

CODE 20

SIDEBAR

CY 2019 SECOND QUARTER APPELLATE UPDATE

This Sidebar is Code 20's appellate case update, highlighting several SCOTUS, CAAF, and NMCCA cases from Q2 of CY19.

SO FAR THIS SCOTUS TERM...

A few notes on some Q2 Supreme Court cases from the current term that may have potential military justice implications:

Fourth Amendment Warrantless Blood Tests

Mitchell v. Wisconsin, 139 S. Ct. 2525 (U.S. Jun. 27, 2019)

On May 30, 2013, police in Sheboygan, Wisconsin arrested Gerald Mitchell for driving while intoxicated. Because Mitchell was slurring his words and lethargic, the police decided to take him to the hospital, rather than taking him directly to the police station. In the emergency room, Mitchell was informed of his rights, and given the statutory opportunity to withdraw his consent to have his blood drawn and tested. However, by this point, Mitchell was too incapacitated to respond. The police officer, nonetheless, instructed the hospital to draw Mitchell's blood, which revealed a blood-alcohol level above the legal limit. Prior to his trial, Mitchell moved to suppress the blood test results, alleging that the blood draw violated his rights under the Fourth Amendment to the United States Constitution as well as Wisconsin state law. The trial court denied Mitchell's motion and he was convicted of the charges.

In a 5-4 opinion, a divided Supreme Court ruled that the Fourth Amendment generally does not bar states from taking a blood sample from an unconscious drunk-driving suspect without a warrant. The Court explained that although the Fourth Amendment generally requires a warrant for a search, there are a variety of exceptions to this rule, including one for "exigent circumstances," which allows searches without a warrant to "prevent the

imminent destruction of evidence." The Court further held that blood-alcohol limits serve an important law enforcement purpose, and the exigent circumstances exception will generally allow police to take blood from an unconscious drunk driving suspect without a warrant, in order to preserve that evidence.

Applicability of "Knowingly" Applies to Status Element of an Offense

Rehaif v United States, 139 S. Ct. 2191 (June 21, 2019)

Hamid Mohamed Ahmed Ali Rehaif was in the United States on a nonimmigrant student visa, but was academically dismissed in December 2014. His immigration status was terminated in February 2015. Rehaif remained in the country and went to a shooting range in December 2015. He purchased a box of ammunition and rented a firearm for one hour. The Government prosecuted him under 18 U. S. C. §922(g), which makes it unlawful for certain persons, including aliens illegally in the country, to possess firearms, and §924(a)(2), which provides that anyone who "knowingly violates" the first provision can be imprisoned for up to 10 years. The jury at Rehaif's trial was instructed that the Government was not required to prove that he knew that he was unlawfully in the country. It returned a guilty verdict.

In a 7-2 opinion, The Supreme Court held that in order to convict Rehaif of unlawful possession of a firearm,

prosecutors must prove the he both knew that he was in possession of a firearm and knew that he was in the country illegally. More broadly, the Court ruled that, when dealing

with otherwise legal conduct that is made criminal only by the defendant's status, "the word "knowingly" applies both to the defendant's conduct and to the defendant's status."

MILITARY APPELLATE CASE UPDATES

Summary of selected CAAF and NMCCA decisions from Q2 of CY19:

Mens Rea for Sexual Assault by Bodily Harm is General Intent to Commit the Sexual Act

United States v. McDonald, 78 M.J. 376 (C.A.A.F. Apr. 17, 2019)

Private First Class McDonald, US Army, was convicted of sexual assault by bodily harm on a non-consent theory. The military judge in his case gave no specific *mens rea* instruction beyond the standard mistake of fact defense, which provides a defense if the accused had an honest and reasonable (non-negligent) belief that consent was obtained. McDonald, however, contended that *Elonis v. United States*, 135 S. Ct. 2001 (2015), required the military judge to instruct the members that a *mens rea* of at least recklessness with regard to consent was necessary for conviction. CAAF granted review to determine the required *mens rea* for sexual assault by bodily harm, and concluded that "Congress clearly intended a general intent *mens rea* for Article 120(b)(1)(B)."

Obscenity is Not Protected Speech; Officers Held to a Higher Standard

United States v. Meakin, 78 M.J. 396 (C.A.A.F. May 7, 2019)

Lieutenant Colonel Meakin, US Air Force, was convicted contrary to his pleas, by a general court-martial composed of a military judge alone, of seventeen specifications of conduct unbecoming an officer and a gentleman under Article 133, and sentenced to confinement for 20 months, total forfeitures, and a dismissal. Meakin's convictions were based on sexually explicit online chats with unidentified individuals about sexual fantasies involving children. At trial, Meakin argued that the Article 133 specifications must be dismissed on the basis that his private chats were protected First Amendment speech. The Air Force CCA and CAAF both rejected this argument.

In its ruling, CAAF explained that obscenity is not speech protected by the First Amendment, that "indecent" as defined by para. 89 of pt. IV of the Manual for Courts-

Martial (2016 ed.) is synonymous with "obscene," and that obscenity can consist of visual images or language. The Court went on to reject Meakin's arguments that the obscenity he transmitted was protected under the First Amendment and/or the Due Process Clause of the Fourteenth Amendment. Moreover, the Court found unpersuasive Meakin's argument that there was no connection between his conduct and the military mission. Rather, the Court enunciated that for purposes of an Article 133 conviction, speech that might not otherwise be criminal may still be punishable. Judge Ryan wrote for a unanimous Court, and explained that the unique nature of the offense of conduct unbecoming an officer and a gentleman defined by Article 133 provides a "more exacting standard of conduct [that] can be traced back at least to the days of knighthood where knights were held to a higher standard of conduct than their fellow countrymen in the Court of Chivalry."

Reversal in Cases Involving Constitutional Error Unless Harmless Beyond a Reasonable Doubt

United States v. Tovarchavez, 78 M.J. 458 (C.A.A.F. May 31, 2019)

Specialist Tovarchavez, US Army, was convicted at general court-martial for sexually assaulting another soldier, and sentenced to confinement for two years, reduction to E-1, total forfeitures, and a dishonorable discharge. At trial, the military judge instructed the members that they could use the charged offenses as evidence of Tovarchavez's propensity to commit the charged offenses, and the defense did not object to the instruction. This instruction, however, was contrary to CAAF's 2016 decision in *United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016), in which the Court ruled that charged offenses may not be used under Mil. R. Evid. 413 to prove an accused's propensity to commit the charged offenses because doing so would violate an accused's constitutional rights.

On appeal, the Army CCA affirmed the findings and sentence as approved by the convening authority. In doing so, the lower court reviewed the *Hills* constitutional error by applying the "material prejudice" standard used for non-

constitutional errors. Upon review, CAAF reversed the decision of the Army CCA, ruling that regardless of whether an error is preserved or forfeited at trial, if the error is constitutional in nature then reversal is required unless the error is harmless beyond a reasonable doubt. Applying this standard, CAAF set aside the findings and sentence, concluding that the error in Tovarchavez's trial was not harmless beyond a reasonable doubt.

Aggravated Sexual Contact with a Child is Not a Lesser Included Offense of Rape of a Child

United States v. Gonzales, 78 M.J. 480 (C.A.A.F. 2019)

Specialist Gonzales, US Army, was convicted by a general court-martial composed of a military judge alone of aggravated sexual contact with a child, aggravated sexual abuse of a child, indecent liberty with a child, and child endangerment, and sentenced to confinement for 22 years, reduction to E-1, total forfeitures, and a dishonorable discharge. CAAF's review was limited to the conviction of aggravated sexual contact with a child. At trial, Gonzales was charged with rape of a child (in violation of Article 120(b) (2006)), but the evidence did not support the element of penetration. The military judge, therefore, acquitted Gonzales of rape but convicted him of aggravated sexual contact, ostensibly as a lesser included offense.

On review, CAAF explained that the statutory elements of aggravated sexual contact with a child are not necessarily included in the statutory elements of rape of a child. Specifically, the two offenses are different, in that rape of a child requires a sexual act (with merely general intent), while aggravated sexual contact requires sexual contact, but with specific intent. The Court further concluded that the charge sheet did not provide notice of the different elements of the sexual contact offense, and that the military judge, therefore, erred in convicting Gonzales of aggravated sexual contact with a child. Nonetheless, the Court found that this error was not plain or obvious at the time of trial, and because Gonzalez failed to object at trial, the Court granted no relief.

A Novel Offense Cannot be Charged When the Conduct is Already Subject to an Enumerated Offense

United States v. Gleason, 78 M.J. 473 (C.A.A.F. Jun. 6, 2019)

Contrary to his pleas at a general court-martial, Staff Sergeant Michael Gleason, US Army, was convicted by a panel of officer members of six specifications of assault

consummated by battery, two specifications of aggravated assault, one specification of adultery, and one "novel" specification of interfering with an emergency call, in violation of Articles 128 and 134. He was sentenced to a reduction to E-1, seven years of confinement, and a dishonorable discharge. The Army CCA set aside the guilty finding as to the adultery specification but affirmed the remaining findings and the sentence. On appeal, Gleason challenged the novel offense on the basis that the conduct in question was already covered by an enumerated Article 134 offense.

Upon review, CAAF rejected the novel offense. In doing so, the Court explained that the conduct in question fell squarely within the offense of obstruction of justice, but that by charging the conduct under a novel specification, the government relieved itself of the burden of proving the second and third elements of an obstruction of justice charge. CAAF concluded that this charging strategy is barred by the prohibition in the MCM against charging a novel specification when the offensive conduct is already covered by an offense enumerated in the Manual. CAAF reversed the decision of the Army CCA, dismissed the specification at issue, set aside the sentence, and remanded for further proceedings.

Intent Supported by Subsequent Text Messages

United States v. Rodriguez, 79 M.J. 1 (C.A.A.F. Jun. 20, 2019)

Boatswain's Mate Second Class Rodriguez, US Coast Guard, was convicted at general court-martial, by military judge alone, of sexual abuse of a child and adultery in violation of Articles 120b (2012) and 134, and sentenced to reduction to confinement for 18 months, reduction to E-1, and a bad-conduct discharge. The sexual abuse of a child conviction was based on evidence that Rodriguez kissed the feet of his fiancé's child. Although the testimony indicated that Rodriguez exhibited no outward signs that he was kissing the child's feet to arouse or gratify his sexual desires, his sexual intent was proven by subsequent text messages in which he discussed a sexual fetish involving feet and also referenced the child. On appeal, Rodriguez challenged the legal sufficiency of this evidence to prove the existence of sexual intent at the time that he kissed the child's feet.

In upholding the conviction, CAAF applied the reasonable fact-finder standard, and "drawing every reasonable inference from the evidence of record in favor of the prosecution," determined that there was ample evidentiary support for the conviction. The Court explained that the military judge's apparent inference that Rodriguez was

sexually aroused, and that such arousal was sufficient to demonstrate that Rodriguez has the requisite intent when he kissed the child's feet, was sufficiently supported by the circumstantial evidence contained in the subsequent text messages.

Unconditional Plea of Guilty Waives Article 10 Speedy Trial Issue that was Not Litigated at Trial

United States v. Lin, 78 M.J. 850 (N-M. Ct. Crim. App. Apr 15, 2019)

Lieutenant Commander Edward Lin, US Navy, was convicted, consistent with his pleas, of three specifications of violating a lawful general order, two specifications of making false official statements, and two specifications of willfully communicating information relative to the national defense of the United States to a person not entitled to receive it, in violation of Articles 92, 107, and 134, UCMJ. On appeal, Lin raised three assignments of error: (1) that he was denied his right to a speedy trial as required by Article 10, UCMJ; (2) that the military judge abused his discretion by admitting into evidence as aggravation damages caused by his misconduct that were hypothetical in nature; and (3) that his sentence was inappropriately severe. The Court addressed Lin's 2nd and 3rd assignments of error, finding that the military judge did not abuse his discretion in admitting the aggravation evidence, and that the adjudged and approved sentence

was appropriate under the circumstances. The Court, however, provided a detailed analysis of Lin's speedy trial claim.

In reviewing the speedy trial issue, NMCCA first made a distinction between the pre-arraignment delay and the post-arraignment delay. At trial, Lin raised the speedy trial issue with regard to the government's delay in bringing him to trial following his arrest. However, after arraignment, Lin eventually entered an unconditional plea of guilty, and did not re-assert his statutory speedy trial claim based on any post-arraignment delay. Under these circumstances, the Court found that Lin had waived his post-arraignment Article 10 speedy trial claim. The Court proceeded to review Lin's pre-arraignment speedy trial claim, and applying the relevant factors, ultimately concluded that Lin was not denied his right to a speedy trial, and that the government was "reasonably diligent in bringing the appellant to trial in accordance with the requirements of Article 10, UCMJ."

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