bed and went to sleep and remembered nothing until awakened by the first sergeant. He explained his state of undress by stating that he failed to button or fasten his pants following his return from the latrine (R25,26).

Doctor Helmuth Hoffman, the Mayor of Leidstadt, testified for the defense that the wines of that locality have a higher alcoholic content than normal Rhine or Moselle wine and that its effect upon consumers is not gradual but that it "bits a person all at once". He stated that such beverage has an especially strong reaction upon those who are not accustomed to drinking it and that on the day in question he observed many soldiers who had consumed only half a bottle and who became drunk as a result thereof (R27).

5. Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p.165). The extent and character of resistance required in a woman to establish her lack of consent depends upon the circumstances of the case and the relative strength of the parties (I Wharton's Criminal Law (12th Ed., 1932), sec.734, p.995). The undisputed evidence herein shows that on the evening in question accused Daniels and Caudill, armed with a carbine and pistol, demanded admittance into a house occupied by three German women and that while there they drank wine and by their conduct frightened the women, resulting in one of them leaving the house in search of help and another escaping by way of a window. In an effort to stifle the outcries of Frau Johnana Kreigree, the only woman remaining in the house, accused Caudill pointed his pistol at her and put a handkerchief over her mouth. Thereafter accused Daniels pushed her onto a bed and made her take his penis in her hands. She fought him, placed a pillow over her person to protect herself, tried to push him away, and resisted his advances. However he overcame her resistance and engaged in sexual intercourse with her. Although she was weak and crying, he again engaged in an act of sexual intercourse with her about ten minutes later, following which he left the room. Thereafter, accused Caudill engaged in sexual intercourse with her at a time when her powers of resistance were weakened and her strength exhausted. Lack of consent may appear where a female submits through reasonable fear of death or impending bodily harm or as a result of bodily weakness (1 Wharton's Criminal Law (12th Ed., 1932), supra, sec.701, pp.942,944).

The German witnesses' testimony is corroborated by the fact that both accused were absent from their quarters on the evening in question when they were needed; that one of them was found in the house

of the prosecutrix, asleep in her bed, while the other accused was discovered in the house next door, asleep in a chair with his pants unbuttoned and his penis hanging out; that the squad leader of accused's platoon overheard Daniels speaking in the building, stating that he again desired to engage in sexual intercourse; that they were armed and threatened their victim with their pistol; and by the accused's own admissions that they were drinking that night. Such evidence affords sufficient corroboration of the direct testimony of the German woman that each accused committed the crime of rape as charged (CM ETO 9611, Prairiechief; CM ETO 11970, Manko and Wortheam). Accused testified they did not deny engaging in sexual relations with the woman but rather stated that after drinking a few glasses of wine they fell asleep and did not remember what occurred. Notwithstanding the evidence that the wine may have been of a strong alcoholic content and that its consumption by accused made them drunk, the law is well settled that voluntary drunkenness does not constitute a defense for the crime of rape or destroy the responsibility of the accused for their misconduct (CM ETO 5609, Blizard; CM ETO 5641, Houston; CM ETO 8691, Heard). Under the circumstances, the accused were legally found guilty of the offenses charged (CM ETO 4266, Guest; CM ETO 6224, Kinney and Smith; CM ETO 12552, Long; CM ETO 12650, Combs et al).

6. The charge sheet shows that accused Daniels is 28 years, seven months of age and was inducted 4 April 1941. He had no prior service. The service record of accused Caudill, who joined the division as a reinforcement, was not available to the reviewing authority and his personal data is not indicated in the record.

7. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that, as to each accused, the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a United States penitentiary is authorized upon conviction of the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 456,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement for each accused is proper (Cir.229, WD,

(104)

8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate General

Judge Advocate General

Judge Advocate General

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

18 AUG 1945

CM ETO 10185

| | |
|---|---|
| U N I T E D S T A T E S | 29TH INFANTRY DIVISION |
| v. | Trial by GCM, convened at APO 29, U. S. Army, 26 March 1945. |
| Private JOHN J. POLANDER (36890582), Company K, 115th Infantry. | Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

---

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private JOHN J. POLANDER, Company "K", 115th Infantry did, at or near Percy, France, on or about 30 July 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Dour, Belgium, on or about 21 January 1945.

He pleaded not guilty and, all members of the court present at the time the vote was taken concurring, was found guilty of the Specification and the Charge. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the

(106)

reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The evidence for the prosecution is substantially as follows:

The first sergeant of Company K, 115th Infantry testified that on 30 July 1944 accused was a rifleman in the first platoon of that company which at that time was moving forward for an attack on Percy, then held by the Germans (R5). The lines were about 350 yards apart and machine gun and artillery fire was being exchanged. Accused was present on 29 July and was not given a pass nor was he thereafter seen in the company by the First Sergeant who continued as such until 20 November 1944 (R6). Accused's squad leader on 29 July made a physical check and found accused present but a similar check next morning disclosed he was missing (R7-8). Accused had then been in the squad only seven days during which time they were not in action (R8).

Without objection an extract copy of the morning report of Company K, 115th Infantry, dated 10 February 1945, containing entries concerning accused was received in evidence as Prosecution's Exhibit No. 1, and read to the court. In substance it shows under date of 2 August 1944, accused "Fr.dy.to MIA (BC) 30 July/44", under date of 30 August 1944, "Fr MIA (BC) to dropped fr asgmt this regiment", under date of 25 October 1944 "(TO CORRECT M/R, 2 Aug/44)", "fr dy to MIA (BC)" 2 Aug/44 should have read: "Fr dy to AWOL, 30 July 44".

Stipulations that accused was apprehended 21 January 1945 by the Military Police at Dour, Belgium, and that Prosecution's Exhibit No. 2, is the voluntary, signed statement of accused were both admitted in evidence with the express consent of accused (R9-10).

Accused's statement is a rather fantastic story of getting lost from a ration detail of an officer and 17 men from his company on the night of 30 July 1944 and of traveling around the country thereafter, visiting Cherbourg, Paris and Aachen. He told of several escapes and unauthorized departures. He later stayed around Mons for several weeks being twice picked up by military police, once escaping from a civilian jail. One night he got "very drunk and the next morning I woke up to find my hair had been dyed black, it had been blond before". On his second apprehension he was returned to his organization, arriving "today". The statement is undated but was sworn to by accused on 9 February 1945 (Pros.Ex.2).

4. After his rights as a witness were explained to him, accused elected to make an unsworn statement and again told a rambling story covering some seven typewritten pages of the record beginning with his

joining the company on 21 July. He mentions "Pruitt, the one I went AWOL with" (R10-16). He then decided to be sworn as a witness and repeated much the same story. He testified that he and Pruitt were between Percy and St. Lo when he decided to leave his organization. He admitted making a "terrible mistake" and disgracing his family, and that "I will do everything I can to get out of this".

5. "Desertion is absence without leave accompanied by the intention not to return" -- (MCM, 1928, par.130a, p.142). Both elements are essential to the offense. Absence without leave is usually proved, prima facie, by entries in the organization's morning report. Here the accused has admitted his absence both in his written signed statement and on the witness stand, denying only the intent not to return. Intent to remain permanently absent may be properly inferred by the court if the condition of absence is much prolonged and there is no satisfactory explanation of it or that while absent he was in the neighborhood of military posts and did not surrender to the military authorities. The longer the absence the stronger, in general, is the inference of intent to remain permanently absent and, unless admitted by the accused, such intent is only provable by inferences arising from the circumstances shown to have existed. Here accused was absent nearly six months, the absence was unauthorized and unexplained in any satisfactory manner. It was terminated by apprehension. The court could take judicial notice that it occurred in a country where was was being actively waged and which was dotted with military establishments where accused could have surrendered had he so desired. Under these circumstances the court was well justified in its findings that accused intended to remain permanently absent (CM ETO 1629, O'Donnell; CM ETO 11173, Jenkins; CM ETO 13956, Depero).

6. The charge sheet shows accused to be 24 years of age and that without prior service he was inducted 17 November 1943 at Detroit, Michigan.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58), and confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

CM ETO 10189

13 SEP 1945

| | |
|---|---|
| U N I T E D S T A T E S<br><br>v.<br><br>Private WALTER W. SLUDER (7081061), Third Replacement Depot | NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS<br><br>Trial by GCM, convened at Castilly, Calvados, France, 8 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private Walter W. Sluder, Third Replacement Depot, did, at the area of the Third Replacement Depot, France, on or about 7 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Trouville, France, on or about 29 November 1944.

CHARGE II: Violation of the 69th Article of War.
(Nolle prosequi)
Specification: (Nolle prosequi)

CHARGE III: Violation of the 96th Article of War.

Specification: In that * * * did, in conjunction with N. A. Osachuk, and others whose names are unknown,

at or near Veuville, Calvados, France, on or about 25 October 1944, wrongfully and knowingly sell about sixteen (16) drums of gasoline, value over $50, property of the British Commonwealth.

CHARGE IV: Violation of the 69th Article of War. (Findings of guilty disapproved by Reviewing Authority)

Specification: (Findings of guilty disapproved by Reviewing Authority)

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence of four previous convictions was introduced, two by summary court for absences without leave for nine days and one day, respectively, and two by a special court-martial for absences without leave for four days and one and one-half hours, respectively, all in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority disapproved the findings of guilty of the Specification of Charge IV and Charge IV, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Competent and substantial evidence, including accused's extra-judicial confession, establishes that he absented himself without leave from 7 September 1944 until he was apprehended on 29 November 1944. The corpus delicti was sufficiently established by evidence independent of the confession to warrant the introduction of the latter in evidence (CM ETO 14040, McCreary; MCM, 1928, par.114a,p.115). An unexplained absence of almost three months in wartime in a foreign theater, coupled with accused's assumption of a false name and his attempt to escape when apprehended, amply sustain the court's finding that he intended to desert (CM ETO 952, Mosser; CM ETO 960, Fazio et al; CM ETO 1629, O'Donnell).

4. The Specification of Charge II alleges that accused, in conjunction with N. A. Osachuk and others unknown, did wrongfully and knowingly sell about 16 drums of gasoline on or about 25 October 1944 at or near Veuville, Calvados, France. M. John Savoski, proprietor of a restaurant at Trouville testified that at the end of September or the beginning of October, accused, who was known to him as Jimmy, a man named Ted, and a colored soldier named Frank sold 16 drums, each containing 40 gallons of gasoline, to a M. LeCarpentier at

Vauville (R13-15). The prosecution then made what may be interpreted as a motion to amend the Specification so as to change the place where the offense was allegedly committed from Veuville to Vauville. This was allowed (R15). M. LeCarpentier testified that he paid Savoski 64000 francs for 16 drums of gasoline, which accused delivered to his house. He stated that the transaction occurred at the end of September or the beginning of October. When pressed, he placed the date as not later than 10 October (R15-16). In accused's extra-judicial confession he stated that he went absent without leave on 20 August. A week or two later he met two soldiers and went with them to Paris in a truck. In Paris he helped them dispose of 18 forty-gallon drums of gasoline which apparently they had stolen from the British dump at Caen. He stayed in Paris a week or ten days and then returned to LaChappelle de Mont-Legon. There he met three soldiers who were also absent without leave and were known to him as "Dave, Willie and Don." Three days after this meeting the four stole 18 drums of gasoline, each containing 40 gallons of gasoline, from British dump 238 at Caen and sold them in the LaChapelle de Mont-Legon area through a French civilian named "Charley". Sales were made a drum or two at a time for 4000 francs per drum. A week later they engaged in a similar transaction.

About three weeks after returning to La Chapelle de Mont-Legon from Paris, accused met a colored soldier named Frank and a Canadian soldier who posed as a second lieutenant in the United States Army and who had assumed the name of Ted Taylor. They went into the business of stealing gasoline from the British dump at Caen and selling it. They would take 18 drums containing 40 gallons of gasoline on each trip. They sold to "several different garages". "A couple of times" they sold loads to farmers around Blondville and on those occasions a French civilian acted as an intermediary. They sold a load to a cafe owner whose name was Raymond. This load, at Raymond's direction, was left at a farm 10 kilometers from Trouville on the road to Lisieux. "Last Friday" (which would be 24 November 1944, the confession having been signed on 30 November 1944) they stole two truckloads, 18 drums in each truck. On this occasion they had the assistance of a soldier named "Littlejohn." Taylor and Littlejohn sold their load through a waitress named "Jennie". Accused and Frank sold theirs to a French civilian at Villers. On all of these deals they sold the drums for 4000 francs each, with the exception of the sales to the farmers around Blondville when they charged 6000 francs per drum, the civilian intermediary getting the extra 2000 francs.

5. It is plain that there was a substantial variance between the allegations of the Specification and the proof. The Specification alleged that the gasoline was sold on or about 25 October; the proof showed that it was sold not later than 10 October. The Specification alleged that accused acted in conjunction with N. A. Osachuk and others unknown, while the proof showed that he acted in conjunction with "Frank" and "Ted Taylor". The question is presented whether a fatal variance exists between the allegations and the proof.

"* * * the tests of a fatal variance are: Was defendant misled in preparing his defense? Will defendant be protected against a future proceeding involving the same charge?" (2 Wharton's Criminal Evidence (11th Ed.1935), sec.1028, p.1802-4).

Where a date is not of the essence of a crime considerable latitude is permitted in variance between allegations and proof (2 Wharton, supra, sec.1039, p.1826). Thus, where a specification alleges that accused embezzled 19 cases of candy on or about 1 January 1943 and the proof showed that it was done after 12 December and before Christmas of the preceding year, the variance was held immaterial (CM ETO 1538, Rhodes). Similarly, in CM ETO 9542, Isenberg, where the specification alleged that on or about 10 March 1944, accused disclosed the contents of a letter he had censored and the proof showed that he had done this sometime in March 1944, the variation was held non-fatal. An examination of these cases reveals the existence of allegations apart from dates in the specifications which accurately informed the accused of the offense with which he was charged and which were fully established by the evidence. Here, however, there is no such meticulous description. The prosecution knew in advance that accused had participated on or about 25 October in numerous transactions of the character described in this Specification, yet is was content to give only a very general description of the offense with which it sought to charge him. There is no reason why the vendee could not have been named in the Specification. There is no reason why Savoski could not have been named. The allied papers show that the part Savoski played was known to the government before these charges were drawn, yet it resorted to the vagueness of describing accused's confederates as persons whose "names are unknown".

Until such time as accused is arraigned in court the only way by which he can know with certainty with what he is charged is by examining the charge sheet. Listed as witnesses against the accused on the charge sheet are M. John Savoski, Madame Paul (widow) M. Guespin Jean, all of Deauville, and N. A. Osachuk, a Canadian soldier. The pre-trial investigation report shows that there were two Savoskis, Raymond and Jean, father and son, and that Jean was the intermediary in a gasoline transaction between accused and Guespin. It also shows that Jean and Guespin were involved in another transaction involving gasoline between accused and a garage proprietor at Honfleur. Raymond, the report reveals, was the intermediary in the deal with LeCarpentier. Mme. Paul apparently bought gasoline from accused through a man named Buquet.

Thus, virtually the only way the accused could know from the charge sheet against which offense he was required to defend, was by referring to the date. Doubtless he could have moved for a bill of particulars or moved to strike the Specification as

indefinite (Cf: CM ETO 12594, Lechinsky), but failure to do this is not equivalent to consent to have the government roam at large over a whole series of offenses and then take its stand wherever the proof indicates it is most prudent. Where, as here, the government appears to be secretive, not to say misleading, about the offense it seeks to prove, there must be some correspondence between the information it furnishes accused by way of specifications and the proof it produces. If a date is the only distinctive element which the accused can with certainty distinguish which among a number of offenses the government is pressing, then it must establish that date with some exactness, certainly more than that shown in this case. The record is legally insufficient to support the findings of guilty of the Specification of Charge III (CM ETO 12594, Lechinsky, supra).

5. Accused, after an explanation of his rights, elected to remain silent, and no evidence was introduced in his behalf (R20).

6. The charge sheet shows that accused is 26 years and three months of age and enlisted 6 March 1940 at Camp Jackson, South Carolina, to serve for three years. His service was extended to the duration of the war plus six months. No prior service was shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted herein, no errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of the Specification of Charge III and Charge III, and legally sufficient to support the findings of guilty of the Specification and Charge I, and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec. II, pars.1b(4),3b).

Wm. F. Sprow Judge Advocate

Edward L. Stevens Jr. Judge Advocate

Donald R. Cavell Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2 2 JUN 1945

CM ETO 10196

| | |
|---|---|
| U N I T E D S T A T E S ) | 4TH INFANTRY DIVISION |
| ) | |
| v. ) | Trial by GCM, convened at Hagenau, |
| ) | France, 27 March 1945. Sentence: |
| Private First ClassRONALD ) | Dishonorable discharge, total |
| J. GAFFNEY (31035033), ) | forfeitures, and confinement at |
| Company F, 8th Infantry ) | hard labor for life. Eastern |
| ) | Branch, United States Disciplinary |
| ) | Barracks, Greenhaven, New York. |

---

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that Private First Class Ronald J. Gaffney, Company F, 8th Infantry, having received a lawful command from First Lieutenant William E. Smith, 8th Infantry, his superior officer, to report to his organization, Company F, 8th Infantry, for duty, did, near Hermespand, Germany, on or about 1 March 1945, willfully disobey the same.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was

found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. On March 1, 1945, at the time his company was attacking a well fortified hill position in the vicinity of Hermespand, Germany, the accused, a rifleman, reported under guard, to First Lieutenant William E. Smith, Battalion S1. The lieutenant talked to him to discover what was wrong and the accused stated that he "couldn't take it any longer" but he did believe he could go back in the line after a couple of days "back there". The matter was arranged and the accused remained in the rear, apparently until 5 March when accompanied by the first sergeant, he reported again to the lieutenant (R4,5,6) who testified:

> "I explained to him that if he did not return to the company all I could do would be to prefer charges against him. He said he couldn't go back and would have to suffer the consequences. At that time I gave him a direct order to return to his company" (R5);

The lieutenant further testified that the order given and the response received were as follows:

> "'Private Gaffney, I am giving you a direct order to return to your company for soldiering in the company.' He said 'I am sorry, I will have to suffer the consequences. I cannot go, sir'" (R6).

The first sergeant testified to substantially the same effect:

"Lieutenant Smith spoke to Private Gaffney and gave him a direct order to go to his company, and he said he couldn't go up there, and Lieutenant Smith told him he would have to turn him in, and he said he just couldn't go up there" (R7).

To the lieutenant, the accused appeared to be physically sound. He was not under the influence of alcohol and appeared to understand the order. The lieutenant was wearing his insignia of rank (R5-6).

At the time of this incident the accused had been in the company three or four weeks. He may have been with the company during another previous interval of time (R7).

4. Accused remained silent and no evidence was presented in his behalf.

5. The receipt by accused of a direct command from the officer named in the specification is clearly proved by unconflicting evidence. Obviously, the officer giving the order was accused's superior and was giving a command which was not only within the scope of his official authority, but closely related to his particular staff function. The immediate and direct refusal to obey the order is equally clear. The only explanation offered by accused was that he could not do it. Some further explanation of this remark may have been helpful, but the accused apparently offered none. There appears to have been no physical obstacle to prevent obedience. The inability to obey to which the accused made reference was apparently a mental attitude which, in the absence of some further showing or definite suggestion must be presumed to have been short of insanity and inadequate as a defense. On the other hand, the evidence creates a strong impression that the accused deliberately chose this trial and probable punishment in preference to the hazards involved in obeying the order.

The specification alleges that this disobedience occurred "on or about 1 March 1945". The date is obviously inaccurate but the phrase is sufficiently elastic to include the date established by the evidence: 5 March 1945 ( CM ETO 9542, Isenberg).

6. The charge sheet shows that accused is 21 years of age and that, without prior service, he was inducted 6 August 1941 at Millford, Massachusetts.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for willful disobedience of the lawful command of a superior officer is death or such other punishment as a court-martial may direct (AW 64). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42, Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3 1 JUN 1945

CM ETO 10197

| | |
|---|---|
| U N I T E D S T A T E S | 4TH INFANTRY DIVISION |
| v. | Trial by GCM, convened at Hagenau, France, 27 March 1945. Sentence: Dishonorable discharge, total forfeitures, confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| Private SAM C. THOMLEY (34107523), Company E, 8th Infantry | |

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Sam C. Thomley, Company E, 8th Infantry, did, near Maspelt, Belgium, on or about 29 January 1945, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: an engagement with the enemy, and did remain absent in desertion until he was apprehended near Virton, Belgium, on or about 9 February 1945.

He pleaded not guilty to and was found guilty of the Charge and Specification except the words "with intent to avoid hazardous duty; to wit:

an engagement with the enemy", of the excepted words not guilty, of the remaining words guilty. Evidence was introduced of two previous convictions by summary court, one for wrongfully appearing in Liege, Belgium, in violation of Article of War 96, and the other for wrongfully appearing in Liege, Belgium, and fraternizing with civilians, the town being off limits, in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved only so much of the findings of guilty as involve findings that accused did, at the time and place alleged, absent himself without leave from his organization and did remain absent without leave until he was apprehended at the time and place alleged in violation of Article of War 61, approved the sentence, designated Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. By reason of the action properly taken by the reviewing authority, accused now stands convicted only of absence without leave from 29 January 1945 to 9 February 1945. Such conviction is amply supported by the evidence in the record of trial. Accused's squad in the early morning of 29 January 1945 was on outpost duty in Maspelt, Belgium. The squad was having a four hour rest period preparatory to a further period of guard duty, which was to be followed by an attack on the German forces in the vicinity. The men had not been advised of the impending attack which, however, took place in due course resulting in some casualties in the company (R5,9-10). Accused refused to go on guard with the squad and some time the same day absented himself without leave, remaining absent until he was apprehended near Vinton, Belgium, on 9 February 1945 (R5,7,10,13).

After being warned of his rights by the law member, accused elected to testify under oath (R14). He stated that at about 0230, 29 January 1945, after being refused permission to go on sick call, he went to an aid station in the area of a neighboring division (R15, 16). He was suffering from stomach trouble (R16). The balance of his period of absence was spent in an effort to relocate his unit (R18-19).

4. Objection was made to the admission in evidence of the extract copy of the morning report on the ground that the entries therein were hearsay (R5-7;Pros.Ex.A). Moreover, in view of the compelling evidence of absence without leave contained in the testimony of the prosecution's witnesses and in accused's admissions on the stand, it is unnecessary to consider the merits of such objection.

5. The charge sheet shows that accused is 25 years of age and was inducted 11 July 1941 at Fort McClellan, Alabama. No prior service is shown.

6. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as modified by the reviewing authority and the sentence.

7. The penalty for absence without leave in violation of Article of War 61 in time of war is such punishment as a court-martial may direct (AW 61). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

_____ Judge Advocate

10197

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 5

CM ETO 10199

| | |
|---|---|
| U N I T E D S T A T E S | 4TH INFANTRY DIVISION |
| v. | Trial by GCM, convened at Hagenau, France, 25 March 1945. Sentence: Dishonorable discharge (suspended), total forfeitures, and confinement at hard labor for 20 years. Loire Disciplinary Training Center, Le Mans, France. |
| Private First Class JOHN J. KAMINSKI (33144209), Company G, 8th Infantry | |

HOLDING by BOARD OF REVIEW NO. 5
HILL, EVINS and JULIAN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the Branch Office of The Judge Advocate General with the European Theater and there found legally insufficient to support the findings in part. The record of trial has now been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of said Branch Office.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private First Class John J. Kaminski, Company G, 8th Infantry, did, near Moestroff, Luxembourg, on or about 19 January 1945, desert, the service of the United States, by absenting himself without proper authority from his organization, with intent to avoid hazardous duty, to wit: an engagement with the enemy, and did remain absent in desertion until he was apprehended near Arlon, Belgium, on or about 26 February 1945.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the

time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for 20 years. The reviewing authority approved the sentence, ordered it executed but suspended that portion thereof adjudging dishonorable discharge until the soldier's release from confinement, and designated the Loire Disciplinary Training Center, LeMans, France, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 49, Headquarters 4th Infantry Division, APO 4, U. S. Army, 1 April 1945.

3. The prosecution's evidence consisted of (1) the testimony (summarized below) of the commanding officer of Company G, 8th Infantry, of which accused was a member, (2) an extract copy of the morning report of the company for 21 January 1945 showing accused from "dy to AWOL 19 Jan 45 (Exact Hour Unknown)", (Pros.Ex.A; R5), and (3) an oral stipulation that "the accused was apprehended at Arlon, Belgium on 26 February 1945" (R8).

The company commander testified that accused was a rifleman in Company G, 8th Infantry (R5). On 18 January, the company crossed the Sure River in Luxembourg, under rocket, artillery, mortar and small arms fire. Prior to that date, it was in a defensive position and received artillery and mortar fire from the enemy. On 18 or 19 January, the company was attacking and from 19 to 31 January it again occupied defensive positions. From the first to the end of February, it attacked from Belgium into Germany (R6). He did not see accused from on or about January 15 until the day of trial (R7) but he saw all other members of the company on occasions when he "circulated freely" among them during combat, and also when he billeted them. Between 19 January and 26 February, he billeted his men four or five times (R6,7).

On cross-examination, the company commander testified that he and accused had been members of the company since June 1944, that the billeting was done by platoon leaders and sergeants, that it would be impossible for him to billet each individual man and to see every member of the company at that time. He admitted that he did not know of his "own personal knowledge" whether accused was present or absent when the billeting took place (R7).

On redirect examination he testified that the morning reports were made up from reports of platoon leaders who in turn based their reports on those of the squad leaders who made the actual physical check (R8).

The extract copy of the morning report was admitted in evidence after the defense had stated there was no objection to its admission. It bore the certificate of the company commander that he was the official custodian of the morning report and that the extract was a true and complete copy for the dates recited. It contains an exact statement of

the alleged initial date of absence on 19 January 1945.

4. After his rights as a witness were explained to him, accused elected to make, through his counsel, an unsworn statement as follows:

> "That he came in with his regiment on D-Day, 6 June 1944 at which time he was wounded and evacuated, and he returned to duty approximately 11 November 1944 and performed duties with Company G from that date until the time of the occurrence in question"(R8).

5. The extract copy of the morning report was properly received in evidence as an official writing (MCM, 1928, pars.116a, 117a, pp.118-119, 120-121). The fact that the morning reports of the organization were prepared by the company commander in large part from reports of platoon leaders whose knowledge was based on reports made by the squad leaders who in turn made a physical check of the men present, does not render the morning reports necessarily inadmissible on the ground that the entries are "obviously" not based on personal knowledge. In the preparation of morning reports by company commanders it is not unusual for them to utilize information reported to them by subordinates acting under their direct or general supervision. This is a reasonable practice growing out of the pyramidical structure of a military unit. It is sanctioned by the custom of the service and is often made indispensable in time of war by the exigencies of military operations in the field. It would seem both needless and imprudent to require a company commander to divert his attention from his mission in order to conduct an immediate and personal investigation of a soldier's unauthorized absence reported to him by a presumably reliable subordinate acting within the scope of his duties. Under field conditions in time of war a competent company commander generally does not, and frequently cannot, make such an investigation, but properly relies in large part on the reports of the platoon leader and non-commissioned officers who were in charge of the missing soldier. The provisions of the Manual relating to the admissibility of morning reports as official writings are to be construed in the light of these considerations whch were undoubtedly well-known at the time the Manual was promulgated.

The company commander in this case based his knowledge of accused's absence not only on reports received from his subordinates but also on the fact that he did not personally see accused in the company from on or about 15 January to 26 February, although he, the company commander, was present and in continual touch with the members of the company during that period and saw all his other men. It is reasonable to assume that he would have seen accused as he did the others, had accused in fact been present. The Board of Review is of the opinion that the company commander's testimony does not show that the entry was "obviously not based on personal knowledge". The morning report, therefore, was competent evidence as an official writing to prove that accused absented himself from his organization without leave on 19 January 1945.

The morning report entry in the instant case was also admissible in evidence as a record made in the regular course of business within the meaning of the Federal statute making such records competent evidence of the occurrence or event so recorded (Act of June 20, 1936, ch.640, sec.1, 49 Stat. 1561, 28 USCA sec.695). The rule of evidence contained in the statute cited is applicable in the trial of cases before courts-martial (III Bull JAG 468; CM ETO 4691, Knorr). It constitutes an exception to the general rule against hearsay distinct from the exception which permits the introduction of official writings. The former is based upon the probability of the trustworthiness of the records because they are the routine reflections of the day to day acts, transactions, occurrences or events of an organization (Palmer v. Hoffman, 318 U.S. 109, 87 L.Ed.645). The exception relating to an official writing is based upon the probability of the truth of its contents because the officer or other person making it had the duty to know the matter stated and to record it (MCM, 1928, par.117a, p.121). Since the two exceptions are separate and distinct from each other, the limitation contained in the Manual with reference to official writings which excludes entries "obviously not based on personal knowledge" is inapplicable to records made in the regular course of business (MCM, 1928, par.117a, p.121). Furthermore, it is specifically provided in the statute above cited that "lack of personal knowledge by the entrant or maker" shall not affect the admissibility of a writing or record made in the regular course of business, but may be shown to affect its weight. There is no reason in principle why an official writing, or what purports to be an official writing, may not be admissible as a record made in the regular course of business if it meets the requirements of the statute. There is nothing in the Manual for Courts-Martial which leads to the conclusion that a morning report may be introduced in evidence only as an official writing. The two bases of admissibility are not mutually exclusive and may coexist with reference to the same writing. Thus, it has been held that a death certificate signed by a county coroner and made pursuant to state law which also provided that such certificate is to be prima facie evidence of the facts therein stated, including the cause of death, is a record made in the regular course of business within the meaning of the statute (Hunter v. Derby Foods, 110 F 2nd 970).

The morning report entry in question meets all the requirements of the Federal statute. It was made in the regular course of the organization's business. By the terms of the statute, the word "business" is expressly made to include "business, profession, occupation, and calling of every kind". It is the normal practice of reporting units to make entries in the morning report within a reasonable time after the occurrences or events recorded. The entry in this case was made within two days after the commencement of the alleged absence. Thus the requirement of the statute that it be "the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter", was fulfilled (CM ETO 4691, Knorr).

The entry in the morning report stands uncontradicted by any other evidence. The court was fully justified in finding that accused absented himself without leave on 19 January 1945. Since the company on that date and immediately prior thereto was engaged in combat operations against the enemy, the court was warranted in drawing the inference, in the absence of evidence to the contrary, that accused quit his organization with the intent to avoid hazardous duty, namely, combat with the enemy (CM ETO 1432, Good; CM ETO 4743, Gotschall). This constituted desertion (AW 28).

6. The charge sheet shows that accused is 25 years of age and was inducted 14 January 1942, at New Cumberland, Pennsylvania. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as the court-martial may direct (AW 58). The designation of the Loire Disciplinary Training Center, Le Mans, France, as the place of confinement was authorized (Ltr. Hqs. Theater Service Forces, European Theater, AG 252 GAP-AGO, 20 Aug 1945).

(DISSENT) Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 5

17 SEP 1945

CM ETO 10199

| | |
|---|---|
| U N I T E D S T A T E S | ) 4TH INFANTRY DIVISION |
| v. | ) |
| Private First Class JOHN J. KAMINSKI (33144209), Company G, 8th Infantry | ) Trial by GCM, convened at Hagenau, France, 25 March 1945. Sentence: Dishonorable discharge (suspended), total forfeitures, and confinement at hard labor for 20 years. Loire Disciplinary Training Center, Le Mans, France. |

DISSENTING OPINION by HILL, Judge Advocate

In this case the prosecution relied on the morning report to prove the initial absence of accused. The commanding officer who prepared this morning report was on the stand. He testified that accused was not present for duty during January 1945 (19 January is alleged date of initial absence). He said that he knew this personally because he did not see him, although he had occasion to see all the men by reason of the fact that he "circulated freely" in attack, and also because he "billeted them". On cross examination he admitted that he did not personally billet all his men. So we have as the sole basis for the captain's "personal knowledge" of accused's absence, the fact that he did not see him in action. This is not enough. The mere failure to "see" has no substance as evidence. It must be coupled with and after a specific search for the missing man. For instance, at roll call the mind is directed specifically to each name. If a name is not answered the sergeant looks around and his subsequent failure to find that man becomes significant. That is one reason that the word "search" has become synonymous with personal knowledge in these cases. Out of regard for the rights of an accused, a personal search has been insisted on in peace time when there is less likelihood of mistake than there is during the noise, the dark and the confusion of combat when the mind is not so easily focussed on the individual. The exigencies of war do not justify any relaxation of the rules of evidence. At least there is nothing in the Articles of War that provides for such a double standard. This is proper. The defense labors under the same difficulties as the prosecution, perhaps more, due to death and confusion in the combat zone. Thus, the captain who made this morning report entry and who was the sole witness as to accused's absence did not offer substantial evidence on this point. In fact, asked

finally on cross examination if he knew of his "own personal knowledge whether this man [accused] was present or absent", his answer was "No". A long line of decisions, too well known to require citation, require the rejection of morning reports and testimony based on hearsay. This captain impeached his own morning report as hearsay.

The morning report entry in the instant case was not admissible in evidence as a record made in the regular course of business within the meaning of Title 28, U.S.C., sec.695. The Manual for Courts-Martial permits the use of the morning report, as evidence of absence in a military trial, only as an "official writing" (SPJGN 1945/3492, 29 March 1945, IV Bull. JAG 86).

In any event, even under the rule pertaining to proof of entries made in the regular course of business, a hearsay morning report entry is not admissible in a military trial. An entry made in the ordinary course of business is one that is made under the bookkeeping rules of the house which relies on that entry. The President is authorized by Article of War 38 to promulgate the rules for the keeping of the books which may be used as evidence before courts-martial. He has said that a morning report entry may be so used when it conforms to the standards which apply to an official writing, thereby requiring, as has been repeatedly decided and as the Manual itself says (par.117a, p.87), that the officer responsible for the morning report have personal knowledge of the entries made therein. Therefore, an entry not made on personal knowledge is an irregular entry, under the rules of our military establishment, and such fact appearing it could not be admitted in evidence under the Federal statute (cited above). It was not made according to the rules of the house (SPJGN 1945/3492, 29 March 1945, supra).

John Tannehill Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

7 JUN 1945

CM ETO 10211

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 4TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at Hagenau, France, 26 March 1945. Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| | ) | |
| Private JAMES E. STONER (20340184), Headquarters Company, 3rd Battalion, 12th Infantry | ) | |
| | ) | |
| | ) | |
| | ) | |
| | ) | |

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private James E. Stoner, Headquarters Company, Third Battalion, 12th Infantry, did, at or in the vicinity of Paris, France, on or about 27 August 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Saint-Maurice, France, on or about 27 December 1944.

(132)

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for forty-seven days in violation of Article of War 61. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution was substantially as follows:

Accused was a basic private in Headquarters Company, 3rd Battalion, 12th Infantry (R4,5,7). His organization was located in the vicinity of Paris on 27 August 1944 and, although he was a member of the guard, he did not report for his tour of duty. The company area was searched and he could not be found. He had not been authorized to be absent and no passes were issued to members of the organization while it was in Paris (R5,67,8). His organization left Paris the next day, going towards Belgium and reached the Siegfried Line on 13 September 1944. They were at all times trying to keep contact with the enemy and while they were in Paris all the men of the organization knew they were going to leave there and continue engaging the enemy. The battalion suffered some casualties during this period (R5,8). The accused expressly consenting thereto, it was stipulated he was apprehended at Saint Maurice, France, on or about 27 December 1944 (R8).

4. The accused after his rights as a witness were fully explained to him (R9), elected to remain silent and no evidence was introduced in his behalf.

5. Accused's unauthorized and unexplained absence from his organization for four months, in an active theater of military operations, and its termination by apprehension were established by the prosecution by competent, substantial evidence. Under these circumstances the court was warranted in inferring that he intended to remain permanently absent from his organization (MCM, 1928, par.130a, pp.143,144). There is substantial evidence to sustain the findings of guilty of the Charge and its Specification (CM ETO 10713, Clark).

6. The charge sheet shows that accused is 25 years of age and enlisted 9 October 1940 at Frederick, Maryland, in the Maryland National Guard. Prior service is shown as "Hq Co, 1st Inf., Maryland National Guard from 23 July 1937 to 22 July 1940".

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI,as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

8 JUN 1945

CM ETO 10212

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 4TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at Hagenau, |
| | ) | France, 23 March 1945. Sentence: |
| Private FRANCISCO V. | ) | Dishonorable discharge, total for- |
| BALSAMO (32178395), Company | ) | feitures, and confinement at hard labor |
| C, 4th Engineer Combat | ) | for life. Eastern Branch, United States |
| Battalion | ) | Disciplinary Barracks, Greenhaven, New |
| | ) | York. |

---

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Francisco V. Balsamo, Company C, 4th Engineer Combat Battalion, did, at Paris, France, on or about 26 August 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Dijon, France, on or about 5 December 1944.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Specification except the word "Dijon" substituting therefor the

(136)

the word "Lyon", of the excepted word not guilty, of the substituted word guilty, and guilty of the Charge. Evidence was introduced of three previous convictions by summary court-martial, two for absences without leave for four and six hours respectively in violation of Article of War 61 and the third for wrongfully appearing in a town off limits in violation of Article of War 96. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term ofhis natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution was substantially as follows:

Accused on 26 August 1944 was a private in Company C, 4th Engineer Combat Battalion (R4,5). His organization was attached to Combat Tean 22 and had moved into Paris, France, on that day and then moved out to continue/with whom it was in contact and was pursuing attack against the enemy across Northern France (R5). When they started to move out of Paris, about 1730 hours on 26 August 1944, accused was reported missing and although a search was made he could not be found. The next morning a further check was made and accused was still missing. He was not again seen in his company until some time in February 1945 (R6,7,8,9). He was not authorized to be absent on 26 August 1944 or at any time thereafter (R6,8,9). With the express consent of the accused, it was stipulated that he was arrested at Lyon, France, on or about 5 December 1944 (R10).

4. Accused after his rights as a witness were fully explained to him (R10), elected to remain silent and no evidence was introduced in his behalf.

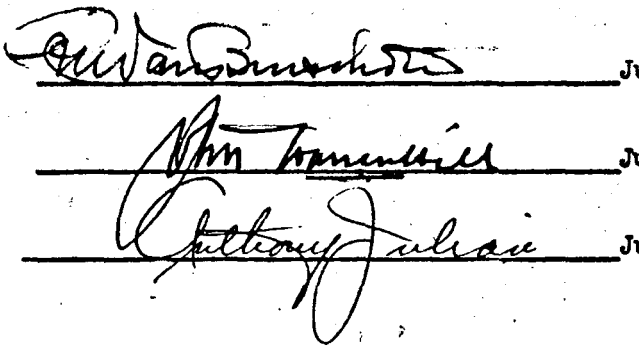
5. The prosecution clearly established the unauthorized absence of accused for a period in excess of three months and his return to military control by arrest. The court was warranted in inferring, from such a prolonged and totally unexplained absence in an active theater of military operations, that he intended to remain permanently absent from military control (MCM, 1928, par.130a, pp.143,144). There is substantial evidence to sustain the findings of guilty of the Charge and Specification (CM ETO 10713, Clark).

6. The charge sheet shows that accused is 29 years of age and was inducted 23 October 1941 at Camp Upton, New York. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial

rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42, Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).



Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3

9 JUN 1945

CM ETO 10213

| | |
|---|---|
| U N I T E D  S T A T E S | 4TH INFANTRY DIVISION |
| v. | Trial by GCM, convened at Hagenau, France, 26 March 1945. |
| Private First Class RAYMOND E. RUPERT (33251122), Company B, 12th Infantry | Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 69th Article of War.

Specification: In that Private First Class Raymond E. Rupert, Company "B", 12th Infantry, having been duly placed in arrest in quarters on or about 9 February 1945, did, at Steinmehlen, Germany, on or about 13 February 1945, break his said arrest before he was set at liberty by proper authority.

CHARGE II: Violation of the 58th Article of War.

Specification 1: In that * * * did, at Bettendorf, Luxembourg, on or about 20 January 1945, desert the service of the United States by absenting himself without proper leave from his organization, and did remain absent in desertion until he was apprehended at Stienfort, Luxembourg, on or about 7 February 1945.

(140)

Specification 2: In that * * * did, at Steinmehlen, Germany, on or about 13 February 1945, desert the service of the United States by absenting himself without proper leave from his organization, and did remain absent in desertion until he was apprehended at Paris, France, on or about 17 February 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found of the Specification of Charge I, guilty, except for the word "Steinmehlen" substituting therefor the word "Herscheid", of the excepted word, not guilty, of the substituted word, guilty, and guilty of Charge I of Specification 1, Charge II, guilty, except for the word "Bettendorf", substituting therefor the word "Eppeldorf", of the excepted word, not guilty, of the substituted word, guilty; of Specification 2, Charge II, guilty, except for the word "Steinmehlen", substituting therefor the word "Herscheid", of the excepted word, not guilty, of the substituted word, guilty, and guilty of Charge II. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The following evidence was undisputed:

a. Charge II, Specification 1: On 20 January 1945 accused was a light machine gunner of Company B, 12th Infantry, when it arrived at Eppeldorf, Luxembourg and was about to go into action against the enemy (R5). Artillery shells were falling in the town (R6). At about 2100 hours accused's absence was discovered (R5,10;Pros.Ex.A). From the latter part of January to the early part of February Company B was engaged in "fighting in some particular sector of Germany" (R11,12). Accused was apprehended at Stienfort, Luxembourg, on or about 7 February 1945 (R12).

b. Charge I and Specification, Charge II, Specification 2:

On 9 February 1945 at Herscheid, accused was returned to the company and placed in arrest in quarters by the first sergeant "by command of the commanding officer, Captain Campbell" and was told "what the penalty would be if he broke arrest". On 13 February it was discovered that accused was absent (R7,9,10;Pros.Ex.A). He was appre-

hended at Paris, France, on 17 February (R12).

4. After his rights were explained, accused elected to remain silent (R12-13).

5. a. The court's findings of guilty of Charge I and Specification are fully supported by the evidence (MCM, 1928, par.20, p.14, par.139a, p.154).

b. Under Charge II, Specification 1, although the evidence of the prosecution is meager, it is sufficient to demonstrate that accused left his company without authority on 20 January 1945 while it was before the enemy and during a period when it was engaged in active combat operations and that he remained absent until his apprehension 18 days later in Eppeldorf, a town about 42 miles away. Under such circumstances all the elements of the offense of desertion with intent to avoid hazardous duty are fully established by the evidence (CM ETO 3641, Roth; CM ETO 3473, Avllon: CM ETO 4701, Minnetto; CM ETO 4490, Brothers).

c. Under Charge II, Specification 2, the circumstances under which accused broke arrest in Herscheid, which is in Germany, on 13 February, his apprehension four days later in Paris, at a time when his company could reasonably anticipate further combat with the enemy, when considered together with his previous absence warranted a conclusion that he again absented himself with intent to avoid hazardous duty and fully supported the court's findings of guilty (CM ETO 4490, Brothers and other cases cited above).

6. The charge sheet shows that accused is 24 years and nine months of age and was inducted 25 August 1942 at Altoona, Pennsylvania, to serve for the duration of the war plus six months.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designa-

(142)

tion of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec. VI, as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Hewes Jr. Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3

5 JUN 1945

CM ETO 10217

| | | |
|---|---|---|
| U N I T E D  S T A T E S | ) | 4TH INFANTRY DIVISION |
| | ) | |
| v. | ) | GCM convened at Hagenau, France, |
| | ) | 26 March 1945. Sentence: Dis- |
| Private First Class LALO | ) | honorable discharge, total forfeit- |
| A. RIVERA (18068351), | ) | ures and confinement at hard labor |
| Company B, 12th Infantry | ) | for life. Eastern Branch, United |
| | ) | States Disciplinary Barracks, |
| | ) | Greenhaven, New York. |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried on the following Charge and Specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private First Class Lalo A. Rivera, Company "B", 12th Infantry, did, at 1 Mile North of Consdorf, Luxembourg, on or about 21 December 1944 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: go to the company forward command post, and did remain absent in desertion until he was apprehended at Esch, Luxembourg on or about 8 January 1945.

Specification 2: In that * * * did, at Bettendorf, Luxembourg on or about 20 January 1945, desert the service of the United States by absenting himself without proper leave from his organization, and did remain absent in desertion

(144)

until he was apprehended at Luxembourg, Luxembourg, on or about 7 February 1945.

Specification 3: In that * * * did, at Blanscheid, Germany, on or about 13 February 1945, desert the service of the United States by absenting himself without proper leave from his organization, and did remain absent in desertion until he was apprehended at Paris, France, on or about 17 February 1945.

He pleaded not guilty and, two-thirds of the members of the court present when the vote was taken concurring, was found guilty of the Charge and of Specification 1, guilty of Specification 2 except for the word "Bettendorf" substituting therefor the word "Eppeldorf", of the excepted word not guilty, of the substituted word guilty and guilty of Specification 3 except the word "Blanscheid" substituting therefor the word "Herscheid", of the excepted word not guilty, of the substituted word guilty. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution was substantially as follows:

Throughout the period beginning about 16 December 1944 and continuing through about 13 February 1945, accused's organization was engaged in virtually continuous combat activity with the German forces in Luxembourg and Germany. This was the period of the so-called "Battle of the Bulge" and heavy casualties were encountered throughout (R5-7). On 20 December 1944, accused was in the company motor pool when he was advised by the first sergeant that he was to be sent next day to rejoin his platoon which was then engaged with the enemy between Consdorf and Bergdorf, Luxembourg. At roll call the next morning (21 December 1944), he was found to be absent and a search of the area failed to reveal his whereabouts. He was apprehended at Esch, Luxembourg on or about 8 January 1945 (R5-6,9; Pros.Ex.A). Sometime in the early part of January 1945, he was returned to his company, remaining with it until 20 January 1945. On that date the company was scheduled to move from Eppeldorf to Bettendorf, Luxembourg. A roll call was taken and accused was again found to be absent. The company moved out

and fought its way to Lonsdorf, Luxembourg, having many casualties in the course of the engagement (R6-8). Accused was apprehended in Luxembourg, Luxembourg, on 7 February 1945 and was returned to his company on 9 February 1945 (R8-9). On 13 February 1945, the company was at Herscheid, Germany, and in contact with the enemy. Accused was again reported absent, and despite a thorough check of the area, could not be found (R6,8). This time he was apprehended in Paris, France, on 17 February 1945 (R9).

4. After being warned of his rights by the law member, accused elected to remain silent. No evidence was introduced for the defense (R10).

5. Accused on three different occasions absented himself from his organization during a period of the most hazardous kind of combat activity. Prior to his absence in each case, he was shown to have been present with his company and hence must have been well aware of the danger facing it. The court therefore was justified on the basis of the evidence adduced in reaching the conclusion that he departed on each occasion with the intention of avoiding hazardous duty and accordingly the record of trial is legally sufficient to support the findings of guilty (See CM ETO 10213, Rupert). Although the intent to avoid hazardous duty is specifically charged only in Specification 1, this is immaterial since a specification charging desertion without reference to specific intent is sufficient to support a finding of guilty of desertion when intent to avoid hazardous duty is proved. (See CM ETO 5958, Perry and Allen).

6. The charge sheet shows that accused is 21 years and eight months of age and enlisted 2 February 1942, at Santa Fe, New Mexico. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

_____ Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3

8 JUN 1945

CM ETO 10218

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 4TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at |
| | ) | Hagenau, France, 26 March |
| Private ROBERT E. GAINES | ) | 1945. Sentence: Dishonorable |
| (39145684), Company B, | ) | discharge, total forfeitures |
| 12th Infantry | ) | and confinement at hard |
| | ) | labor for life. Eastern |
| | ) | Branch, United States Dis- |
| | ) | ciplinary Barracks, Greenhaven, |
| | ) | New York. |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 58th Article of War.

Specification 1: In that Private Robert E. Gaines, Company "B", 12th Infantry, did, at Bech, Luxembourg, on or about 21 December 1944 desert the service of the United States by absenting himself without leave from his organization with intent to avoid hazardous duty, to wit: an engagement with the German forces in the vicinity of Bech, Luxembourg, and did remain absent in desertion until he surrendered himself at Luxembourg, Luxembourg, on or about 6 February 1945.

(148)

Specification 2: In that * * * did, at Steinmehlen, Germany, on or about 13 February 1945 desert the service of the United States by absenting himself without leave from his organization with intent to avoid hazardous duty, to wit: an engagement with the German forces in the vicinity of Steinmehlen, Germany, and did remain absent in desertion until he surrendered himself at Luxembourg, Luxembourg, on or about 22 February 1945.

CHARGE II: Violation of the 69th Article of War.

Specification: In that * * * having been duly placed in arrest in quarters on or about 9 February 1945, did, at Steinmehlen, Germany, on or about 13 February 1945, break his said arrest before he was set at liberty by proper authority.

He pleaded not guilty, and was found guilty of Specification 1, Charge I, of Specification 2, guilty except for the word "Steinmehlen", substituting therefore the word "Herscheid", and guilty of Charge I; of the Specification of Charge II, guilty, except for the word "Steinmehlen", substituting therefor the word "Herscheid", and guilty of, Charge II. Evidence was introduced of two previous convictions by special court-martial, one for absence without leave for 20 days in violation of Article of War 61 and one for absence without leave for 14 days and for escape from confinement in violation of Articles of War 61 and 69 respectively. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined to hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the finding of guilty of Specification 2, Charge I, as involves a finding that accused did, at the time and place alleged, absent himself without proper leave from his organization until he surrendered himself at the time and place alleged, in violation of the 61st Article of War, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence is clear and undisputed that from 20 to 24 December 1944 accused's organization was in the vicinity of Bech, Luxembourg, and was receiving small arms, mortar and artillery fire from the enemy. At this time the now historic von Rundstedt break-

through was at its height. The weather was severe and the issue of the battle in doubt. On the 20th accused went back on sick call to the rear command post, where the first sergeant told him and several others that he was going to take them back to the company the next morning. The following morning accused's absence was discovered. He surrendered to military control at Luxembourg, Luxembourg on 6 February 1945 and was returned to the company under guard on 9 February. He was thenplaced in arrest and remained restricted to quarters until 13 February when he was again found absent without leave. He surrendered to military control at Luxembourg on 22 February 1945. There was no evidence that his organization was engaged in hazardous duty between 13 and 22 February.

No evidence was offered by the defense and after his rights were explained accused elected to remain silent.

4. a. Under Specification 1, Charge I, there is substantial evidence from which the court was authorized to infer that accused knew of the hazardous duty in which his organization was engaged and deliberately left his place of duty to avoid prospective battle hazards. The court's findings of guilty was fully justified (CM ETO 8083, Cubley; CM ETO 7189, Hendershot; and authorities therein cited).

b. The action of the reviewing authority in approving only so much of the finding of guilty of Specification 2, Charge I as involves a finding that accused did, at the time and place alleged, absent himself without proper leave from his organization until he surrendered himself at the time and place alleged, in violation of the 61st Article of War, was warranted, since the evidence failed to indicate that accused intended at the time of his absence to avoid hazardous duty (MCM, 1928, par.130a, pp.142-143).

c. The court's findings of guilty of Charge II and Specification were fully supported by the evidence.

5. The charge sheet shows that accused is 20 years and five months of age and was inducted 22 December 1943 at San Francisco, California, to serve for the duration of the war plus six months. No prior service is shown.

6. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings, as approved, and the sentence.

(150)

7. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. V. Davis Jr. Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

29 JUN 1945

BOARD OF REVIEW NO. 3

CM ETO 10250

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | NINTH UNITED STATES ARMY |
| | ) | |
| v. | ) | Trial by GCM, convened at Rheydt, |
| | ) | Germany, 3 April 1945. Sentence: |
| Private CARL L. KATES (37411774), 87th Quartermaster Railhead Company | ) | Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern |
| | ) | Branch, United States Disciplinary |
| | ) | Barracks, Greenhaven, New York. |

---

HOLDING BY BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Carl L. Kates, 87th Quartermaster Railhead Company, did, at Perwez, Belgium, on or about 24 September 1944 desert the service of the United States and did remain absent in desertion until he was apprehended at Brussels, Belgium, on or about 18 February 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for 11 days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the

reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence is clear and not disputed that on 24 September 1944, while with his organization at Perwez, Belgium, accused went absent without leave (R6-9,11;Pros.Ex.A). He so remained until apprehended 18 February 1945 in Brussels, Belgium, by military police (R10; Pros. Ex. B).

After his rights were explained (R16-17), accused testified that he returned eight days after his initial absence to find his company gone, that after searching for it unsuccessfully he continued to remain away, until apprehended in Brussels 18 February 1945, because he "thought about the punishment and figured they would catch me anyway" (R17-23). That accused was a good worker and a frequent church attendant was disclosed by character witnesses (R14-16).

The court's findings of guilty were fully justified (MCM, 1928, par.130a, p.143; CM ETO 5414, White; CM ETO 1629, O'Donnell; CM ETO 2343, Welbes and cases therein cited).

4. The charge sheet shows that accused is 22 years of age and that he was inducted 18 January 1943 at Jefferson Barracks, Missouri. He had no prior service.

5. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

6. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is proper (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3

9 JUN 1945

CM ETO 10273

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 4TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at Hagenau, France, 25 March 1945. |
| Private HENRY A. HANEBERG (39583270), Company F, 8th Infantry | ) | Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Henry A. Haneberg, Company F, 8th Infantry, did near Schevenhutte, Germany on or about 27 November 1944, desert the service of the United States, by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to wit: an engagement with the enemy, and did remain absent in desertion until he was apprehended near Tranegnies, Belgium, on or about 15 February 1945.

He pleaded no guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. Evidence was introduced of one previous conviction by summary court for absence without leave for about two days in violation of Article of War 61. Three-fourths of the

(154)

members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence shows that on 27 November 1944 accused's squad, after having occupied a defensive position under sporadic and infrequent mortar or artillery fire for approximately a week, jumped off over flat, thickly-wooded terrain to go into an attack near Schevenhutte, Germany, during the initial phase of the Hurtgen Forest operation (R5-7). Accused, a Browning Automatic Rifleman, was seen by his squad leader about the time the squad jumped off but later was found to be missing at the result of a check made when "we were stalled during the time we were going into the attack" (R5). At the time his absence was discovered the squad had not yet encountered small arms fire but the area through which it had passed had received "a few shells" (R7). His departure was unauthorized and he remained absent without leave until apprehended at or near Tranegnies, Belgium, on or about 15 February 1945. During his absence, his unit engaged in severe fighting in the Hurtgen Forest during which both small arms and artillery fire was received and casualties were suffered (R5-7). On this evidence, the Board of Review is of the opinion that the court was warranted in finding that accused absented himself without leave to avoid hazardous duty, as alleged, and accordingly was justified in finding him guilty of the offense charged (CM ETO 10213, Rupert; CM ETO 7688, Buchanan).

4. The accused after his rights as a witness were fully explained to him, elected to remain silent and no evidence was introduced in his behalf (R8).

5. The charge sheet shows that accused is 28 years of age and was inducted on 19 April 1944 at Temple City, California. No prior service is shown.

6. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

7. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designa-

tion of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. H. McCarty II Judge Advocate

(157)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3

8 JUN 1945

CM ETO 10275

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 4TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at Hagenau, France, 27 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| Private First Class EDWIN M. EDWARDS (31464739), Company G, 8th Infantry | ) | |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that Private First Class Edwin M. Edwards, Company "G", 8th Infantry, having received a lawful command from First Lieutenant William E. Smith, 8th Infantry, his superior officer, to report to his organization, Company "G", 8th Infantry, for duty, did, near Hermespand, Germany, on or about 4 March 1945, willfully disobey the same.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. Evidence was introduced of one previous conviction by special court-martial for absence without leave for six days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was

sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence is clear and not in dispute that on 4 March 1945, accused was at his battalion's command post near Hermespand, Germany, and was with a group of men who were being returned to their companies from hospitalization. Company G, of which accused was a member, was then engaged in an attack on a hill just northeast of Hermespand. First Lieutenant William E. Smith, Headquarters Company, 2nd Battalion, 8th Infantry, was battalion adjutant and intended to return accused to his company by runner. However, the runner in accused's presence reported to Lieutenant Smith that accused would not return to the company for duty. Lieutenant Smith, who was wearing the insignia of his rank, then explained to accused the possible consequences if he did not return to his company and said, "Private Edwards, I am giving you a direct order to return to Company G, as fit for duty with the company". Accused replied, "I will not return to the company" (R5-6).

4. For the defense, it was stipulated between the prosecution, the accused and his counsel that if "Lieutenant Nunez" were present in court he would testify under oath substantially as follows:

> "I am Lieutenant Nunez, a member of Company G, 8th Infantry. I knew the accused from the 26th day of November until 19 January, and I had occasion to observe his conduct during combat. During the dates stated I would rate the accused as a good combat soldier, obedient to orders, and giving satisfactory performance" (R7).

5. After his rights were explained, accused elected to remain silent (R7).

6. To show the guilt of accused as alleged the prosecution was required to prove: (a) that he received a certain command from a certain officer as alleged, (b) that such officer was his superior officer, and (c) that he willfully disobeyed such command (MCM, 1928, par.134b, p.149). All the elements of the offense were clearly shown,

except that proof of his willful disobedience ended with the evidence of his emphatic refusal to obey the order. But he had just previously refused to go with the runner. What transpired thereafter was not disclosed. However, such an open and express refusal sufficiently establishes the willful and intentional character of his disobedience under Article of War 64 and the court's findings of guilty are therefore supported by the evidence (CM ETO 6194, Sulham; Winthrop's Military Law and Precedents (Reprint, 1920), p.573).

7. The charge sheet shows that accused is 28 years of age and was inducted 21 April 1944 at East Hartford, Connecticut. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. The penalty for willfully disobeying the lawful command of his superior officer by a person subject to military law is death or such other punishment as a court-martial may direct (AW 64). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

E. L. Green Jr. Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3 8 JUN 1945

SM ETO 10276

| | |
|---|---|
| U N I T E D S T A T E S<br><br>v.<br><br>Private First Class LOGAN HANCOCK (15055765), Company B, 8th Infantry | 4TH INFANTRY DIVISION<br><br>Trial by GCM, convened at Hagenau, France, 25 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that Private First Class Logan Hancock, Company "B", 8th Infantry, having received a lawful command from Captain Robert D. Moore, 8th Infantry, his superior officer, to report to his organization, Company "B", 8th Infantry, for duty, did, near Waschеid, Germany, on or about 21 February 1945, wilfully disobey the same.

He pleaded not guilty to, and was found guilty of, the Specification and the Charge. Evidence was introduced of two previous convictions, by special court-martial and summary court-martial respectively, each for absence without leave for one day. All members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to the provisions of Article of War 50½.

3. The uncontroverted evidence shows that on 21 February 1945, while his company was occupying a position in the line near Wascheid, Germany, subject to hostile artillery and mortar fire, accused reported at battalion command post with a group of men returning to the front from the service company. At the command post accused told Captain Robert D. Moore, the battalion S-1, that he was not going to return to his company because he "couldn't take it any more". Captain Moore undertook to persuade him to change his mind about not returning but accused insisted he was worthless at the front, that Hurtgen Forest had taken a lot out of him and that he could continue only if given an assignment in the rear. Finally, after warning him of the penalty for disobedience, Captain Moore gave accused a direct order to return to his company. Accused replied that he could not and would not do so. He was then placed in arrest. Accused appeared in good physical condition, although nervous, during his interview with Captain Moore (R5-7). He later told the investigating officer that he did not feel he was any good any more up there in the front lines with his buddies (R8).

For the defense, it was stipulated that, if present, a staff sergeant of accused's company would have testified that accused was an average soldier who under normal field conditions performed his job without question. Accused was advised of his rights and elected to remain silent (R8).

4. The evidence establishes every element of the offense charged, viz. willful disobedience by accused of the lawful order of his superior officer which order related to a military duty and was one which the officer was authorized under the circumstances to give the accused. Since the evidence shows that he was physically able to execute the order, the excuse offered by accused to Captain Moore and suggested in his statement to the investigating officer, that he felt that prior combat experiences had rendered him incapable of further effective combat service, was not of a character to exculpate him (See: Winthrop's Military Law and Precedents, (Reprint, 1920), p.573).

5. The charge sheet shows that accused is 28 years of age and that, with no prior service, he enlisted at Fort Thomas, Kentucky, 9 September 1940. He had no prior service.

6. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

7. The penalty for willful disobedience of any lawful command of an accused's superior officer is death or such other punishment as a court-martial may direct (AW 64). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. N. Levey Jr. Judge Advocate

(165)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

5 MAY 1945

CM ETO 10282

| | |
|---|---|
| U N I T E D  S T A T E S | CONTINENTAL ADVANCE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| Technician Fifth Grade JAMES VANDIVER (34419462) and Private First Class BENJAMIN J. COELHO (31445544), both of 592nd Quartermaster Salvage Repair Company | Trial by GCM, convened at Dijon, France, 9 February 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for three years. VANDIVER: United States Penitentiary, Lewisburg, Pennsylvania. COELHO: Federal Reformatory, Chillicothe, Ohio. |

---

HOLDING BY BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

---

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Immediately prior to arraignment, the Charge against each accused was purportedly amended to allege a violation of the 94th Article of War rather than the 84th Article of War. The Specification as to each accused, however, was not altered. Each accused was found guilty of the unlawful sale of "six cases of type 'D' field rations, of the value of about $54.72, issued for use in the military service of the United States" (underscoring supplied). The labelling of the Charge as a violation of the 94th Article of War, which covers offenses involving property of the United States furnished or intended for the military service, did not change the nature of the offense alleged. The Specification alleged an offense under the 84th Article of War (CM ETO 5032, Brown and Finnie; CM ETO 6268, Maddox; MCM, 1928, par.28, p.18). The wrongful sale

(166)

of rations issued for use in the military service of the United States was proved by substantial competent evidence, including sworn testimony of the accused.

3. The court was legally constituted and had jurisdiction of the persons and offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved and the sentence as to each accused.

4. The offense of selling property issued for use in the military service under the 84th Article of War is essentially a military offense for which confinement in a penitentiary is not authorized (CM ETO 7506, Hardin; CM ETO 7609, Reed and Pawinski; AW 42). The place of confinement of each accused should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (Cir.210, WD, 14 Sept. 1942, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

2 MAY 1945

CM ETO 10284

| | |
|---|---|
| UNITED STATES<br><br>v.<br><br>Private MARIO T. SPROVIERI (36655219), Anti-Tank Company, 222nd Infantry | 42ND INFANTRY DIVISION<br><br>Trial by GCM, convened at Dahn, Germany, 21 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for 25 years. Federal Reformatory, Chillicothe, Ohio. |

HOLDING by BOARD OF REVIEW NO 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and found legally sufficient to support the sentence.

2. Confinement in a penitentiary is authorized upon conviction of robbery by Article of War 42 and section 284, Federal Criminal Code (18 USCA 463) and of sodomy by Article of War 42 and section 22-107 District of Columbia Code (CM ETO 3717, Farrington, and authorities therein cited). Only prisoners 25 years of age and younger and with sentences of not more than 10 years may be confined in a Federal correctional institution or reformatory. The designation of the Federal Reformatory, Chillicothe, Ohio, as the place of confinement should therefore be changed to the United States Penitentiary, Lewisburg, Pennsylvania (Cir.229, WD, 8 June 1944, sec.II, pars.1a(1), 1b(4), 3a, 3b, as amended).

Judge Advocate

Judge Advocate

Judge Advocate

AGPD 2-45/19M/C504ABCD

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3 20 JUL 1945

CM ETO 10314

| | |
|---|---|
| U N I T E D S T A T E S | 3RD INFANTRY DIVISION |
| v. | Trial by GCM, convened at Toul, France, 26 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| Private KENNETH E. WHITE (37443246), Company E, 15th Infantry | |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Kenneth E. White, Company "E", 15th Infantry, did, at Pozzuoli, Italy, on or about 21 July 1944, desert the service of the United States and did remain absent in desertion until he returned to military control at Pianura, Italy, on or about 30 December 1944.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the rest of his natural life. The reviewing authority, the Commanding General, 3rd Infantry Division, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on or about 21 July 1944 accused was a student cook with Company E, 15th Infantry, which was then at Pozzuoli, Italy. On the morning of 21 July he was not present to help serve breakfast. The mess sergeant checked his bed and the kitchen area, around which the whole company was bivouacked, but did not find accused. He had no permission from the mess sergeant to be absent, and was not present with the company after 21 July 1944 (R8-10).

A duly authenticated extract copy of the morning report of Company E for 22 July 1944, which was introduced in evidence, showed accused "Dy to AWOL 0600 since 21st " (R7; Pros.Ex.A).

It was stipulated in writing that Sergeant Philipse, if present in court and sworn as a witness, would testify as follows:

> "I am Sgt Philipse, 59th M. P. Company. On 30 December 1944, Pvt Kenneth E. White, Company "E", 15th Infantry, returned to military control at Pianura, Italy" (R10; Pros.Ex.B).

4. After his rights as a witness were explained to him by the president of the court, accused elected to make

an unsworn statement through his counsel, who thereupon read the following, which he stated was quoted from "the psychiatric report on" accused dated 12 February 1945:

> "Soldier claimed that his brother was killed while serving with the 34th Division, 133rd Inf. Regt., in February 1943 in Tunisia. He knew of this before he left the Zone of Interior and expressed the belief that he 'would have done better if my brother had not been killed'" (R10-12).

5. The evidence shows that accused left his organization at Pozzuoli, Italy on 21 July 1944 and remained absent without leave for 162 days, after which he returned to military control at Pianura, Italy. The court was clearly warranted in inferring from such a prolonged and unexplained absence without leave that accused, at some time during the period of absence, intended to remain absent permanently from the service (CM ETO 1629, O'Donnell; CM ETO 6093, Ingersoll; CM ETO 1577, Le Van). The statement read by defense counsel, if true, obviously could not have afforded accused an excuse to desert his organization. Such statement suggests rather a motive or reason for the formation of the intention to desert the service, and may well have been quite properly considered by the court in that connection.

6. The charge sheet shows that accused is 29 years of age and was inducted 16 November 1942 at Des Moines, Iowa. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

B R Sleeper Judge Advocates

Melvin C. Thorman Judge Advocates

[illegible] Judge Advocates

[illegible]-3-

(173)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

26 MAY 1945

CM ETO 10331

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 45TH INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at APO 45, U. S. Army (France), 15 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Private HERSHEL W. JONES (34083509), Headquarters Battery, 160th Field Artillery Battalion | ) | |

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 58th Article of War.

Specification I: In that Private Hershel W. Jones, Headquarters Battery, 160th Field Artillery Battalion, did, at Rome, Italy on or about 7 June 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Rome, Italy on or about 4 September 1944.

10331

(174)

Specification II: In that * * * did, at Marseilles, France on or about 21 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Marseilles, France on or about 24 September 1944.

Specification III: In that * * * did, at Marseilles, France on or about 1 October 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Verpillere, France on or about 30 November 1944.

Specification IV: In that * * * did, at or near Dijon, France on or about 2 December 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Macon, France on or about 14 January 1945.

CHARGE II: Violation of the 94th Article of War.

Specification: In that * * * did, at or near Grenoble, France on or about 13 November 1944, feloniously take, steal, and carry away one quarter-ton Command and Reconnaissance Car W-20137181, of the value of about $1,407.00, property of the United States furnished and intended for the military service.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and all specifications thereunder. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 45th Infantry Division, disapproved so much of the findings as to the Specification, Charge II, as found the value of the vehicle to be greater than $800.00, approved the sentence, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, after reconsideration of his previous action confirming the sentence without commutation, confirmed the sentence, but commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the

term of accused's natural life, recalled so much of his previous action as was inconsistent with his present action pursuant to paragraph 87b, Manual for Courts-Martial, 1928, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. Prosecution's evidence was substantially as follows:

On 6 June 1944 accused was the battery carpenter of Headquarters Battery, 160th Field Artillery Battalion, stationed near Rome (R5,6,7,11). First Sergeant Jack Christy, of that battery (R5), testified that on the evening of that day, he saw accused in the battery area, but although witness was present with the battery between 7 June 1944 and 14 January 1945 and did not excuse him from being present with the battery for any time during that period, accused was not present between those dates. He was carried absent without leave from 7 June to 12 July (R5-6). The prosecution offered in evidence an extract copy of the morning report of accused's battery for 31 January 1945 (R24), reading as follows:

> "Jones, Hershel W., 34083509, Private Duty to AWOL 0001 Rome, Italy 7 Jun 44. AWOL to conf 73 MP Co. Rome, Italy APO 794 US Army eff 4 Sep 44. ~~Conf~~ 73 MP Co. Marseilles,France to AWOL 0001 21 Sep 44. AWOL to ~~Conf~~ CBS Stockade Marseilles, France 2000 24 Sep 44. ~~Conf~~ CBS Stockade Marseilles, France to AWOL 0001 1 Oct 44. AWOL to ~~Conf~~ 53 MP Co. Dijon, France APO 722 1500 30 Nov 44" (Ex.B).

The defense objected to the admission of the exhibit on the ground that it contained entries that were purely hearsay and the law member received it in evidence.

> "except entry as to 21 September, 24 September, and 1 October 1944, and the entry as to 30 November, 1944, will prove only that he was under military control on that date. I will draw a line through the portions not admitted" (R24).

Technician Fourth Grade Harold R. Merrill, personnel clerk of accused's battalion, testified that at Giuliano, Italy, on the morning of 12 September, he saw accused in confinement with a group of prisoners who were evidently being returned to their units. Witness

had known him for about three years but had not seen him for some time and accused came over and inquired about his mail (R7,10). They engaged in a conversation and he seemed interested in telling witness "exactly how he lived and the good times he had" (R11). Merrill was not conducting an investigation, nor did he make him any offer or threaten him in any way, but he did not inform him that he might testify against him in court (R10). Accused stated in substance that he left his battery a few days after Rome fell (which event occurred on 4 June 1944 (The Stars and Stripes, Paris Ed., 1 Jan. 1945, p.5, "Review of the War")) and went to Rome where he met some friends and spent several days "just travelling from barroom to barroom and having a good time". Later he became acquainted with an Italian girl and lived with her and her mother for some time. Subsequently the girl's father appeared and inquired if accused wished to join him in black market operations. Accused was afraid because it was "risky", but made several trips to a quartermaster installation near Anzio where it was easy to take rations and cigarettes and where he occasionally took gasoline. It was "easy to get enough money to live on" in Rome. He always kept his passes up to date to show the military police. About 0900 hours 4 September, military police demanded his pass. He stated that he had none but that he did not believe he needed one because his unit was stationed nearby and he had come to town for a short time. When it appeared that they intended to take him to his unit, he told them truthfully that it was with the 45th Division and he had been absent without leave for three months (R7-11).

Private George E. Clark, Battery B, 160th Field Artillery Battalion, testified that he was on pass in Grenoble, France on 13 November with a ¼-ton jeep, No. W-20137181, property of the United States Army assigned to his battery, which he had permission to use. He met accused and stayed in the hotel where he stated he was living (R12-14,17). The two entered a cafe, leaving the jeep unattended, and when witness returned from the cafe, the jeep was gone (R14,17). About 1900 hours 15 November, Clark recognized accused driving the jeep and when he called twice, accused stopped and Clark ran toward the vehicle. When he came to within about 20 feet, accused put the jeep into low gear and "left going very fast" (R14-18). Witness did not see him thereafter in Grenoble and the vehicle was never recovered by the battery (R16). Captain John R. Turner, S-4 of the 160th Field Artillery Battalion, testified that the vehicle had been in service about 18 months but was in running order. His duties involved handling of vehicles and, in his opinion as S-4, based upon its serviceability, this vehicle was worth approximately $800.00 (R21-23). Clark testified it was in excellent order (R23).

On or about 27 January 1945, Captain Turner investigated the charges herein at his battery command post near Bust. He informed accused he was appointed to investigate desertion charges

against him, that he need not make any statement, that any statements he might make could be used against him, and that any evidence which could be used for him would be so used (R11). Accused thereupon made and signed the following statement, which was admitted as Exhibit A, the defense stating there was no objection (R12):

"About the first of June, 1944, near Rome, I left the Battery and stayed in Rome until I was arrested the 4th of September, 1944. I came to France with the 45th Division rear echelon and out-maneuvered the guards about the 21st of September, 1944, at Marseilles, France. I stayed around Marseilles a few days and was picked up again. After five or six days, I outmaneuvered the guards and went to Valence, Lyon, and to Nancy; it was too cold there, so I went south to Lyon. I went to Grenoble and then to Macon, and back to Bourgoin, France to a girl I had there who owned a restaurant. The Civil French Police picked me up there about November 30th, 1944, and surrendered me to the Army M.P.s. I stayed with the Military Police until December 2nd, 1944, when I out-maneuvered the M.Ps again by jumping train. I went back to Macon and was picked up about the 14th of January, 1945, by the 815th M.P. Co.

I saw Pvt. George Clark at Grenoble, France and drank some with him. We ran around some and finally separated, but I never stole his 1/4-ton.

The reason I was so successful was because I made friends with the Army M.P.s and could always bum a meal or some cigarettes from them. It also helps to have some kind of a pass and to wear sergeant chevrons of some kind. To keep from being picked up by the Military Police, I always kept neat and clean and always wore my dog-tags. Never do any business with the common soldier, always talk to a lieutenant and be sure and be courteous. The French Civil Police are pretty tough because they are so jealous of their women and afraid of German paratroopers so they always ask for a 'paper'.

(178)

The first thing I always looked for when I hit a town was a good-looking woman.The best kind of woman to take care of a person is one who owns a restaurant, about 30 to 35 years old, and whose husband is missing" (Ex.A).

4. After his rights were explained (R24), accused elected to remain silent. No evidence was introduced by the defense (R25).

5. a. Specification I, Charge I: Accused was charged generally with desertion commencing on or about 7 June 1944 terminated by apprehension on or about 4 September 1944. His pre-trial confession, which under the evidence the court was warranted in determining to be voluntary, establishes his absence without leave and termination at the time and in the manner alleged. From this absence of almost three months in an active theater of operations, terminated by apprehension and unexplained, the court was warranted in inferring an intent on accused's part not to return to his organization (MCM, 1928, par.130a, p.143; CM ETO 1629, O'Donnell). The corpus delicti of the offense, absence without leave (CM 143744, 145555 (1921), Dig. Op. JAG, 1912-1940, sec.416(7a), p.267), is established by the testimony of the first sergeant of his battery that, without permission from him, accused was absent between 7 June 1944 and 14 January 1945 and by accused's voluntary admissions to Merrill. Accused's admitted conduct during his protracted absence furnished a further basis for a reasonable inference of intent not to return: his living with civilians, his larceny of Army rations, cigarettes and gasoline, his continued falsification of passes to evade detection by the military police and his false statement upon apprehension as to the location of his unit. The date of termination of the absence is indicted generally by his statement to Merrill and specifically by his written confession. In the opinion of the Board of Review, the record contains ample evidence in support of the Specification. The morning report entry dated 31 January 1945, purporting to show accused's status as absent without leave as of 0001 on 7 June 1944 (Ex.B) was not admissible to prove the inception of such absence (CM 254182, Roessel, 35 B.R. 179 (1944); CM ETO 7381, Hrabik). As in the last cited case, it appears certain that the information as to accused's status, recorded over seven months after the time thereof, could not have been within the personal knowledge of the entrant and hence the entry was not competent evidence of the facts therein stated. The other evidence, however, constitutes sufficient proof of the corpus delicti.

b. Specifications II, III and IV, Charge I: Accused was charged generally with desertion on three further occasions, as follows:

Marseilles, France, 21 September - 24 September 1944, apprehended Marseilles (Spec.II);
Marseilles, France, 1 October - 30 November 1944, apprehended Verpillere, France (Spec.III);
Dijon, France, 2 December 1944 - 14 January 1945, apprehended Macon, France (Spec.IV).

His written confession states that on 21 September, on or about 1 October, and on 2 December he "out-maneuvered" his guards and escaped from confinement. His explanation of the reasons for his success in avoiding apprehension is clearly indicative of an intent not to return to the military service. The vital question for determination is whether the record contains adequate proof of the corpus delicti of each of the three offenses. A confession is not admissible in evidence unless there is evidence aliunde the confession that each offense has probably been committed. Such evidence need not be sufficient of itself to prove the commission of the offense beyond a reasonable doubt, to cover every element thereof, or to connect the accused therewith (MCM, 1928, par.114a, p.115). It has been held by the Board of Review (sitting in Washington) that it is not necessary to prove the corpus delicti even by a preponderance of the evidence, but that some evidence corroborative of the confession must be produced and it must touch the corpus delicti (CM 202213, Mallon, 6 B.R.1 (1934), Dig. Op. JAG, 1912-1940, sec.395(11), p.208). In the cited case, the Board of Review followed the rule laid down by Judge Learned Hand in Daeche v. United States (CCA 2nd, 1918), 250 Fed.566. In a case decided since the Board's opinion in CM 202213, Mallon, supra, Justice Stephens of the Court of Appeals for the District of Columbia gave exhaustive consideration to the whole subject of the degree of proof required for corroboration of confessions (Forte v. United States, 68 App. DC 111, 94 F(2nd) 236 (1937)). Reference is made to his opinion for a discussion of the views of Professors Wigmore and Greenleaf as well as of the findings of the National Commission on Law Observance and Enforcement (1931) that the practice of forcing confessions is widespread throughout the United States. It is made clear in the opinion that, as construed by subsequent authority (Forlini v. United States (CCA 2nd, 1926), 12 F(2nd) 631,634), the Daeche case stands for the proposition "that in addition to a confession there must be 'some independent proof of the corpus delicti'". The rule announced in the Forte case, which in the opinion of the Board of Review should be followed in the administration of military justice, is thus stated:

"Moreover, there is no suggestion in the instant case that the statement of the appellant that he knew the car was stolen was not voluntary. But the case cannot be decided upon an ad hoc basis. The question presented is of first impression here; and we feel bound upon a subject

(180)

> touching so materially liberty, and in many cases life itself, and especially in the criminal law where justice requires equality of treatment in respect of trial procedure and proof, to give weight to the findings of the National Commission, and to follow in adopting a rule for this jurisdiction the rule of the great majority of the courts in the United States--that there can be no conviction of an accused in a criminal case upon an uncorroborated confession, and the further rule, represented by what we think is the weight of authority and the better view in the Federal courts, that such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the corpus delicti and the whole thereof. We do not rule that such corroborating evidence must, independent of the confession, establish the corpus delicti beyond a reasonable doubt. It is sufficient, according to the authorities we follow, if, there being, independent of the confession, substantial evidence of the corpus delicti and the whole thereof, this evidence and the confession are together convincing beyond a reasonable doubt of the commission of the crime and of the defendant's connection therewith" (94 F(2nd) at p.240).

Applying the foregoing rule to the instant case, it is apparent that the record lacks adequate evidence of the corpus delicti of each of the three desertions charged and that the confession was therefore improperly admitted as to those desertions. The only competent evidence aliunde the confession with respect to accused's absences without leave under the circumstances alleged in the specifications consisted of the first sergeant's testimony that accused was absent from his battery without permission from 7 June 1944 to 14 January 1945 and that on 13 November 1944 he was living in a hotel in Grenoble, France, stole an Army jeep and on 15 November drove it away from the soldier who was entitled to its possession. The morning report entries purporting to show absences without leave at the places and for the periods alleged in Specifications II and III were incompetent not only because not made reasonably contemporaneously therewith (subpar. a, supra), but also because obviously not made on personal knowledge of the entrant (CM 155032 (1923), 161011, 161013 (1924), Dig. Op. JAG, 1912-1940, sec.395 (18), pp.213, 214). The record is devoid of evidence

aliunde the confession as to absence without leave from 2 December 1944 to 14 January 1945, as alleged in Specification IV.

As indicted above (subpar.a), the first sergeant's testimony was competent to prove accused's absence without leave from his battery at or near Rome from 7 June 1944 to 14 January 1945 or to such time as the evidence might prove. Accused's confession, admissible as to Specification I as indicated and introduced by the prosecution, established the date of termination of this absence as 4 September 1944 and that it was by apprehension as alleged. But such testimony had no substantial bearing upon accused's status with respect to the organizations from which he deserted, according to the other three specifications, at Marseilles, France, on or about 21 September (Spec.II), again at Marseilles on or about 1 October (Spec.III), and at or near Dijon, France, on or about 2 December 1944. In view of his return to military control on 4 September 1944, he was necessarily attached, albeit in confinement, to some military organization other than his battery, from which he must necessarily have absented himself without leave under the specifications. There is absolutely no proof, aliunde the confession, that he did so absent himself as alleged, or as to the duration or manner or place of termination of any of said absences. The evidence that he was living at a hotel at Grenoble on 13 November and was in that town on 15 November is far from probative in any degree that his absence (without leave) had commenced on 1 October as alleged in Specification III or as to its duration or manner or place of termination.

It may be argued in support of the admissibility of the confession as to the specifications under consideration that the whole is equal to the sum of all its parts, that the greater includes the lesser and that therefore evidence of an overall absence without leave necessarily includes evidence as to any separate absences without leave occurring within such overall period. Such argument, while mathematically plausible, ignores the rule that such separate unauthorized absences are entirely separate and distinct offenses from the overall unauthorized absence. In CM 235559, Bartold, 22 B. R.121 (1943), II Bull. JAG 380, the Board of Review (sitting in Washington) held that where an accused was charged with absence without leave from about 19 March to about 10 April 1943, a finding that he was guilty of two separate unauthorized absences, from 19 March to 1 April and from 1 April to 6 April, respectively, by dividing the period alleged into two separate periods, constituted thereby two separate offenses and changed the identity of the offense charged, in violation of the provision of Manual for Courts-Martial, 1928, concerning exceptions and substitutions (par.78c, pp.64-65). Only so much of the finding was approved, therefore, as involved a finding of absence without leave from 19 March to 1 April. This case was followed by

the Board of Review (sitting in the European Theater of Operations) in CM ETO 3829, Newton. It is thus apparent that evidence of an absence from 7 June 1944 to 14 January 1945 can support Specification I but not Specifications II, III or IV. In view of the foregoing, the Board of Review is of the opinion that the confession was improperly admitted as to the latter specifications because the corpus delicti of each was not adequately established, and that the record is therefore legally insufficient to support the findings of guilty of such specifications.

c. Specification, Charge II: The uncontroverted evidence establishes that at the time and place alleged a vehicle of the type alleged, property of the United States, furnished and intended for the military service, was taken without authority under circumstances strongly indicating accused's culpability. Two days thereafter accused was seen in the vehicle and when its driver attempted to apprehend him, hastily left with the vehicle, which had not been returned to the organization to which it was assigned at the date of trial, three months later. The court had before it testimony from which it might properly infer that the vehicle had a value of $800.00 at the time of the theft. The findings of guilty as modified by the reviewing authority are therefore, in the opinion of the Board of Review, supported by substantial evidence (CM ETO 2185, Nelson).

6. The record shows that the trial took place only two days after the charges were served upon accused (R1). As the defense stated in open court that accused had no objection to trial at such time (R4) and as it does not appear that his substantial rights were prejudiced in any way, no error was committed (CM ETO 8083, Cubley; CM ETO 8732, Weiss).

7. The charge sheet shows that accused is 30 years of age and was inducted 13 June 1941 at Fort McPherson, Georgia, to serve for the duration of the war plus six months. No prior service is shown.

8. The court was legally constituted and had jurisdiction of the person and offenses. Except as noted, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings of guilty of Specifications II, III and IV of Charge I, and legally sufficient to support the findings of guilty of Charge I, Specification I thereof, Charge II, and its Specification, and the sentence as commuted. There is no question as to the legality of such sentence as it does not exceed the maximum authorized as punishment for the desertion charged in Specification I (AW 42; Abrams v. United States (1919) 250 U.S. 616, 619, 63 L.Ed.1173, 1176,

followed in Sinclair v. United States (1929), 276 U.S. 263,299, 73 L. Ed. 692,700; Cf: Bailey v. United States ( CCA, 7th, 1922) 284 Fed. 126, 127; and CM ETO 709 Lakas).

9. The penalty for desertion in time of war is death or such other punishment as the court-martial may direct (AW 58). Confinement in a panitentiary is authorized by Article of War 42. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

B. Franklin Pikes Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(184)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 26 MAY 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private HERSHEL W. JONES (34083509), Headquarters Battery, 160th Field Artillery Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings of guilty of Specifications II, III and IV of Charge I, and legally sufficient to support the findings of guilty of Charge I, Specification I thereof, Charge II, its Specification, and the sentence as commuted. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10331. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10331).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

---

( Findings vacated in part in accordance with recommendation of Assistant Judge Advocate General. Sentence as commuted ordered executed. GCMO 201, ETO, 8 June 1945).

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

CM ETO 10338

26 MAY 1945

BOARD OF REVIEW NO. 1

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | THIRD UNITED STATES ARMY |
| | ) | |
| v. | ) | Trial by GCM, convened at Dudelange, Luxembourg, 1 February 1945. |
| | ) | |
| Technician Fourth Grade GEORGE D. LAMB (37606977), 4050th Quartermaster Truck Company | ) | Sentence: To be hanged by the neck until dead. |

---

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review, and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of the Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fourth Grade George D. Lamb, 4050th Quartermaster Truck Company, did, at Loning, Moselle, France, on or about 27 December 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Percy Abraham, 4050th Quartermaster Truck Company, a human being by shooting him with a pistol.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the

Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Third United States Army, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence and withheld the order directing execution thereof pursuant to Article of War 50½.

3. The evidence for the prosecution was in substance as follows:

The kitchen personnel of the 4050th Quartermaster Truck Company was composed of the mess sergeant, Technician Fourth Grade Christian; the first cook of the first shift, Technician Fourth Grade James Fletcher and his assistant, Technician Fifth Grade Pringle; and a second shift of the accused as first cook and his assistant, Technician Fifth Grade Barry. Private Percy Abraham, the deceased, was a permanent "KP". On 27 December 1944, the first shift was on duty and the second shift off duty. Cooks off duty were accustomed to eat in the kitchen before or after meals according to their own choice (R18). In the absence of the mess sergeant, the first cook was in charge of the kitchen during his period of duty (R19). Accused had been in the company for 16 or 17 months and he had not engaged in previous quarrels or made any threats against anyone in the company. He was friendly with everyone in the kitchen. There was no previous animosity between accused and the deceased and Pringle, nor had there been any violent arguments (R20,31,34,35,46,58). The deceased however was very friendly and solicitous towards Pringle, often saying that if anybody "fucked with * * * /him/ or bothered * * * /him/ they fuck with me" (R65).

At about 1300 hours on 27 December 1944 at Lenning, Moselle, France, accused entered the kitchen and asked for food. He was told that one or two officers had not eaten and that he must wait until they had finished. Accused left (R27). He went to the mess sergeant and asked him to come to the kitchen to make arrangements for the time when cooks off duty should eat (R15). The mess sergeant returned with accused to the kitchen and asked Fletcher whether he wanted Lamb to eat in the chow line or in the kitchen as was customary (R15). Fletcher said either that he did not care when he ate (R15), or that he could eat as soon as the officers finished (R27). Fletcher then walked away, according to his testimony, and proceeded to load a mess truck, walking back and forth through the kitchen from the storeroom to the truck at intervals during the subsequent events (R27-29,35). Pringle testified he came into the kitchen about

this time, asked Christian "What was the score", walked over to Fletcher who had his head buried in his hands, and asked him what the trouble was. Fletcher replied "These people keep fucking with me" (R48). Fletcher appeared angry. Pringle then said he would try to talk with accused and urged Christian, Pearson, "an officer's orderly", and Fletcher to leave. (R48).

Pearson's version of the ensuing argument between Pringle and accused is as follows:

> "And the cook told him that there wasn't nothing left only some food that was left for the officers that hadn't eaten, so he asked him how many officers had eaten, and he said all but one, and Lamb spoke up and said there was enough food left for five men, and the cook told him he couldn't give him any of that food, but he had some bacon and eggs he would cook for him. And Lamb said he didn't want the bacon and eggs, because if he was on duty and he come in, he wouldn't cook them for him. So it started off about that" (R40).

Pringle's version is the same except that he claimed that he offered accused the food on the stove and said "Eat that food and when the officers come I will fix them some more" and he claimed accused also refused to eat that food. (R49). Pringle says he then said

> "'George, if you don't want that food on the stove, and you don't want me to fix you nothing, mother fuck you then, I got work to do'" (R49).

Pringle testified that these words were spoken in a rough tone and that his temper was high (R54). Accused had said during the argument "If you want me to get in the chow line you do the same when I am on duty" (R23).

The deceased, who also was passing in and out loading the truck, entered and said "If you bother Pringle you bother me". Accused replied "Go ahead on before I crack your head" and started towards deceased. Barry stopped him (R15,16,40). Accused had said nothing to deceased prior to this statement (R19). Either Christian or Fletcher told deceased to continue with the loading and he left. (R16,41). Christian, Pearson and apparently Barry also departed (R16,41). Pringle also began loading the truck (R49).

In a few moments Fletcher heard the deceased again speak to accused telling him that he would kill anybody who put his hands on Pringle (R32). Accused replied that "he was tired of him fucking

with him" (R28). Fletcher subsequently heard, while he was in the storeroom, what he thought to be the loading of a carbine in the kitchen (R28,29). He saw accused with a carbine on his shoulder (R28). He knew Pringle carried a pistol and had seen it that morning (R34). Accused had not brought his carbine to the kitchen but it was customary for those on duty to hang their weapons up in the kitchen and there were some so placed that day (R39,47).

Pringle, tired of working , came into the kitchen where accused stood alone, sat down and said "Oh, Oh, these folks keep fucking with me, they are going to cause me to kill somebody or do something wrong" (R49). Accused who had picked up a carbine off the table and started out of the door turned back and asked Pringle to repeat his statement (R49,56,57). The following is Pringle's version of the subsequent events:

> "So I said 'I am talking to Abraham, George'. He said 'You mother fucker, you, I know you got your pistol in your pocket and your carbine under cover.' I said 'No, George, you got me wrong.' I said 'Yes, I have got a pistol in my pocket, yes, but wait, let me tell you. This pistol isn't even loaded, and the safety is on.' And I took the pistol out of my pocket and I started walking towards George, and he started walking towards me.' And I said 'See, it isn't even loaded, and the safety is on.' And he reached for it and he said 'Turn loose.' And I said 'Just a minute. Just because you are larger than I am, you can't run over me.' And he said 'Turn loose.' And he had a carbine over his shoulder so I didn't resist too much, because I knew it was not loaded. So I just turned the pistol loose and grabbed the barrel of the carbine which was swinging down by my side, and he took the pistol, and at that time Abraham came in the door. Abraham said 'Don't be fucking with Pringle. If you fuck with Pringle you are fucking with me.' And Abe walked up and he stopped, and George said, 'You mother fucker, you, you have been fucking with me every day. If you come on tomorrow I will work the goddam hell out of you.' And at that time George had the pistol in his right hand. And I said 'Abe, go ahead on with your work.' And Abe started on with his work, started towards the store room. And George had the pistol in his right hand and brought it up like this and fired, and I saw Abraham start to fall, and as soon as the pistol was fired I turned the carbine loose and I ran

out the door, and I went down and reported it to the top sergeant" (R49,50).

By not being "loaded", Pringle meant there was no shell in the chamber of the automatic pistol although there were three rounds in the magazine (R68). His reason for taking it from his pocket was to show "it wasn't loaded and the safety was on" (R58). When accused walked forward, he had his carbine slung over his shoulder but was not "too hostile" (R57). Accused grasped Pringle's pistol with his left hand, Pringle holding it in his right (R58,59). When Pringle released the pistol he held the carbine pointed down to his side with his left hand and his right hand swung free (R59,60,63). Accused released his hold on the carbine and changed the pistol from his left to right hand (R60,61,63). Deceased spoke to accused first, whereupon accused loaded the pistol by pulling back the slide, and "the safety automatically came off" (R55,63,66). Deceased was about six feet from accused when he was shot (R52,98). Accused did not take any aim (R51). Pringle testified positively that deceased spoke only once to accused on this occasion, and that he had come in after the scuffle over the carbine was finished; but upon being shown his pre-trial statement he changed his testimony to say that deceased spoke twice saying a later time "Fuck you" (R67) and that deceased entered during the scuffle (R99). Deceased was apparently unarmed (R68). Pringle knew he was violating company orders in carrying a pistol (R56).

Accused and Pringle were seen by Pearson coming out the kitchen door scuffling over a carbine with Pringle holding the barrel (R41,44). Accused had the pistol in his hand and the carbine over his shoulder with the muzzle pointed forward but not at any person (R20,23). Pringle was saying "don't shoot" and Pearson intervened to say "Lamb don't shoot that boy". Accused's reply was, "I will shoot any two that grabs me". When Pearson started forward accused said "Get back" but Pearson said he could not shoot him because the pistol was jammed. Accused then told Pearson "This carbine is not hung up. Get back" (R42). Pearson stopped. Pringle broke and ran as did Christian (R17,42). The witnesses were extremely excited and could not recall these events clearly (R24,37). Accused's carbine was not in any threatening position (R20,34). He made no move of the gun toward Pringle (R46). After Pringle broke away, Lamb stood still for a moment and then walked towards the orderly room (R25,26,45).

The time of all these events from the moment accused originally entered into the kitchen until he walked away was about 35 or 40 minutes (R38).

(190)

It was stipulated between the defense and the prosecution that the deceased was pronounced dead at 1415 hours 27 December 1944 and that the cause of death was a gunshot wound at the back of the neck at the base of the skull. The accused expressly agreed to the stipulation (R12; Pros.Ex.1).

4. The defense presented two witnesses other than accused. The company commander testified that he had published specific orders against carrying weapons not authorized under the tables of equipment. An automatic pistol was not authorized for Pringle. He had also published a company order prohibiting profane language (R70). He testified that the character rating of accused was "very satisfactory" and his performance rating "satisfactory". The first sergeant of the company testified that accused's reputation for industry was fair and that he had never caused any trouble (R93,94).

Accused, after his rights as a witness were fully explained to him, elected to take the stand in his own behalf (R71,72). His testimony is substantially that proven by the prosecution differing only in three essential points: he agreed with Pearson's version of the quarrel to the effect that Pringle never offered to allow him to eat the regular fare, which is contrary to Pringle's testimony; he claimed the pistol was discharged accidentally while deceased had his hands on it; and he did not remember the final remarks with deceased or making any statements after the shooting. His testimony in substance was as follows:

There had been no prior arguments as to when the cooks not on duty should eat. This day he asked Fletcher if all the officers had eaten and was told they had not. He thought this was untrue because Pearson, the officer's orderly, had told him they had all eaten (R73,74). He went to see Christian and said if it were desired that all cooks should eat in the chow line, it was all right with him, and that the cooks now on duty should eat in the chow line when accused was on duty. Christian returned with him to the kitchen and told Fletcher he would have to eat in the chow line if accused could not eat in the kitchen. Fletcher then walked away (R74).

Pringle came in and asked what was "going on" and accused told him that all cooks would have to eat in the chow lines since he could not eat in the kitchen. Pringle replied that this was unnecessary and that he would cook eggs for accused. Accused asked to be given "what the rest of the people eat", but Pringle said he could only have eggs and walked off into the storeroom (R75). Fletcher also went into the storeroom and accused heard a noise from the storeroom which he thought was a belt loading a gun.

He then picked up someone's carbine off the rack on the wall (R76,84). He said that he picked up the carbine even though no threats had been made because he was suspicious of the men's attitude and of the noise (R85,88,91). He did not put a bullet into the chamber, although he knew Pringle carried a pistol and had one that day (R89,90).

Pringle came back into the kitchen and sat down with the pistol in his hand. It was the first time during the incident accused definitely knew Pringle had a gun (R78,89). Pringle said "I am going to shoot one of these son of a bitches that is fucking with me" (R77,89). He and Pringle were the only ones in the room and Pringle made the statement roughly, without smiling. Accused answered "You don't want to shoot me do you" (R77). Pringle stepped forward brandishing the pistol and accused also walked towards him (R77,93). They met close together with Pringle pointing the pistol which accused grasped. Pringle grabbed the carbine and accused dropped his right hand to the stock (78-80). Pringle was saying that the pistol was not loaded, but accused replied that he would not take chances and that Pringle was to turn it loose (R80,81).

The deceased then came into the room, which was the first time accused knew he was near. He came to within a foot of the struggle (R80,81). Neither accused nor deceased spoke but deceased grasped the pistol with both his hands (R82,86,88-90). During the ensuing struggle the gun went off and deceased fell back. Pringle said "You done shot that man" (R82,87). Pringle left the room and accused followed (R83). He started towards the orderly room but on the way met the lieutenant, and gave him the carbine and the pistol. Accused did not know in which hand he had the pistol nor could he see the deceased's hands on it (R87). He felt a "pile of hands" there and knew that deceased had both hands on the pistol (R86-90).

There was a period of four or five seconds during the scuffle in which he did not know what "was going on" (R88). He received no threats before getting the carbine (R88) and he had not intended to use it when he procured it (R92). Accused did not remember making any statements to Pearson or to anyone else outside the kitchen (R83,86). He did not know until the time of the trial where the bullet hit the deceased (R88). He denied that there was any exchange of words between him and the deceased immediately before the shooting (R81,82).

5. The court recalled the witness Pringle who testified that the deceased never touched the pistol during the struggle (R95,98). He admitted that deceased did speak twice to the accused during the affray and did enter the room during the scuffle (R99,101).

6. There is a procedural question in the case. The defense entered a special plea to the effect that his substantial rights were prejudiced because the case had not been properly investigated by the

(192)

investigating officer, in that accused's statement was taken by another officer and accused was not accorded the opportunity to see any of the statements against him or to cross-examine any of the witnesses. A further objection was made on the grounds that accused had objected at the time to the statement of Pringle, requested further investigation of him and no effort was made to secure any additional statement. The investigating officer was called to the stand at the trial and testified that he read Article of War 24 to the accused, the charges, and the statements of expected testimony taken by the summary court officer. Accused was told that the witnesses could be called before him and examined by him but he declined (R7,8). He objected to the statement of Pringle and requested the investigating officer to investigate further (R8,10). The investigating officer did not see accused again, but he contacted Pringle and found his testimony substantially the same as the original statement and therefore had it recopied and signed (R10,11). He procured an additional statement from Pearson which he did not show to accused; he attached the original statements of Christian and Fletcher to his report of investigation and forwarded the charges (R9,10).

This is at most a perfunctory investigation which raises some doubt as to compliance with the provisions of Article of War 70 requiring "A thorough and impartial investigation". The investigating officer did not inquire into the critical circumstance of the case, which was the presence or absence of powder burns on the body of the deceased. The accused however waived his rights at the time of the investigation. The charges were referred for trial 17 January 1945 and the trial was not had until 1 February 1945. There is no contention that not all the witnesses were present at the trial, or available for conference before the trial, or that the right to subpoena any additional witness desired was not accorded. Under the approved interpretation and construction of the 70th Article of War the requirements thereof are of administrative concern of the appointing authority only. It is his responsibility to see that the pretrial investigation is conducted in compliance with the letter of the Article and consistent with the intent and purpose of Congress evidenced by its enactment. However, the neglect or failure of the investigating officer to perform his duties does not affect the jurisdiction of the court nor does it result in prejudice to the substantial rights of the accused. The plea in bar was bad on its face and should have been denied by the court without taking or considering evidence as to the investigation which was irrelevant and immaterial. The practice followed by the court injected into the case collateral issues which served to becloud the main issues, prolong the trial and extend the trial record beyond necessary length. However, no prejudice resulted to the substantial rights of accused as the erroneous procedure was invited by the defense. The Board of Review has heretofore considered

the situation thus presented and it has consistently applied the above rule (CM 229477, Floyd, 17 B.R. 149; CM ETO 106, Orbon; CM ETO 4570, Hawkins; CM ETO 5155, Carroll and D'Elia; CM ETO 6694, Warnock).

7. Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par.148a, pp.162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Criminal Law (12th Ed., 1932), sec. 426, pp.654-655), and an intent to kill may be inferred from an act of the accused which manifests a reckless disregard of human life (40 CJS, sec.44, p.905, sec.79b, pp.943-944). The presumption of malice is not conclusive however, and the evidence rebutting it may be found in the evidence introduced by prosecution or defense (Winthrop's Military Law and Precedents (Reprint, 1920), p.673; 29 C.J. 1103). "Manslaughter is distinguished from murder by the absence of deliberation and malice aforethought" (1 Wharton's Criminal Law (12th Ed.) sec.423, p.640; 26 Am. Jur. 189).

It is not the function of the Board of Review sitting in the European Theater of Operations to weigh evidence in cases requiring confirmation by the Commanding General, European Theater of Operations, under the 48th Article of War. The record of trial is examined only to determine whether the findings are supported in all essentials by substantial evidence. The findings are treated as presumptively correct and they are legally sufficient if the ultimate facts drawn by the court could legally have been inferred from the evidence introduced (CM ETO 1631, Pepper; WD Ltr. to CG, ETO (AG 321.4 (4-26-43) OB-S, 28 April 1943: Subj: Op. of Br. Off. JAG)).

The evidence conclusively showed that accused killed deceased and that the former was legally convicted of a homicide. The question is whether it was murder or manslaughter, that is to say, whether or not malice was present. The duty is on the Board of Review to resolve the following question: whether the strongest proof adduced shows that accused killed from "a wicked and corrupt motive" springing from a malignant or depraved nature out of "a heart regardless of social duty and fatally bent on mischief"; or whether he killed the deceased in anger, excitement and the passion of the moment occasioned by the combat in which he was engaged (Foster Crown Law, p.257,262; Commonwealth v. Webster, 5 Cush. (Mass.) 304; 29 CJ 1128).

Blackstone distinguishes murder and manslaughter as follows:

"Manslaughter, when voluntary, arises from the sudden heat of the passions, murder from the wickedness of the heart.

Manslaughter is therefore thus defined, the unlawful

> killing of another without malice either express or implied; * * * if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter: and so it is, if they upon such an occasion go out and fight in a field; for this is one continued act of passion: and the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the agressor, though this is not excusable se defendendo, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter" (IV Blackstone, Vol. II, p.190,191).

There are many conflicts in the evidence, as is to be expected where all the testimony is direct and the events occurred in a time of great excitement. Much can be said in favor of accused's case. The witness Pringle contradicted himself on three occasions. The testimony of Pearson coincides with that of accused as to the beginning of the quarrel. Accused's claim that he felt the deceased's hands on the pistol is not inconsistent with the fact that the shot was found in the back of deceased's neck as one or both hands could easily have been released, unknown to accused, in the twisting and pushing of the struggle. Yet those considerations were for the court which passed upon the credibility of the witnesses, and resolved conflicts in the evidence.

The facts presenting the strongest case of the prosecution are as follows:

Accused was a man of peaceable disposition who had no previous quarrel with either Pringle or the deceased. He became involved in a heated argument, wherein he was threatened with death, first by the deceased and then by Pringle, each of whom was his inferior in rank. After the latter threat he armed himself and attempted to disarm Pringle of a pistol, which he carried in violation of orders. This precipitated a struggle over the possession of deadly weapons, and in the midst thereof, he was approached by his opponent's confederate with whom at close quarters he exchanged hot words. He then loaded and fired without aiming when the deceased was at a distance of six feet. The deceased fell, but the struggle of accused and Pringle continued until they were out of the kitchen, where accused said in effect that he would shoot any two people who assaulted him. Thereupon he left the scene and surrendered to an officer. Argument and affray lasted about 35 or 40 minutes. If provocation did not exist under these facts, when could it be present? Imminence of danger, rage, sudden combat and

affray, threats coupled with violence, are common grounds whereby hot blood is held to reduce murder to manslaughter (29 C.J., secs. 114,115,119-121, pp.1127,1128,1135-1138).

There is no evidence of malice; on the contrary, the evidence is compelling that the offense would not have occurred except for the quarrel and the affray. The excitement of accused was such that he did not remember the words with the deceased, nor his own statements immediately after the shooting, nor did he know where the bullet struck the deceased. Continued argument, sudden combat, deadly weapons, failure to aim, the danger, and continuance of the struggle, were the events in this case which "would naturally destroy the sway of reason and render the mind of an ordinary person incapable of cool reflection" (State v. Davis, 50 S.C. 405, 27 S.E. 905, 62 Am. S.R. 837). That accused armed himself during the course of the affair is not determinative (Wallace v. U.S., 162, U.S. 466, 16 S. Ct. 859, 40 L.Ed. 1039 (1896), and even though he had provoked the fight the crime might still be manslaughter (Stevenson v. U.S., 162 U.S. 313, 16 S. Ct. 839, 40 L.Ed. 980 (1896)). The evidence is such that it should not be said that the murder was in cold blood, and that the accused acted with malice.

It is ordinarily a question of fact for the determination from the evidence by the jury (or by a court-martial) whether an accused acted in passion upon adequate provocation, or from malice. However, when from the strongest facts for the prosecution, no reasonable and logical inference of malice can be drawn, the issue becomes one of law and the insufficiency of the evidence to show malice and support the findings and sentence may be considered by the appellate tribunal upon examination of the record of trial (CM ETO 1414, Elia; CM ETO 3957, Barneclo; 17 C.J., sec.3593, 262-263; CM 223336 (1942), I Bull. JAG 159-162; Metropolitan Railroad Company v. Moore, 121 U.S. 558, 30 L.Ed. 1022 (1887); see CM ETO 1554, Pritchard, pp.20-22). If there is a reasonable doubt as to the guilt of an accused of a higher or lesser crime, the court should convict him of the lesser (30 C.J., sec.558,312; 23 C.J.S., sec. 925,206). If the evidence is as consistent with the guilt of a lesser crime as it is with the guilt of a higher, the conviction should be of the lesser (Eagan v. State, 128 Pac. (2d)(Wyo.) 215,225). There are no degrees of murder in military law, and for that severe reason, convictions in such cases ought to be critically weighed. Particularly is this true where, as here, it was necessary for the court and the reviewing and confirming authorities to act in the midst of a hard campaign. Where the proof in a murder case fails to show malice, the Board of Review should reduce the offense to manslaughter (CM ETO 82, McKenzie; CM ETO 3957, Barneclo).

(196)

The reason the grade of this homicide should be reduced from murder to manslaughter is:

> "Not because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing of an intent to commit it - but because it presumed that passion disturbed the sway of reason, and made him regardless of her admonitions. It does not look upon him as temporarily deprived of intellect, and therefore not an accountable agent; but as one in whom the exercise of judgment is impeded by the violence of excitement, and accountable therefore as an infirm human being" (State v. Hill, 20 N.C. 629, quoted in State v. Baldwin, 152 N.C., 822, 829; 68 S.E. 148).

> "It will not do to hold that reason should be entirely dethroned, or overpowered by passion, so as to destroy intelligent volition. Such a degree of mental disturbance would be equivalent to utter insanity, and, if the result of adequate provocation, would render the perpetrator morally innocent * * *. The principle involved in the question, and which we think clearly deducible from the majority of well-considered cases, would seem to suggest, as the true general rule, that reason should, at the time of the act, be disturbed or obscured by passion to an extent which might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment" (Peo. v. Poole, 159 Mich. 350,354, 123 NW 1093, 134 Am. SR 722).

In the considered opinion of the Board of Review the prosecution failed to establish that the homicide was committed with malice, but conversly its evidence showed that accused acted in hot blood when his powers of reason were temporarily replaced by anger and heat of passion. He was guilty of voluntary manslaughter only.

8. The charge sheet shows that the accused is 30 years 11 months of age and was inducted 6 March 1943, at Jefferson Barracks, Missouri, to serve for the duration of the war plus six months. No prior service is shown.

9. The court was legally constituted and had jurisdiction of the person and offense. Except as noted herein, no errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification and of

the Charge as involves a finding of guilty of voluntary manslaughter in violation of Article of War 93 and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for ten years.

10. Confinement in a penitentiary is authorized upon conviction of voluntary manslaughter by Article of War 42 and section 275, Federal Criminal Code (18 USCA 454). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

B. Franklin Potter Judge Advocate

Wm. T. Burgess Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(198)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 1 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Technician Fourth Grade GEORGE D. LAMB (37606377), 4050th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification and of the Charge as involves a finding of guilty of voluntary manslaughter in violation of Article of War 93 and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for ten years, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence as reduced.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, this indorsement and the record of trial, which is delivered to you herewith. The file number of the record in this office is CM ETO 10338. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10338).

E. C. McNEIL,
Brigadier General, United States Army
Assistant Judge Advocate General.

---

( Findings vacated in part in accordance with recommendation of Assistant Judge Advocate General. Sentence mitigated to dishonorable discharge, total forfeiture and confinement for 10 years. Sentence ordered executed. GCMO 226, ETO, 26 June 1945).

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

20 JUL 1945

CM ETO 10339

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | OISE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | ) | |
| Private First Class WILLIE A. BOYD (34843324), 663rd Ordnance Ammunition Company | ) | Trial by GCM, convened at Reims, France, 20 February 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

---

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Willie A. Boyd, 663rd Ordnance Ammunition Company, did, at Brancourt-en-Laonnois, (Aisne) France, on or about 6 January 1945, forcibly and feloniously, against her will, have carnal knowledge of Mademoiselle Arlette Maillet.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. All of the members of the court present at the time the vote was taken concurring, he was sentenced to be hanged by the neck until dead. The reviewing authority, the Commanding General, Oise Section, Communications Zone, European Theater of Operations, approved the sentence and

forwarded the record of trial for action pursuant to Article of War 48 with the recommendation that, if the sentence be confirmed, it be commuted to dishonorable discharge, total forfeitures, and confinement at hard labor for the term of accused's natural life. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but, owing to special circumstances in the case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of accused's natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. This is a companion case to CM ETO 8542, Myles. Accused was one of the three negro soldiers (Myles, Gee and accused) who waylaid, kidnapped and finally raped Mademoiselle Arlette Maillet, a 16 year old French girl, in a weapons carrier in a field adjoining the Coucy-Pinon Highway near Brancourt-en-Laonnais, Department of Aisne, France at about 1830 hours on 6 January 1945. The facts and circumstances of the crime are set forth in the holding in the Myles case to which reference is hereby made. The legal questions involved in the instant case are the same as those which concerned the Board of Review in the Myles case. The discussion thereof in the Board's holding in the Myles case is hereby adopted. Substantial competent evidence proved accused's guilt of the crime of rape alleged beyond reasonable doubt.

4. The charge sheet shows that accused is 19 years five months of age and was inducted 18 August 1943 to serve for the duration of the war plus six months. Accused stated at trial that he was 17 years six months of age (R50). No prior service is shown.

5. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted.

6. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567).

The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec. II, pars.1b(4), 3b).

B. Franklin Pitts Judge Advocate

Wm. J. Lynch Judge Advocate

Edward C. Stevens Judge Advocate

(202)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 20 JUL 1945
TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Private First Class WILLIE A. BOYD (34843324), 663rd Ordnance Ammunition Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. I transmit herewith copy of holding of Board of Review in CM ETO 8542, Myles, to which reference is made in the holding in the instant case.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10339. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10339).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

( Sentence as commuted ordered executed. GCMO 297, ETO, 31 July 1945).

CONFIDENTIAL

10339

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

24 MAY 1945

CM ETO 10354

| | |
|---|---|
| U N I T E D S T A T E S | FIRST UNITED STATES ARMY |
| v. | Trial by GCM, convened at Duren, Germany, 5 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Private EDWARD L. BEAR (35665646), 868th Ordnance Heavy Automotive Maintenance Company | |

---

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private Edward Bear, Eight Hundred Sixty Eighth Ordnance Heavy Automotive Maintenance Company, did, in the vicinity of Meux, France, on or about 21 September 1944, desert the service of the United States and did remain absent in desertion until he was apprehended by military authorities at Anor, France, on or about 26 February 1945.

CHARGE II: Violation of the 94th Article of War.

Specification: In that * * * did, in the vicinity of Meux, France, on or about 21 September 1944, knowingly and willfully apply to his own use and benefit a two and one-half ton, 6 x 6 truck of the value of about two thousand four hundred and seventy-six ($2,476.00) dollars, property of the United States, furnished and intended for the military service thereof.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. Evidence was introduced of one previous conviction by special court-martial for absence without leave for seven days in violation of Article of War 61. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution was substantially as follows:

The accused, a member of the 868th Ordnance Heavy Automotive Maintenance Company, was dispatched from the vicinity of Hirson, France on 13 September 1944 as driver of a 2½ ton truck to transport ammunition from a point near Paris. He was accompanied by an assistant driver.

On the second trip the truck developed mechanical difficulty, the assistant driver reported back to the company (R7,8,13), and the accused stayed with the truck saying "I will look around for an ordnance company to see if I can get the truck fixed" (R8). On 21 September a warrant officer from the company, while driving in the vicinity of Meux, France, came upon the accused driving a 2½ ton truck. The warrant officer recognized the truck and knowing that it had broken down, inquired about it. The accused explained that he had been relieved of his load of ammunition and that the truck had been repaired. He said he was going back to the company. The warrant officer gave him a strip map and inquired if he could find the way back with it (R9), the accused replied, "yes" (R9,10). The accused did not return to the company and was not again present for duty until 26 February 1945 (R12). On that date a lieutenant of the military police saw the accused walking along a road near Anor and invited him to ride. At that time, accused was wearing

government-issue trousers and a Belgian blouse with a government-issue mackinaw. At accused's request, he was permitted to go into a nearby house to dispose of a camera he had with him. He did not come back, but about half an hour later, the lieutenant again picked him up on the highway between Anor and Fourmies. At that time, he was wearing a government-issue raincoat over his other clothes (R11). Accused had no authority to be absent or to use the 2½ ton truck on and after 21 September (R13).

It was stipulated that the truck referred to in the Specification, Charge II, was military property of the United States of a value of $2,476 (R13; Pros.Exl).

4. The accused stated that he understood his rights but elected to remain silent and no evidence was introduced for the defense (R14).

5. The uncontradicted evidence in this case discloses a prolonged absence without leave terminated by apprehension. No explanation for the absence was offered. The accused during his absence had wrongfully applied a government truck to his own use. From the circumstances of prolonged absence, apprehension and attempt to escape, the court very reasonably inferred that the accused intended to remain away permanently(CM ETO 1629, O'Donnell). The evidence as to the wrongful application of a government owned truck of a value of $2,476 is equally clear and uncontradicted.

6. The charge sheet shows that accused is 24 years and two months of age and, without prior service,was induced 14 October 1942 at Fort Thomas, Kentucky.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized upon conviction for desertion in time of war (AW 42) and also upon conviction of knowingly applying to one's own use property of the United States furnished or to to be used for the military service (AW 42, sec.36, Federal Criminal Code,(18 USCA 87)). The designation of the United States Penitentiary, Lewisburg, Pennsylvania,as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

_____ Judge Advocate

10354

_____ Judge Advocate

_____ Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3 19 JUL 1945

CM ETO 10360

| | |
|---|---|
| U N I T E D S T A T E S | THIRD UNITED STATES ARMY |
| v. | Trial by GCM, convened at Esch, Luxembourg, 3 February 1945. |
| Captain DONALD R. GAILEY (O-921975), 1092nd Engineer Utilities Detachment | Sentence: Dismissal and total forfeitures. |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review, and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following charges and specifications.

CHARGE: Violation of the 61st Article of War.

Specification: In that Captain Donald R. Gailey, 1092d Engineer Utility Detachment, did, without proper leave, absent himself from his organization at Nancy, France, from about 19 December 1944 to about 21 December 1944.

ADDITIONAL CHARGE I: Violation of the 96th Article of War.

Specification 1: In that * * * did, on or about 14 December 1944, at St. Avold, France, wrongfully throw Sergeant Marion H. Farris, 1092nd Engineer Utilities Detachment, to the floor by overturning the bed in which the said Sergeant Marion H. Farris was sleeping thereby causing an injury to his right knee.

10360

Specification 2: In that * * * did, on or about 14 December 1944, at St. Avold, France, wrongfully state to Sergeant Marion H. Farris, 1092nd Engineer Utilities Detachment, that he would reduce the said Sergeant Marion H. Farris to the grade of Private, if he said "anything about what had happened", or words to that effect, referring to an incident on the same date in which the said Captain Donald R. Gailey had thrown Sergeant Marion H. Farris to the floor by upsetting a bed in which he was sleeping.

ADDITIONAL CHARGE II: Violation of the 85th Article of War.

Specification: In that * * * was, at Bivouac area, Etain, France, on or about 25 September 1944, found drunk while on duty as Detachment Commander.

He pleaded not guilty to, and was found guilty of, all charges and their specifications. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for three years. The reviewing authority, the Commanding General, Third United States Army, approved the sentence, but in view of the special circumstances in this case, remitted the confinement at hard labor imposed and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, though deeming it, as approved by the convening authority, wholly inadequate punishment for an officer convicted of such serious offenses and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution was as follows:

a. Additional Charge II and Specification. On 25 September 1944, accused was commanding the 1092nd Engineer Utilities Detachment, then bivouacked on the outskirts of Etain, France (R8,41-42,53). At about 1900 hours accused was drinking cognac and champagne in the supply officer's tent with others who were sitting around drinking, "having a good time there, joking and talking among themselves" (R34). Between 1900 and 2000 two enlisted men of the detachment heard shots in their area and went to investigate. They found accused in a shell hole. He was drunk, mumbling to himself and unable to arise. His

10360

breath smelled of liquor. They helped him to his tent and took him to his bed (R10,11,13,15-16,23-25,28,31-33). A little later he entered a squad tent where a number of enlisted men were sitting (R32,39). He carried a .45 automatic revolver in a cocked position. One of the men took the weapon from him and noted it had a live cartridge in the chamber and four in the magazine. Accused brought with him a parachute which he offered to trade for a truck (R11-12). Several times he stumbled and fell, smelled of liquor and asked some of the enlisted men if they wished to take a ride with him (R32-33). His conversation "wasn't any too plain at times. He sort of had to grope for words" and his clothing was "kind of soiled, muddy" (R34-35). He asked several of the men "to drive him out to get some booze" and "naturally nobody wanted to go with him". When one refused, accused told him he was yellow, scared (R42-43).

b. Additional Charge I, Specifications 1 and 2. While the detachment was stationed at St. Avold, France, in December, 1944, accused instructed Sergeant Marion H. Farris, a member of the organization, to start the generator at 0700 hours the morning of 14 December (R59-60). The sergeant overslept and at 0705 accused entered his room, turned over his bed, throwing Farris to the floor, and said, "Get up and get that damn generator started" (R60,73). As a result of the fall, Farris' right knee was bruised (R68), but his "feelings were hurt more than anything". Technician Fifth Grade Frank Kulinski, of the same organization, who was then present, testified that he was awakened by the noise of Farris' bed being overturned (R73-74). He heard accused say, "Get up you damned bastards" (R75). Farris testified that on the afternoon of 14 December, accused

> "eat me out about having on fatigue clothes and being dirty, which I had been operating the generator, handling diesel fuel and gasoline and all and cleaning the generator, and instructing another fellow to operate it. He stated that if you say anything about what happened, I will bust you".

Farris understood he was "referring to when he threw me out of bed" (R63,67). He was not reduced in rank, however (R71).

c. The Charge and Specification. On 19 December 1944, while his detachment was at St. Avold, France, accused received orders from his immediate superior officer, Colonel Rufus S. Bratton, Commanding Officer, Special Troops, Third United States Army, to load up his convoy and infiltrate back to Nancy, France (R84-85). All the vehicles and personnel had departed by about 1500 hours when accused left in a reconnaissance car accompanied by his driver, Private First Class James Corkin, and Technician Fifth Grade Abraham Gelman (R91-94).

Accused told Corkin they were going to Libramont in search of an engineer depot where he was going to look over some electric generators. He said the machinery that he had at that time was breaking down, they were not getting good use of it and he wanted to see if he could get some new machinery (R120-121). They drove to Halanzy, Belgium, where they arrived at about 1800 hours after stopping several times along the road on account of traffic delays (R96-97, 115). Because Corkin had become ill, he was left at Halanzy with some friends he knew and accused said they would pick him up on their way back (R97-98,103-104,110,116,122-123,126). Gelman then drove for about three and one-half hours in a westerly direction stopping several times while accused obtained directions from various persons (R105-106). There was "quite a bit" of artillery firing or bombing and flashes could be seen (R106-107). They stopped in a small town in Belgium at a hotel restaurant for coffee. Gelman said he was tired, so accused took the wheel and continued driving, while Gelman slept, until about 0700 the following morning when they arrived in Brussels, Belgium (R99,105). After inquiring and receiving instructions as to the location of a certain street in the city, accused drove there and left the vehicle at about 0730 or 0800 hours (R99-100). Gelman remained in the car. At about 1100 accused returned bringing him some coffee, which he said he obtained from the people that he was visiting (R100). He left again and returned at about 1300 or 1400 hours with a young woman to whom Gelman was introduced. Her first name was "Betty". She was about 28 or 30 years of age, five feet tall with blonde hair and "a very nice looking girl". Accused said he would see him again about 1600 and because it was foggy would make arrangements to stay overnight. He did not say what he was doing in Brussels. He told Gelman to make some arrangements to stay overnight and call for him at 0600 the following morning (R100-101,109,111,119). Gelman found a billet (R109) and called for accused the next day as requested. They then left Brussels and drove to Nancy, picking up Corbin at Halanzy on the way (R102,109,120).

On the night of 21 December accused telephoned Colonel Fred H. Kelley, Headquarters Special Troops, Third Army, at Nancy, France, stating that he had just arrived in Nancy. Colonel Kelley asked him to come to his room at the Thiers Hotel (R86-87). When accused arrived and was asked where he had been, he said

> "he had no excuse to offer, that he had visited a friend in Luxembourg, the night of the 19th and that traffic was too heavy on the 20th for him to return, that he stayed also the night of the 20th and had just gottan in".

Asked whether the "friend" was male or female, Colonel Kelley testified, "I think he used the expression it was a girl" (R88).

10360

4. For the defense, Colonel Bratton testified that accused's performance of his duties had been superior (R138,140). He had never seen accused drunk or under the influence of liquor (R139-140). Accused was responsible for providing the utilities of an Army headquarters and in the course of his duties was required to secure materials and equipment from outside places (R140-141). He was authorized to exercise his own judgment in the procurement of such materials and did not need permission to leave the command post in order to do so as long as he kept his commanding officer generally advised as to where he was and what he was doing (R141).

On 19 December Colonel Bratton issued orders that commanders at St. Avold were to stop work, load up and return to Nancy. No route was specified and if accused took a roundabout route for reasons of his own or in the course of his duties, Colonel Bratton had no objection even if accused arrived in Nancy the following day. He had wanted accused to proceed to Luxembourg to set up a command post there, but accused had no way of knowing this on the 19th (R142). He recalled that accused had said something to him about securing electrical equipment at an engineer depot in Libramont, Belgium. Had accused gone there in search of equipment on the 19th and returned to Nancy that evening or before breakfast the following morning, Colonel Bratton would have had no objection (R143). On 22 December, in Luxembourg, accused explained to him his recent absence, stating he had started toward Nancy, but had encountered a number of convoys and had gradually changed his course, finally finding himself north of Metz. He decided that he might as well drop by Libramont and get some equipment that they needed, but ran into enemy action which upset his plans. He finally found himself in Brussels late at night or early the next morning and since he and his driver were completely exhausted, they got some sleep an d returned to Nancy by a circuitous route (R144,146,149). Colonel Bratton would "most emphatically" like to see accused restored to full duty under his command (R147).

Accused had mentioned to Colonel Bratton that he had visited a male friend in Brussels but never referred to any "Betty". He had no authority to allow accused to go to Brussels since it is outside the Third Army boundary and such authority would have to come from the Chief of Staff with clearance from the appropriate officer of that area (R147-148). He had accepted accused's explanation of his returning to Nancy by way of Metz and Brussels under the circumstances, since conditions on that day were abnormal and one of the best motor routes passed through Metz (R151-152).

An officer of the Inspector General's Department made a special investigation of accused's unit on or about 19 January 1945, and the result of the inspection in all phases was found to be excellent (R208-209). In general, the morale of the unit was excellent and there was no unrest among the enlisted men, whose principal complaints were that accused did not censor their mail promptly and the laundry facilities were inadequate (R204-205,210-212; Def.Ex."1").

10360

(212)

5. After his rights were explained (R155) accused testified that he was commissioned a first lieutenant 13 January, 1943 and arrived overseas in April, 1944 as the commanding officer of the 1092nd Engineer Utility Detachment. In civilian life he was a mechanical and electrical engineer and worked as foreman in large construction projects and supervised the installation and operation of large power plants (R156-157). His duties were those of Third Army Utilities Officer, training and retraining men, and caring for a rapidly expanding headquarters (R158-159). Regarding the offenses charged against him, he testified as follows:

a. Additional Charge II and Specification. On or about 25 September 1944, accused's unit was living under canvas in a forest east of Etain, France (R187). It was very rainy and regarding the alleged incident he remembered hearing two shots fired in the distance. In passing a generator, he tripped over a wire. He ordered a sergeant to fix the line, went to his tent and went to sleep. He had had three or four drinks that evening, but was not drunk, did not invite any person to go to town with him and did not say anything about a parachute. He was not on duty at any time after dinner that evening until he went to bed (R188-192).

b. Additional Charge I, Specifications 1 and 2. On the morning of 14 December accused arose at 0600 hours and upon returning from mess noticed that the generator carrying current to a pump which supplied water to military units had not been turned on (R195). He went to the room occupied by Farris and Kulinski and called them both by name. Neither responded. He went to Farris' bed, grasped the bed clothing near its foot and gave two or three jerks. Farris jumped as though exceedingly startled, started to slide out of his bed and then fell out of it, pulling it over on its side (R196). Accused used no profanity other than that he may have said, "Get that damned generator started" (R198). That afternoon he admonished Farris for wearing dirty clothes, but did not threaten to reduce him for any reason (R197).

Accused attributed the testimony against him by the men of his organization to the fact that they were skilled mechanics who commanded high wages in civil life and who resented the fact that they had to do the same work in the Army for less. They also resented the fact that accused, by reason of his experience, knew exactly how much work each man could turn out and they therefore were not able at any time "to successfully do any malingering" (R192-193).

6. a. Under Additional Charge II and Specification, there was substantial and convincing evidence that accused was drunk on the evening of 25 September 1945. As commanding officer of the detachment under the circumstances shown he was constantly on duty (MCM, 1928, par.145, p.159; Winthrop's Military Law and Precedents (Reprint, 1920), pp.613-614). The court's findings of guilty were fully warranted and the court exercised its prerogative in disbelieving accused's testimony that he was not drunk.

10360

b. Regarding Additional Charge I, Specifications 1 and 2, each of the offenses alleged constituted conduct prejudicial to good order and military discipline (Winthrop's Military Law and Precedents (Reprint, 1920), pp.722-727). The court's findings of guilty, upon its determination of the credibility of the witnesses, are supported by substantial evidence.

c. As to the Charge and Specification, the defense was that during the period of accused's alleged absence without leave, he was engaged on official duty with the initial intention to visit an engineer depot at Libramont, where he later found it unsafe to go because of the changing tactical situation. He went instead to Brussels, where he had friends, got some rest and returned promptly to his organization. However, the prosecution showed clearly that he had no authority to go to Brussels and, under all the circumstances surrounding his trip to that city, there was substantial evidence to support the court's findings of guilty. Even if a portion of accused's absence was due to enemy operations and the weather, as claimed by accused, such circumstances did not afford a sufficient answer to the accusation once he deliberately absented himself without authority (Winthrop's Military Law and Precedents (Reprint, 1920), p.608; MCM, 1928, par.132, p.146).

7. The charge sheet shows that accused is 43 years and five months of age. He was appointed a first lieutenant 13 January 1943 and entered on extended active duty 18 January 1943. He was promoted to Captain 29 December 1943. He had no prior service.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. A sentence of dismissal and total forfeitures is authorized respectively upon conviction of a violation of Articles of War 61, 85 and 96.

_____ Judge Advocate

Malcolm C. Sherman Judge Advocate

_____ Judge Advocate

10360

(214)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 19 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Captain DONALD R. GAILEY (O-921975), 1092nd Engineer Utilities Detachment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10360. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10360).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

( Sentence ordered executed. GCMO 291, ETO, 26 July 1945).

10360

5685-S

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

13 AUG 1945

CM ETO 10361

| | | |
|---|---|---|
| UNITED STATES | ) | VIII CORPS |
| | ) | |
| v. | ) | Trial by GCM, convened at Bastogne, Belgium, 15 February 1945. Sentence: Dismissal. |
| | ) | |
| First Lieutenant PHILIP C. SCHINHAN (O-1059271), IPW Team No. 54, Headquarters VIII Corps. | ) | |

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater.

2. Accused was tried upon the following Charge and Specifications:

CHARGE: Violation of the 95th Article of War.

Specification 1: In that First Lieutenant Philip C. Schinhan, CAC, IPW Team 54, VIII Corps, in conjunction with First Lieutenant Fritz C. Wildermann, CAC, IPW Team 54, VIII Corps, while the said First Lieutenant Philip C. Schinhan was in command of and directing the official activities of First Lieutenant Fritz C. Wildermann, Master Sergeant Joseph Kirschbaum, Technician Third Grade Fred Van Dyk, Staff Sergeant Walter Bonne and Technician Fifth Grade Phillip J. W. Glaessner, members of IPW Team 54, during interrogation of German prisoners of war, did, near Beaugency, France, during the period 17-28 September 1944, wrongfully and unlawfully aid, abet and conduct commercial trafficking in cigarettes, candy, gum and matches with various and sundry of said German prisoners of war wherein and whereby the said First Lieutenant Philip C. Schinhan used and employed his official status as a commissioned officer of the Army and prisoner of war interrogator to obtain for himself, for First Lieutenant Fritz C. Wildermann

and for the above-named soldiers, personal gain and profit through unreasonable, unconscionable and disproportionate prices for said cigarettes, candy, gum and matches sold to said German prisoners of war.

Specification 2: In that * * * while in command of IPW Team 54 and directing the official activities of First Lieutenant Fritz C. Wildermann, Master Sergeant Joseph Kirschbaum, Technician Third Grade Fred Van Dyk, Staff Sergeant Walter Bonne and Technician Fifth Grade Phillip J. W. Glaessner, members of IPW Team 54 and while said IPW Team 54 was engaged in interrogating German prisoners of war, did, near Beaugency, France, during the period 17-28 September 1944, wrongfully and unlawfully sanction, condone and permit said First Lieutenant Fritz C. Wildermann, his subordinate officer, and the said soldiers under his command, to traffic in cigarettes, candy, gum and matches with various and sundry of said German prisoners of war in pursuance of which said cigarettes, candy, gum and matches were sold to said German prisoners of war at unreasonable, unconscionable and disproportionate prices.

Specification 3: (Finding of not guilty)

Specification 4: In that * * * while in command of IPW Team 54, acting jointly and in pursuance of a common design and conspiracy, did, in conjunction with First Lieutenant Fritz C. Wildermann, Master Sergeant Joseph Kirschbaum, Technician Third Grade Fred Van Dyk, Staff Sergeant Walter Bonne and Technician Fifth Grade Phillip J. W. Glaessner, all members of IPW Team 54, during interrogation of German prisoners of war, in Normandy, Brittany and at Beaugency, France, from on or about 26 June 1944, to on or about 28 September 1944, inclusive, wrongfully, unlawfully and knowingly aid, abet, conduct, supervise, sanction, condone and engage in, for personal gain and profit, commercial and financial trafficking in cigarettes, cigars, candy, gum, matches and other sundry supplies, and in money exchange transactions, with various and sundry of said German prisoners of war in pursuance of which said supplies were sold to and said money exchange transactions made with said German prisoners of war at unreasonable, unconscionable and disproportionate prices.

He pleaded not guilty and was found guilty of specifications 1 and 2 of the Charge, except in each specification the words "17-28 September 1944" and substituting therefor, respectively, the words "19-25 September 1944", of the excepted words not guilty, of the substituted words guilty; not guilty of Specification 3; guilty of Specification 4, and guilty of the Charge. No evidence of previous convictions was introduced. He was

sentenced to be dismissed the service. The reviewing authority, the Commanding General, VIII Corps, approved the sentence and forwarded the record of trial for action pursuant to Article of War 48. The confirming authority, the Commanding General, European Theater, confirmed the sentence, "notwithstanding its inadequacy which was regrettably inevitable upon conviction of such offenses charged under Article of War 95," and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence introduced by the prosecution showed that:

At all times mentioned in the specifications, accused was a first lieutenant and commanding officer of "IPW Team 54, attached to G-2 Section, VIII Corps." This team was composed of accused, First Lieutenant Fritz C. Wildermann and the four noncommissioned officers named in the specification. Its duty was to sort, screen and interrogate prisoners of war in the areas to which it was sent. After landing in France, 26 June 1944, it had participated in the Normandy and Brittany campaigns; and from 18-25 September, it was at Beaugency, France (R6,17,19,20,26,27). As a matter of convenience and to satisfy different tastes, during this time all of the members of the team had been pooling their individual supplies of cigarettes, chocolate candy bars, cake and other similar items received by them from home or as rations. This was considered to belong to everybody. If any man wanted to get a particular item he went to the pool (R20, 21,32).

First Lieutenant Fritz C. Wildermann, a member of the team, testified for the prosecution. He said that after the landing in Normandy and the forming of the pool, to which accused had frequently contributed cigarettes which he received from home, "Sergeant Bonne", one of the members, had sold some items and that he himself at times had sold an item or two to prisoners of war. This witness said that as far as the selling was concerned at that time accused "permitted this"; however, he could not "specify any definite time that Lieutenant Schinhan [accused] and I spoke together about that or any definite statement he made" but "we all commonly believed that any money from sales would be split." At that time there was no agreement as to who was to hold the money. He was convinced that other members made sales but he never saw anyone sell. The "agreement" did not work. The sum was too small, and although, as he said, he sold a few items himself, receiving 100 francs, sometimes more, for cigarettes, the amount was too small to split up, only 16 or 32 francs per member. There was no accounting. He assumed that the others had as much money as he. He never asked questions. However, he received 200 francs profit on what Sergeant Bonne sold (R19-22,25,35). Later, he said he made 10,000 francs himself, in Normandy and Brittany, which he did not divide (R25). When this team went to Beaugency, it arrived in two sections. Lieutenant Wildermann, Sergeants Kirschbaum and Bonne arrived 17 September, while accused and the two other members came in two days later bringing with them the pooled supplies (R22,26,32,33,35). During this intervening time, about 20,000 German prisoners were brought into the prisoner of war cage at Beaugency (R22,27). On their arrival, they were cold and hungry but had plenty of money, some having large sums of French money in denominations of 1000 and 5000 franc notes. "It was almost an education to see how little money can

be worth to watch those prisoners pay their prices." He told of being approached by prisoners desiring to buy when he first walked into the cage, and of his sale of cigarettes the next time he went there (R35). Prior to accused's arrival at Beaugency, one of the members of the pool, Sergeant Bonne, sold 24 bars of chocolate, his personal property, to prisoners of war for 1000 francs each, aggregating 24000 francs. Sergeant Bonne and Sergeant Kirschbaum had a difference as to the disposition of this money, the latter contending that this was common property. "In the end everybody agreed" to this and accused, to whom Wildermann had reported the difference in feeling, got the money (R24,30,32,34,35). This was, according to Wildermann, for "convenience * * * . Up to them the sales were so small.

> "When we realized that chocolate bars were selling for 1000 francs for one Hershey bar, we all realized at once that we would have to find out how much belonged to the whole team, and the most convenient way was for one man to hold it and naturally Lieutenant Schinhan" (R34).

After that, accused received the proceeds of all other sales (R24). These included cigarettes sold for 500 to 800 francs. Other profits came from money changing transactions carried on by Wildermann with prisoners who had "so many (5,000) franc notes that they were willing to take change to a very much lesser amount." He would charge about 1000 francs for breaking down a 5000 franc note. Wildermann asked accused "for some small change in order to do that" saying that he wanted "to change the 5000 franc notes to 4000 from PW's." "Eventually, he gave it [5000 franc notes]" to accused (R24,25,29,30). The money received at Beaugency approximated 62,000 francs. This came from money changing, the sale of cigarettes and one sale of candy, the chocolate bars for 24000 francs. It was all turnedover to accused. The sales were never made during the interrogation of prisoners (R28). No "PX" rations were received after reaching Beaugency (R33). This witness, under questioning by the court, said that accused "must of known" where the 62,000 francs came from, because:

> "I think that all came back to our original agreement at Normandy which didn't work, because the sums were too small, but at Beaugency they were not too small" (R35).

On 25 September at a "show-down inspection" everybody on the team was searched by Colonel Francis B. Linehan, Inspector General's Department, Ninth Army, and by "Major Gilfoil". As soon as accused was approached by Major Gilfoil he produced the 62000 francs which included the twelve 5000 franc French notes. He was told to hold on to it pending further instructions (R6,7,10,28,29). The same day, Colonel Lineham interrogated accused after advising him of his rights. This interview was written up, evidently in question and answer form, and although used by Colonel Lineham not to refresh his recollection but as independent evidence, was not introduced in evidence (R8-19). In this interview, accused admitted full knowledge of and responsibility for sales made by the team after its arrival at Beaugency (R10-13). He said they sold cigarettes for 1000 francs and 24

chocolate bars for 24000 francs (R15). The cigarettes were those that had been thrown "in a bag together"; some came from "home", and others from personal rations. The 5000 franc notes came from the sale of items to the prisoners of war (R15-17). Accused said "that he sold some matches or something" (R14). This selling was stopped after "Captain Otto said it could not be done" (R14). Colonel Lineham testified further that he asked accused whether it had been "the practice of his team, to sell to prisoners of war" and that accused replied that "it had been done before by members of his team," but that later accused had said "it was not a common practice but it had been done part of the time after they arrived in Beaugency" (R10). (The minutes of the interview show accused, interrogated the second time on this point, said: "I don't think I said it was the practice of the team, but the team has done it. It wasn't an organized practice" (R18; Pros.Ex. No.1 for identification)).

On cross-examination of Lieutenant Wildermann, it developed that the team was split up during most of the time it was in Brittany and that Wildermann, not accused, was actually in command of one-half of the team at that time. Kirschbaum and Bonne were on his team. In Normandy, the first sale was made by Bonne who didnot divide with him. No post exchange rations were received at Beaugency and accused never gave him a split of any sales. The court asked Wildermann if accused knew of ration selling "back in Normandy" and was told "I can't prove he knew it, but we all knew it was going on." (R31-33).

4. The evidence for the defense shows that:

Technician Third Grade Fred Van Dyk, a member of this team, testified that he had worked directly under accused since he arrived in France and had not been on the detail under Lieutenant Wildermann. He never made a sale to prisoners nor didhe ever see accused make such a sale, but he once received money from Bonne on a sale made by the latter. He testified that after landing in Normandy, in July or August, there was an understanding among the members of the team about the selling and that there was "an agreement among the members including * [accused] * * with regard to dividing the money equally." Someone had asked accused the question as to whether sales to prisoners would be allowed and accused had replied that "he didn't know anything at that time to prevent it" (R37-41).

Advised fully as to his rights as a witness, accused elected to testify on his own behalf (R44). After his team landed in France, its "items" were pooled for personal convenience. In July it came to his attention that Sergeant Bonne had made a sale to some prisoners. He did not recall getting any money from Bonne or others other than money given him for the purchase of butter and other items for the team. He did nothing about this sale by Bonne not knowing it was an offense. Before reaching Beaugency he received no money made on sales from the members of the team. While not remembering the situation as it existed at that time, he may have been asked if it was wrong to sell to prisoners of war, in which case he would have answered that he knew nothing against it. There certainly was no common practice or agreement that things would be sold to prisoners (R45,51).

After reaching Beaugency there had been the sale by Bonne of 24 bars of chocolate for 24000 francs. This had created a good bit of feeling, with the result that Bonne decided to give the money to the team and had given him the money which he put in his pocket without counting. Thereafter, Lieutenant Wildermann and Sergeant Bonne came to him with additional moneys to hold for the joint benefit of the members. These sales amounted to 62,000 francs and this money was to be shared equally by the team members. Wildermann had asked him for money for change, but he never knew that Wildermann was "conducting the exchange." When "Captain Otto" told the team that the sales were wrongful, he immediately admitted the sales to the Captain, told him that they had been made in ignorance of anything wrongful, and that they would cease. After that he told the various team members that such sales would have to stop (R46-53). He said also that while in Normandy he had sold some of his cigarettes to a prisoner of war but denied selling any pooled property (R47,48).

5. There is no necessity for recapitulating the evidence. Each allegation of Specifications 1, 2 and 4 of which accused was found guilty, was supported by competent, substantial evidence. Accused himself admitted substantial knowledge and condonation of the sales practices of his team members in Normandy and he admitted, in addition, that at Beaugency he expected to participate in the profits from the sales made at that place, of which sales he knew and which he sanctioned. His only denial was that he knew of the money changing practices at Beaugency. The court disbelieved this denial. It accepted the testimony of Lieutenant Wildermann and believed that accused didknow of this aspect of the transactions. Wildermann testified as to what he told or asked accused in connection with the money changing. Considered in the light of all the proven circumstances, it can be said that the court was justified in attributing to that conversation an import significant of guilty knowledge on the part of accused.

The conduct of accused was a military offense. He abused his official position. He had charge of the interrogation of prisoners of war. This brought him and his team inside the stockade, in direct touch with the prisoners. While there, his men sold merchandise andhad financial dealings with the prisoners, with the permission of accused and with profit to him and his men. It is obvious that such transactions could easily impair the proper relationships and disciplinary requirements involved in such a situation. Conduct of such character is a military offense (CM 230736, II Bull. JAG 144). In addition, it requires little reflection to decide that this practice, by American standards, was discreditable to the service.

Accused is charged with conduct unbecoming an officer and a gentleman under Article of War 95. To be found guilty under this Article, the officer must have not only committed a military offense, but have violated the code of a gentleman. An examination of all the implications flowing from the conduct of which accused was found guilty leads to the fair conclusion that, judged by the high moral standards which are found in the unwritten code applied to gentlemen, this accused was guilty of conduct unbecoming an officer and a gentleman (Winthrop's Military Law and Precedents (Reprint, 1920), pp.711,713). He accordingly was properly charged under Article of War 95.

6. The charge sheet shows that accused is 28 years, four months of age. He was commissioned second lieutenant 26 August 1943, after one and one-half years enlisted service. He was promoted to first lieutenant 1 October 1944.

7. Five of the six members of the court recommended clemency. On 13 March 1945, Colonel Hamer P. Ford, Commanding Officer of Headquarters, Military Intelligence Service, European Theater of Operations, addressed a request for clemency to the Theater Commander. In this communication he expressed his opinion that accused's offense was the result of ignorance rather than any premeditated attempt to breach military order. He mentioned accused's free admission of his role in the matter from the very start and the absence of any effort to conceal or misrepresent his acts. He also characterized as "Excellent" accused's services as a prisoner of war interrogator and told of his having been twice wounded.

8. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. A sentence of dismissal is mandatory in the case of an officer upon conviction under Article of War 95.

Judge Advocate

Judge Advocate

Judge Advocate

(222)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater
13 AUG 1945
TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of First Lieutenant PHILIP C. SCHINHAN (O-1059271), IPW Team No. 54, Headquarters VIII Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding, and this indorsement. The file number of the record in this office is CM ETO ~~12759~~ 10361. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO ~~12759~~ 10361).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 349, ETO, 27 Aug 1945).



6830-C

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1 19 MAY 1945

CM ETO 10362

| | |
|---|---|
| U N I T E D S T A T E S | 4TH ARMORED DIVISION |
| v. | Trial by GCM, convened at Morfontaine, France, 8 February 1945. |
| Captain JAMES E. HINDMARCH (O-404946), Battery D, 489th Antiaircraft Artillery Automatic Weapons Battalion (Self-Propelled) | Sentence: Dismissal, total forfeitures and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |

---

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 95th Article of War.

Specification: In that Captain James E. Hindmarch, Battery "D", 489th Antiaircraft Artillery Automatic Weapons Battalion (SP), was, at Rancimont, Belgium, on or about 6 January 1945, drunk and disorderly under such circumstances as to bring discredit upon the military service.

CHARGE II: Violation of the 96th Article of War.

Specification: In that * * * was, at Rancimont, Belgium, on or about 6 January 1945, drunk and disorderly under such circumstances as to bring discredit upon the military service.

He pleaded not guilty to and was found guilty of the charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for five years. The reviewing authority, the Commanding Officer, 4th Armored Division, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Prosecution's evidence was as follows:

On 6 January 1945 accused was commander of Battery D, 489th Antiaircraft Artillery Automatic Weapons Battalion (Self-Propelled), and was stationed with his battery at L'Eglise, Belgium. He had received an award of the Bronze Star. After evening mess on that date, accused and other officers, including First Lieutenant Ivan H. McGee of the same battery, partook liberally of champagne in "celebration" of the award (R13). About 9:30 pm accused suggested that Lieutenant McGee and he proceed to Rulles, Belgium, the bivouac to which the battery would move the next morning. The officers loaded their equipment into a jeep of which Private First Class Nicholas John Matusky of accused's unit was the assigned driver (R10,13). The party left L'Eglise and proceeded on the road in the direction of Rulles. Accused drove the vehicle and Lieutenant McGee and Matusky were passengers (R13). Monsieur Fernand Noel of Rancimont, Belgium and Mademoiselle Madeleine Mohy of L'Eglise, Belgium, were encountered as they proceeded afoot toward Rancimont. Mademoiselle Mohy, a midwife, accompanied Monsieur Noel to his home for the purpose of delivering Madame Noel (who was then in labor) of a child (R5,8). They were halted by accused who dismounted from the jeep and demanded that they produce identification papers. When such papers (which included a permit from the American Civil Affairs Administration authorizing Monsieur Noel to be out of doors after curfew hour) were presented, accused pronounced them invalid and threw them to the ground, although Mademoiselle Mohy explained the purpose of her mission. He also searched Mademoiselle Mohy's purse (R4,8,13).

Finally he required the Belgians to enter the jeep. He continued to drive. His control of the vehicle was erratic and dangerous and was plainly indicative of his then drunken condition (R5).

In due course, accused drove to the Noel dwelling house. Monsieur Noel and the midwife entered the house followed by accused. Mademoiselle Mohy pointed to Madame Noel and exclaimed: "Mister, you see I told you the truth". Madame Noel was sent upstairs to her bedroom by the midwife, who in company with the husband, followed her. Soon the midwife returned to the first floor to speak with Madame Noel's sister who was engaged in making coffee for the Americans (R5,8,13). On this occasion Mademoiselle Mohy saw accused take a drink from a bottle bearing "an English trade mark" (R7). When Mademoiselle Mohy again ascended to the upstairs bedroom, accused accompanied her and carried towels. He repeated the word "doctor" on several occasions although Mademoiselle Mohy demanded of him proof of such fact, and again descended to the first floor to make inquiry of Lieutenant McGee and Matusky as to accused's status (R5,8,13).

Returning to the accouchement chamber, the midwife ordered accused to leave, but he refused. She proceeded to arrange the bed for childbirth and threw back a sheet. Accused returned it to its original position and slapped Mademoiselle Mohy in the face. After remaining near the stove for some moments, he went downstairs, but soon returned with Matusky.. He offered the midwife cigarettes and a glass of liquor which she at first refused, but in order to appease him she finally accepted the liquor. As Madame Noel's condition was then critical, the midwife again requested accused and Matusky to leave. She succeeded in evicting them from the bedroom and closed the door. Accused and the soldier remained outside and the former knocked persistently upon the door. The midwife called to him: "Captain, leave or I will go to the Major". Accused refused to leave. Mademoiselle Mohy opened the door and said: "Captain will you leave?" He pressed past the woman and again entered the bedchamber where he placed money on two tables. He came close to the midwife, and said to her: "Kiss me". Upon her refusal he repeated, "Kiss me quick". Three times she refused his request. He pointed to the bed and said "me". When Mademoiselle Mohy was questioned by defense counsel upon cross-examination in respect to accused's request to kiss him, whether she was sure he was not joking, she replied:

> "I don't know, his eyes were not fit to look at. His eyes were not normal, they are not like they are today" (R7).

Accused, after displaying his billfold, left the room in anger,

and the door was closed. Shortly thereafter, he opened the door and, uninvited, entered the bedroom. He was followed by Matusky who, understanding Madame Noel's precarious condition and fearing for her safety, struck accused on the head with a revolver in an endeavor to render him unconscious. Accused reeled against a wall of the room but retained consciousness. Blood flowed from a wound inflicted by the blow of the revolver. He then left the room and went into the hallway (R6,11,13).

Lieutenant McGee in describing accused's condition, testified:

> "At this time after he received the blow I would say he was more or less what you call berserk" (R13).

Fernand Noel testified accused

> "was probably a little drunk because he still had another bottle which he was drinking from. * * * When we say a man is a little drunk he does not know what he is doing" (R8).

Matusky declared that accused

> "was drunk, sir, very drunk. * * * before we left our billet he drank some and when we got to this Frenchman's he drank some" (R11).

Monsieur Noel was in the bedroom during accused's several intrusions and disturbances therein. When the latter had departed after Matusky had struck him, Noel jumped from a bedroom window and went to neighbor's house where he obtained a ladder. By means of the ladder Madame Noel and Mademoiselle Mohy left the bedroom at about 2 am on 7 January and proceeded to the home of a sister of Monsieur Noel in the proximity of the Noel home (R6,8,14).

Matusky left the bedroom after attempting to immobilize accused, and returned to the lower floor. Accused, upon leaving the bedroom called to Matusky and ordered him to return upstairs. When Matusky reached the top of the stairs accused struck at him with his fist and then asked if Matusky had hit him on the head. Matusky replied in the negative. Accused then called Lieutenant McGee to the second floor and made similar inquiry of him. Upon receiving a denial from Lieutenant McGee, accused ordered Matusky to conceal himself behind a door and Lieutenant McGee to stand under a set of steps. Sacks of flour were piled in the hallway.

Accused produced a pocket knife and cut holes in the sacks, scattered flour about the floor and ordered Matusky to assist him (R6,8,9,11,14).

Following the above episode, the three Americans descended to the lower floor. Accused encountered Monsieur Julian Noel, brother of Fernand, and also Julian's wife (R8,11). He threatened both of them with a trench knife he had borrowed from Matusky. He soon tired of this demonstration and again ascended to the second floor. He ordered Matusky to follow him. Lieutenant McGee also came to the upper floor. Accused endeavored to force the door of Madame Noel's bedroom and asked Matusky for his gun in order to shoot the lock from the door. Matusky handed it to him, having previously unloaded it. By some undisclosed means accused gained entrance to the bedroom which he carefully searched. Matusky at this time entered an adjoining bedroom, where he believed the midwife and Monsieur and Madame Noel had concealed themselves. He desired to escort them downstairs. He discovered, however, that it was occupied by Gustave Noel, a brother of Fernand, who was in bed (R9,12,14). Accused followed Matusky into this bedroom, grabbed Gustave and held him by his shirt. By motions he directed that Gustave arise, dress, and go downstairs (R9,12,14). Accused, Lieutenant McGee and Matusky accompanied him to the lower room. Here accused inquired of Gustave as to the identity of the person who had previously struck him. Gustave did not understand English. When accused did not receive an understandable reply he struck Gustave in the mouth and broke a small chip from a tooth (R9,11,12). Accused as he continually wiped his head with his hand repeated "that is my blood", and persisted in his inquiry as to the identity of the person who had struck him. As the final act of the evening accused made his handkerchief into a roll and attempted to force it into Gustave's mouth. Lieutenant McGee and Matusky intervened and succeeded in prevailing upon accused to leave the Noel household (R11,13).

4. In defense the following evidence was presented:

Captain Marvin N. Kauder, acting S-3 and assigned S-2 of the 489th Antiaircraft Artillery Automatic Weapons Battalion, testified that he had known accused for two years; that he was an excellent officer; that his dealings with him had been highly satisfactory; that he was one of the most cooperative of the battery commanders; and that his demeanor in social life was satisfactory when the witness was with him (R16).

Accused, after the defense stated his rights as a witness were explained to him, elected to be sworn as a witness in his own behalf. He related the circumstances which brought him to the Noel home substantially as shown by the prosecution's evidence. He stated that "from 7:30 pm to about 10:30 pm on 6 January, he and the officers who were with him celebrated" his receipt of a Bronze Star by drinking champagne. Between 11 pm and 11:45 pm he had several

drinks of gin. Upon arrival at the Noel home, he and Lieutenant McGee were invited into the house for coffee. He testified

> "I had no coffee as I had the feeling that the evening called for a little more of a celebration. I got the gin from the jeep and we had a few more gins, two or more within the period of one half hour" (R17).

He asserted that it appeared to him that no one was helping the midwife; that he took some towels upstairs to her and asked if he could help her.

> "She wanted to know if I was a doctor. I showed her my insignia. I had my coast artillery insignia on "(R17).

He was only there to assist the midwife who experienced difficulties in putting Madame Noel to bed, and he volunteered to help. He placed some francs on one side of the room and said "if it is a girl" and added other francs and said "if it was a boy", and then placed 500 francs with the money and "said that was for the woman". In the hallway he had a drink with Monsieur Noel. He was hit on the head and the blow dazed him. He "came up more or less fighting". He asked Matusky if he struck him and upon receiving a denial he made inquiry of Lieutenant McGee,who also denied striking witness. The accused remembered striking

> "this one man, but that is about the extent of what I know" (R18).

Upon cross-examination he asserted that striking a man was proper conduct for an army officer "with reservations" because he "was struck on the head" and didn't know who hit him. He didn't know whether he was invited upstairs or asked to assist at the birth of the baby. The husband gave him the towels to take upstairs. He asserted he did not know whether the midwife objected to his presence; whether she tried to evict him from the room several times; or whether he kicked in or cracked one of the panels of the door. He emphatically denied making certain advances to Mademoiselle Mohy (R19).

By agreement with the prosecution the following exhibits were introduced:

Defense Ex.A: Report of Division Psychiatrist dated 6 February 1945 which certified he had examined accused and found no evidence of mental disease or disorder.

Defense Ex.B: War Department, AGO Form 66-1, which

showed that accused was awarded Bronze Service Stars for (1) Normandy campaign, (2) Northern France campaign, (3) Germany campaign, and (4) meritorious service in France, 17 July to 13 December 1944.

5. Certain procedural irregularities should be noted:

a. The first indorsement to the charge sheet which referred to the charges to the court for trial, was signed by Lieutenant Colonel R. M. Connelly in his capacity as Adjutant General of the 4th Armored Division. Lieutenant Colonel Connelly sat as a member of the court which tried accused. The accused raised no objection to the presence of the officer in the court. This situation did not prejudice substantial rights of accused and is not error (CM ETO 3948, Paulercio; CM ETO 4095, Delre; CM ETO 4619, Traub; CM ETO 8451, Skipper).

b. The action approving the sentence was signed by "W. A. Bigby, Colonel, Infantry, Commanding". The order appointing the court reveals that Colonel Bigby was the regular chief of staff of the division. There is no order or declaration in the record of trial indicating Colonel Bigby's assumption of command of the division. However, it may be presumed, in the absence of evidence to the contrary, that the command of the division devolved upon him and that in approving the sentence he was properly executing his official duties (Winthrop's Military Law and Precedents (Reprint, 1920), pp.317,450).

c. The specifications of Charge I (violation of AW 95) and Charge II (violation of AW 96) are identical and cover the same events and transactions. This is not an illegal multiplicity of charges as the same facts and circumstances may give rise to two or more offenses (CM ETO 4570, Hawkins; CM ETO 5155, Carroll and D'Elia), and an officer may be charged with and found guilty of violations of the 95th and 96th Articles of War, although the separate offenses stem from the same set of facts (McRae v. Henkes, (C.C.A. 8th, 1921) 273 Fed 108 cert. denied 258 U. S. 624, 66 L.Ed.797 (1922); CM ETO 1197, Carr; CM ETO 5389, Pomerantz; CM ETO 7245, Barnum).

6. The specifications of the charges do not follow any suggested form contained in Manual for Courts-Martial, 1928, Appendix 4, pp.253-255. Each specification alleges that accused

> "was, at Rancimont, Belgium, on or about 6 January 1945, drunk and disorderly under such circumstances as to bring discredit upon the military service".

(230)

a. While the specification is not a model of pleading and is not to be commended as a precedent, it does allege that (a) - Accused was drunk and disorderly.(b) "under such circumstances", the details of which are not specified or described. The word "circumstances" means facts or things standing round or about some central fact (7 Words and Phrases (Permanent Ed.) p.178; Webster's New International Dictionary 2nd Ed. p.489). The central fact was accused's drunken condition and disorderly conduct. The "circumstances" included the facts as to where and when he was drunk and disorderly and who was affected thereby. The phrase "to bring discredit upon the military service" is not a factual allegation, but is a legal conclusion lifted from the 96th Article of War (CM 232190, Lester 19 B.R. 13 (1943); CM ETO 4512, Gault). It added nothing of factual weight to the specifications (MCM, 1928, par.29, p.18; Winthrop's Military Law and Precedents (Reprint, 1920)p.132). However, even when the legal conclusions of the pleader are rejected as valueless, sufficient facts are alleged to constitute an offense under both the 95th and 96th Articles of War. While accused would have been entitled to require the specifications to be made more definite and certain had he made timely objection, in the absence of such claim he has no ground for complaint. By the specifications he was informed that at the stated time and place he was drunk and disorderly under circumstances which would be proved. Such specification duly notified him of the nature of the offense with which he was charged and also is sufficient to support a future plea of double jeopardy which he might be called upon to make (CM ETO 4235, Bartholomew and Briscoe; CM ETO 6235, Leonard).

7. The evidence is full and complete that accused was exceedingly drunk and disorderly in the Noel household on the night of 6-7 January. A mere casual reading of the evidence is convincing that it fully satisfied the requirements of law to sustain accused's conviction under Charge II. Drunkenness and disorder of the violent nature here shown constitutes conduct of a nature to bring discredit upon the military service and is prejudicial to good order and military discipline (CM 197398, Mini, 3 B.R.99 107 (1931); CM 224465, Moore, 14 B.R.153, 157 (1942); CM ETO 1197, Carr). The fact that accused was guilty of this misconduct in a private home of a citizen of a foreign country wherein the United States military forces were engaged, increased rather than lessened the opprobriousness of his conduct. The following comment is highly relevant:

> "It should here be noted that in the Code of 1916 (39 Stat. 650-670) the General Article was enlarged in scope, in the matter of misconduct punishable by court-martial, by the addition of the clause,

'all conduct of a nature to bring discredit upon the military service'. We are of opinion that this clause must be given a reasonably liberal construction in keeping with its manifest purpose and verbal comprehensiveness. And because persons under the influence of liquor are oftentimes thereby rendered mentally blind to the rights of their fellows; or to be more explicit, because drunkenness involves a deprivation of normal control of the mental and physical faculties and oftentimes makes persons in that condition a source of potential trouble, mischief or harm to others; we are of opinion that all persons in that condition who are subject to the Articles of War are, in legal contemplation, punishable by court-martial therefor under the clause above quoted, if not thereby infringing some other punitive Article, whenever the drunkenness is voluntary on the part of officer or enlisted man, irrespective of the offender's active or retired status or of the time or particular place of commission of the offense" (Underscoring supplied) (CM 197011, Kearney,3 B.R.63(1931)).

With respect to the Charge under the 95th Article of War, the proof must meet the standard which is well stated as follows:

"From the authorities quoted above, it appears that to constitute a violation of the 95th Article of War the conduct must be such as to show moral turpitude on the part of the officer or cadet concerned, of a nature to stamp him as morally unfit to hold a commission and one with whom his brother officers or cadets cannot associate without loss of self-respect. Acts prosecuted and punished as violations of this Article are, as a rule, of a clearly dishonorable character, such as acts of fraud or dishonesty, knowingly making a false official statement, opening and reading another's letters without authority, giving worthless checks, and the like. The Manual for Courts-Martial (par. 151), however, mentions among instances of violation of this Article 'being grossly drunk and conspicuously disorderly in a public place'; and Colonel Winthrop cites 'drunkenness of a

gross character committed in the presence of military inferiors or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused' as an example of conduct unbecoming an officer and a gentleman (Reprint, page 717)". (CM 197398, Mini, 3 B.R.99, 107 (1931)).

When the undisputed evidence in this case is read in the light of the above pronouncement of the applicable legal principles, the Board has no difficulty in reaching the conclusion that accused's drunken conduct was not only a gross violation of the canons of decent and courteous human relationship, but in certain of its aspects approached criminality. His guilt of conduct unbecoming an officer and a gentleman was irrefragably proved (CM ETO 439, Nicholson; CM ETO 1197, Carr, supra; CM ETO 3966, Buck; CM ETO 6235, Leonard, supra, and authorities therein cited).

8. The charge sheet shows that accused is 34 years, nine months of age. He was enlisted in the National Guard from 25 April 1933 to 1 November 1935. He was re-enlisted in the National Guard from 5 September 1939 to 10 February 1941. He was commissioned in the Army of the United States, after examination on 11 February 1941.

9. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

10. A sentence of dismissal is mandatory upon conviction of a violation of Article of War 95. Dismissal, total forfeitures and confinement at hard labor are authorized punishments for a violation of the 96th Article of War. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42 and Cir. 210, WD, 14 Sept. 1943, Sec.VI, as amended).

B. Franklin Ritter Judge Advocate

Wm. F. Burrow Judge Advocate

Edward L. Stevens, Jr. Judge Advocate

(233)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 19 MAY 1945 TO: Commanding General, European Theater of Operation, APO 887, U. S. Army.

1. In the case of Captain JAMES E. HINDMARCH (O-404946), Battery D, 489th Antiaircraft Artillery Automatic Weapons Battalion (Self-Propelled), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10362. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10362).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

---

(Sentence ordered executed. GCMO 183, ETO, 27 May 1945).

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

28 JUL 1945

BOARD OF REVIEW NO. 1

CM ETO 10363

| | |
|---|---|
| U N I T E D S T A T E S | 9TH BOMBARDMENT DIVISION (MEDIUM) |
| v. | Trial by GCM, convened at Chantilly, Department of Oise, France, 10 February 1945. Sentence: Dismissal, total forfeitures, and confinement at hard labor for 12½ years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| Second Lieutenant JOSEPH W. MANGIAPANE (O-766315), 553rd Bombardment Squadron, 386th Bombardment Group (Medium). | |

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that 2nd Lt. Joseph W. Mangiapane, 553rd Bombardment Squadron, 386th Bombardment Group (M) did, at AAF Station A-60, APO 140, U. S. Army, on or about 23 December 1944 desert the service of the United States by quitting his place of duty as Bombardier on Aircraft No. 41-31823, with intent to avoid hazardous duty to wit: The performance of his duties as Bombardier on Aircraft No. 41-31823 in the aerial bombardment of the enemy on said date, and did continue to absent himself from his place of duty until after completion of the mission on which said Aircraft was scheduled to fly.

CHARGE II: Violation of the 96th Article of War.

Specification: In that * * * did, at AAF Station A-60, APO 140, U. S. Army, on or about 23 December 1944, wrongfully refuse to accompany and fly as Bombardier with his crew, which had been ordered by Captain Howard L. Burris, Commanding Officer, 553rd Bombardment Squadron, 386th Bombardment Group (M), of which said crew formed a part, to fly in a bomber and to execute a combat operational mission over territory occupied by the enemy in Europe.

He pleaded not guilty and, all of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor, at such place as the reviewing authority may direct, for 12-1/2 years. The reviewing authority, the Commanding General, 9th Bombardment Division, (Medium), approved the sentence, although deemed wholly inadequate for conviction of such grave offenses, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, although deemed inadequate punishment for an officer guilty of such grave offenses, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The following facts are undisputed: Accused, a bombardier on a B-26, had participated in nine combat missions. On the sixth mission, he saw one of the planes of his flight go into a spin, for no apparent reason, and crash to the ground. On the seventh mission the plane in which he was flying was unable to find the landing field and was destroyed in making a crash landing. On the ninth and last mission, about 14 or 15 December 1944, a plane in his flight was struck by a bomb dropped from above and exploded. Pieces of the exploding plane damaged the hydraulic system on accused's plane and he had difficulty in jettisoning the bombs, closing the bomb bay doors, and lowering the landing gear. Eventually, he managed to drop the bombs and release the landing gear but it was impossible to close the bomb bay doors and that made landing rather difficult (R45-57).

On 22 December 1944, accused was notified that he was to take part in a combat mission which had as its objective the destruction of a bridge at Ahrweiler, Germany (R22,30,55). About 9:00 am on 23 December, after he was briefed, he and the remainder of the crew assumed their posts in the plane, preparatory to the take-off. While taxiing from the dispersal area to the take-off strip, the plane stopped to permit another plane to precede it down the runway. At this point accused left the plane

and went to his tent apparently some distance away. In response to a question from the pilot he stated: "I got to get out" (R17,18,22,42,44, 49,54). As a result of his absence the plane did not participate in the mission assigned to it (R13,17,26,44). In a conversation with his superior officers later the same day accused, in explaining his conduct, stated "I guess I'm just yellow" (R9,10,29,30,51).

4. Major Alexander Halperin, Medical Corps, testified that he was a member of a board of officers who examined accused. In his opinion, accused was not suffering from a mental disease but from combat flying reaction, severe, manifested by a panic state. This is almost the inevitable reaction shown by all combat personnel when they are exposed to combat stress over a period of time, the severity of the reaction depending upon the personality of the individual and the degree of stress to which he is exposed. The action of accused in abandoning his post was the result of fear but he still retained the faculty of free choice (R31-39).

5. Accused, after being advised of his rights, elected to be sworn and testify. He told of his experiences in combat, already outlined above. He offered no satisfactory reason for abandoning his post in the plane and he so informed his commanding officer. Tacitly, however, he admitted to this officer that he was afraid to fly and for that reason he declined his offer of reassignment. He did not at the time of trial have any such fears and desired to be returned to a flying status. In fact, shortly after his first interview he sought an audience with the commanding officer with that object in mind, but when he eventually did see him, he was told that it was too late because the commanding general had ordered a court-martial. He never had any intention of deserting the service of the United States or of avoiding hazardous duty (R45-55).

6. The Specification of Charge I:

This Specification charges that accused deserted the service of the United States by quitting his post with intent to avoid hazardous duty. The question presented is whether the evidence in the record is legally sufficient to establish each of the four elements of the offense charged, namely:

a. That accused absented himself without leave from his post of duty;

b. That he was under orders or anticipated orders involving hazardous duty;

c. That notice of such orders and of imminent hazardous duty was actually brought home to him; and

d. That at the time he absented himself he entertained the specific intent to avoid hazardous duty (CM ETO 5958, Perry and Allen, and authorities therein cited).

(238)

The evidence showed that accused, a bombardier, was ordered to participate in a combat mission over Germany; that he attended a briefing on the proposed mission; that he assumed his post in the plane to which he was assigned; and that while the plane was preparing to take off he abandoned his post and thus prevented the plane from participating in the mission. Clearly, his place of duty was in the plane and in thus abandoning it, he was guilty of absence without leave. The orders directing accused to participate in a combat mission over enemy territory were orders that directed the performance of hazardous duty (CM ETO 4138, Urban). Accused's presence at the briefing and his partial compliance with these orders makes it manifest that they were brought to his attention. Lastly, his abandonment of his post on the airplane at the threshhold of its mission, admittedly because he was "yellow", sufficiently establishes that his intent in so doing was to avoid hazardous duty.

The correlation of the legal principlies governing the instant case and those which control the Urban case above cited is a matter of technical value and interest. Urban was charged with an unauthorized absence from his organization with the intent to avoid hazardous duty. The proof showed that he absented himself from his station for a period of six days with full knowledge that he, and the rest of the crew, were in combat operational status and were under anticipated orders to fly on combat missions at any time. These facts justified the court in finding that his unauthorized absence from his organization was motivated by his desire to avoid the perils and hazards of these future combat flights which he knew were certain to occur. Under the circumstances it was necessary for him to absent himself from his organization in order to accomplish his purpose. In the instant case, Lieutenant Mangiapane was charged with absenting himself from his place of duty, viz. the bomber as it was about to depart on its mission, with the intent to avoid hazardous duty. Proof of his alleged misconduct was therefore narrowed to the specific and particular perils and hazards of this particular mission. The case therefore may be assimilated to the well-known pattern of cases involving absences without leave to avoid hazardous duty by Ground Force personnel when confronted with immediate, specific hazards of a present defined mission (CM ETO 4570, Hawkins; CM ETO 5293, Killen; CM ETO 6637, Pittala; CM ETO 8028, Burtis).

Combat flying reaction short of legal insanity is, of course, no defense. Accused's mental responsibility for his conduct was under the state of the evidence solely a question of fact for the court (CM ETO 4074, Olsen; CM ETO 4095, Delre; CM ETO 4219, Price).

7. The Specification of Charge II:

The Specification in effect alleged that accused wrongfully refused to accompany his crew which had been ordered by Captain Howard L. Burris, Commanding Officer of the 553rd Bombardment Squadron, to ex-

ecute a combat operational mission over enemy held territory. From what has already been said, it is clear that accused refused to accompany his crew which had been ordered to take part in a combat mission as alleged. Although there is a complete absence of proof that Captain Howard L. Burris, who testified as a witness, issued the order, the gravamen of the offense charged is a wrongful refusal to accompany his crew on a combat mission that had been ordered (Cf: CM ETO 3080, Holliday) rather than a willful disobedience or a failure to obey the order of a superior officer (Cf: CM ETO 2469, Tibi). Consequently, the failure to prove the identity of the officer who ordered the mission did not mislead accused or prejudice his substantial rights.

Accused's conduct constituted two separate and distinct offenses. The offense of absence without leave to avoid hazardous duty (Charge I and Specification) required proof that accused entertained the specific intent to avoid hazardous duty at the time he left his place of duty (the bomber). This element is not involved in the offense of wrongfully refusing to accompany his crew on the bombing mission (Charge II and Specification). It was competent for Congress to denounce accused's conduct as constituting more than one offense and to authorize punishment for each offense. There is therefore no duplication or multiplication of charges and the court was justified in finding him guilty of both offenses (CM ETO 4570, Hawkins; CM ETO 5155, Carroll and D'Elia; CM ETO 6694, Warnock). The record of trial is legally sufficient to support the findings of accused's guilt of the offense of wrongfully refusing to accompany his crew on a combat mission - conduct which is manifestly a disorder to the prejudice of good order and military discipline under the 96th Article of War.

8. The charge sheet shows that accused is 26 years of age, was inducted 20 February 1941, discharged 4 February 1944, and commissioned a second lieutenant 5 February 1944.

9. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

10. Dismissal, total forfeitures, and confinement at hard labor are authorized punishment upon conviction of a violation of the 58th and 96th Article of War. The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42 and Cir.210, WD, 14 Sept. 1943, sec. VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(240)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 28 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Second Lieutenant JOSEPH W. MANGIAPANE (O-766315), 553rd Bombardment Squadron, 386th Bombardment Group (Medium), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10363. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10363).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

---

(Sentence ordered executed. GCMO 342, ETO, 25 Aug 1945).



10363

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3 14 JUN 1945

CM ETO 10364

| | |
|---|---|
| U N I T E D S T A T E S ) | CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. ) | |
| First Lieutenant HARRY E. EVANS (O-885852), CMP, 295th Military Police Company ) | Trial by GCM, convened at Brussels, Belgium, 7 February 1944. Sentence: Dismissal and total forfeitures. |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Harry E. Evans, 295th Military Police Company, did, at the 81st Finance Disbursing Section, Keergerge, Belgium, on or about 17 December 1944, with intent to deceive Major M. L. Tush, FD, officially certify to said Major M. L. Tush

that the money offered for exchange represented funds acquired legally by personnel of the 295th Military Police Company and represented funds from their pay, which certificate was known by said Lieutenant Harry E. Evans to be untrue.

Specification 2: In that * * * on or about 21 December 1944, with intent to deceive Major M. L. Tush, FD, officially certify to the said Major M. L. Tush that the money he offered for exchange had been legally received by the personnel of the 295th Military Police Company for their pay, and for their personal use, and were not for any unauthorized parties, which certificate was known by the said First Lieutenant Harry E. Evans to be untrue.

Specification 3: (Finding of not guilty).

Specification 4: In that * * * did, at Lille, Nord, France, on or about 21 December 1944, wrongfully take and use without consent of/owner, to wit, a one-quarter ton reconnaissance truck 4x4, property of the United States of the value of more than $50.00.

CHARGE II: Violation of the 95th Article of War.

Specification: In that * * * did, at the 81st Finance Disbursing Section, Keergerge, Belgium, on or about 17 December 1944, with intent to deceive Major M. L. Tush, FD, officially certify to said Major M. L. Tush that the money offered for exchange represented funds acquired legally by personnel of the 295th Military Police Company and represented funds from their pay, which certificate was known by said Lieutenant Harry E. Evans to be untrue.

He pleaded guilty to and was found guilty of all charges and specifications except Specification 3, Charge I, to which he pleaded, and of which he was found, not guilty. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due and to become due. The reviewing authority, the Commanding General, Channel Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action pursuant to the provision of Article of War 48. The confirming authority, the Commanding General, European Theater of Operations confirmed the sentence, though characterizing it as wholly inadequate punishment for an officer guilty of such grave offenses, withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. All essential elements of each offense charged are appropriately alleged in the respective specifications to which accused pleaded and of which he was found guilty. With reference to the false official statements involved in Specifications 1 and 2, Charge I, and the Specification, Charge II, the evidence adduced in corroboration of accused's pleas of guilty omits any showing that the statements were made to "Major M. L. Tush, FD," as alleged. Since the record of trial presents no suggestion that the pleas of guilty were improvidently made, the omission was clearly immaterial.

4. The charge sheet shows that accused is 39 years of age; that he served enlistments from 15 March 1924 to 14 March 1927, from 22 March 1927 to 2 June 1939 and from 3 June 1939 to 13 January 1943, and was commissioned first lieutenant 14 January 1943.

5. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence. Dismissal of

an officer is mandatory upon conviction of a violation of Article of War 95 and authorized upon conviction of a violation of Article of War 96.

(SICK IN HOSPITAL) Judge Advocate

Malcolm C. Sheiman Judge Advocate

B. L. Kinsey Jr. Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 JUN 1945
TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of First Lieutenant HARRY E. EVANS (O-885852), CMP, 295th Military Police Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10364. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10364).

E. C. McNEIL,
Brigadier General, United States Army,

Assistant Judge Advocate General.

---

( Sentence ordered executed. GCMO 225, ETO, 26 June 1945.)

(247)

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

16 AUG 1945

CM ETO 10375

| | |
|---|---|
| U N I T E D S T A T E S | 3RD INFANTRY DIVISION |
| v. | Trial by GCM, convened at Bad Kissingen, Germany, 13 April 1945. |
| Private FRANCISCO R. DIAZ (38440587), Battery A, 41st Field Artillery Battalion | Sentence: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Francisco R. Diaz, Battery "A", 41st Field Artillery Battalion did, at Bad Kissingen, Germany, on or about 8 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Greta Schmitz.

He pleaded not guilty and, two thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the

place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Competent evidence offered by the prosecution shows that accused is a member of Battery "A", 41st Field Artillery Battalion (R75,76; Pros. Ex.B). At about 4 o'clock on the afternoon of 7 April 1945, "when the troops came into town", accused entered a house at 6 Bismarck Strasse, Bad Kissingen, Germany "to examine the rooms". He opened a door on the first floor and entered a room where the prosecutrix, Mrs. Greta Schmitz was sitting. "He also wanted to see the second floor" and Mrs. Schmitz and a "Miss Klarwen" went upstairs with him. After looking around, accused departed (R31-33,66,67,78). At about 1:00 am the following morning, a number of the occupants of this same house "were all sitting down in the cellar", because of fear of airplanes, when accused came to the door. He said he wanted "to see the rooms". Accused was carrying a flashlight in one hand, and in the other a gun which he manipulated, taking out a bullet which he displayed. After instructing all to remain in the cellar, he left escorted by Mrs. Gertrude Fuller who took him upstairs and showed him a few rooms, including one occupied by prosecutrix and her 10-year old daughter, Erica. The mother and child were in bed and a candle was burning. Accused looked in, then closed the door to this room, and said to Mrs. Fuller, who spoke English, "OK, come back with me to the cellar". They went down, and Mrs. Fuller thought he had gone away (R18-29, 30,34,61,68). However, accused returned to the room of Mrs. Schmitz (R61, 68).

Mrs. Schmitz testified that accused opened the door and, with his gun pointed at her and a flashlight in his left hand, came toward her bed. The candle was burning next to the bed in which she was lying with her daughter. She inquired of accused whether she was to go to the cellar and was told to "sleep, sleep". Thereafter, he went to her bed, sat down on the side and extinguished the light. He next pulled her blouse open, lowered her brassiere, and put her "breasts into his mouth". He commanded her to take off her pants and drawers. She complied (R34-39, 42-44,58,61,62). After further sex acts, which included the manipulation of accused's penis by Mrs. Schmitz "so long until he was satisfied" because he took her hand and made her understand, and also included the entry by accused of his gental organ into her mouth, he had sexual intercourse with her three times, all against her will (R37-39,63). He remained lying on her for about 20 minutes, during which time his gun was lying across her body between her and accused (R54,57). After this, accused got up, pointed his gun at Mrs. Schmitz, said something about an infantry soldier sleeping there, and departed (R40). The prosecutrix dressed herself a little and went to the group in the cellar. She was excited and crying and fell down on the floor, calling aloud the name of "Greta" her cousin. This was, about half to three-quarters of an hour after accused had "evidently", to those in the cellar, made his departure from the house (R21,41,80,81). Mrs. Schmitz testified that when accused had his mouth to her breasts, she was afraid. At that time, Erica her

daughter asked "what is he doing with you" and she answered: "He is biting me". At the point where accused told her to take off her pants, she at no time consented to what he was doing (R36,37). She remained because of her fear since "he threatened with a gun". She also said that when accused entered her room she "was petrified for fright and could hardly move" (R36); she wanted to resist but he always threatened with his gun; she pushed against him with her hands when he was on her but he was too heavy to remove; and she always wanted to push him off (R39,46-48). At the time the sexual act occurred, she had her arms down, he was lying on them, and she made no further effort to resist with her hands, limbs or pelvic muscles (R51). The prosecutrix contended that during the intercourse for 20 minutes, "the carbine must have laid like this /diagonally/ across me" (R45), between her body and that of accused who was lying on top of her. She felt the pressure, but due to fear, she did not experience pain from the carbine (R54,55). With respect to resistance at the time of the sexual act, she said that after "he had done all this to her", she had to submit to that also, thinking; "Well, after this it will be all over". There was no physical violence done to her person (R53). When the act of penetration occurred she "didn't want to but then he took my hand and made me to guide him" (R52,53). She made no outcry because of "fear fright and horror". Asked if her real motive for not crying out was that she did not want her child to know what was happening, Mrs. Schmitz said that she was afraid of that, having always been careful that the child knew nothing "of this type", but that she permitted him to have his way and "was unable to resist in the sense of resisting" because of fear (R48-50).

Erica, the ten-year old daughter of Mrs. Schmitz, testified under oath. She corroborated her mother in part. She saw accused by the candle light when he entered the room where she and her mother were in bed. He was carrying a gun with the muzzle pointing forward and said, in a "brisk way", in answer to her mother's query if they should go to the cellar: "No, here sleep, sleep". According to her, accused extinguished the candle, sat down on the side of the bed, opened her mother's blouse and bit her. When sitting on the bed, he moved, "shaking to and fro". The little girl asked her mother whether she should call for help, and was told "no because otherwise he'd shoot us". She further described what she knew of accused's movements in the bed by saying: "He once moved down a little bit" from the center of the bed where he had been sitting. When she wanted to get help the accused, she said, restrained her by putting "his arm more tight to her". She at no time felt accused's gun (R66-74).

Accused voluntarily made a signed written statement, dated 11 April 1945, for the investigating officer. In this statement he said he "went to that house to get laid". He went in the room in question, put his gun down and sat on the bed. He was unable to converse with the

prosecutrix to find out if she desired intercourse. So he started to fondle her breasts. According to him, she said nothing so he continued and shortly thereafter, she joined him in sex play, cooperated, and finally assisted him in placing his penis in her person. He stated that if she had refused him intercourse, he would have left the house (R75,76; Pros.Ex.B).

4. Advised fully as to his rights as a witness, he elected to make an unsworn statement by defense counsel and also to take the stand as a witness under oath (R92,93). The unsworn statement consisted of an abstract of accused's Form 20 and service record. This showed that he was 20 years old, had had but one year of high school education before entering the Army in 1943, and that his Army General Classification Test Score was 72. He was inducted at the age of 18. He arrived at Anzio in February 1944, fought to Rome, made the landing in Southern France, and participated in all the ensuing fighting. He has never been absent without leave, nor missed any duty because of his misconduct. On the stand, accused told substantially the same story as thatfound in his statement, only in greater detail. It was the same story of seduction and complete cooperation by prosecutrix (R93-119). He said that when he asked the prosecutrix for intercourse, she replied in German that she did not understand so "I just took my chance. I played with her tits. She let me do it and I thought she was willing" (R100). He again said that if she had refused he would have gone out (R101).

The defense introduced a report by the division neuro-psychiatrist of his examination of accused. He found accused subdued and cooperative; a substrate review "justified no presumption of psychoneurotic, psychotic or psychopathic tendencies"; and his mental age (Kent Test) was 11 years.

5. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par.148b, p.165).

The testimony of the prosecutrix indicated the presence of each of these elements. There was penetration, force and lack of consent. There is a difference between submission and consent.

> "The term 'by force' does not necessarily imply the positive exertion of actual physical force in the act of compelling submission of the female to the sexual connection; but force or violence threatened as the result of noncompliance, and for the purpose of preventing resistance, or extorting

> consent, if it is such as to create a real apprehension of dangerous consequences, or great bodily harm, or such as in any manner to overpower the mind of the victim so that she dare not resist, is, and upon all sound principles must be, regarded, for this purpose, as in all respects equivalent to force actually exerted for the same purpose" (44 Am.Jur.sec.5, p.904).

In this case, the prosecutrix testified to fright and fear that accused would shoot, which fear, if real, excused the absence of a more vigorous resistance on her part.

The accused, on the other hand, testified to acts of cooperation which, if voluntary, might well, under normal circumstances, have justified him in the belief that he had seduced the woman and that there was consent. The prosecutrix herself corroborated in part accused's claim that she cooperated in certain acts during the period preparatory to the intercourse. These admissions did not destroy the prosecution's case. If consent gained through fear of bodily injury is void so as to make the act rape, then acts of cooperation performed as a result of the same fear may be disregarded as evidencing consent. The prosecutrix contended that she was powerless to refuse to cooperate. Certainly she did not admit that she volunteered cooperation. What she did followed the command of his voice or of his hand.

Under ordinary circumstances, as stated, the general conduct of the prosecutrix might have justified the accused in assuming the existance of consent. But the circumstances here were not ordinary. This accused had no right to such an assumption. A man who enters a strange house, carrying a loaded rifle in one hand is not justified in believing that he has accomplished a seduction with the other hand.

It was the sole function of the court to determine whether the prosecutrix was telling the truth. If it believed her story, as it evidently did, there was before the court credible evidence which establishe every element of the offense of rape, and the findings of guilty may not be disturbed by the Board (CM ETO 1953, Lewis).

6. The charge sheet shows that accused is 20 years of age. He was inducted 12 May 1943, without prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

(252)

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a United States penitentiary is authorized upon conviction of the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars.1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

CM ETO 10402

26 MAY 1945

| | |
|---|---|
| U N I T E D S T A T E S | 3RD ARMORED DIVISION |
| v. | Trial by GCM, convened at Bickendorf, Germany, 13 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Private WILLIAM J. WOLF (6946321), Headquarters Company, 2nd Battalion, 32nd Armored Regiment (attached to Company E, 36th Armored Infantry Regiment) | |

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and specifications:

CHARGE: Violation of the 58th Article of War.

Specification 1: In that Private William J. Wolf, Headquarters Company 2nd Bn., 32nd Armored Regiment (attached to Company E 36th Armored Infantry Regiment), did, in the vicinity of Hastenrath, Germany, on or about 4 December 1944, desert the service of the United States by absenting himself without proper leave from his company, with intent to avoid hazardous duty, to wit: Combat against the German Army; and did remain absent in desertion until he surrendered himself on or about 17 January 1945.

Specification 2: In that * * * did, in the vicinity of Cherain, Belgium, on or about 18 January 1945, desert the service of the United States by absenting himself without proper leave from his company, with intent to avoid hazardous duty, to wit: Combat against the Germany Army; and did remain absent in desertion until he surrendered himself on or about 24 January 1945.

He pleaded not guilty and, three-fourths of the members of the court present when the vote was taken concurring, was found guilty of both specifications and the Charge. No evidence of previous convictions was introduced. Three-fourths of the members of the court present when the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. The prosecution's evidence shows that accused is a member of the 32nd Armored Regiment and had been attached for temporary duty to Company E of the 36th Armored Infantry Regiment (R12) about 24 or 25 November 1944 (R15,18) and was assigned as a rifleman, third platoon, armed with an M1 rifle (R8,15,20). The company was in reserve in Hastenrath, Germany on 4 December 1945 and on that evening was ordered to move to Langerwehr, a captured town on the front line two or three miles distant (R6,10). They were put on a one hour alert (R7) at three or four o'clock in the afternoon (R16,17,18). Accused was personally told of the alert and ordered to get ready to move but when they moved that night he was missing (R12,17,18,21). Search failed to locate him (R19). He had no permission to be absent (R13,14) and remained absent without leave from 4 December 1944 to 17 January 1945 during which time the unit was in contact with the enemy and suffered casualties (R14,19).

On 18 January 1945 the company was in contact withthe enemy, holding a hill just east of Cherain, Belgium (R7). Accused was back at the kitchen, was sent for and taken up to the front line. He had returned to duty the day before. He stayed up in front about an hour when he again left without permission (R13,14,19) and did not return until 22 or 23 January at Mean, Belgium, in a rest area (R18,19,20). The unit had been subjected to mortar, small arms and artillery fire from 18 to 20 January when they were

relieved (R14,19). Reinforcements for the company had been called for on 18 January as the company had been reduced by casualties to a fighting strength of 13 men (R19). When accused returned on 23 January, he mentioned that he had no training with an M1 (R15) but had never previously mentioned that fact even to those of his unit billeted in the same house (R17).

The court accepted in evidence an oral stipulation between the prosecution and defense that accused had surrendered himself to his unit on both the 17th and 24th of January 1945. Entries concerning the accused as shown by an extract copy of the morning report of Company E, 36th Armored Infantry Regiment for December 1944 and January 1945 were received in evidence without objection (R21). Under date of 6 December 1944, it shows accused from duty to absence without leave as of 4 December 1944 and under date of 17 January 1945 it shows his return to duty on that date. Under date of 22 January it again shows him from duty to absence without leave on 18 January and his return to duty on 24 January (Pros.Ex.A).

4. For the defense there was read into the record a communications from the Commanding General of the First United States Army, not dated, to the effect that Division Commanders will not accept replacements who have not fired the individual weapon with which they are armed, and also a letter dated 27 December 1944 to the same effect (R22).

Defense counsel announced that the rights of accused had been explained to him, and at his own request he was sworn and testified that he enlisted in 1939, requested to be put in a tank outfit and received such training but had never received any infantry training or any training with the M1 rifle. He was assigned to the 32nd Armored Regiment but as the tanks were filled up he was put on a supply truck. He went to the 36th Armored Infantry Regiment "around the 17th of December I think" (R25) as a "57" gunner which was all right as he knew that gun but when he got there he was made a rifleman although he informed them he had no training as such. Nothing was done. He testified he wanted to go back in a tank outfit but would fight in the infantry if given the training (R26). He had never fired an M1 or received any instructions on it (R27) nor did he make any effort to learn anything about the M1 rifle after he found he was to be armed with one (R28).

5. The undisputed evidence clearly shows that accused absented himself from his unit without authority when they were about to engage in combat with the enemy on 4 December. He says he "thinks" he joined the unit on the 17th of December. He returned on 18 January to his unit but finding it in combat, left

after an hour's stay, again without authority and did not return until his unit had gone back to a rest area. His defense is that by direction of higher authority, replacements who had not fired the individual weapon with which they are armed should not be accepted and he claims he informed them that he had had no infantry training when he was assigned as a rifleman. The evidence also shows that accused has been in the army since 1939 and must of necessity have learned the duties of a soldier. The communications by which he attempts to excuse himself were apparently made in the latter part of December while accused's first offense occurred on the 4th of December. The prosecution's evidence is that he never made any statement of lack of training with a rifle until his return to his unit on 24 January 1945 after two unauthorized absences, one of a month and a half and both under circumstances that compellingly indicate a purpose to avoid the hazardous duty of combat with the enemy. The directive to the division commanders could in no way excuse accused from his assigned duty under the circumstances shown. Winthrop (Reprint, 1920, pp.571,572) states that "Obedience to orders is the vital principle of military life" and that the "obligation to obey is one to be fulfilled without hesitation", adding that, "nothing short of physical impossibility ordinarily excusing a complete performance" is an excuse. The accused produced no evidence in support of the defense inference that he was psychologically or physically unfit or unable to do or perform the task assigned (CM ETO 5167, Caparatta; CM ETO 4622, Tripi). The evidence fully supports the court's findings of guilty.

6. The charge sheet shows accused to be 24 years of age. He enlisted 28 March 1939 at Harrisburg, Pennsylvania, without any prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (AW 42; Cir.229, WD, 8 June 1944, sec.VI, pars.1b(4), 3b).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

28 JUL 1945

CM ETO 10413

| | |
|---|---|
| U N I T E D S T A T E S | DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| Second Lieutenant HAROLD G. SHIPLEY (O-1317996), Detachment of Patients, Third General Hospital | Trial by GCM, convened at Marseille, France, 31 January 1945. Sentence: Dismissal |

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater.

2. Accused was tried upon the following Charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that 2nd Lt. HAROLD G. SHIPLEY, Detachment of Patients, Third General Hospital, (then a member of Company M, 65th Infantry Regiment), did, at Callahan Beach, France, on or about 8 October 1944, wrongfully neglect his duty as officer in charge of boat unloading detail by permitting cargo to be pilfered.

Specification 2: In that * * * did, at Callahan Beach, France, on or about 8 October 1944, drink intoxicating beverages while on duty to the prejudice of good order and military discipline.

He pleaded not guilty to, and was found guilty of, the Charge and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service. The reviewing authority, the Commanding General, Delta Base Section, Communications Zone, European Theater of Operations, approved the sentence, and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, stating that it was wholly inadequate punishment for an officer guilty of such grave offenses, and that in imposing such meager punishment the court reflected no credit upon its conception of its own responsibility, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence presented by the prosecution was substantially as follows:

First Lieutenant Johnnie C. Koon was officer of the day and First Lieutenant Robert H. Fetterly, officer of the guard for the 6th Port Area, Marseille, France, on 8 October 1944 (R6,18). Acting on a report about 1400 hours on that date, they proceeded to Callahan beach to investigate an alleged disturbance (R6,7,19). They boarded a ship, the "Zed 3", where a detail of Puerto Rican soldiers from the 65th Infantry Regiment, commanded by accused, who was not present on the vessel, "were going through some of the merchandise" and putting it in their pockets (R7,12,21,26). There were broken boxes of rations and empty whiskey cases scattered about the ship and also on the beach (R7,11,15,17,21). There was no supervision of this detail at the time; some of the men were on the boat, some were on the beach and the vessel was not being unloaded (R11). A military policeman on guard at the beach had been unable to stop the pilfering that was taking place (R13,20,21). They "ran the men off of the boat" and went to find out who was in charge of the men (R7,11).

They first met accused about 100 feet from the ship, walking away from it. He said he was the officer in charge of the unloading detail (R8,12). He was not asked where he was going and these officers did not know if part of his detail was in that direction (R15). Accused was then told to form his detail and he had his sergeant do so (R9,14,19). He then gave them a command which faced them the wrong way, and in Lieutenant Fetterly's opinion, this was due to the fact that accused had been drinking (R9,10,15,19,20). The detail numbered about 60 soldiers (R22,25) and when they were searched various quantities of sugar, herring, pork sausage, Vienna sausage, salmon, sardines, cheese, emergency rations, cigarettes, and biscuits were found on their persons (R8,9). Two bottles of whiskey were found nearby in a raincoat (R9,16) and some empty whiskey bottles were found on the beach (R11,21). Lieutenant Fetterly was left in charge of the Puerto Rican soldiers and Lieutenant Koon took accused to the Provost Marshal, where he reported his findings (R10). Accused

did not appear to have full control of his thinking and, from his actions and the way he walked, Lieutenant Koon formed the opinion that he was under the influence of liquor (R8,19). Accused's speech was thick, his gait not steady and his breath smelled of liquor (R17,19,24). Lieutenant Fetterly also was of the opinion that accused was drunk (R19).

4. Accused, after his rights as a witness were fully explained to him (R29), was sworn and testified in substance as follows:

On the evening of 7 October 1944 he was ordered to report to some railroad place with 75 enlisted men for a labor detail. When he first reported to Callahan beach with his men, there was nothing for them to do. About 1030 hours, they were assigned to a ship. Inasmuch as this detail only required about 35 or 40 men, he split his group in half, arranging for two-hour reliefs. He did not receive any instructions with reference to unloading the vessel and when he first boarded it, he observed considerable cases broken open. Never having unloaded a barge before, he did not think it necessary to report his findings. He placed Staff Sergeant Carrasquillo in charge of the men working on the barge and instructed both him and the men not to take any of the rations. Half of the men were working on the barge and half were resting on the beach, near the beach control point, about 75 to 100 yards away. He was supervising work on the barge and on the beach, going back and forth between the two groups. In the past, his gait has been criticized and when he appeared before the officer candidate school board they at first did not believe him when he told them this was his normal manner of walking. He was not drunk, but between 1130 and 1430 hours he did have four drinks of whiskey with an American non-commissioned officer of the ship's crew. At the time the two military police officers arrived, he was going from one of his details to the other, preparatory to relieving the group that was working with the one that was resting (R30-33,39). On cross-examination, he stated that he did not know it was wrong to drink while on duty. His men carried their own rations when they started out that morning and he did not hear anyone authorize them to take rations from the barge, although he understood some officer did give them this permission (R34-36). The British were unloading the whiskey from the vessel and he did not see any any of his men with liquor in their possession, although later on he did see a bottle of whiskey under the raincoat of one of his men (R35,36). He drank the whiskey because it was so cold but he knows he was not drunk and he had full control of his senses (R34,36). He consumed the drinks he had in the living quarters of the crew out of sight of the members of his detail (R38). It was necessary to check the men who were resting on the beach to prevent them from wandering around the area (R37). Before going on the barge he talked with the officer at the control point, but he was not given any instructions about pilfering. He does not know whether the liquor he was drinking was stolen from the ship (R38,39).

Staff Sergeant Carrasquillo, the non-commissioned officer in charge of the unloading detail, testified substantially as follows:

(260)

On 8 October 1944 he was in charge of a detail working on the ship. They began working about 1000 or 1030 hours and had some field rations for lunch. When they first boarded the barge there were broken boxes of rations on it, and the military police told the men they could eat some of the canned meat that was on the ship. The group of enlisted men were divided into two details and he saw accused going off and on the barge visiting both sections during the course of the day. In his opinion, accused was not drunk and he was performing his duty as officer in charge of the unloading detail. Accused had ordered the men not to steal rations but it was impossible to watch everyone all of the time, or to search all of them as they left the barge (R40-43).

It was stipulated by the prosecution and defense counsel that if Lieutenant Colonel Ceasar Corgar, Commanding Officer of the 3rd Battalion, 65th Infantry, were present, he would testify that in his opinion, over a period of observation of the accused, he would mark accused "Excellent" and that his efficiency as an officer was "Good" (R39).

5. The record of trial contains uncontradicted evidence that the members of accused's detail pilfered substantial quantities of the rations they were unloading from the barge, and that he was not present on the ship where the main part of the unloading operation was taking place. From these facts and the other circumstances established by the evidence, together with his own admission that he consumed four drinks of whiskey, the court could properly infer that he wrongfully neglected his duty as officer in charge of the unloading detail as alleged in Specification 1 of the Charge.

Concerning Specification 2 of the Charge, the testimony of the two military police officers, describing accused's condition at the time alleged is corroborated by his admission that he had four drinks of whiskey with an American non-commissioned officer of the ship's crew. Accused's conduct in drinking such intoxicating liquor, while engaged in the serious mission of unloading critical supplies was clearly a disorder and neglect to the prejudice of good order and military discipline (MCM, 1928, par. 152a, p.187).

Accused's contention that he was supervising the work by going back and forth between the two groups, and that he felt it was necessary to do this to keep the section that was resting on the beach from wandering around the area raised an issue of fact for the exclusive determination of the court. The court by its findings resolved this issue against accused and its determination is amply supported by the evidence.

6. Accused is 25years, two months of age, was inducted 7 October 1942 and commissioned a second lieutenant in the Infantry in April 1943. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. A sentence of dismissal is authorized upon conviction of an offense in violation of Article of War 96.

Judge Advocate

Judge Advocate

Judge Advocate

(262)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater. 28 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Second Lieutenant HAROLD G. SHIPLEY (O-1317996), Detachment of Patients, Third General Hospital, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10413. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10413).

E. C. McNEIL,
Brigadier General, United States Army.
Assistant Judge Advocate General.

---

( Sentence ordered executed. GCMO 320, ETO, 11 Aug 1945)

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3 19 JUL 1945

CM ETO 10414

| | |
|---|---|
| U N I T E D S T A T E S ) | IX TACTICAL AIR COMMAND |
| ) | |
| v. ) | Trial by GCM convened at APO 595, U. S. Army, 8 March 1945. Sentence: Dismissal and total forfeitures. |
| ) | |
| Captain WOODROW HOPKINS ) | |
| (O-885226), Headquarters ) | |
| and Headquarters Squadron, ) | |
| IX Tactical Air Command ) | |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review which submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War

Specification: In that Captain Woodrow Hopkins, Headquarters and Headquarters Squadron, IX Tactical Air Command, did, without proper leave, absent himself from his station at Site A-87 from about 20 January 1945 to about 4 February 1945.

He pleaded guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, IX Tactical Air Command, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence though deeming it wholly inadequate for an officer guilty of such grave misconduct, and withheld the order directing the execution thereof pursuant to Article of War 50½.

3. On 20 January 1945, accused was to fly an "L-5" from Site A-87 to Site A-93 (R7). He did not arrive at Site A-93 on the 20th or 21st. On the 22nd accused's immediate superior officer flew to Site A-87. Accused was not present. The "L-5" was then flown to Site A-93 by another pilot (R8). Accused had no permission to be absent (R8,9). A duly authenticated extract of Morning Report (maker not shown) of 4 February 1945 showing accused from "AWOL to duty, 1500" was introduced into evidence without objection (R10; Pros.Ex.1).

Accused was "quite amiable" with other officers. The quality of his service was "quite favorable" as was his willingness to perform duties (R10).

4. After his rights as a witness were explained (R11) accused testified that his father was away from home most of the time; his mother, partially blind; his sister, an invalid. His was the responsibility of the family. He stopped school at sixteen, worked as a truck driver and clerk, and then entered the "C.C.C." for a year. This completed, he worked as a grocery clerk and finally for General Motors Corporation until he joined the "RAF". While with General Motors he completed night school and took courses in navigation, meteorology, and others pertaining to flying. He joined the "RAF" in the latter part of 1940 and arrived in England in April, 1941. He flew on "shipping attacks", "air defense", "Air-Sea Rescue" and "shipping reconnaissance". He transferred to the American Air Force in September 1942. He served

as a gunnery instructor for a year and received a commendation for his work. He "participated in the British exercises as an observer for IX Tactical Air Command before the invasion and approximately for ten days". He was liaison officer in the movement of aircraft to the continent after D Day. During that time he was given a four day leave to marry an English girl he had known for two years. In July 1944 he was granted leave to the States because of his mother's serious illness. He returned to England in October and saw his wife for one night. She was very upset about his stay in the States. He returned to his unit and had nothing to do for about three weeks. Finally he got on the flight line as a co-pilot in a C-47 which kept him fairly busy and enabled him occasionally to see his wife who was ill. Shortly after Thanksgiving he learned his mother had died. Contemplating moving to Site A-93 he was checked out in a "UC-78" which unfortunately dropped him to the category of a "UC-78" pilot. There was nothing much to do. His rotation chances were nil. He was receiving no mail. He "felt pretty fed up and hopeless". On 20 January 1945 he threw his bags on a plane going to England. Arriving in England he decided to "take the easy way out". He met an old friend who straightened him out. He returned to "face whatever came about" (R11-14).

Proceedings of a Medical Board were introduced. Extracts therefrom follow:

> "It has been observed that for the past three months 'Captain Hopkins has become progressively more introspective, tense, depressed and generally unhappy * * *'".
>
> "From the forwarded medical history and from Captain Hopkins' descriptions it is the opinion of the Central Medical Board that Captain Hopkins was suffering from a situational depression at the time he proceeded to the U.K. without leave. The depression was probably not of psychotic proportions but there were definite suicidal ruminations. The external factors producing his depressed state were chiefly the death of his mother and a complicated marital situation. An additional factor was lack of meaning for him of his assignment".

"Diagnosis:
(1) No psychosis existed or exists.
(2) Situational depression; moderately severe; now partially subsided"
(R14-15; Def.Ex.1).

5. The record of trial supports the findings of guilty

6. All of the members of the court, except one who was absent on leave, signed a recommendation for clemency, which is attached to the record of trial.

7. The charge sheet shows that accused is 29 years four months of age and "entered on active duty" 25 September 1942. No prior service is shown.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. The penalty on conviction of absence without leave is such as a court-martial may direct (AW 61).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B L Levy Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 19 JUL 1945
TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Captain WOODROW HOPKINS (O-885226), Headquarters and Headquarters Squadron, IX Tactical Air Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10414. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 10414).

E. C. McNEIL
Brigadier General, United States Army
Assistant Judge Advocate General

---

( Sentence ordered executed. GCMO 618,USFET, 4 Dec 1945).

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

26 JUN 1945

CM ETO 10418

| | |
|---|---|
| U N I T E D S T A T E S | CHANNEL BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| First Lieutenant DAVID BLACKER (O-1281175), Finance Department, 81st Finance Disbursing Section | Trial by GCM, convened at Antwerp, Belgium, 1 March 1945. Sentence: Dismissal and total forfeitures. |

---

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant David Blacker, 81st Finance Disbursing Section, did, at the 81st Finance Disbursing Section, Keerbergen, Belgium, on or about 5 November 1944, wrongfully exchange one hundred thousand (100,000) francs, lawful money of France, for eighty-eight thousand (88,000) francs, lawful money of the Kingdom of Belgium.

10418

(270)

Specification 2: (Finding of guilty disapproved by confirming authority)

Specification 3: In that * * * did, at the 81st Finance Disbursing Section, Keerbergen, Belgium, on or about 22 November 1944, wrongfully exchange two hundred thousand (200,000) francs, lawful money of France, for one hundred seventy-six thousand (176,000) francs, lawful money of the Kingdom of Belgium.

CHARGE II: Violation of the 95th Article of War. (Finding of not guilty).

Specification: (Finding of not guilty).

He pleaded not guilty and was found guilty of Specifications 1 and 2 of Charge I, except, in each case, the word "Keerbergen", substituting therefor the word "Antwerp", of the excepted word not guilty, of the substituted word guilty, guilty of Specification 3 of Charge I and of Charge I and not guilty of Charge II and its Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, Channel Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, disapproved the finding of guilty of Specification 2 of Charge I, confirmed the sentence, though deemed wholly inadequate punishment for an officer guilty of such grave offenses, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The prosecution's evidence, which in material respects was uncontroverted and which included two voluntary pretrial statements of accused (R24; Pros.Exs. 2,3), was substantially as follows, with respect to Specifications 1 and 3, Charge I:

For about 13 months from November 1943, accused was Assistant Disbursing Officer of the 81st Finance Disbursing Section (R6), (which moved to the continent from England about 15 August 1944, to Antwerp, Belgium, about 25 October, and to Keerbergen, Belgium, on 22 November (R30)). As such, his duties included handling cash and reporting irregularities (R6-7).

On about four different occasions prior to 5 November 1944, Staff Sergeant Morris Lechinsky, 245th Quartermaster Depot Supply Company, stationed at Antwerp, came to the finance office where accused was on duty, with sums ranging from 50,000 to 400,000 French francs and exchanged them for Belgian francs (R10-11; Pros.Ex.2).

On 5 November, Lechinsky brought to the fihance office 100,000 French francs to be exchanged for Belgian francs. Accused was suspicious because of his previous exchanges and asked him where he was getting such large sums of French francs, to which Lechinsky replied either that they belonged in part to "members of various Army units" and in part to himself, according to accused's statement (Pros.Ex.2), or that he won the money through gambling, as Lechinsky himself testified (R18). Accused delivered to him 88,000 Belgian francs in exchange for the 100,000 French francs and Lechinsky paid accused 5000 Belgian francs for making the exchange (R21; Pros. Ex.2). Lechinsky testified that he "bought" these French francs at the rate of 100 for 60 Belgian francs, which was 28 Belgian francs below the regular official rate of exchange, to which extent he profited (R20-21).

About the middle of November, accused arranged, with the aid of Lechinsky, to issue Belgian francs in exchange for between 200,000 and 210,000 French francs to be obtained from a civilian woman (R8-9; Pros.Ex.3). About 19 November, Lechinsky brought the money to the finance office and advised accused he had arranged to receive from the woman 40 Belgian francs for each 100 French francs exchanged, as payment for the transaction. Accused made the exchange, delivering to Lechinsky an undisclosed number of Belgian francs (R9-10,14; Pros. Ex.3). Accused received "30%" or approximately 62,000

Belgian francs and Lechinsky received "10%" or 21,000 Belgian francs, as their respective shares of the premium for the exchange (R9-10,22; Pros.Ex.3).

Over objection by the defense, the court took judicial notice ( R24-25) of Administrative Memorandum Number 35, Supreme Headquarters, Allied Expeditionary Force, 25 October 1944, entitled "Transactions in Currency and Foreign Exchange Assets", prohibiting, among others, allied military personnel in liberated territory from participating in transactions involving the purchase, sale or exchange of any currency against any other currency, except through authorized agencies (par.2b), and from participating in the transfer of any currency against any other currency on behalf of persons not belonging to the Allied Forces in liberated or occupied territory (par.2e).

4. The defense introduced testimony of finance officers to the effect that no copy of the above mentioned memorandum was ever received by the Finance Office (R28), that the United States Government lost no money as a result of accused's exchange transactions (R29), and that, although accused handled millions of dollars in pounds and francs, his conduct and work were excellent (R29-32). He was efficient, honest and duteous and his present and former commanding officer would have been willing to have him in their respective commands (R29,31).

After an explanation of his rights, accused elected to remain silent (R32). The defense, both after the prosecution completed its case (R27) and at the end of all the evidence (R33), made a motion for findings of not guilty of Specifications 1, 2 and 3 of Charge I, which was denied.

5. a. Accused, an officer of an Army Finance Office located in Belgium, was charged in Specifications 1 and 3 of Charge I with wrongfully exchanging large amounts of French francs for large amounts of Belgian francs on two separate occasions in November 1944, each of which took place at that Finance Office. The presence of the word "wrongfully" in each specification was sufficient to put him on notice that the exchanges were

alleged to have been effected under improper circumstances so as to be prejudicial to good order and military discipline or to constitute conduct of a nature to bring discredit upon the military service (Cf: CM 226512, Lubow (1943), 15 B.R. 105, II Bull, JAG 17; and CM ETO 8458, Penick). It is common historical knowledge and thus a proper subject of judicial notice (MCM, 1928, par.125, p.135; CM ETO 6226, Ealy) that at the time of these exchanges the currency situation in liberated and occupied countries in Europe was delicate, if not precarious, partially as a result of the fact that the United States Government, after the invasion of the continent, put into circulation millions of dollars worth of local currency for the payment of its military and other personnel. This was undoubtedly an important factor in the fixing of the official exchange rate between such currencies and United States money (Cf; CM ETO 8187, Chappell). Accused was charged as an Army finance officer with the responsibility, among others, of effectuation of the Government and the Army policy which sought to aid in stabilizing local currencies and thus of effecting exchanges of currencies only under proper circumstances. He was also bound to use the facilities of the Finance Office only for authorized, official transactions. The word "wrongfully" may reasonably be construed to mean under improper circumstances in the light of the general situation with regard to European currencies, of accused's position and of the place where the exchanges were made. The specifications thus state offenses in violation of Article of War 96. It was not essential to allege that accused profited by either exchange (CM ETO 7553, Besdine) or that either violated any official directive (Ibid.; Williams v. United States, (1897), 168 U.S. 382,389, 42 L.Ed. 509-512; CM ETO 2005, Wilkins and Williams).

The undisputed evidence established that on two separate occasions at the finance office where he was on duty, accused effected exchanges of French francs presented by Lechinsky in the amounts respectively alleged for Belgian francs issued from that office. The failure of the evidence to show the amount of Belgian francs issued in the second exchange (Specification 3, Charge I) is immaterial as it showed clearly that a substantial amount thereof was issued in the transaction. The allegation that accused exchanged French francs for Belgian francs is sustained by the evidence that he became a party to Lechinsky's exchange thereof in each instance by accepting a portion of the

(274)

Belgian francs involved therein as a reward for effecting the same and on the second occasion by accused's prearranging the exchange on behalf of a civilian.

Accused took full advantage of his position as Assistant Disbursing Officer in a local Army Finance Disbursing Section and of the consequent high degree of trust and confidence reposed in him, to use the official exchange facilities, necessarily available to him for the performance of his official duties, in effectuating sizable exchanges of French francs for Belgian francs under admittedly suspicious circumstances in the case of the first exchange (Specification 1, Charge I) and with full knowledge of the extra-official character of the second, which was for a civilian (Specification 3, Charge I). His awareness of the highly irregular nature of the transactions is made manifest, if indeed it were to be doubted, by his acceptance of substantial amounts of the identical Belgian francs issued at his direction, as a reward or premium for effecting the exchanges. His conduct was of a pattern resembling that condemned by Section 89, Federal Criminal Code (18 USCA 175) in the following pertinent language:

> "Every officer or other person charged by any Act of Congress with the safe-keeping of the public moneys, who shall loan, use, or convert to his own use, or shall deposit in any bank or exchange for other funds, except as specially allowed by law, any portion of the public moneys intrusted to him for safe-keeping, shall be guilty of embezzlement of the money so loaned, used, converted, deposited, or exchanged, and shall be fined in a sum equal to the amount of money so embezzled and imprisoned not more than ten years (R.S. sec. 5490; Mar. 4,1909, c.321, sec.89,35 Stat. 1105)" (Underscoring supplied).

See also Section 87, Federal Criminal Code (18 USCA 173) providing in pertinent part:

> "Whoever, being a disbursing officer of the United States, or a person acting as such, * * * shall, for any purpose not prescribed by law, withdraw from the Treasurer or any assistant treasurer, or any authorized depository, or transfer, or apply, any portion of the public money intrusted to him, shall be deemed guilty of * * * embezzlement * * * and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both (R.S. sec.5488; Mar.4, 1909, c.321, sec.87, 35 Stat. 1105)" (Underscoring supplied).

Certainly neither exchange was "specially allowed by law", nor was the purpose of either "prescribed by law", or by official directive. Accused's grave violation of his trust in prostituting the official exchange facilities over which he had control as a finance officer to his own ends was un-questionably not only a disorder to the prejudice of good order and military discipline but was also conduct of a nature to bring discredit upon the military service (MCM, 1928, par.152a,b, pp.167-168).

> "In the discharge of his high trust the law holds a responsible agent * * * to standards of probity and fidelity more lofty than those of 'the market place'" (Fleishhacker v. Blum (CCA 9th, 1940), 109 F(2d) 543,547).

The Board of Review is of the opinion that the findings of guilty are fully sustained by the evidence and that the motion for findings of not guilty was properly denied as to Specifications 1 and 3 (MCM, 1928, par.71d, p.56).

It is unnecessary, in view of the inherently flagrant nature of accused's conduct, to consider the effect of directives issued by the European Theater of Operations (see Ltr., AG 121 Op GA, 23 Sept.1944) or by Supreme Headquarters, Allied Expeditionary Force (see Admin. Memo No. 35, 25 October 1944, and CM ETO 7553, Besdine, and authorities therein cited), prohibiting participation in certain currency exchanges, and both War Department (see Cir.364, WD, 8 Sept.1944) and Theater (see S.O.P. No. 11, Hqs. European Theater of Operations, 31 Aug.1944) directives regulating the exchange of foreign currencies on behalf of personnel attached to

(276)

or representing the United States Government. Suffice it to hold that the evidence indisputably established that accused wrongfully effected the exchanges alleged whether or not they violated any specific War Department or Theater directives (Cf: CM ETO 4492, Shelton,et al).

6. The charge sheet shows that accused is 26 years eight months of age and was inducted 17 July 1941, discharged 1 June 1943, and commissioned a second lieutenant 2 June 1943 after attending the Finance Officer Candidate School. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. A sentence of dismissal and total forfeitures is authorized upon conviction of an offense in violation of Article of War 96.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

BR Jeq.

1st Ind. (277)

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 26 JUN 1945
TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of First Lieutenant DAVID BLACKER (O-1281175), Finance Department, 81st Finance Disbursing Section, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10418. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 10418).

E. C. McNEIL
Brigadier General, United States Army
Assistant Judge Advocate General

---

**( Sentence ordered executed. GCMO 253, ETO, 10 July 1945).**

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

14 JUN 1945

CM ETO 10419

| | |
|---|---|
| U N I T E D S T A T E S | 84TH INFANTRY DIVISION |
| v. | Trial by GCM, convened at Homberg, Germany, 12 March 1945. |
| First Lieutenant BYRON BLANKENSHIP (O-1322673), 334th Infantry | Sentence: Dismissal. |

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 95th Article of War.

Specification: In that First Lieutenant Byron Blankenship, 334th Infantry, did, at Homberg, Germany on or about 5 March 1945, wrongfully fraternize with a German civilian, in violation of Memorandum 84th Infantry Division, dated 23 November 1944, Subject: Fraternization, by having sexual intercourse with one Elizabeth Kirchmann.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the

(280)

time the vote was taken concurring, he was sentenced to be dismissed the service. The reviewing authority, the Commanding General, 84th Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the finding of guilty of the Charge and Specification as involved a finding of guilty of the offense alleged in violation of Article of War 96, confirmed the sentence, and withheld the order directing execution thereof pursuant to Article of War 50½.

3. a. The Specification, charging that accused fraternized with a German civilian in violation of Memorandum, 84th Infantry Division, 23 November 1944, Subject: Fraternization, was drafted on an extremely narrow factual basis. The Specification alleges that accused did

> "wrongfully fraternize with a German civilian * * * by having sexual intercourse with one Elizabeth Kirchmann".

The act of sexual intercourse was clearly proved and is admitted by accused. The question directly presented by the evidence is whether the commission of the act was criminal and therefore not an act of fraternization as heretofore defined by the Board of Review (CM ETO 10967, Harris; CM ETO 10501, Liner; CM ETO 11854, Moriarity and Sberna).

The testimony of the female involved, when given the greatest possible weight, indicates definitely that she engaged in the sexual act freely and voluntarily. If not actually invited by her, as asserted by accused, it was not against her will. Her claim that she acted under the fear that accused would kill her or inflict great bodily harm upon her cannot stand under her admission that he laid aside his pistol after she had solicited him "to get rid" of it. The sexual act then followed. This question was one of fact for the court and the Board of Review is not prepared to say that there is no substantial evidence supporting its conclusion. Beyond that it is not necessary to consider the evidence (CM ETO 1631, Pepper; CM ETO 1554, Pritchard).

b. The Memorandum of the 84th Infantry Division, upon which the Specification is based, defined non-fraternization as:

> "The avoidance of mingling with Germans upon terms of friendliness, familiarity,

or intimacy, whether individually or in groups, in official or unofficial dealings" (Pros.Ex.A).

Sexual intercourse between an American soldier and a German female civilian, voluntarily engaged in by both parties, is clearly an act of "familiarity or intimacy" and is prohibited. Accused's guilt was proved beyond doubt.

c. The action of the confirming authority in approving only so much of the finding of guilty of the Charge and Specification as involves a finding of guilty of the offense alleged in violation of Article of War 96 was proper (CM ETO 4184, Heil; Cf: CM ETO 3303, Croucher). It should be noted that accused was found guilty of an act which was malum prohibitum only, to wit, wrongful fraternization. His sexual act constituted the unlawful fraternization. He was neither charged with nor convicted of an offense involving unlawful sexual intercourse.

4. The charge sheet shows that accused is 29 years 11 months of age and was inducted 5 October 1942 at Camp Joseph T. Robinson, Arkansas, to serve for the duration of the war plus six months. He had prior service with the National Guard for two years, 1939-1940.

5. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty as approved by the confirming authority and the sentence.

6. A sentence of dismissal is authorized upon conviction of an offense in violation of Article of War 96.

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(282)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 JUN 1945
TO: Commanding General, European Theater of Operations, APO 887, U.S. Army

1. In the case of First Lieutenant BYRON BLANKENSHIP (O-1322673), 334th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty as approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. The approving authority, Major General A. R. Bolling, stated in a letter to accused written on 24 April 1945, more than a month after his action approving the sentence, that

> "I considered you one of the most outstanding lieutenants in the entire division * * * When it was alleged that you committed a crime for which you were subsequently tried I was greatly impressed by your honest and true statements * * * In any event if you are returned to duty I would be most pleased to have you as an officer in this command as * * * I am convinced that you have learned a lesson that will prove quite lasting".

Also Lieutenant Colonel R. C. Ewbank, Finance Officer of the 84th Infantry Division attested, in a general letter, to accused's reputation as an efficient and faithful officer in garrison and as an outstanding and fearless leader in combat.

3. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10419. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10419).

E. C. McNEIL
Brigadier General, United States Army,
Assistant Judge Advocate General

(Execution suspended. GCMO 227, ETO, 27 June 1945).

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3 20 JUL 1945

CM ETO 10443

| | |
|---|---|
| U N I T E D S T A T E S | 83RD INFANTRY DIVISION |
| v. | Trial by GCM, convened at Buttgen, Germany, 18 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| Private THOMAS B. MAYS (35793467), Company F, 331st Infantry | |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Thomas B. Mays, Company F, 331st Infantry, did, at or near La Gue, France, on or about 13 August 1944, desert the service of the United States by absenting himself without proper leave from his organization, with intent to avoid hazardous duty, to-wit: Combat with the enemy, and did remain absent in desertion until he was returned to his organization on or about 1 March 1945.

He pleaded not guilty, and two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewihg authority may direct, for the term of his natural life. The reviewing authority, the Commanding General, 83rd Infantry Division, approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 13 August 1944, accused was a rifleman in the first squad of the second platoon of Company F, 331st Infantry (R7,9). During that afternoon the company attacked fortified enemy positions about 200 yards south of La Gue, France, encountering machine gun, rifle, mortar and artillery fire (R8,9). Accused was present for duty with his squad, being lead-off man and the first one to move (R7). The objective was reached at about 4:00 during the afternoon, and more than forty prisoners were taken by the company (R7,10,12). About ten minutes after the objective was reached, a check of the platoon revealed that one man was killed and accused was missing (R7,10). Accused had no permission from his company commander, platoon leader or assistant squad leader to be absent, and he was not present with the company at any time between 13 August 1944 and 1 March 1945 (R7-8,10,12). On 1 March 1945 he was delivered to the provost sergeant of the regimental stockade for confinement in the stockade (R13).

4. On behalf of the defense, Private First Class Harry E. Banchi, Jr., testified that on 13 August 1944 he was squad leader of the second squad of accused's platoon at the time of the attack near La Gue. Before the company reached its objective he was ordered by the first sergeant to take one man who was wounded and to select another man to accompany him as a guard to escort 23 prisoners back to the battalion. The witness selected accused, who was not at the time with his squad because

"after we started taking prisoners in, we all got messed up". Accused accompanied him to the battalion (R13-16).

5. The accused, after his rights as a witness were fully explained to him, elected to remain silent (R16).

6. In rebuttal, the prosecution showed by Private Banchi that accused returned with him the following day, 14 August, to the company command post at La Gue, France, while the company was "laying in position". Banchi did not see accused at any time after that (R17-18). Accused's assistant squad leader, on being recalled as a witness, testified that on 14 August the company was pushing into Parame, France, and moved into the town that night. Accused did not report for duty with his squad, platoon and company on 14 August, and was not with the company at any subsequent time (R18-19).

7. The evidence is undisputed that on either 13 or 14 August 1944 accused disappeared from his company and was not present with the company again prior to 1 March 1945, at which time he was delivered to the regimental stockade for confinement. On 13 August he participated with his company in attacking fortified enemy positions and was under fire from various enemy weapons. He was not seen again by his commanding officer, platoon leader or assistant squad leader. The defense sought to show that on 13 August, at the time he was first missed, accused had gone to the rear under orders of the first sergeant as a guard of a group of newly taken prisoners. The prosecution showed in rebuttal that he returned to his company on 14 August. The defense made no attempt to show that accused was present with the company for duty at any time after 14 August. It was affirmatively shown that on both 13 and 14 August his company was engaged in active combat with, and on the offensive against, the enemy. Whether accused left on 13 August or 14 August is of little or no significance. Under the facts shown the court was clearly justified in inferring and concluding that accused was fully aware of the operations being undertaken by his company and that he deliberately and willfully absented himself from his organization with a then existing intent to avoid combat with the enemy as charged (CM ETO 7413, Gogol; CM ETO 5953, Myers; CM ETO 5293, Killen).

8. The charge sheet shows that accused is 20 years and six months of age and was inducted 11 March 1943 at Cincinnati, Ohio.

9. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

10. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, is authorized (AW 42; Cir.210, WD, 14 Sept.1943, sec.VI, as amended).

B R Keeper Judge Advocate

Valentine C. Sherman Judge Advocate

E. L. Levy Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3

18 AUG 1945

CM ETO 10444

| | |
|---|---|
| U N I T E D S T A T E S | 83RD INFANTRY DIVISION |
| v. | Trial by GCM, convened at Buttgen, Germany, 13 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |
| Private NATHAN MARKOWITZ (42057652), Company E, 331st Infantry | |

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private Nathan Markowitz, Company E, 331st Infantry, did, at or near LaGue, France, on or about 7 August 1944, desert the service of the United States by absenting himself without proper leave from his place of duty with intent to avoid hazardous duty, to wit: Action before the enemy, and did remain absent in desertion until he was returned to his organization on or about 14 February 1945.

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Summary of evidence for the prosecution:

On 7 August 1944, near La Gue, France, accused's platoon was engaged with the enemy, receiving fire and suffering casualties (R7, 11,13). In the morning (R9,14) near noon (R17) accused was told by his platoon leader to report their position (R8) and need for medical aid (R8,11,12,14) to the company commander. After the route was explained to him, accused stated that he felt he could follow the instructions which included returning to his platoon upon the completion of his mission (R8,10). He departed but did not return (R8, 11) although some aid men came up that afternoon (R25). He was not at the company command post that night (R8) and was not present with the company from 7 August 1944 to 14 February 1945 (R9,12,14). On 14 February 1945 accused was delivered to the provost sergeant of the 331st Infantry by a military policeman of regimental headquarters (R14).

Certified true extract copies of the company morning reports for 15 August 1944 and 5 September 1944 were introduced without objection. The copies were authenticated by the acting personnel officer but fail to show the maker of the morning reports. The morning report entry for 15 August 1944 shows accused "MIA" as of 7 August 1944; that for 5 September 1944, from "MIA" to "AWOL" as of 7 August 1944 (R15; Pros.Ex.1,2).

4. Summary of evidence for defense:

After his rights were explained to him, accused testified (R15). On 7 August 1944 his unit (Company E) was engaged with the enemy and suffering casualties (R16,17). About 1700 (R18) his squad leader told him to go for medical aid. With a soldier named Mastronicola, he went about 1000 yards to the rear and secured the medical aid (R16,17). They did not return with the aid men because while at the medical battalion he drank some cider, became sick, and was told by the medics to

"rest up for a while" (R16,18). After about an hour and a half they started back. They were pinned down by fire and so returned to the medical battalion. They received directions to the company command post but were unable to find it. They met a member of the 308th Engineers, then attached to the 331st Infantry, with whom they stayed that night (R16,19). The next day they were unable to find their company but did find Company I, reported to Captain Smith, its Commanding Officer (R16,19), and remained with that company for four or five days until it fell back to a defensive position. Captain Smith told them their company was somewhere near St. Malo and gave them permission to find it (R16,20). At St. Malo they were unable to find the company, whereupon they turned themselves over to military police who told them to go to Cherbourg, which they did by hitch-hiking (R16,20, 22). Arriving there some seven or eight days after leaving their company (R17,22), they turned themselves in to the military police (R16,22) who sent them to a prisoner of war camp (R16,21). There they remained for about two weeks and then were taken to the 19th Replacement Depot which refused to accept them. When the truck drove away, everybody started walking in different directions, so he left, parted with Mastronicola, returned to Cherbourg and remained there until 23 December 1944 when apprehended by military police (R16-18,20,21,23). During this time he lived with troops from other units and for two weeks with a French family (R22). It appears that sometime prior to 23 December 1944 accused surrendered to military police only to "take off" (R21,22).

It was brought out in the examination of prosecution witnesses that a Sergeant Mastronicola was a member of accused's platoon (R10, 12,24). The platoon leader denied sending Mastronicola for medical aid (R10,24-25) but admitted he was missing the next morning (R25). However, another prosecution witness testified Mastronicola was sent for medical aid - by the platoon leader as he recalled (R12).

5. The record of trial supports the findings (CM ETO 4165, Fecica; CM ETO 6842, Clifton). As the finder of facts, it was within the province of the court to disbelieve accused's testimony.

6. The charge sheet shows that accused is 19 years four months of age and that he was inducted 1 December 1943 at New York, New York. No prior service was shown.

7. The court was legally constituted and had jurisdiction of the person and offense. No error injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient

(290)

to support the findings of guilty and the sentence.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). The designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is authorized (AW 42; Cir.210, WD, 14 Sept. 1943, sec.VI as amended).

B.R. Harper Judge Advocate

(ON LEAVE) Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 2

20 AUG 1945

CM ETO 10445

| | | |
|---|---|---|
| UNITED STATES | ) | 83rd INFANTRY DIVISION |
| | ) | |
| v. | ) | Trial by GCM, convened at |
| | ) | Ober Kassel, Germany, 23 March |
| Private DALLAS J. KEFFER | ) | 1945. Sentence: Dishonorable |
| (15112598), Service Company, | ) | discharge, total forfeitures, |
| 330th Infantry. | ) | confinement at hard labor for |
| | ) | life. Eastern Branch, United |
| | ) | States Disciplinary Barracks, |
| | ) | Greenhaven, New York. |

---

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL, and JULIAN, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 96th Article of War.

Specification: In that Private Dallas J. Keffer, Service Company, 330th Infantry, did, at Ober Kassel, Germany, on or about 8 March 1945, wrongfully, unlawfully and feloniously assault Renate Baumann, a female, age eleven (11) years; to wit: by penetrating her sexual organs with his finger, against her will.

CHARGE II: Violation of the 93rd Article of War.

Specification 1: In that * * * did, at Ober Kassel, Germany, on or about 8 March 1945, with intent to commit a felony, viz: rape, commit an assault upon Hubertine Baumann by willfully and felonious-

ly menacing her with a pistol and attempting to forcibly subdue her with the purpose of then and there having sexual intercourse with her, the said Hubertine Baumann.

Specification 2: In that * * * did, at Ober Kassel, Germany, on or about 10 March 1945, with intent to commit a felony, viz: rape, commit an assault on Camilla Simmes by willfully and feloniously menacing her with a pistol and attempting to forcibly subdue her with the purpose of then and there having sexual intercourse with her, the said Camilla Simmes.

CHARGE III: Violation of the 92nd Article of War.

Specification: In that * * * did, at Ober Kassel, Germany, on or about 10 March 1945, forcibly and feloniously against her will, have carnal knowledge of Friedel Benning.

He pleaded not guilty and two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of all of the charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hardlabor for the term of his natural life. The reviewing authority approved the sentence, designated the Eastern Branch United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence for the prosecution:

The substantial and competent evidence of record shows that the accused soldier during the afternoon of 8 March 1945 at Ober Kassel, Germany entered, uninvited, the third floor apartment of German civilians, locked the door, and with pointed pistol compelled two women and an 11-year old girl to disrobe (R8-9,17-18,23). He fired his pistol at the kitchen cabinet to frighten them. He then fondled and felt the bodies of the females and inserted his finger into the privates of each (R10-11, 18,24-25). The girl cried out in pain (Charge I). He forced one of the women to lie on the floor. Forcing her legs apart he knelt between them, unfastened his trousers, exposing his erect penis, and was about to ravish her when he was interrupted by some other people coming up the stairway (Spec. 1 of Charge II) (R11-12,19-20,26-27). He was described

as quite drunk but that he knew what he was doing (R20). He was positively identified (R13,20,28).

On the following night after midnight, the accused, who had been drinking, was admitted after knocking, into the home of Walter Simmes and his wife Camilla. This couple had retired but arose in night clothes to answer the knock on the door. With pointed pistol the accused herded them downstairs into a hallway where he started to compel them to remove their night clothes and felt of the woman's breasts. When he discovered there were other people in a room adjoining and was told that a "commander" lived in the house, he fled (R42, 46, Spec. 2 of Charge II).

The accused then entered, uninvited, the home of Heinrich Benning and his wife Friedel. With his pistol he forced them to arise from their bed and to remove all of their clothing. He tried without success to compel them to have intercourse together. He struck the man with his pistol and forced the woman to lie over a chair where he ravished her. He put his private parts into her private parts, (Charge III) (R52-54,57-59). The accused was positively identified by the Bennings and by several articles belonging to him that were found in the house (R63-64).

A complete detailed summary of the evidence with specific references to the record of trial appears in the Staff Judge Advocate's Review attached to the record, which is adopted by the Board of Review.

4. For the defense:

Defense counsel recalled several of the prosecution's witnesses and questioned them further with regard to their ability to identify the accused when they had previously identified him in several line ups held for that purpose (R64,65,66).

Having been advised concerning his rights, the accused elected to remain silent (R67-68).

5. With reference to Charge I and its Specification (assault on Renate Baumann) and Specification 1 of Charge II (assault with intent to rape Hubertine Baumann) the uncontradicted testimony of three eye witnesses established that at the time and place alleged in the specifications the accused did as alleged (1) assault Renate Baumann, the eleven-year old female, by inserting his finger into her sexual organs without her consent and against her will, and (2) at the same time and place he did also assault her mother Hubertine Baumann with intent to commit rape upon her when he compelled her with a drawn pistol and by pulling at her clothes, to disrobe, forced her to lie on the floor, and attempted to penetrate her female genitals with his erect male organ.

It is an assault and battery to fondle a woman against her will (MCM, 1928, par.149l,p.178). The accused's unwarranted and unwanted conduct of inserting his finger into the child's privates was clearly an assault and as such constituted a violation of Article of War 96.

An assault with intent to commit rape is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished. The intent to ravish must exist and concur with the assault--he must intend to overcome any resistance by force and penetrate the woman'sperson. Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted (MCM, 1928, Par.149l,p.179). The evidence adduced establishes a clear case of assault with intent to rape Hubertine Baumann. He forced her to disrobe by threats of violence. He forced her to lie down. He spread her legs apart and was about to ravish her when interrupted by the approach of other people. The evidence amply supports the finding of guilty of the Specification and the Charge.

With reference to Specification 2 of Charge II the same principles of law apply. The accused assaulted Camilla Simmes when he pulled her coat open and placed his hand on her breast. He desisted in his intentions only when he observed the number of other persons present in the adjoining sleeping room. His conduct on the second day preceding this occurrence and his immediate subsequent conduct of raping another woman clearly indicate that he intended to overcome all resistance in his effort to have sexual intercourse with Frau Simmes if she resisted. The finding of guilty of this offense is supported by substantial evidence (1 Wharton's Criminal Evidence (11th Ed., 1935), secs. 223,252,345,348,350,352,pp.265,298,487,507,516,527).

The accused's guilt of Charge III and its Specification (rape of Friedel Benning) was also clearly established by the evidence. Not only did the surrounding circumstances, consisting principally of his previous conduct in assaulting Frau Simmes, the proximity of the house where the crime was committed to the accused's billet, and the finding of his belt, flashlight and cigarette box at or near the scene support that conclusion, but so also did the uncontradicted and unimpeached testimony of the two eye witnesses to the commission of the offense. Rape is the unlawful carnal knowledge of a woman by force and without her consent. It was clearly shown that the accused by force penetrated the woman's genitals with his male organ without her consent (MCM, 1928, par.148b,-p.165).

6. The Staff Judge Advocate for the 83rd Infantry Division in his review of the case states that the accused was examined by the Division Neuropsychiatrist on 19 March 1945, who reported him sane,

that he began the use of alcohol at the age of seventeen and has since had a history of overindulgence, that he was a truck driver in civil life and for three years in the Army; that his character rating in the army has been excellent; and that the accused claimed to have no memory of the offenses charged against him because of overindulgence in alcoholic beverages. His company commander rated his character as excellent and described him as a conscientious worker attentive to duty.

7. The charge sheet shows the accused to be 21 years of age. Without prior service, he enlisted 26 March 1942 at Fort Thomas, Kentucky.

8. The court was legally constituted and had jurisdiction of the person and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. The penalty for rape is death or life imprisonment as the court martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567) and of assault with intent to commit rape by Article of War 42 and section 276, Federal Criminal Code (18 USCA 455). Designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II,pars.1b(4),3b).

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

22 SEP 1945

CM ETO 10446

| | |
|---|---|
| U N I T E D S T A T E S | ) 8TH ARMORED DIVISION |
| v. | ) Trial by GCM, convened at Lobberich, Germany, 17 March 1945. Sentence as to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Privates LEWIS R. WARD (6860997) and JESSIE W. SHARER (35731087), both of Battery B, 405th Armored Field Artillery Battalion | ) |

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, Judge Advocates

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review.

2. Accused were charged separately and tried together by direction of the appointing authority upon the following charges and specifications:

WARD

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Lewis R. Ward, Battery "B", 405th Armored Field Artillery Battalion did, at Aldekerk, Germany, on or about 4 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Margarete Kranen, a German woman.

CHARGE II: Violation of the 96th Article of War.

Specification: In that * * * did, at Aldekerk, Germany, on or about 4 March 1945, wrongfully and contrary to United States Army directive, fraternize with German civilians.

SHARER

(Same as Ward, with appropriate substitutions of name of accused).

Each accused pleaded not guilty to Charge I and Specification and guilty to Charge II and Specification preferred against him; and two-thirds of the members of the court present at the times the votes were taken concurring, was found guilty of both charges and specifications preferred against him. Evidence was introduced of two previous convictions of accused Ward by special courts-martial, one for absence without leave for one day in violation of Article of War 61 and one for feloniously taking a can of meat and misapplication of a cargo vehicle in violation of Article of War 94. No evidence of previous convictions of accused Sharer were introduced. Three-fourths of the members of the court present at the times the votes were taken concurring, each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority, as to each accused, approved only so much of the finding of guilty of the Specification of Charge II as involved a finding of guilty of attempting to fraternize with German civilians, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Evidence, both of the prosecution and the defense, established that at the time and place alleged, accused Ward engaged in three acts, and accused Sharer in two acts, of sexual intercourse with the prosecutrix. In the absence of a motion on behalf of either accused to compel the prosecution to elect upon which act of each it would rely in its proof of the single rape separately charged against each, it will be presumed that it elected to rely upon the first act of intercourse by each accused as to which it introduced evidence (23 CJS, sec.1044b(1), p.432; CM ETO 7078, Arthur L. Jones). In the event the evidence showed that the first act of intercourse by either accused constituted rape, and that the other aided and abetted in its commission, such other accused could properly be convicted as a principal (CM ETO 5068, Rape and Holthus, and authorities therein cited). The prosecution may not be compelled to elect, in a trial of two or more accused for offenses in the commission of which they aided and abetted one another, the offense of which accused it will rely upon for conviction, or whether its theory of guilt of any or all accused is as actor or aider and abettor (23 CJS, sec.1044b(3), fn.74, p.435; cf: CM ETO 8542, Myles, and cases therein cited, and companion case of CM ETO 10339, Boyd). It follows that the prosecution will not be deemed to have elected to stand upon the first theory of guilt of any particular accused as to which it offers evidence. The reason for the foregoing is that in such situation each accused is placed upon adequate notice that the proof may establish his guilt either as actor or as aider and abettor, or for that matter on any other theory (cf: CM ETO 4949, Robbins, and authorities therein cited). It follows again in the instant case, that the prosecution may be deemed to have relied, for its establishment of guilt of each accused,

either upon the first act of intercourse engaged in by him or upon the first act of intercourse of his companion in which he aided and abetted. It would be a highly artificial situation if the proof showed that the first act of intercourse of the first accused did not constitute rape and consequently the second accused having aided and abetted nothing was not guilty (cf: CM ETO 9643, Haymer), and that because the prosecution must be deemed to have elected to rely upon proof of the aiding and abetting of the first act of the first accused as the first theory of guilt of second accused, therefore the latter was not guilty at all. It is reasonable to assume that each accused has been put upon notice that his guilt may rest upon proof either of his own first act or of his aiding and abetting his co-accused in the latter's first act and thus to permit the prosecution to establish guilt of each accused upon either theory.

4. Evidence for the prosecution was substantially as follows:

On the afternoon of 4 March 1945, in Aldekerk, Germary, the two accused, armed with rifles slung on their shoulders and uninvited, entered the house of the prosecutrix, an unmarried virgin, 19 years of age (R6-7,12,15,23). Ward entered first, went into a room occupied by the girl, her parents and brother, and a woman lodger, motioned for the girl to come out, touched her on the shoulder, and motioned her upstairs. She complied and Ward, after looking into the second floor rooms, selected one containing a bed and directed her to follow him therein (R7,13). Sharer also ascended the stairs. Fraulein Kranen testified that Ward then motioned her towards the bed and indicated that she should sit down there. He spoke with Sharer, put down his rifle and proceeded to undress her (R7,8). Meanwhile Sharer remained outside of the door with his weapon. She made no resistance to being undressed because

> "I was very much afraid. * * *It was only the second day after the occupation by the Americans and before that there had been no soldiers in our house. We were very much afraid".

Asked by the prosecution of what she was afraid, she stated, "If one cries out, they may be beaten or shot" (R8). She was "only naturally frightened" and had never talked with anyone about American soldiers (R11). After Ward undressed her, she lay on the bed where he, after undressing himself, joined her. He touched her sexual organ first with his fingers and then with his own sexual organ, which "hurt very much" and she started to cry (R8). She also shook her head in the negative (R11). He then engaged in sexual intercourse with her for several minutes, dressed, left the room, and called Sharer. She also wished to leave the bed but Ward motioned her to remain there. Sharer thereupon entered the room, put down his rifle and engaged in sexual intercourse with her. When he finished, she dressed, left the room and proceeded towards the staircase. Then Ward emerged from another room, held her by the sleeve, and motioned her

to re-enter the room. She "had to" go back to the bed. He took her pants down, undressed himself and "used" her again. His rifle at this time stood behind a table next to the bed (R8). He then dressed and spoke to Sharer, who in turn "used" her again. Meanwhile, Ward left the room and returned with Frau Kranen, the girl's mother, after Sharer had completed his second act. The four "stood around" and drank Ward's wine. Ward kissed Fraulein Kranen twice in her mother's presence. Sharer then went downstairs with Frau Kranen. Ward descended with the girl and the two went to a neighbor's house, where he motioned her upstairs, touching her on the back. When he found a room with a bed he motioned her to it, removed her slacks and his own clothing, placed his rifle beside the door and "used" her again, and then gave her more wine to drink. He transferred her ring from the third finger of her left hand to another finger and put a simple gold ring in its place, saying "You-me-Frau". When he heard a noise outside the room, he pointed his gun at the door. After they dressed, he had her accompany him to a vehicle where there were soldiers (R9). After Ward spoke with some of them, a soldier motioned for the girl to "go home". She complied but finding no one at home, went to the "other people", to whom she did not complain but "started to cry" and inquired of them for her parents (R10). Had not her father gone to the American authorities, she would have done so (R12). About 5:30 or 6:00 P.M. an American Lieutenant asked "us" what had happened and "we" informed him (R10).

This was her first intercourse and she was not menstruating at the time. The first act caused her pain (R10) and bleeding (R11) (which was evidenced by blood spots on the sheet or mattress covering (R11,20; Ex.A)). Neither accused pointed a gun directly at her or struck her in any way. When they touched her, it was neither affectionately nor roughly. They did not act drunk (R11).

Fraulein Kranen did not tell her mother the soldiers "used" her until after their departure (R15). One of the other women, but not the prosecutrix, complained to the American lieutenant who investigated the affair. There were tears in the girl's eyes then, but she was not crying (R22). When a soldier at the command post of accused's battery, to which she had accompanied him, warned accused about associating with Germans and motioned the girl to leave, she was gazing in the distance with her arms crossed (R17) and walked away slowly, looking as if she did not wish to leave (R18).

Stipulated testimony of an American medical officer established that Fraulein Kranen had been a virgin before the first act in question, corroborated her mother's testimony that she, the mother, was in a nervous condition later the same day, and stated that there was blood on accused (R23).

Each accused had been instructed in the subject of non-fraternization with Germans (R24).

5. For the defense, evidence was introduced that Sharer was drunk early in the afternoon of the day in question (R28).

After an explanation of their rights, each accused elected to take the stand as a witness in his own behalf. Each testified, in material substance, that they had been drinking and their intent was to look for German soldiers (R30,40). Each denied the use of force or threats to obtain intercourse with the girl, and each insisted that she offered no resistance (R31,32,38,41). Ward stated that she undressed herself without his aid and did not cry (R31,38). He experienced no difficulty in entering her sexual organ and did not believe she was a virgin (R35). At one time the girl, her mother, and both accused were drinking together (R33). He gave her the ring because he believed from her actions that she desired it (R36). He did not make motions, he believed, indicating his sexual desire. The act happened as a result of his love-making (R39-40). He was required to carry a gun in the combat area (R40). Sharer stated that the girl responded to his advances by saying "Yay, yay". After his first intercourse with her, she drank wine with them and smoked a cigarette. When her mother, who also drank with them, was in the room, the girl was laughing. He insisted that he would not have engaged in the act with her if she had hesitated and had not consented (R41,43). He denied seeing blood on the sheets and stated the girl's mother did not seem upset or nervous (R44).

6. Charge I and Specification:

Rape is the unlawful carnal knowledge of a woman by force and without her consent (MCM, 1928, par.148b, p.165). The principles governing the determination of the legal sufficiency of the evidence to sustain the findings of guilty of rape herein, are set forth in CM ETO 9301, Flackman:

> "Consent, however reluctant, negatives rape; but where the woman * * * ceases resistance under fear of death or other great harm (such fear being gaged by her own capacity), the consummated act is rape. * * * Nor is it necessary, that there should be force enough to create 'reasonable apprehension of death'. But it is necessary to prove in such case that the defendant intended to complete his purpose in defiance of all resistance" (1 Wharton's Criminal Law (12th Ed., 1932), sec.701, p.942,943).

> "It is submitted that the true rule must be, that where the man is led from conduct of the woman to believe that he is not mommitting a crime known to the law, the act of connection cannot under such circumstances amount to rape. In order to constitute rape there must, it would appear, be an intent to have connection with the woman notwithstanding her resistance. * * * /It follows that/ the guilt of the

> accused must depend upon the circumstances as they appear to him" (ibid, fn.9, pp.943-944, citing Roscoe Crim.Ev.1878 Ed., p.648; Hunter v. State (1892), 29 Fla.486, 10 So.730; Walton v. State (1890), 29 Tex. App.163, 15 SW 646).

The prosecutrix' own testimony shows that she offered no resistance whatever to either accused. She did not cry out although three members of her immediate family were within easy earshot downstairs. She did not complain of either act to her family until the accuseds' departure and never made any complaint herself to American military authorities. After two acts of intercourse with each accused, she and her mother drank wine with them. After her third act of intercourse with Ward (after her second with Sharer) she accompanied him to his own battery command post where she still made no complaint, and from whence she reluctantly departed only when directed to do so.

As in the Flackman case, the most that her weeping and mild protestation by shaking her head in the negative could have reasonably charged Ward with notice of, "was the reluctance of the consent which her docility seemed to demonstrate". She testified that neither accused pointed a gun at her, struck her, or even handled her roughly.

> "Admitting that accused's status as a member of the conquering forces added, to his knowledge, some degree of persuasive force to his unconscionable demand, such knowledge and demand alone will not support the inference that accused intended or threatened to use ultimate force if necessary to achieve his purpose. If this were the case, every successful solicitation of a German woman to sexual intercourse by an American soldier (certainly by any armed American soldier) would lay him liable - depending on the subsequent disposition of the woman to assert she consented through fear - to prosecution for rape. Moreover, in rape cases, to negative consent in the absence of resistance, the woman's fear, induced by conduct on the part of the accused reasonably calculated to inspire it, must be of death or great bodily harm" (CM ETO 9301, Flackman).

She testified she was afraid because "If one cries out, they may be beaten or shot". Her reference merely to the possibility, rather than the likelihood, or probability of violence, is understandable in view of the lack of threats and violence by accused Ward is not probative that he did anything

> "which might have given her reasonable cause to believe that he would have shot her, had she refused to submit. Had she indeed, been of a mind to submit willingly, it is hardly conceivable, under the circumstances, that she would have con-

ducted herself very differently. Such half-hearted protests as she testified to, expressed only at the eleventh hour, when she was taking and had taken off her clothes, are of a type which might be expected from almost any consenting female in the situation shown.. Accused's persistence despite them presents no basis for inferring that he intended to complete his purpose regardless of all resistance" (CM ETO 9301, Flackman).

Her delay in complaining and the casualness of her subsequent conduct are

> "incompatible with the sense of outrage which might reasonably be expected from such a crime".

Unlike the prosecutrix in the Flackman case, Fraulein Kranen was only 19 years old and a virgin. Ward's first act clearly ruptured her hymen and caused her to bleed. It is inconceivable that, as Sharer testified, he did not see the blood on the sheet. But she offered no resistance to Sharer, did not cry out, and did nothing to indicate to him as a reasonable person that she was unwilling to engage in the sexual act. She did even less than in the case of Ward. While virginity, in connection with other circumstances, may be evidence of nonconsent, its effect as such is clearly negatived here by the utter consistence of her conduct with consent, certainly so far as these accused were concerned. From the evidence that each accused waited outside the room, armed, while the other engaged in intercourse, it may as reasonably be inferred that each was merely awaiting his turn as that they were guarding against interference with their forcing of the girl. They were required to be armed. The Board of Review is therefore of the opinion, on the basis of CM ETO 9301, Flackman, and authorities therein cited, that any lack of consent was not apparent to the accused and that the evidence is legally insufficient as to each accused to support the findings of guilty of rape.

But such conclusion does not absolve accused of their guilt of an offense in violation of Article of War 96. In CM ETO 4119, Willis, the Board of Review held that it is an offense in violation of that article for a soldier, married or unmarried, to engage in sexual intercourse with an unmarried woman, under the circumstances of that case, and that such offense is included within rape, where the specification indicates that the female is unmarried. In the instant case, the acts of the accused, who were combat soldiers in the midst of a campaign in a newly occupied enemy city, of engaging in promiscuous sexual intercourse with an enemy citizen only 19 years old while unlawfully in her home, with her mother nearby, constituted, in the opinion of the Board of Review, conduct "to the prejudice of good order and military discipline" under the 96th Article of War. The law as to the maximum

(304)

punishment applicable has been well stated in the above cited case as follows:

> "The Table of Maximum Punishments contains no provisions for the punishment of the offense of the nature hereinabove described, nor does it indicate the punishment of a closely related offense. 'Offenses not thus provided for remain punishable as authorized by statute or by the custom of the service' (MCM, 1928, par.104c, pp.96-101)). Both the District of Columbia Code (sec.22-1001 (6:176a)) and the provisions of the Federal Criminal Code applicable to territories (sec.318, Federal Criminal Code; 18 USCA 518) provide that the punishment for fornication shall be a fine of not more than one hundred dollars or imprisonment of not more than six months. Using these Congressional declarations by way of an analogy and as a measuring rod, it appears to the Board of Review that the maximum legal punishment upon conviction for the offense herein determined by a military court is confinement at hard labor for not more than six months and forfeitures of two-thirds of an accused's pay and allowances for a like period (MCM, 1928, par.104c, p.96)" (CM ETO 4119, Willis).

7. One flagrant error deserves mention. Upon the cross-examination by the defense of the lieutenant who investigated the affair, he testified that the story "boiled down to rape", the forcible entry of the vagina; that in this case, it was under the threat of weapons, his conclusions from the facts that accused were carrying weapons and that although no one said they had been threatened by weapons;

> "The situation at that time was such that people were scared. We had only been in that town a short time and the men were carrying guns which at the time was in itself a threat" (R22).

A defense motion to strike out the testimony of the witness' "opinion" was denied by the law member, evidently on the theory, as argued by the prosecution, that the error was self-invited (R22). Even assuming that it was, the law member should have ordered the opinion and conclusion testimony stricken from the record as it was inadmissible, went to the very essence of the case on rape and involved the very real danger that the court would accept it instead of drawing its own conclusions (CM ETO 3811, Kimball and Morgan, and authorities therein cited). In view of the Board's holding herein, however, which demonstrates so clearly the error in leaving the testimony before the court, it was immaterial.

8. Charge II and Specification:

It was here alleged that each accused did wrongfully and contrary to an Army directive fraternize with German civilians. The evidence showed that after two acts of intercourse between each accused and the prosecutrix, Ward brought her mother to the room, where the four drank his wine together. The reviewing authority, acting on the advice of his staff judge advocate that the two women, under the circumstances, did not join in or consummate accused's "fraternity", approved only so much of the findings of guilty as to each accused as involved attempting to fraternize with German civilians. The clear intent of this action was to approve findings of guilty of the lesser included offense of wrongfully attempting to fraternize and it will be so construed (cf: CM ETO 11987, Johnson, and authorities therein cited). Accused's conduct so nearly approached, if indeed it did not amount to, wrongful fraternization, that it must be held to have constituted conduct to the prejudice of good order and military discipline in violation of Article of War 96, even though characterized by the reviewing authority technically as an attempt and even though many attempts to commit civil offenses are not themselves crimes (cf: CM ETO 10967, Harris).

Wrongful fraternization, which constitutes disobedience of a standing order, is punishable, at maximum, by confinement at hard labor for six months (CM ETO 6203, Mistretta; CM ETO 9301, Flackman). As the attempt is a lesser included offense not listed in the table of maximum punishments, the maximum penalty therefor is the same (MCM, 1928, par.104c, pp.96,100).

9. The charge sheets show that accused Ward is 28 years of age and was inducted 16 March 1943, and that accused Sharer is 20 years of age and was inducted 27 May 1943. Each was inducted to serve for the duration of the war plus six months. Neither had prior service, according to the charge sheets, but a letter from the staff judge advocate attached to the record indicates that accused Ward had prior service with Troop "B", 12th Cavalry, in peacetime, from which he deserted.

10. The court was legally constituted and had jurisdication of accused and of the offenses. Except as herein noted, no errors injuriously affecting the substantial rights of either accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient, as to each accused, to support only so much of the findings of guilty of Charge I and Specification as involves wrongful sexual intercourse at the time and place alleged with a female not his wife in violation of Article of War 96, and legally sufficient to support the findings of guilty, as approved, of Charge II and Specification, and only so much of the sentence as adjudges dishonorable discharge, total forfeitures, and confinement at hard labor for one year (pars.6,8, supra; MCM, 1928, Par.104c, p.102).

(306)

11. Confinement in a penitentiary is not authorized for either of the offenses of sexual intercourse by a soldier with a female not his wife or attempting to fraternize with German civilians (AW 42). The Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, would be the authorized place of confinement (AW 42; Cir.210, WD, 14 Sep.1943, sec.VI, as amended).

Wm. F. Sarrow Judge Advocate

Edward L. Stevens Judge Advocate

Donald K. Carroll Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

4 JUL 1945

BOARD OF REVIEW NO. 3

CM ETO 10466

| | |
|---|---|
| U N I T E D  S T A T E S | IX TROOP CARRIER COMMAND |
| v. | Trial by GCM, convened at Chartres, Eure-et-Loir, France, 6 February 1945. |
| Second Lieutenant LEWIS E. SANFORD (O-688020), 99th Troop Carrier Squadron, 441st Troop Carrier Group. | Sentence: Dismissal and total forfeitures. |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that Second Lieutenant Lewis E. Sanford, 99th Troop Carrier Squadron, 441st Troop Carrier Group, did without proper leave absent himself from his station at USAAF Field A-41 from about 7 December 1944 to about 6 January 1945.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, IX Troop Carrier Command, approved the sentence and forwarded

10466

the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence although deeming it wholly inadequate for an officer guilty of such a grave offense, and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. On 2 December 1944 accused left his station to go on leave to England for 5 days. He did not return on 7 December when his leave expired. Searches were made for him without success. His leave was not extended. He was seen in London 4 January 1945 and ordered to report to the Command Provost Marshall. He was at his station 8 January 1945 (R7-8, 12).

Accused came overseas in March 1944, was grounded in April, and thereafter had various assignments (R9). It was difficult to assign him. For a short time prior to his absence he had been "Alert Officer; officer in charge of all functions of the squadron after five o'clock" (R14).

4. No witnesses were called by the defense. Defense counsel stated accused's rights as a witness had been explained to him and he elected to remain silent (R14).

5. The president, instead of the law member, admitted into evidence extracts of morning reports (R7,14; Pros. Ex.1,2). In addition, there was much confusion as to their authentication (R13-14); and also as to their preparation for the extracts admitted fail to show the dates or makers of the morning reports (Pros. Ex.1,2). No comment need be made as to these irregularities other than to say accused's substantial rights were not prejudiced thereby. Substantial and compelling oral evidence supports the findings.

6. The charge sheet shows that accused is 28 years four months of age, that he enlisted 17 September 1940 in the National Guard, was discharged 28 July 1943 to accept a commission, and was appointed a Second Lieutenant 28 July 1943. He had prior service from 3 November 1936 to 3 November 1939.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for absence without leave is such punishment as a court-martial may direct.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B K Sawyer Jr. Judge Advocate

10466

(309)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 4 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Second Lieutenant LEWIS E. SANFORD (O-686020) 99th Troop Carrier Squadron, 441st Troop Carrier Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as approved, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10466. For convenience of reference please place that number in brackets at the end of the order: (CM ETO 10466).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

---

( Sentence ordered executed. GCMO 260, ETO, 10 June 1945).

10466

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2 19 JUL 1945

CM ETO 10496

| | |
|---|---|
| U N I T E D S T A T E S | ) OISE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | ) |
| First Lieutenant LYLE R. PIERSON (O-1574118), 3060 Ordnance Service Composite Company | ) Trial by GCM, convened at Reims, France, 6 March 1945. Sentence: Dismissal, total forfeitures, and confinement at hard labor for five years. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 61st Article of War.

Specification: In that First Lieutenant Lyle R. Pierson, 3060th Ord Serv Comp Co, on detached service to Depot O-653, did without proper leave absent himself from his station at Depot O-653, Bazancourt, France from about 21 January 1945 to about 1 February 1945.

He pleaded guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place

10496

as the reviewing authority may direct, for five years. The reviewing authority, the Commanding General, Oise Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution showed that accused was a first lieutenant, 3060th Ordnance Service Composite Company. On 11 January 1945, by Special Order 11, Headquarters Oise Section, Communications Zone, he was detailed to detached service with Depot O-653, Bazancourt, France (R79;Pros.Ex.A), and reported for duty as ordered (a reading of the testimony (R7,8,11,12) clearly indicates this). Thereafter, and while on such detached service, on 21 January 1945, he absented himself from his station at Depot O-653 and remained absent until 1 February 1945. This absence was unauthorized. He was carried on the morning report of the Headquarters and Headquarters Detachment, 323rd Ordnance Battalion, as absent without leave from 0800 hours, 21 January 1945, until 2000 hours, 1 February 1945 (R9,10; Pros.Exs.B,C). A personal search was made for accused at his "residence" and elsewhere on 21 January 1945 and he could not be found (R11,13).

4. By cross-examination of prosecution witness, the defense showed that accused voluntarily reported back to duty on the "2nd (sic) of February", that he had been on duty since that date, performing his work in a manner entirely satisfactory to the depot commander (R8,9), such as would entitle him to an efficiency rating of excellent (R9). After accused's return, the character of his work was superior according to another officer who had observed his work (R12).

The defense introduced without objection, a true copy of accused's "Form 66-1" card which showed that from August 1942 until November 1943, he had been rated as "Superior" and "Very Superior", and since then as "Very Superior", and since then as "Excellent". He went to officer candidate school with a superior rating (R12,13; Def.Ex.1).

Fully advised of his rights as a witness, accused elected to remain silent.

5. In view of accused's plea of guilty, comment on the evidence is unnecessary, other than to say that the allegations of the Specification were fully proved by competent evidence. This evidence

showed accused absent from his station without proper leave, in violation of Article of War 61, as charged (MCM, 1928, par.132, p.145).

6. The charge sheet shows that accused is 24 years, one month of age. He enlisted 11 October 1939 at Detroit, Michigan, and was commissioned second lieutenant 3 July 1942.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. Dismissal and confinement at hard labor are authorized punishment for violation of Article of War 61.

_____ Judge Advocate

_____ Judge Advocate

(ON LEAVE) _____ Judge Advocate

10496

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 19 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of First Lieutenant LYLE R. PIERSON (O-1574118), 3060 Ordnance Service Composite Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10496. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10496).

E. C. McNEIL,
Brigadier General, United States Army
Assistant Judge Advocate General.

---

( Sentence ordered executed. GCMO 292, ETO, 26 July 1945).



10496

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1 14 JUL 1945

CM ETO 10497

| | |
|---|---|
| U N I T E D S T A T E S | 83RD INFANTRY DIVISION |
| v. | Trial by GCM, convened at Hamoir, Belgium, 2 February 1945. Sentence: Dismissal, total forfeitures and confinement at hard labor for seven years. No place of confinement designated. |
| Captain SPENCER A. SWITZER (O-1296767), Company M, 330th Infantry | |

---

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 64th Article of War.

Specification: In that Captain Spencer A. Switzer, Company M, 330th Infantry, having received a lawful command from Lieutenant Colonel George M. Shuster, his superior officer, to assume command of Company K, 330th Infantry, did at Domre, Belgium, on or about 16 January 1945, willfully disobey the same.

10497

He pleaded not guilty and, two-thirds of the members of the court present at the time the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. Two-thirds of the members of the court present at the time the vote was taken concurring, he was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for seven years. The reviewing authority, the Commanding General, 83rd Infantry Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, although deemed wholly inadequate punishment for an officer guilty of such a grave offense, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. Evidence for the prosecution was, in summary, as follows:

On 16 January 1945 the 3rd Battalion, 330th Infantry, Lieutenant Colonel George M. Shuster Commanding, had just been withdrawn from the line and was being held in reserve at Lomre, Belgium. The battalion was disorganized and Company K lacked a company commander (R7,12). Colonel Shuster told accused that he wanted him to take command of Company K. Accused replied that he could not do that because he had experience only as a commanding officer of a heavy weapons company and that it would not be fair to the men to put him in command of a rifle company. Colonel Shuster then summoned his executive officer and in the latter's presence asked accused whether he was refusing to take command of Company K and whether he realized the consequences of his refusal to obey a command. To both questions accused replied in the affirmative (R8-13). He was then placed under arrest and did not assume command of Company K (R11,13).

4. Accused, after being advised of his rights, elected to make an unsworn statement. He stated that prior to the incident in question, Colonel Shuster discovered him weeping and in a nervous condition during an engagement with the enemy at Strass, Germany. Pursuant to Colonel Shuster's orders he reported to the aid station and was evacuated. During his absence of four days from the battalion he was replaced as commanding officer of Company M, a heavy weapons company. When he returned to the battalion, Colonel Shuster at first told him that he was going to have him reclassified or placed in command of rifle company. After some discussion, however, Colonel Shuster indicated that accused might assume some other position and he was assigned to duty with the regiment in the rear echelon.

When he was ordered to report back to the battalion, Colonel Shuster said that he would have to take command of Company K. Accused replied that because of his inexperience that would not be fair to the men. In response to Colonel Shuster's suggestion that he might learn the duties of the commander of a rifle company, he replied that the company might be committed before that could be accomplished. Colonel Shuster again asked him to assume command of Company K and he again replied that it was unfair to the men because of his inexperience. He was then placed under arrest (R14-15).

5. The elements of proof of the offense of willful disobedience of the lawful command of a superior officer in violation of Article of War 64 are:

> "(a) That the accused received a certain command from a certain officer as alleged; (b) that such officer was the accused's superior officer; and (c) that the accused willfully disobeyed such command" (MCM, 1928, par.134b, p.149; CM ETO 1057, Redmond).

The evidence showed that accused received an order to assume command of Company K from his battalion commander, his superior officer, known to him to be such. While it is true that the order could have been couched in more positive language, there can be no doubt on this record that a direct order was intended to be given and that accused so understood. Accused made no contention to the contrary. "But if an order be actually given, it is no less to be obeyed though expressed in a courteous instead of a peremptory/ form." G.C.M.O. 46 of 1883" (Winthrop's Military Law and Precedents (Reprint, 1920), fn.16, p.574). CM ETO 1096, Stringer, is distinguishable because there the accused had the choice of becoming a mess sergeant or being "busted to private". The first two elements of proof are thus established.

The evidence likewise established that accused willfully disobeyed the order. Twice he was asked whether he refused to assume command of Company K and twice he answered in the affirmative. This is sufficient to establish the intentional character of his disobedience (CM ETO 2469, Tibi; CM ETO 3080, Holliday).

6. The charge sheet shows that accused is 24 years of age. He was commissioned a second lieutenant on 15 October 1942. He had prior service as an enlisted man in the National Guard from 7 September 1937 to 14 October 1942.

(318)

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. Dismissal and confinement at hard labor are authorized punishments upon conviction for a violation of Article of War 64. The proper place of confinement is the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York (AW 42 and Cir.210, WD, 14 Sept. 1943, sec.VI, as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(319)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 14 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Captain SPENCER A. SWITZER (O-1296767), Company M, 330th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. In view of the confinement, it is believed the action would be fortified by a report of psychiatric examination.

3. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, should be designated as the place of confinement (AW 42; Cir.210, WD, 14 Sep.1943, sec.VI, as amended). This may be done in the published court-martial order.

4. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10497. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10497).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

---

( Sentence ordered executed. GCMO 419, USFET, 18 Sept 1945).

10497

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3 5 JUL 1945

CM ETO 10498

| | |
|---|---|
| U N I T E D S T A T E S ) | 3RD AIR DIVISION (Formerly 3RD BOMBARDMENT DIVISION) |
| v. ) | |
| Second Lieutenant DAVID R. WISEMAN (O-583619), 503rd Fighter Squadron, 339th Fighter Group ) | Trial by GCM, convened at AAF Station F-378, APO 559, 3 March 1945. Sentence: Dismissal and total forfeitures. |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General withthe European Theater of Operations.

2. Accused was tried upon the following Charge and specifications:

CHARGE: Violation of the 61st Article of War.

Specification 1: (Nolle prosequi)

Specification 2: (Nolle prosequi)

10498

Specification 3: In that Second Lieutenant David R. Wiseman, 503rd Fighter Squadron, 339th Fighter Group, did, without proper leave, absent himself from his proper station at Number One Radio School, Royal Air Force, Cranwell, Lincolnshire, England from about 1000 hours, 20 January 1945 to about 2100 hours, 21 January 1945.

Specification 4: In that * * * did, at Number One Radio School, Royal Air Force, Cranwell, Lincolnshire, England, on or about 1100 hours, 11 January 1945, fail to repair at the fixed time to the properly appointed place for instruction.

Specification 5: Same as Specification 4, but alleging failure to repair on or about 1400 hours, 11 January 1945.

Specification 6: Same as Specification 4, but alleging failure to repair on or about 1100 hours, 15 January 1945.

Specification 7: Same as Specification 4, but alleging failure to repair on or about 0900 hours, 18 January 1945.

Specification 8: Same as Specification 4, but alleging failure to repair on or about 1100 hours, 18 January 1945.

Specification 9: Same as Specification 4, but alleging failure to repair on or about 1200 hours, 19 January 1945.

Specification 10: Same as Specification 4, but alleging failure to repair on or about 1400 hours, 19 January 1945.

Specification 11: Same as Specification 4, but alleging failure to repair on or about 0900 hours, 20 January 1945.

He pleaded not guilty to and was found guilty of the Charge and all specifications thereof. Evidence of one previous

conviction by general court-martial in July 1944 for negligently suffering a government vehicle to be damaged, in violation of Article of War 83, and for unlawfully taking and operating a government vehicle, in violation of Article of War 96, was introduced at the trial. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority, the Commanding General, 3rd Air Division, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, though characterizing it as wholly inadequate punishment for an officer convicted of such gross misconduct, and withheld the order directing execution thereof pursuant to the provisions of Article of War 50½.

3. The evidence for the prosecution shows that by special orders dated 8 January 1945 the accused was directed to proceed on temporary duty for approximately fifteen days to No. 1 Radio School, Cranwell, Lincolnshire, England, reporting not later than 1600 hours, 10 January 1945, to attend a course of instruction in radio maintenance (R8; Pros.Ex.1). Officers attending the school were attached to a headquarters unit of the Royal Air Force for discipline and administration (R8). On 11 January 1945 the accused "booked in on the arrival book" at the school with the headquarters adjutant (R13,18). Accused was the only officer member of Class No.68, which was also composed of about twenty enlisted men, and which began at 1100 hours on 11 January (R20,23,28). He was not present at this class, and reported to class for the first time between 1500 and 1600 hours during the afternoon of 11 January, at which time the instructor handed to him and told him to copy a complete schedule showing hours and places at which all classes would be held (R20-21,25,28; Pros.Ex.2). In order for a student to be excused from attending a class it was required that he first receive permission from the instructor of the class, after which he was referred to the first sergeant or to headquarters (R15-16,26-27,29-30). Classes were held daily, except Sunday, from 0900 to 1300 hours and from 1400 to 1800 hours, by three non-commissioned officers (R12,19-22; Pros.Ex.2).

(324)

With reference to Specifications 4 to 11, inclusive, the testimony of the three instructors at the school shows that accused was absent from the following scheduled classes:

1100 to 1300 hours, 11 January 1945 (R23-24).
1400 to 1500 hours, 11 January 1945 (R24,26).
1100 to 1300 hours, 15 January 1945 (R29).
0900 to 1100 hours, 18 January 1945 (R23,26).
1100 to 1300 hours, 18 January 1945 (R32).
1200 to 1300 hours, 19 January 1945 (R23,26).
1400 to 1800 hours, 19 January 1945 (R32).
0900 to 1300 hours, 20 January 1945 (R23,26).

No permission was given accused by any of the instructors to miss these classes, nor did he speak to the commanding officer prior to 22 January 1945 (R9,26,30,33).

As to Specification 3, it was shown that accused was not present for any classes on 20 January 1945 (R23,26,32). A search for him was made about his quarters and mess by the adjutant at about 1700 hours on 20 January. Accused was not found, and a note was left on his bed requesting him to report to the commanding officer the following morning (R13-14). He did not report until 22 January (R9-10). He had no permission from the class instructors to be absent, nor from the commanding officer, whose permission was required in order for an officer to leave the post during class hours (R8-9,16-17,26,30,33). It was permissible, however, for an officer to be absent from the station from 1800 hours on Saturday until classes were resumed the following Monday (R10-11). A signed copy of a voluntary statement, prepared and given by accused to the investigating officer, after being fully advised of his rights, was received in evidence (R34-35; Pros.Ex.3). In the statement accused admitted having arrived at Sleaford at approximately 1730 hours on 10 January 1945. He spent the night there and proceeded to Cranwell the following morning arriving at about 1100 hours (Pros.Ex.3). Sleaford is approximately six miles from Cranwell and there is adequate bus service between the two points daily until about 2140 hours (R9). By his statement accused also admitted that he left the base at about 1000 hours on 20 January, and did not return until about 2100 hours on 21 January (Pros. Ex.3).

4. The accused, having been warned of his rights by the law member, elected to remain silent (R39).

In behalf of accused, Major Dale E. Shafer, Jr. Commanding Officer of the 503rd Fighter Squadron, and Major Roy Ballard, Group Communications Officer of the 339th Fighter Group, each of whom had maintained daily contacts with accused as squadron communications officer, testified that accused had an excellent reputation both as to character and military efficiency (R37-39).

5. The evidence clearly establishes that accused, without proper permission or apparent justification, failed to repair to regularly scheduled classes of instruction, of which he had full notice, and which he was required by orders to attend, at the hours set forth in Specifications 5 to 11, inclusive.

With respect to Specification 4, alleging failure to repair for instruction at 1100 hours on 11 January, it appears that accused did not report to any class or receive a schedule of classes until the afternoon of 11 January. From his statement it appears that he did not arrive at the school or station until about 1100 hours. However, his orders required him to report to the school not later than 1600 hours on 10 January. His statement and other evidence affirmatively show that he arrived on 10 January in a town only six miles from the school, and that he could have reached the school in ample time to have been present at the first class which began at 1100 hours the following day. It is clear that his failure to be present at the first class was a result of his own neglect, which does not afford him a defense to the Charge (See CM 248497, Daugette, 31 B.R. 303 (1944); III Bull. JAG 233).

6. Defense counsel insisted that as to the absence without leave alleged in Specification 3 no corpus delicti was shown, and that accordingly the confession of accused as to that offense was inadmissible. The evidence shows that accused did not attend any classes on 20 January, and that a search made for him at his quarters and the mess failed to reveal his whereabouts. Although a note was left on his bed on Saturday, 20 January, requesting him to report to the commanding officer the following morning, he failed to report until Monday, 22 January. This evidence clearly constituted sufficient proof of the corpus delicti to render the confession admissible with respect to the offense charged (See CM 202213 (1934), Dig.Op. JAG, 1912-40, sec.395(11), p.208; CM ETO 4915, Magee).

(326)

Defense counsel also contended that since the accused was not required to be at his station from 1800 hours on Saturday, 20 January, until Monday morning, he should not be found guilty of absence without leave for that period of time. It is too clear for argument that an accused who has acquired voluntarily a status of absence without leave is in no position to claim a cessation of that status during periods when he might have been lawfully absent had he remained at his place of duty.

7. The charge sheet shows that accused is 23 years and five months of age. He enlisted in the Army on 21 November 1939 at Fort Douglas, Utah, and was commissioned a second lieutenant in the Army of the United States on 13 November 1943. No prior service is shown.

8. Attached to the record of trial are recommendations for clemency from the commanding officer of accused's station, from the Commanding General of the 66th Fighter Wing, and from defense counsel.

9. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

10. Dismissal and total forfeitures are authorized punishments for an officer upon conviction of a violation of Article of War 61.

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

E V Lowry Jr Judge Advocate

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 5 JUL 1945
TO: Commanding General, United States Forces, European Theater, APO 887, U. S. Army.

1. In the case of Second Lieutenant DAVID R. WISEMAN (O-583619), 503rd Fighter Squadron, 339th Fighter Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10498. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10498).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

---

( Sentence ordered executed, GCMO 263, ETO, 10 July 1945).

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 1

25 JUL 1945

CM ETO 10499

| | |
|---|---|
| U N I T E D S T A T E S | DELTA BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| First Lieutenant ERWIN W. DINTSCH (O-1000348), Adjutant General's Department, 8th Postal Regiment. | Trial by GCM, convened at Marseille, France, 30 November 1944, 23 January 1945. Sentence: Dismissal, total forfeitures, fine of $2,000 and confinement at hard labor for one year. Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York. |

HOLDING by BOARD OF REVIEW NO. 1
RITER, BURROW and STEVENS, Judge Advocates

1. The record of trial in the case of the officer named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 96th Article of War.

Specification: In that First Lieutenant Erwin W. Dintsch (then Second Lieutenant) A.G.D., 8th Postal Regiment, then Postal Officer, APO No. 9, 9th Infantry Division, having custody and control of gold seal American currency of the value of about one thousand dollars ($1,000.00), property of a person or persons unknown, did, at Port Lyautey, French Morocco, on or about 5 February 1943, in conjunction with Leonard Ignaszak, wrongfully cause to be exchanged said one thousand dollars for French francs at the rate of seventy-five (75) francs per dollar and did wrongfully convert

therefrom the sum of about twenty-five thousand francs, value about five hundred dollars, to his own use and profit.

He pleaded not guilty to, and was found guilty of, the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, to pay the United States a fine of $2,000, and to be confined at hard labor, at such place as the reviewing authority may direct, for one year. The reviewing authority, the Commanding General, Delta Base Section, Communications Zone, European Theater of Operations, approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority, the Commanding General, European Theater of Operations, approved only so much of the findings of guilty of the Specification "as involves a finding that accused did, at the place and time alleged, having custody and control of gold seal American currency of the value of about one thousand dollars ($1,000.00), property of a person or persons unknown, did, in conjunction with Leonard Ignaszak, wrongfully cause to be exchanged said one thousand dollars ($1,000.00) for French francs at the rate of seventy-five (75) francs per dollar and did wrongfully convert therefrom the sum of about twelve thousand five hundred (12,500) francs, value about two-hundred fifty dollars ($250.00), to his own use and profit", confirmed the sentence, though deeming it wholly inadequate punishment for an officer guilty of such a grave offense, designated the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement, and withheld the order directing execution of the sentence pursuant to Article of War 50½.

3. There is no dispute in the evidence over the basic facts giving rise to this prosecution. Accused himself, while testifying under oath as a witness in his own behalf, detailed a course of conduct on his part in conformity with that shown by the evidence introduced by the prosecution. At all times material to the issues involved, accused was Division Postal Officer, 9th Infantry Division, stationed at Port Lyautey, French Morocco. Between 12 January 1943 and 4 February 1943 the post office was without forms upon which to issue post office money orders. During that period of time certain units of the division were ordered to the front for combat duty. Many of the men comprising these units, being unable to procure money orders, having no safe place in which to leave their surplus money, and not desiring to carry it with them into the combat area, requested permission to leave it in the post office safe until such time as it could be converted into the form of money orders. Accused testified that he informed the men that he could not accept the money in his official capacity or in any manner so as to make the Post Office Department or Government responsible for it. He did, however, in order to accommodate the men, agree to accept it on his own personal responsibility for safe keeping and to convert it to the form of money

orders in accordance with their directions as soon as money order blanks could be procured. Postal regulations prohibited the acceptance of money for safekeeping as a post office responsibility but at that time no postal or military directive had been issued prohibiting the keeping of money in the post office safe under some such arrangement as suggested (R22). Under the arrangement agreed upon, accused himself received and receipted for more than one hundred thousand dollars. Some of the clerks working under him received and receipted for additional sums. Whichever of them received the money issued his personal receipt therefor, which receipt showed that the money was for the purchase of money orders. The money was then placed in envelopes which were sealed and placed in the safe. Upon each envelope was marked the name of the owner of the money and also the name of the postal officer or clerk who handled the transaction. At the time of delivering their money, the owners supplied the necessary data from which to prepare money orders, signing formal applications therefor so long as forms for the purpose were available, and the money orders were to be issued without further authorization.

Most of the money which was delivered to accused under the foregoing arrangement was in the form of America gold seal currency. Prior to the time that money orders were issued in exchange for this money, the rate of exchange of French francs for American dollars, which was controlled insofar as personnel of the Army of the United States was concerned, was reduced from 75 to 50 francs for a dollar. There were, however, those who for a time after this change in rate would still pay at the old rate of 75 francs per dollar for the gold seal American currency. After the change became effective, 50 francs would purchase a one dollar money order at United States Army Post Offices. In the presence of Corporal William McGee, on or about 1 February 1943, accused and Sergeant Leonard Ignaszak, who was chief postal clerk, discussed the opportunity offered by the situation to make a profit by exchanging American gold seal currency for francs and purchasing money orders with francs (R16). In this or another conversation held between the two about the same time, accused asked Sergeant Ignaszak if he would convert gold seal currency into francs at a bank in Casablanca for half of the profits (R13; Pros.Ex.1). Thereafter, on or about 5 February 1943, from money that had been delivered to him personally under the circumstances already set out, and by him placed in the safe, accused withdrew and delivered to Sergeant Ignaszak the sum of $1000. At a bank in Casablanca, Sergeant Ignaszak exchanged this money for francs at the rate of 75 francs for a dollar, and returned to accused 62,500 francs. Accused placed 50,000 of these francs in envelopes in the safe in lieu of the $1000 he had removed. He retained the difference of 12,500 francs ($250) for himself. He assumed that Sergeant Ignaszak retained a like sum for himself. In due course money orders aggregating $1000 were issued in favor of the proper persons in exchange for the 50,000 francs which had been substituted in

lieu of the American currency. On or about 9 February 1943, accused, a remitter, purchased ten money orders in the amounts of $100 each (R16).

4. In addition to testifying to substantially the foregoing, accused stated that the total profits realized by him from all of his manipulations of the nature here involved amounted to only an amount between $1000 and $1200. At the time of trial, he had been in the Army 12 years, lacking two months. Before being commissioned as an officer, he was stationed at the United States Military Academy in the permanent grade of a staff sergeant. He continued to be affiliated with postal work after the acts involved and was thereafter promoted from the rank of second lieutenant to that of first lieutenant.

Major Raymond D. Ferguson, under whose command accused had served during the 20 months next preceding trial, stated that during that time accused had been an excellent officer. All ratings appearing on accused's form 66-1 were those of "excellent" except for one of "satisfactory" given for the period during which the incident giving rise to this prosecution occurred.

5. The Specification of the Charge is perhaps not altogether free from ambiguity, and somewhat creates the impression of being duplicitous, but no objection was urged to it, and accused does not appear to have been prejudiced in any substantial right by the form of the pleading. When considered as a whole, and when the various allegations thereof are considered as complementing each other, the Specification sufficiently charged an offense, the gravamen of which is the wrongful conversion or appropriation by accused to his own use and benefit of $1000 of American currency which he was holding in trust for others. Clearly he held the money in trust to be applied to a particular purpose, viz., the purchase of money orders in conformity with the directions of the owners of the money. He had no authority to use the money for his own personal purposes or benefits. When, without authority and with the intent and purpose of making a profit for himself, he delivered the $1000 to Sergeant Ignaszak and procured it to be exchanged for francs, he breached his trust and converted the $1000 to his own use and benefit (65 C.J. Sec.48, pp.36,37; Sec. 520, p.654; Cf: CM ETO 1553, Salyards). This is so despite the fact that, voluntarily and pursuant to his original plan, he replaced the $1000 with sufficient francs to purchase money orders in the same amount that could have been originally purchased with the $1000. By breaching the trust relationship which existed between him and Army personnel, he was guilty of conduct to the prejudice of good order and military discipline. This is not rendered any the less true by the fact that accused was holding the money in his individual capacity rather than in his official capacity (CM 228147, Day, 16 BR 83 (1943) II Bull. JAG, p.13). The record of trial is legally sufficient to support the findings of guilty.

6. The charge sheet shows that accused is 31 years four months of age. He served as an enlisted man in the regular army for nine years and five months before being commissioned as an officer on 19 September 1942.

7. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. Dismissal, fine and confinement at hard labor are authorized punishments upon conviction of an offense in violation of Article of War 96. Designation of the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York, as the place of confinement is proper (AW 42, Cir. 210, WD, 14 Sept 1943, sec. VI as amended).

_____ Judge Advocate

_____ Judge Advocate

_____ Judge Advocate

(334)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations. 25 JUL 1945 TO: Commanding General, United States Forces, European Theater, APO 887, U.S.Army.

1. In the case of First Lieutenant ERWIN W. DINTSCH (O-1000348), Adjutant General's Department, 8th Postal Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10499. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10499).

E. C. McNEIL,
Brigadier General, United States Army,
Assistant Judge Advocate General.

---

( Sentence ordered executed. GCMO 304, ETO, 4 Aug 1945).

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 3 23 MAY 1945

CM ETO 10501

| | | |
|---|---|---|
| U N I T E D S T A T E S | ) | 95TH INFANTRY DIVISION |
| v. | ) | Trial by GCM, convened at APO 95, U. S. Army, 14 April 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |
| Private LEMUEL J. LINER (14065661), Headquarters Battery, 920th Field Artillery Battalion | ) | |

---

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

---

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Lemuel J. Liner, Headquarters Battery, 920th Field Artillery Battalion, did, at or near Beckum, Germany on or about 4 April 1945 forcibly and feloniously, against her will, have carnal knowledge of Ursula Hindahl, a female child of the age of about fifteen (15) years.

CHARGE II: Violation of the 96th Article of War.

Specification: In that * * * did, at or near Beckum, Germany on or about 4 April 1945 wrongfully fraternize with German civilians.

(336)

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of all charges and specifications. Evidence was introduced of two previous convictions, one by special court-martial for leaving his post as a sentinel before being properly relieved in violation of Article of War 86, and one by summary court for willfully and carelessly discharging his rifle while intoxicated in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution was substantially as follows:

On the evening of 4 April 1945 at about 2000 hours, a group of German civilians was staying in a hunting lodge near Beckum, Germany. Included in the group were Fraulein Ursula Hindahl and her mother. Ursula was 15 years of age. One of the women of the group was standing in front of the lodge when accused and a Russian displaced person approached. The Russian spoke a little German and, grabbing the woman by the front of her dress, said "This American wants a woman. We get a woman or we shoot". Accused was armed with a carbine. The two men then went into the house and accused turned his flashlight on the various occupants. The Russian pointed to Ursula, saying "Come, Come" and accused also pointed and beckoned to her. Ursula cried, but the Russian said "Come, come otherwise we will shoot". Accused and the Russian took her by the arm and went outside. They had been in the house for about ten minutes during which time accused had his carbine under his arm, raising and pointing it at the male members of the group whenever they undertook to speak. Ursula was afraid and said she did not wish to accompany them, but was told they would shoot her if she did not (R10-12,22-25, 26-28).

All three proceeded into the woods for a short distance. The Russian said the American was drunk and wanted intercourse. Ursula drew back indicating that she did not wish to go, but accused insisted, pointing his gun at her in a threatening manner. Arriving at a place about 100 meters from the lodge, accused and the Russian took off Ursula's apron and pants and told her to lie down on the apron. She complied because she was afraid. Accused opened

his trousers, laid himself upon her and had intercourse with her. The experience was physically painful to her, and although she knew accused had his penis in her vagina, it was her first sexual experience and she was uncertain whether "it was in right". A little while later they returned to the vicinity of the house. Accused went inside leaving Ursula in custody of the Russian. In aoout 15 minutes he returned, gave his gun to the Russian and again had intercourse with the girl, this time per anus, she having guided his penis away from her vagina because of the pain the previous experience had caused her. She permitted accused to have these relations with her because he would have done it even had she resisted (R13-21).

Meanwhile, Ursula's mother had complained to the military authorities. Accused's battalion commander, being informed that accused and the girl had been located in a field near the lodge, immediately went to the place described. He found accused sitting on his heels with a bottle of liquor pouring out on to the ground. The Russian had accused's carbine, and Ursula was standing nearby in a frightened condition. Accused said "Why don't you go ahead and shoot me now". The battalion commander placed him in arrest and took him to the command post. En route, accused remarked "I've got to get rid of this 'hard'", and upon arrival, he said "any man who wouldn't take a good piece of ass doesn't have any balls". He was intoxicated, but seemed to be in control of his faculties (R7-9).

Accused was interviewed on 6 April 1944, by the Inspector General of the 95th Infantry Division and after proper warning of his rights, made a sworn oral statement relative to the matters charged. He said the Russian lived in the farmhouse where their command post was located and had indicated to him through signs that he could find a girl with whom accused could have intercourse. They therefore went to the lodge and the Russian called the girl out. He talked to herin an ordinary conversational tone and she came along willingly and without threats or force on the part of accused or the Russian. On reaching a nearby field, the Russian removed her pants and apron, and she voluntarily lay on the ground and permitted accused to have intercourse with her. She was willing, made no protest and appeared to enjoy it. The Russian then had intercourse with her and after he finished, they were all still there when accused's battalion commander arrived. Accused kept his rifle with him at all times and never relinquished it to the Russian. In his opinion the girl was not a virgin previously to his intercourse with her (R29-35).

4. Accused after being warned of his rights by the law member, elected to testify under oath (R36).

His testimony was substantially to the same effect as his

statement to the Inspector General. He reiterated his account of the intercourse, stating that the girl was not only willing but actually cooperated in the act. There was only one act of intercourse which, however, was complete. He thought the girl was between 18 and 20 years of age (R37-42,44-45).

On cross-examination, accused testified that he was illiterate and that he had never read or had explained to him the rules and regulations relative to fraternization with German civilians. Except that he knew Germany to be an enemy, he was unfamiliar with the policies of the army governing the relationship between members of the military personnel and the Germans and had never heard such policies discussed (R42-45).

5. The record of trial clearly is legally sufficient to support the findings of guilty of rape (Charge I and Specification). While the prosecution's evidence on the question of penetration is somewhat confused, the victim nevertheless testified positively that entrance into her vagina was effected, and her testimony in this respect was fully corroborated by the admissions of accused to the Inspector General as well as his testimony at the trial. The only substantial issue therefore, is that of consent, such issue being raised not only by accused's contention that intercourse was had with the full consent of the girl, but also by the failure of the prosecution to show any physical resistance by the vicitm to the sexual act. As far as accused's contentions are concerned, a question of fact was created involving the relative credibility of the witnesses. Such questions, as the Board of Review has frequently held, are matters to be resolved by the court whose findings will not be disturbed if supported by substantial competent evidence (CM ETO 6148, Dear and Douglas). It is necessary to consider, therefore, whether the record of trial contains sufficient evidence to justify the court's obvious disbelief of accused's testimony and its consequent finding of lack of consent. The prosecution's evidence shows that the victim, a 15 year old girl, was taken from her friends against her will and under threat of force, in which threat accused is shown to have participated at least to the extent of pointing his carbine. Once in the field, various of her clothes were removed and she was told to lie down and was then subjected by accused to sexual intercourse. According to her testimony, she was not only sexually inexperienced, but throughout the proceeding was acting under fear of accused and his companion anddid not resist because of such fear. Under all the circumstances it cannot be said that she was required to offer further physical resistance or that her failure to do so was tantamount to consent (CM ETO 6554, Hill). Hence the court's finding of lack of consent was adequately supported by the evidence and will not be disturbed.

As for the charge of fraternization (Charge II and Specification), the evidence fails to show any contact whatever on the part of accused with the girl or any other German civilian except the criminal acts constituting the rape for which he was convicted. For the reasons stated in the recent opinion of the Board of Review in CM ETO 10967, Harris, the record of trial is therefore legally insufficient to support the findings of guilty of this Charge and Specification.

6. The charge sheet shows that accused is 24 years of age and enlisted 5 December 1941 at Fort McPherson, Georgia. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. For the reasons stated, the Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty of Charge I and its Specification, legally insufficient to support the findings of guilty of Charge II and its Specification and legally sufficient to support the sentence.

8. The penalty for rape is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a United States penitentiary is authorized upon conviction of the crime of rape by Article of War 42 and sections 278 and 330, Federal Criminal Code (18 USCA 457, 567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4),3b).

Benjamin R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. H. Levy Jr. Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 1

25 AUG 1945

CM ETO 10532

| | |
|---|---|
| U N I T E D S T A T E S | NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| Private KENNETH J. MARKS (33622198), 232nd Replacement Company, 39th Replacement Battalion, 19th Replacement Depot | Trial by GCM, convened at Rennes, France, 23 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

HOLDING by BOARD OF REVIEW NO. 1
BURROW, STEVENS and CARROLL, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 92nd Article of War.

Specification: In that Private Kenneth J. Marks, 232nd Replacement Company, 39th Replacement Battalion, 19th Replacement Depot, did in conjunction with Private Peter C. Nungiato Company L, 12th Infantry and Private George M. Farley, attached unassigned to 446th Replacement Company, at the Island of Grand Bey, near Saint Malo, Brittany, France, on or about

22 November 1944, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill a white male person known only as "Al", a human being, by shooting him with a pistol.

CHARGE II: Violation of the 58th Article of War.

Specification: In that * * * did, near Carentan, Normandy, France, on or about 26 August 1944, desert the service of the United States by absenting himself from his organization with intent to avoid hazardous duty and to shirk important service, to wit, military operations against the German Armed Forces, and did remain absent in desertion until he was apprehended at Cherbourg, Normandy, France, on or about 19 December 1944.

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of both charges and specifications. No evidence of previous convictions was introduced. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for the term of his natural life. The reviewing authority approved only so much of the findings of guilty of the Specification of Charge II and of Charge II as involved a finding of guilty of absence without leave from 26 August 1944 until apprehended 19 December 1944, in violation of Article of War 61, approved the sentence, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. Accused, deceased, Private George M. (Jim) Farley, Private Peter C. Nunziata, and a soldier named William Reck constituted a gang of absentee Army personnel who lived by beggary and small trading with headquarters in a farmhouse on the outskirts of Cherbourg, France. During the latter part of November 1944, this group visited St. Malo, France, where they took up residence for several days. There they discovered a small island off the coast named Grand Bey, which could be reached on foot at low tide and which they visited on one or two occasions. Accused had the largest amount of money among them (R39),

but the deceased, a newcomer to the group, had sufficient funds to spend freely (R45).

While at St. Malo, accused in the course of a quarrel with a hotel manager menaced his antagonist with a pistol. Deceased admonished him "to put his gun away" and was told to go on about his business. Thereafter accused was angry and less friendly with the other members of the group (R19-21).

Some days later, about 21 November 1944, at approximately 1600 hours (R23,69; Pros.Ex.L), after some persuasion by accused to the others and particularly to deceased, the group again visited the island of Grand Bey (R23-24,69; Pros.Ex.L). They strolled around for a half an hour looking for souvenirs. Accused and deceased were together on the highest point on the island. Farley and Nunziata testified as to the subsequent events. They were about 15 feet from accused and heard a shot. They saw accused with a gun in his hand. Below him at the foot of the steps in a German dugout lay deceased groaning and bleeding from the head (R31,32,48). Accused said "I shot the son of a bitch" (R31) "Because he was going to shoot me" (R48). He then demanded of the rest "What in the hell are you standing there for?" Deceased was carried into the dugout chamber. Accused, while standing in the doorway, then shot at him again (R33,49). Farley thought the victim's appearance after the second shot was the same as after the first, "just lying there groaning" (R33), but Nunziata said there was more blood (R49). Accused told Nunziata he had fired the second shot because he could not help it, for he was nervous and the man was groaning (R50).

At accused's direction to "take everything off of this man, I mean everything", deceased who then lay on his back still groaning was robbed of his pistol, pocketbook, watch, dog tags, cigarette lighter and fountain pen, of all of which accused took possession (R34-35,39).

The pistol was found in the pocket of deceased's combat jacket where deceased had customarily carried his hand on it (R34,53). Nunziata, without statement as to the basis of his knowledge, testified it was then loaded, although he further testified deceased had been looking for ammunition for the gun that afternoon (R48,52). Farley's testimony was that accused gave him the gun unloaded an hour or so after the shooting and had no opportunity to unload it unobserved and did not do so meanwhile (R41). Accused subsequently gave Nunziata and Reck 600 francs of the spoils (R53). The body was covered with straw, and the group left the island and St. Malo immediately, travelling to Cherbourg (R35,50). The dog tags were thrown into the sea.

Accused's version of these events, as set forth in three voluntary pretrial statements introduced in evidence, followed generally the above testimony up until the time of the shooting. He claimed however that the day before, he had seen deceased draw a gun on him while walking in his rear in a beach area. His version of the shooting was that all five of the group were in the dugout when deceased pointed his gun at one of the other soldiers, and he fired to protect that soldier. He did not know whether he fired once or twice; he knew the victim was dead; and he claimed the spoils were equally divided (R63,67,71; Pros. Exs.K-M).

A partly decomposed body was found in the dugout 1 December 1944. Pictures were taken by a Government agent and introduced in evidence after his identification of them. Farley and Nunziata could not identify them. This body was delivered on 2 December 1944 by the Government agents to two noncommissioned officers of the 127th General Hospital (R55,59). A stipulation as to the results of an autopsy performed at the 127th General Hospital on 2 December 1944 was received in evidence (R78,79; Pros.Exs.O-P). The stipulated report described wounds and a peculiar tattoo mark on the right arm, all of which appear in the pictures. The autopsy revealed two wounds, one a gunshot wound with entry above the left eyebrow and exit in right temple, which was the cause of death, and a large lacerated wound in the center of the forehead insufficient to result in death and caused either by a glancing bullet, a blow or a fall (R80; Pros.Ex.P).

An extract copy of a competent morning report proved the inception of the absence without leave on 26 August 1944, and continued absence until apprehension on 19 December 1945 at Cherbourg was admitted (R63,77,86; Pros.Exs.K,N).

4. The accused, after his rights were fully explained to him, elected to remain silent as to the murder charge (R84-85), and by unsworn statement admitted apprehension as alleged in the Specification of Charge II (R86). No other evidence was introduced in his behalf.

5. Murder is the killing of a human being with malice aforethought and without legal justification or excuse. The malice may exist at the time the act is committed and may consist of knowledge that the act which causes death will probably cause death or grievous bodily harm (MCM, 1928, par.148a, pp.162-164). The law presumes malice where a deadly weapon is used in a manner likely to and does in fact cause death (1 Wharton's Criminal Law (12th Ed., 1932), sec.426, pp.654-655), and an intent to kill may be inferred from an act of the accused which manifests a reckless disregard of human life (40 CJS, sec.44, p.905, sec.79b, pp.943-944).

The proof is strong that this was a case of murder for profit. Accused was the ringleader of a gang living outside the law and dependent upon dubious means for a livelihood. The selection of the isolated spot after a previous quarrel, accused's concealment of deceased's body in a place where if not so soon found he would have been taken for a battle casualty, the robbery and removal of means of identity, together with the testimony of the eyewitnesses, constituted ample testimony from which the court could properly find that the killing was with malice aforethought. It was within the province of the court to resolve against accused the questions of fact raised by his pretrial statements. Points of time and place and identity of description with photographs were circumstances rendering the autopsy report competent evidence concerning the body found in the dugout. That the victim was dead was admitted by accused. The firing of the second shot was convincing evidence of malice. We conclude that the evidence was legally sufficient to sustain the findings and sentence (CM ETO 10740, Rollins; CM ETO 7315, Williams; CM ETO 6229, Creech; CM ETO 4640, Gibbs).

6. The charge sheet shows that accused is 21 years five months of age and was inducted 1 April 1943 at Allentown, Pennsylvania. No prior service is shown.

7. The court was legally constituted and had jurisdiction of the person and offenses. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

8. The penalty for murder is death or life imprisonment as the court-martial may direct (AW 92). Confinement in a penitentiary is authorized upon conviction of murder by Article of War 42 and sections 275 and 330, Federal Criminal Code (18 USCA 454,567). The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

Wm. T. Sprouse Judge Advocate

Edward H. Stearns, Jr. Judge Advocate

Donald R. Cowell Judge Advocate

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

10 MAY 1945

CM ETO 10563

| | |
|---|---|
| UNITED STATES<br><br>v.<br><br>Privates MICHAEL T. INZEO (32696458) and FERDINAND D. SALVIA (32325417), both of 374th Replacement Company, 101st Replacement Battalion, Ground Force Reinforcement Command | UNITED KINGDOM BASE, COMMUNICATIONS ZONE, European Theater of Operations,<br><br>Trial by GCM, convened at London, England, 10 April 1945. Sentence as to each: Dishonorable discharge, total forfeitures and confinement at hard labor for 12 years. The United States Penitentiary, Lewisburg, Pennsylvania. |

HOLDING by BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

1. The record of trial in the case of the soldiers named above has been examined by the Board of Review and found legally sufficient to support the sentences.

2. The "passes" involved in this case were blank, uncompleted, printed forms for passes. A blank, printed form for a pass is not a "military, or official pass or permit" within the contemplation of the Act of June 15, 1917, chapter 30, title X, section 3 (40 Stat. 228; 18 USCA 132).

3. As none of the offenses of which accused were convicted are punishable by penitentiary confinement, designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is not authorized (AW 42), and should be changed to the Eastern Branch, United States Disciplinary Barracks, Greenhaven, New York.

Judge Advocate

Judge Advocate

Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater
APO 887

BOARD OF REVIEW NO. 3 8 AUG 1945

CM ETO 10568

| | |
|---|---|
| U N I T E D S T A T E S | NORMANDY BASE SECTION, COMMUNICATIONS ZONE, EUROPEAN THEATER OF OPERATIONS |
| v. | |
| Private BILLY RITCHIE (15086655), Company D, 341st Engineer Regiment | Trial by GCM, convened at Le Mans, Sarthe, France, 23,27 March 1945. Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The "U.S. Penitentiary", Lewisburg, Pennsylvania. |

HOLDING by BOARD OF REVIEW NO. 3
SLEEPER, SHERMAN and DEWEY, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review.

2. Accused was tried upon the following charges and specifications:

CHARGE I: Violation of the 58th Article of War.

Specification: In that Private Billy Ritchie, Company "D", 341st Engineer Regiment, did, at Epernon, France on or about 28 August 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at Nogent - Le - Rotrou, France, on or about 26 October 1944.

CHARGE II and Specification: (Withdrawn by the prosecution at direction of appointing authority)

He pleaded not guilty and, three-fourths of the members of the court present at the time the vote was taken concurring, was found guilty of Charge I and Specification. Evidence was introduced of three previous convictions, one by special court-martial for disrespect toward his superior officer in violation of Article of War 63, and two by summary court respectively for absence without leave for 45 minutes in violation of Article of War 61 and a violation of standing orders by indiscriminately discharging weapons in violation of Article of War 96. Three-fourths of the members of the court present at the time the vote was taken concurring, he was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the receiving authority may direct, for the term of his natural life. The receiving authority approved the sentence, designated the "U.S. Penitentiary", Lewisburg, Pennsylvania, as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence was not disputed that on 28 August 1944 accused absented himself without proper authority from his organization at a place not disclosed (R7,10,11-12; Pros.Ex.1). On 26 October 1944 at a place not shown, but probably near Daujean and Chateaudun, he was apprehended by the military police. He was then dressed in civilian clothes (R9-10,12-13,14,16; Pros.Exs.3,4,5) and had no identification papers. He said he was a Canadian and was going to Paris from Cherbourg to "Supreme Headquarters to get his papers fixed up" (R13). Later the same day at a military police headquarters at a place not shown (R14), he gave his name as "Flouffe" and repeated his previous representation that he was a Canadian. He claimed he had been a prisoner of war in Cherbourg for three or four years and was "en route to Paris to get travelling orders to go back to his outfit". However, the next day he identified himself as William Ritchie, a member of the United States Army (R16). On 29 December 1944 he was interviewed by an agent of the Criminal Investigation Division at Le Mans, France, who informed him of his rights under Article of War 24 (R8-9,11,12). Accused then identified the civilian clothes worn by him at the time of his apprehension (R9). He said these had been given him by a French civilian living in Le Mans and that he wore them so that he might not be apprehended (R10).

4. No evidence was offered by the defense. After his rights were explained, accused elected to remain silent (R17).

5. The evidence failed to show either the place of accused's initial absence other than "APO 350, U.S. Army", or that of his apprehension. These omissions were not vital to the proof of desertion in this instance. The gravamen of the offense charged is absence without leave accompanied by the intent at some time during his absence not to return to the service (CM 119864(1918), CM 149669 (1922, 250.401, Aug.30, 1940, Dig.Op.JAG 1912-40, sec.369 (1), p.180; CM 199270(1932), CM 186501(1929), Dig.Op.JAG 1912-40, sec.416(10), p.270).

6. The accused's absence without leave for a period of 59 days, his apprehension while dressed in civilian clothes and his denial of his proper identity fully support the court's findings of guilty of desertion (CM ETO 1645, Gregory; CM ETO 2343, Welbes).

7. The charge sheet shows that accused is 23 years two months of age and that he enlisted 11 December 1941 at Fort Thomas, Kentucky, to serve for the duration of the war plus six months. No prior service is shown.

8. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence.

9. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized by Article of War 42. The action designates the "U.S. Penitentiary" as the place of confinement. The designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement, is proper (Cir.229, WD, 8 June 1944, sec. II, pars.1b(4), 3b).

B R Sleeper Judge Advocate

Malcolm C. Sherman Judge Advocate

B. L. Wiener Jr. Judge Advocate

Branch Office of The Judge Advocate General
with the
European Theater of Operations
APO 887

BOARD OF REVIEW NO. 2

9 JUN 1945

CM ETO 10578

| | |
|---|---|
| U N I T E D  S T A T E S | 8TH INFANTRY DIVISION |
| v. | Trial by GCM, convened at APO 8, U.S. Army, 11 March 1945. |
| Private WILLIAM J. PARISIEN (32046291), Company F, 28th Infantry | Sentence: Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, Lewisburg, Pennsylvania. |

HOLDING BY BOARD OF REVIEW NO. 2
VAN BENSCHOTEN, HILL and JULIAN, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined by the Board of Review and the Board submits this, its holding, to the Assistant Judge Advocate General in charge of the Branch Office of The Judge Advocate General with the European Theater of Operations.

2. Accused was tried upon the following Charge and Specification:

CHARGE: Violation of the 58th Article of War.

Specification: In that Private William J. Parisien, Company F, 28th Infantry, did, in the vicinity of La Haye du Puits, France on or about 13 July 1944 desert the service of the United States with intent to avoid hazardous duty, to wit; combat duty against an armed enemy of the United States and did remain absent in desertion until he was apprehended at Carentan, France on or about 20 November 1944.

He pleaded not guilty and, all the members of the court present when the vote was taken concurring, was found guilty of the Charge and Specification. No evidence of previous convictions was introduced.

All members of the court present when the vote was taken concurring, he was sentenced to be shot to death with musketry. The reviewing authority, the Commanding General, 8th Infantry Division, approved the sentence, recommended that it be commuted to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life and forwarded the record of trial for action under Article of War 48 and 50½. The confirming authority, the Commanding General, European Theater of Operations, confirmed the sentence, but owing to special circumstances in this case and the recommendation of the reviewing authority, commuted it to dishonorable discharge from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for the term of his natural life, designated the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement and withheld the order directing the execution of the sentence pursuant to Article of War 50½.

3. The evidence for the prosecution shows that accused's organization was at La Haye du Puits and at Mobecq Hill, just south, (R5) from 10 July to 16 July (R11), moving in attack constantly from 12 to 15 July 1944 (R5,8,10-11) within from 150 to 200 yards of the enemy (R5). Many casualties were suffered (R11). For a part of this time accused was engaged in carrying ammunition to a platoon of Company G of the 28th Infantry and when he finished this job was ordered by Captain Emerson, the platoon leader, to return to his own platoon (R9-10). At this time the fight was still going on and continued for an additional 12 hours (R11). Captain Emerson did not remember lending his shovel to accused nor of asking accused to be his runner (R12-13). Accused was missing in the early evening of 12 July (R8). The platoon and company area was searched for accused on the evening of 12 July (R6,14) but he was not again seen in the company area (R6,8,12,14) until 8 January 1945. He had been given no authority to be absent from the company area (R6).

The Regimental Graves Registration officer, 28th Infantry, Captain Culhane, who knew accused, while leading a convoy some three miles north of La Haye du Puits on 16 or 17 July, saw a man, whom he identified as accused, step out on the road and look at the bumper of Culhane's vehicle which had the 28th Infantry marks on it, and who when he saw he was observed "double-timed across the road". Shortly thereafter the area was searched but accused was not found. Culhane knew all the dead of the regiment and was on the lookout for accused who was missing (R16).

4. Accused was sworn as the only defense witness and testified that he had fought for at least six days prior to 12-13 July; that while fighting in close combat on 13 July, Lieutenant Emerson had asked him to be his runner and that later behind a hedgerow he borrowed the lieutenant's shovel to dig in; that thereafter he did not again see the lieutenant (R19). When he got lost in the action, he inquired for the 28th Infantry but saw no "MP's" on the road (R20) and did not stop any other people. He denied intending to desert or of seeing Captain Culhane and testified that he was picked up at Carentan about 13 to 15 miles from La Haye du Puits on 20 November (R21).

He had found an anti-aircraft battalion and stayed with them "a little more than a month" till an officer told him he "was hanging around long enough" so he left and found an "Ordnance Tank Transport outfit" (R22), who had just arrived and he stayed with them "about a month" doing nothing but "just fooled around". He then went to Belgium sometime in December and while "looking for my outfit" landed in Paris where he spent two weeks "still looking for my outfit" (R23). While there he saw many soldiers and he asked one "M.P." who did not know where accused's outfit was. He tried to find them "but no one ever told me" (R24).

5. "Desertion is absence without leave accompanied by the intention not to return, or to avoid hazardous duty, or to shirk important service" (MCM, 1928, par. 130a, p.142; AW 28).

While accused may have been some combat service in early July 1944, the evidence is clear and convincing that he disappeared while the action was progressing and search failed to locate him. As his regiment was in action in the same vicinity for several days longer, his story of becoming lost and being unable to find them is not plausible. The further fact that he was seen shortly after his disappearance examining the markings on the bumper of a vehicle from his own organization, hastily disappearing when he was observed would also indicate his intent to remain away from duty. His story of how he spent the several months of his absence in a country full of soldiers and military stations where he could have inquired for or surrendered and been returned to his company is also implausible. The conclusion is compelling that he deliberately went absent without leave to avoid further combat duty and the evidence fully substantiates the findings of the court (CM ETO 1406, Pettapiece; CM ETO 6549, Festa).

6. The charge sheet shows that accused is 21 years old and was inducted 9 April 1941. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person and offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence, as commuted.

8. The penalty for desertion in time of war is death or such other punishment as a court-martial may direct (AW 58). Confinement in a penitentiary is authorized (AW 42). Designation of the United States Penitentiary, Lewisburg, Pennsylvania, as the place of confinement is proper (Cir.229, WD, 8 June 1944, sec.II, pars. 1b(4), 3b).

Judge Advocate

Judge Advocate

Judge Advocate

CONFIDENTIAL

(356)

1st Ind.

War Department, Branch Office of The Judge Advocate General with the European Theater of Operations 9 JUN 1945 TO: Commanding General, European Theater of Operations, APO 887, U. S. Army.

1. In the case of Private WILLIAM J. PARISIEN (32046291), Company F, 28th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the findings of guilty and the sentence as commuted, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. The file number of the record in this office is CM ETO 10578. For convenience of reference, please place that number in brackets at the end of the order: (CM ETO 10578).

E. C. McNEIL
Brigadier General, United States Army,
Assistant Judge Advocate General

---

( Sentence as commuted ordered executed. GCMO 228, ETO, 27 June 1945).



25 935231

REGRADED UNCLASSIFIED
BY AUTHORITY OF TJAG
BY CARL E. WILLIAMSON, LT. COL.,
JAGC, ASS'T EXEC. ON 20 MAY 54