

CODE 20

SIDEBAR

NOVEMBER 2019 APPELLATE UPDATE

This Sidebar is Code 20's monthly appellate case update, reporting on all NMCCA cases from November of 2019.¹

Authored and Published NMCCA Opinions:

Pretrial Confinement Credit Awarded for Civilian Confinement When the Confinement is Related to the Resulting Conviction and Sentence.

United States v. Tyndall, 2019 CCA LEXIS 476 (N-M. Ct. Crim. App. November 27, 2019)

An Electronics Technician Seaman was convicted at a general court-martial, consistent with his pleas, of violations of Articles 90, 120a, 128, and 134 of the UCMJ. The charges against Appellant related to several instances of domestic violence against his wife. On appeal, Appellant asserted that he should have received pretrial confinement credit for time spent in civilian confinement. Appellant was held in civilian confinement for 3 days for a "domestic battery" arrest and 16 days for violating a civilian protective order.

Upon review, the Court determined that Appellant was entitled to credit for the 3 days of civilian confinement related to the domestic battery arrest because it related to the offenses for which he was later sentenced, but was not entitled to credit for the 16 days because that offense occurred after the court-martial offenses. Accordingly, the Court ordered that Appellant receive an additional 3 days of pretrial confinement credit.

Broadcasting a Video Does Not Require Transmission Between Two Devices

United States v. Lajoie, 79 M.J. 723 (N-M. Ct. Crim. App. November 27, 2019)

A Lance Corporal was convicted at a special court martial, consistent with his pleas, of one specification of indecent visual recording and three specifications of broadcasting an

indecent visual recording in violation of Article 120c, UCMJ. On appeal, the Court raised the issue of whether Appellant's pleas to the three specifications of broadcasting an indecent visual recording were provident when the conduct admitted by Appellant consisted of displaying a video recording on his cell phone for another to view.

The Court first analyzed the definition of "broadcast" under Article 120c(a), UCMJ. The Court looked to the text of 120c(a)(4), and noted that the definition of "broadcast" is to "electronically transmit a visual image with the intent that it be viewed by a person or persons." The question then became whether "electronic transmission" required the sending from one electronic device to another. The Court ultimately concluded that the involvement of more than one electronic device is not necessary for an electronic transmission to occur. The Court was satisfied that Appellant had "broadcast" the indecent visual recording when he showed it to other Marines, even when he did so using the same phone on which he recorded the video. The Court found no textual requirement for another electronic device to receive the image. Accordingly, the Court affirmed the findings and sentence.

Failure to State an Offense is Waivable Motion; Plea Supported by the Entirety of the Record.

United States v. Spence, 2019 CCA LEXIS 475 (N-M. Ct. Crim. App. November 27, 2019)

A Hospitalman was convicted at a general court-martial, pursuant to his pleas, of three specifications of attempted sexual abuse of a child, in violation of Article 80, UCMJ. On appeal, he raised two assignments of error (AOE): (1) that the third specification failed to state an offense and (2) that his plea to the third specification was improvident

¹ There were no published CAAF or relevant SCOTUS opinions in November 2019.

because the military judge did not elicit a factual basis to satisfy all elements of the offense.

In addressing the first AOE, the Court found that Appellant did not raise the issue at trial and entered an unconditional guilty plea, and therefore, “[f]ailure to state an offense is a waivable motion pursuant to RCM 907(b)(2)(E) and [he] explicitly relinquished his right to raise that motion at trial.”

The Court also concluded that Appellant’s plea to the third specification was provident. Although the Court found that the specification poorly drafted, when read in its entirety, the specification contained the basic allegation. The Court further found that the providence inquiry, charge sheet, PTA, stipulation of fact, and the voluntary plea by exceptions and substitutions, all clearly established that the appellant knew the elements and admitted them freely. Accordingly, the Court held that there was no substantial basis to question Appellant’s plea and the military judge did not abuse her discretion in accepting it.

Per Curium and Summary Disposition With Comment:

United States v. Brightwell, 2019 CCA LEXIS 447 (N-M. Ct. Crim. App. November 5, 2019)

An Aviation Maintenance Administrationman Third Class was convicted at a general court-martial, in accordance with his pleas, of violations of Article 120, UCMJ. On appeal, the Court found that Appellant failed to make any showing of prejudice in his two raised AOE: (1) that the Government failed to serve his trial defense counsel (TDC) with either the SJA recommendation or the addendum to the recommendation as required by R.C.M. 1106(f); and (2) that the TDC’s failure to request viable clemency constituted ineffective assistance of counsel. Accordingly, the Court affirmed the findings and sentence.

United States v. Gevero, 2019 CCA LEXIS 474 (N-M. Ct. Crim. App. November 27, 2019)

An Electrician’s Mate (Nuclear) Second Class pleaded not guilty to Specification 1 of the sole Charge, Article 112a,

distribution of lysergic acid diethylamide, but guilty to the lesser-included offense of possession with intent to distribute. However, the Court noted the court-martial order (CMO) was silent on the resolution of the greater offense of distribution. The Court, therefore, ordered a supplemental CMO to accurately reflect the disposition of the greater offense.

United States v. Bauer, 2019 CCA LEXIS 477 (N-M. Ct. Crim. App. November 27, 2019)

This case was submitted without AOE, but upon its own review, the Court noted that the Entry of Judgment (EOJ) did not accurately reflect the disposition of charges. The Court modified the EOJ and directed that it be included in the record.

Summary Disposition Without Comment:

U.S. v. Lunsford, No. 201900137 (Nov 14, 2019)

U.S. v. Landrum, No. 201900141 (Nov. 14, 2019)

U.S. v. Kickhefer, No. 201900124 (Nov. 14, 2019)

U.S. v. Ayers, No. 201900107 (Nov. 14, 2019)

U.S. v. Perez, No. 201900118 (Nov. 14, 2019)

U.S. v. Kerlagon, No. 201800358 (Nov. 20, 2019)

U.S. v. Thrasher, No. 201900179 (Nov. 26, 2019)

U.S. v. Granja, No. 201900129 (Nov. 29, 2019)

Appellate Review Completed:

U.S. v. Brasberger, No. 201900084 (Nov 19, 2019)

U.S. v. Miller, No. 201900093 (Nov. 19, 2019)

U.S. v. Balausky, No. 201900121 (Nov. 19, 2019)

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