IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES

Appellee

v.

Virginia S. MORATALLA
Boatswain's Mate Second Class (E-5)
U.S. Navy

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 201900073

USCA Dkt No. 21-0052/NA

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street, SE
Building 58, Suite 100
Washington, DC 20374
Phone: (202) 685-7296
jasper.casey@navy.mil
CAAF Bar No. 37453

Table of Contents

Table of Cases, Statutes, and Other Authorities

Other Sources

Issue Presented

WHETHER APPELLANT'S GUILTY PLEA TO BANK FRAUD UNDER 18 U.S.C. §1344 WAS IMPROVIDENT.

Statement of Statutory Jurisdiction

The Convening Authority approved a court-martial sentence that included a dishonorable discharge.[1] Appellant's case fell within the lower court's jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ).[2] Accordingly, this Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

Statement of the Case

Consistent with her pleas, a military judge sitting as a general court-martial convicted Appellant of one specification of attempted larceny in violation of Article 80, UCMJ (alleging an attempted violation of Article 121, UCMJ); one specification of larceny in violation of Article 121, UCMJ; one specification of drawing and uttering a check without sufficient funds in violation of Article 123a, UCMJ; ten specifications of bank fraud in violation of Article 134, UCMJ; and one specification of dishonorably failing to pay a debt in violation of Article 134, UCMJ.[3]

---

[1] General Court-Martial Order No. 03-2019, Feb. 14, 2019.
[2] 10 U.S.C. § 866(b)(1) (2012).
[3] J.A. at 0078.

The court-martial sentenced Appellant to confinement for sixty months, reduction to E-1, forfeiture of $1,000 per month for sixty months, and a dishonorable discharge.[4] Pursuant to a pretrial agreement, the convening authority disapproved all confinement in excess of forty-eight months but in all other respects approved the sentence as adjudged.[5]

On July 27, 2020, the NMCCA affirmed the findings and sentence in an unpublished opinion.[6] This Court granted Appellant's timely petition for review on March 15, 2021.

Statement of Facts

Charge V, Specification 2, alleges that Appellant:

> ". . . knowingly execute[d] or attempt[ed] to execute a scheme or artifice to defraud a financial institution, ABNB Federal Credit Union, or to obtain moneys, funds, credits, and assets owned by or under the custody and control of ABNB Federal Credit Union, by means of false or fraudulent pretenses, representations, or promises involving [BM2 Westerfield], and ABNB Credit Union, in violation of 18 U.S.C. §1344, a crime not capital."[7]

Appellant wanted money to invest in her house flipping business, but she was unqualified to get a loan from the bank.[8] To get the money, she sold her car to

[4] J.A. at 0080.
[5] J.A. at 0027.
[6] *United States v. Moratalla*, No. 201900073, 2020 CCA LEXIS 242 (N-M. Ct. Crim. App. July 27, 2020).
[7] J.A. at 0018.
[8] J.A. at 0051.

one of her former co-workers, BM2 Westerfield.[9] BM2 Westerfield purchased the car by obtaining an auto loan from Amphibious Base Naval Base (ABNB) Federal Credit Union ("the Credit Union").[10]

During the providence inquiry, Appellant stated that she decided to help BM2 Westerfield obtain an auto loan because such loans are easier to acquire and may have a lower interest rate than a small business loan.[11] Appellant also stated that BM2 Westerfield wanted to make money by investing in her business but lacked the funds to invest with her.[12]

Appellant met BM2 Westerfield at the credit union with the registration and title for her car.[13] Appellant and BM2 Westerfield represented to the credit union that BM2 Westerfield was going to purchase Appellant's car with the auto loan.[14] Appellant transferred her car's registration and title to BM2 Westerfield, and the credit union provided him an $8,900 secured loan which BM2 Westerfield paid to Appellant.[15]

During the providence inquiry, Appellant stated that at the time of this transaction, the intention was not for BM2 Westerfield to purchase the car but

---

[9] J.A. at 0044.
[10] J.A. at 0049-0051.
[11] J.A. at 0051.
[12] J.A. at 0050.
[13] J.A. at 0044, 0049, 0051.
[14] J.A. at 0052.
[15] J.A. at 0044.

rather to invest in her business.[16] Appellant stated that she and BM2 Westerfield both agreed he was lying to the credit union.[17]

After this, Appellant stated that she retained physical possession of the car for "a couple of months" before actually giving possession of the car to BM2 Westerfield.[18] The record is silent as to why BM2 Westerfield did not take immediate possession. The military judge simply asked whether Appellant maintained possession of the car, and did not ask follow up questions about why she transferred title to BM2 Westerfield.[19]

On appeal, the NMCCA ruled that the military judge did not abuse his discretion by accepting Appellant's plea to Charge V, Specification 2.[20] The NMCCA found that Appellant executed a scheme with BM2 Westerfield to create a false impression with the credit union that she was selling the car to BM2 Westerfield.[21] Like the military judge, the lower court also focused on the fact that Appellant did not transfer possession of the car immediately. But the lower court also recognized that "[a]t the time the loan was secured, the vehicle's registration and title were transferred into [BM2 Westerfield's] name . . ."[22]

---

[16] J.A. at 0050.
[17] J.A. at 0052.
[18] J.A. at 0052.
[19] J.A. at 0052.
[20] *Moratalla*, 2020 CCA LEXIS 242, at *11.
[21] *Id.* at *6.
[22] *Id.* at *3.

The NMCCA also agreed that Appellant partnered with BM2 Westerfield to "create a false impression as to the character of a material fact regarding the arrangement she had with him, in order to influence the financial institution to provide funds based upon that representation."[23] According to the lower court, this "represent[ed] the concealment of a material fact and embodie[d] a false representation made in order to both defraud a financial institution and obtain the funds of a financial institution, covering both clauses of 18 U.S.C. § 1344."[24]

Summary of Argument

There is a substantial basis in law and fact to question Appellant's guilty plea to Charge V, Specification 2. Appellant told the military judge she falsely told the credit union she was engaging in a car sale, but she also stated thatBM2 Westerfield actually purchased Appellant's car with that loan.

These facts set up a material inconsistency with Appellant's plea. The military judge abused his discretion by accepting the plea without reconciling this inconsistency.

[23] *Id*. at *8.
[24] *Id.* at *8-9.

Argument

The military judge abused his discretion by accepting Appellant's guilty plea to Charge V, Specification 2 because the facts revealed a substantial basis to question the providence Appellant's plea.

Standard of Review

A military judge's decision to accept a guilty plea is reviewed for an abuse of discretion, and questions of law arising from the guilty plea are reviewed *de novo*.[25]

Analysis

A military judge may only accept a guilty plea if there is an adequate factual basis to support it.[26] It is the military judge's responsibility to prevent improvident pleas by inquiring into the facts to ensure one exists.[27]

A military judge abuses his discretion in accepting a guilty plea "when the record shows a substantial basis in law or fact for questioning the plea."[28] To meet the standard of showing a substantial basis, an Appellant must show more than the "mere possibility" of a conflict.[29]

---

[25] *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2015).
[26] *United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012).
MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016) [HEREINAFTER MCM], Rule for Courts-Martial (R.C.M.) R.C.M. 910(e) ([t]he military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea.)
[28] *United States v. Moon*, 73 M.J. 382, 386 (C.A.A.F. 2014).
[29] *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

As this Court made clear in *United States v. Moon,* "[t]he providence of a plea is based not only on the accused's understanding of the factual history of the crime, but also on an understanding of how the law relates to those facts."[30] Even if the accused subjectively believes she is guilty of an offense, the factual circumstances must objectively support the guilty plea.[31]

"If an accused sets up a matter inconsistent with plea at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea."[32] For example, a "substantial inconsistency" may exist if the facts elicited at trial reasonably raise the possibility of a defense.[33]

A. The Federal "Bank Fraud" statute requires that an offender either (1) defraud a financial institution or (2) obtain money from a financial institution through fraudulent pretenses.

The federal bank fraud statute is composed of two separate clauses, and a violation occurs if a person violates either clause.[34] It states:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—
>
> **(1)** to defraud a financial institution; or

---

[30] *Moon,* 73 M.J. at 386 (C.A.A.F. 2014) (holding that there was a "substantial basis" to question the appellant's guilty plea when the military judge oscillated in his explanations and failed to resolve whether the appellant understood the distinction between criminal activity and constitutionally-protected speech).
[31] *United States v. Garcia,* 44 M.J. 496, 497-498 (C.A.A.F. 1996).
[32] *United States v. Goodman,* 70 M.J. 396, 399 (C.A.A.F. 2011).
[33] *See Id.*
[34] *See Loughrin v. United States*, 573 U.S. 351 (2014).

> **(2)** to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.[35]

Under either clause, courts are to apply the common law understanding of "fraud," which includes "acts taken to conceal, create a false impression, mislead, or otherwise deceive."[36]

Whether a scheme is fraudulent is a "nontechnical standard," that does not require proof of any specific false statements.[37] While there is no requirement that a financial institution be defrauded, the overall scheme must still be a "departure from fundamental honesty, moral uprightness, or fair play and candid dealing in the general life of the community."[38] Each individual action taken to advance the scheme does not need to be criminal, the focus is on whether the scheme as a whole is fraudulent.[39]

Under either clause, the misrepresentation or concealment must relate to a "material fact."[40] A fact is "material" if it has "a natural tendency to influence, or

---

[35] 18 U.S.C. § 1344 (2012).
[36] *United States v. Colton*, 231 F.3d 890, 898 (4th Cir. 2000).
[37] *United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005).
[38] *See United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980).
[39] *See Id.*
[40] *Neder v. United States*, 527 U.S. 1 (1999).

[is] capable of influencing, the decision of the decision making body to which it was addressed."[41] For example, courts have found it to be material when a defendant lied about his or her identity to qualify for a loan,[42] or when a defendant inflated his or her income on a loan application to appear more creditworthy.[43]

For clause one offenses only, the government must prove that a defendant (1) intentionally participated in a scheme or artifice to defraud another of money or property; and (2) that the victim of the scheme or artifice was a federally insured financial institution.[44] To prove intent, the Government must establish that there was a fraud that exposed the financial institution to actual loss or a risk of loss.[45] "Risk of loss" has been interpreted expansively and includes any time a financial institution is exposed to the potential for loss inherent to the practice of lending.[46]

For clause two offenses only, the government prove: (1) that a scheme exited to obtain money in the custody of a federally insured financial institution; (2) that the defendant participated in the scheme by means of false pretenses, representations or promises; and (3) that the defendant acted knowingly.[47]

---

[41] *Id.*
[42] *See United States v. Williams*, 865 F.3d 1302, 1317 (10th Cir. 2017); *United States v. Camick*, 796 F.3d 1206 (10th Cir. 2015).
[43] *See United States v. Irvin*, 682 F.3d 1254 (10th Cir. 2012).
[44] *United States v. Goldsmith*, 109 F.3d 714, 715 (11th Cir. 1997).
[45] *Williams*, 865 F.3d at 1317.
[46] *Id.*
[47] *Goldsmith*, 109 F.3d at 715.

A major difference between the clauses is that a clause two offense focuses on the conduct of the defendant and requires no proof that a financial institution was at risk of loss.[48] In fact, clause two can encompass "any knowingly false representation" by the defendant to any party that results in obtaining money, funds, credits or assets from a financial institution.[49] For example, in *United States v. Loughrin*, the defendant's conviction under clause two was affirmed when the subjective target of his fraudulent scheme was a retail store, but he received money belonging to a financial institution.[50] In that case, the appellant used forged checks to purchase items from a retail store, then returned the items for cash.[51] The Supreme Court agreed that the Government did not need to prove that the appellant intended to defraud the bank itself because there was ample evidence that the appellant knowingly executed a fraudulent scheme or artifice that resulted in him obtaining money belonging to a financial institution.[52]

[48] *United States v. Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995).
[49] *Id.* at 1102.
[50] *Loughrin*, 573 U.S. at 355
[51] *Id.* at 353.
[52] *Id.* at 356-357.

B. The facts raise a substantial basis to question the providence of Appellant's plea of guilty to either clause: Appellant said she "falsely" told the credit union she was selling her car to BM2 Westerfield, but the record shows this is exactly what occurred.

The government alleged that Appellant engaged in bank fraud by making it appear to the credit union that she was selling her car to BM2 Westerfield when, in reality, she was investing in her house flipping business.[53] Appellant likewise claimed during the providence inquiry that BM2 Westerfield secured the loan from the credit union by indicating that it would be used to buy Appellant's car, when really it was for investing in her business.[54]

But the evidence shows that the loan *was* used to purchase Appellant's car, notwithstanding this statement. At the beginning of the providence inquiry, Appellant made the following statements:

> MJ (military judge): Please describe what you did.
>
> ACC (Accused): Your Honor, I had provided information for the 2009 Kia Rio to BM2 Westerfield to obtain a loan; *the title and registration was transferred to him*, but the money is intended to be used for house flipping investment.
>
> . . .
>
> MJ: Did you own this 2009 Kia Rio?
>
> ACC: Yes, Your Honor.[55]

---

[53] J.A. at 0083.
[54] J.A. at 0049-0050.
[55] J.A. at 0044, 0049 (emphasis added)

As Appellant later explained, she met BM2 Westerfield at the credit union with the "papers" for the car.[56] She stated that she went to the bank with the necessary information to complete the sale of her car and then transferred him the registration and title after he paid her the $8,900.[57]

Two circuit court decisions demonstrate factual scenarios involving car sales that do constitute bank fraud under 18 U.S.C. § 1344.

In *United States v. Friedman,* the defendant was properly convicted of bank fraud because the government produced ample evidence of a fraudulent scheme including loans for fake purchases of vehicles.[58] The appellant and his business partner devised a scheme to obtain money for their luxury car dealership.[59] They exported cars overseas but kept the title certificates.[60] The appellant then secured loans against these cars, using the title certificates as proof of collateral.[61] The loan applications used the names of family members, friends, former employees, and customers, without their knowledge.[62] The loan applications also included false

[56] J.A. at 0051.
[57] J.A. at 0044.
[58] *United States v. Friedman,* 971 F.3d 700, 705 (7th Cir. 2020).
[59] *Id.* at 706
[60] *Id.*
[61] *Id.*
[62] *Id.*

employment or income information, falsified corporate documents and title information, and forged signatures, which the banks relied on.[63]

In *United States v. Swearingen,* the appellant was also convicted for bank fraud involving fraudulent car sales.[64] The appellant and a co-conspirator, who both owned separate car dealerships, devised a plan to generate cash flow for their respective businesses.[65] When the appellant needed cash to pay for a car he was purchasing for his inventory, he drew a draft on the other dealer and presented it the bank for collection.[66] The draft represented to the bank that the co-conspirator had purchased a car from the appellant and would pay for the car by honoring the draft, or vice-versa.[67] The bank immediately credited the appellant's checking account for the amount of the draft, and appellant used the funds to pay for the car he was buying.[68] The drafts that the appellant and the other dealer presented to the bank involved fictitious automobile sales.[69] In executing his scheme, the appellant also submitted falsified documents to the bank.[70]

---

[63] *Id*.
[64] *United States v. Swearnigen,* 858 F.2d 1555 (11th Cir. 1988)
[65] *Id.*
[66] *Id.* at 1556.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*

Nothing similar happened in this case. Appellant actually owned the car she sold to BM2 Westerfield.[71] BM2 Westerfield was ultimately the bona-fide purchaser of the car.[72] The record contains no indication that any of the records presented to the credit union were falsified or exaggerated. The money loaned by the credit union to BM2 Westerfield was then actually used to purchase Appellant's car.[73]

Similarly, the evidence suggests that Appellant did not make any false or fraudulent pretenses, representations, or promises as required by clause two.

Appellant sold her car to BM2 Westerfield just like she represented to the credit union. There is no indication that Appellant made any fraudulent representations to BM2 Westerfield. BM2 Westerfield provided Appellant with money the credit union loaned him, and, in exchange, Appellant gave him title to and ultimately possession of the car.

[71] J.A. at 0044, 0049, 0051.
[72] J.A. at 0044.
[73] J.A. at 0044.

C. The military judge erred by failing to clarify this inconsistency and instead focusing on the fact that Appellant did not immediately transfer possession of the car to BM2 Westerfield. This wrongfully conflated the concepts of ownership and possession

The military judge appeared to find it dispositive that Appellant retained possession of the car for two moths after the sale. For example, the military judge asked, "[a]nd by telling ABNB Credit Union he was purchasing the car, they would know that if he were to default, they could go to his place of residence and repossess the car….but in reality you kept possession of the car?"[74]

This demonstrated a misunderstanding of the legal concepts of possession and ownership.[75] When determining who has a secured interest in property, ownership—not possession—is material to the inquiry.[76] "A certificate of title in the name of one other than the person in possession of an automobile raises a presumption of ownership in favor of the title holder."[77]

Here, once BM2 Westerfield gained title to the car, he held presumptive ownership of it over Appellant.[78] However, the military judge did not ask questions

---

[74] J.A. at 0052.
[75] *Moratalla*, 2020 CCA LEXIS 242, at *2-3.
[76] *See* Uniform Commercial Code § 9-103.
[77] *Smith*, 467 F.2d at 107. (affirming summary judgment when appellee submitted sufficient evidence to overcome this presumption and show that a driver owned her car when she was bona fide cash purchaser despite not yet receiving the title certificate).
[78] *Smith*, 467 F.2d at 107.

about BM2 Westerfield's presumptive ownership. Rather, his questions focused on the fact that Appellant retained possession of the car.[79]

The record is silent as to why BM2 Westerfield did not take immediate possession of the car. Regardless, based on the fact that BM2 Westerfield held legal title, he was the presumptive owner and was free to exercise all ownership rights. This would include letting Appellant use his car for a couple of months.

The military judge was presented with a clear inconsistency between the factual basis and Appellant's guilty plea. The military judge had a duty to "resolve the apparent inconsistency or reject the plea."[80] Instead, he accepted the plea. That acceptance was an abuse of discretion because there was left a "substantial basis in law and fact" to question the providence of Appellant's guilty plea.[81]

The NMCCA opinion adopted the erroneous logic of the military judge by finding it dispositive that BM2 Westerfield did not possess the car until two months after the sale.

The lower court focused on the fact that Appellant stated she understood the elements of Charge V, Specification 2 and agreed that her conduct satisfied the elements.[82] In doing so, the lower court found that Appellant partnered with BM2

---

[79] J.A. at 0049-0052.
[80] *Goodman*, 70 M.J. at 399.
[81] *Moon*, 73 M.J. at 389.
[82] *Moratalla*, 2020 CCA LEXIS 242, at *5

Westerfield to "create a false impression as to the character of a material fact regarding the arrangement she had with him, in order to influence the financial institution to provide funds based upon that representation."[83]

The lower court identified that Appellant and BM2 Westerfield "executed paperwork and received a car loan for $8,900 from ABNB and provided Appellant with these funds to invest in her business."[84] It also noted that Appellant stated during the providence inquiry that BM2 Westerfield considered the loan "not to be for purchase of the vehicle, but for him to invest in Appellant's business."[85] The lower court acknowledged that Appellant stated she and BM2 Westerfield agreed to lie to the credit union.[86]

But it is not dispositive that Appellant wanted to use the proceeds from selling her car to invest in her business. Appellant was free to spend the money she made from selling her car however she wished. From the credit union's perspective, this would have no bearing on their decision to extend BM2 Westerfied a loan to purchase Appellant's car.

Elsewhere, the NMCCA found it important that Appellant did not lose possession of the car right away.[87] But the lower court also found that, "[a]t the

---

[83] *Id*. at *8.
[84] *Id.* at *2-3.
[85] *Id.*
[86] *Id.* at *8-9.
[87] *Id.* at *8.

time the loan was secured, the vehicle's registration and title were transferred into [BM2 Westerfield's] name. . . ."[88]

Despite acknowledging that BM2 Westerfield became the legal owner of the car, the lower court failed to reconcile this with Appellant's pleas. The lower court opinion contains no discussion of the distinction between possession and ownership. Nor does the opinion contain any discussion of the consequences of BM2 Westerfield's holding title to the car.

Conclusion

This Court should set aside and dismiss Charge V, Specification 2, as factually improvident and reassess Appellant's sentence.

Respectfully submitted,

Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
(202) 685-8502
jasper.casey@navy.mil

[88] *Id.* at *3.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 24(c) because it does not exceed 14,000 words, and complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one-inch margins on all four sides.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and seven copies of the foregoing were delivered to the Court on 27 April 2021 that a copy of the foregoing was uploaded into the Court's case management system on 27 April 2021, and that a copy of the foregoing was delivered to Director, Appellate Government Division on 27 April 2021.

Jasper Casey
Jasper W. Casey
Captain, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps
Appellate Review Activity
1254 Charles Morris Street SE
Building 58, Suite 100
(202) 685-8502
jasper.casey@navy.mil