CAAF/SCOTUS Term in Review

Kurt Brubaker

Judge, U.S. Coast Guard Court of Criminal Appeals

CAAF

- Term concludes 30 Sep 19
- Total of 31 opinions, none pending

Court	Affirmed	Reversed	Total	% Affirmed
ACCA	13	5	18	72%
AFCCA	6	2	8	75%
NMCCA	3	1	4	75%
CGCCA	1	0	1	100%
TOTAL	23	8	31	74.2%

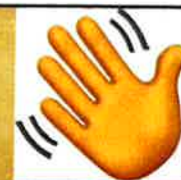
Mens Rea

- *United States v. Tucker*, 78 M.J. 183
  - Minimum *mens rea* for Art 134 offense of providing alcohol to underage individuals?
  - ACCA affirmed: negligence.
  - CAAF 5-0 reversed: recklessness. *Elonis* framework. Plea improvident.
- *United States v. Voorhees*, 79 M.J. 5
  - Minimum *mens rea* under Art 133?
  - AFCCA: affirmed the specs.
  - CAAF, 5-0: affirmed. Art 133 is a general intent offense.

Mens Rea

- *United States v. McDonald*, 78 M.J. 376
  - Appellant convicted of sexual assault by bodily harm on a nonconsent theory.
  - No specific *mens rea* instruction beyond standard mistake of fact defense.
  - Appellant asserted on appeal that under *Elonis*, *mens rea* was recklessness and MJ should have so instructed.
  - ACCA: affirmed.
  - CAAF, 5-0: affirmed. Congress clearly intended sexual assault by bodily harm to be a general intent offense.

Waiver



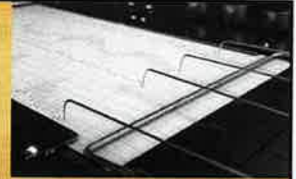
- *United States v. Smith*, 78 M.J. 325
  - Motion to suppress at trial denied. On appeal, Appellant argues it should have been granted, but on different basis.
  - MRE 311: failure to move to suppress or object constitutes waiver.
  - ACCA: New ground for suppression waived.
  - CAAF, per curiam: agreed despite Govt concession, affirmed.
  - 2 forms of waiver: operation of law; voluntary relinquishment of known right.

Waiver

- *United States v. Haynes*, 79 M.J. 17
  - Claim for *Pierce* credit for first time on appeal.
  - ACCA: waived by TDC's affirmative agreement w/ MJ's PTC credit calculation.
  - CAAF, 3-2: agree. Affirmed.
  - Concurrences by Ohlsen, Maggs.
- *United States v. Cooper*, 78 M.J. 283
  - At trial:

    MJ: Do you wish to be represented by any other counsel, either civilian or military?

    ACC: No, sir, I do not.
  - But on appeal: Deprived of choice of counsel when DDC failed to submit IMC request.
  - NMCCA: agreed, set aside findings and sentence. Did not knowingly and intelligently waive right to IMC.
  - CAAF: 4-1 reversed.
    - Dissent by Sparks.



Evidence

- *United States v. Kohlbek*, 78 M.J. 326 (Polygraphs)
  - MRE 707:

Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

  - ACCA: read this to preclude Defense from offering to explain later confession.
  - CAAF, 5-0: Nope. Provision can be read 2 ways: blanket prohibition or reference that implicates reliability of the polygraph. But harmless, affirmed.
- *United States v. Hamilton*, 78 M.J. 335 (Victim Impact Statements)
  - Follow-up to last term's *United States v. Barker*, 77 M.J. 377.
  - MJ admitted unsworn victim impact statements at trial.
  - AFCCA: not an abuse of discretion + not evidence, so not subject to MRE 403 balancing.
  - CAAF, 5-0: Disagreed: unsworn victim impact statements are not government exhibits, must meet dictates of RCM 1001A, which they didn't. But no prejudice; affirmed.
- *United States v. Perkins*, 78 M.J. 381 (Good Faith Exception)
  - MRE 311(c)(3) requires that "the individual issuing the authorization or warrant had a *substantial basis* for determining the existence of probable cause."
  - NMCCA: under *Carter*, 54 M.J. 414, test is not literal, but whether "in the eyes of a reasonable law enforcement official executing the search authorization," there was a substantial basis for determining PC.
  - CAAF, 4-1: affirmed.

Standards of Review

- *United States v. Tovarchavez*, 78 M.J. 458
  - Standard for testing prejudice for forfeited *Hills* errors?
  - ACCA: plain error test does not include a "harmless beyond a reasonable doubt" component.
  - CAAF: 3-2 reversed: when forfeited error is constitutional, prejudice prong assessed using *Chapman* "harmless beyond a reasonable doubt" standard.
  - Dissent by Maggs, Stucky.
- *United States v. English*, 79 M.J. 116
  - Sexual assault by causing bodily harm to wit: "grabbing her head with his hands."
  - ACCA: factually insufficient evidence of grabbing head w/ hands. Affirmed but excepted that language.
  - CAAF, 5-0: can't do that. Reversed on that spec.

Novel Art 134 specs

- *United States v. Gleason*, 78 M.J. 473
  - Convicted of "novel" spec under Art 134 of knowingly and wrongfully interfering w/ an emergency call.
  - Not raised at trial, but argued on appeal that spec fails to state offense because it covers the same ground as obstructing justice under Art 134 and thus is precluded.
  - ACCA: affirmed the conviction.
  - CAAF, 3-2: reversed.
    - "One must necessarily view" conduct charged in a novel spec "within the circumstances in which it arose."
    - Separate dissents by Ryan and Maggs.

SCOTUS

Mens Rea
Rehaif v. United States, 139 S.Ct. 2191

- Fed statute: certain individuals, including felons and aliens illegally in the US, prohibited from possessing firearms. Anyone who *knowingly* violates the provision may receive certain punishments.
- Trial judge: "knowingly" applies to possession of firearm but not to status.
- 11th Circuit: agree; affirmed.
- SCOTUS, 7-2: Reversed.
  - Govt must prove both that he knew he possessed the firearm and that he was in a status that barred him from possessing a firearm.
  - "Longstanding presumption" that Congress intends to require applicable *mens rea for each element.*

Dual Sovereignty Doctrine
Gamble v. United States, 139 S.Ct. 1960

- Gamble pleaded guilty to violating Alabama's felon-in-possession-of-firearm statute. Fed prosecutors then indicted him for same possession under federal law. Gamble moved to dismiss the indictment on Double Jeopardy grounds.
- District Court denied. 11th Cir. affirmed.
- SCOTUS, 7-2: Declines to overturn dual sovereignty doctrine, affirms.
  - Text: meaning of "for the same offence."
  - *Stare decisis*
- Concurrence by Thomas
  - His views on *stare decisis*
- Dissent by Ginsburg
- Dissent by Gorsuch

Search and Seizure
Mitchell v. Wisconsin, 139 S.Ct. 2525

- DUI case
  - Prelim test 3x Wisconsin's legal limit
  - To hospital for blood test. Unconscious but drew blood anyway based on State's implied consent.
- Motion to suppress on 4th Amendment grounds denied. Wisconsin Supreme Court affirmed lawfulness of warrantless blood test.
- SCOTUS, 4-1-4: judgment vacated, remanded
  - Plurality (Alito, Roberts, Breyer, Kavanaugh)
  - Concurrence (Thomas)
  - Dissent (Sotomayor, Ginsburg, Kagan)
  - Dissent (Gorsuch)

Court procedure
Yovino v. Rizo, 139 S.Ct. 706

- Issue: May a federal court count the vote of a judge who dies before the decision is issued?
- 9th Circuit judge listed as author of 6-4 *en banc* decision 11 days after his death.
- FN: "Prior to his death, Judge Reinhardt fully participated in this case and authored this opinion. The majority opinion and all concurrences were final, and voting was completed by the en banc court prior to his death."
- SCOTUS, *per curiam*: Vacated and remanded.
  - Not aware of any rule or decision rendering judges' votes and opinions immutable at some point prior to public release.
  - Cites earlier decision: judge who participated in decision, then entered "senior" status prior to release was, when the opinion issued, "without power to participate" in the *en banc* decision.

Questions/Discussion