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	**REPLY TO APPELLEE'S ANSWER** 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

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Index of Reply

Table of Cases, Statutes, and Other Authorities

Issue Presented

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

Law and Argument

1. The Government's brief does not address the military judge's failure to resolve the conflict between Appellant's bare assertions of guilt with the clear contradiction that was presented by circumstances that do not objectively support a guilty plea.

The Government's brief emphasizes that Appellant told the military judge "over one dozen times . . . that her scheme had [BM2 Westerfield] lie to ABNB about the purpose of the loan."[1] The Government's brief similarly emphasizes that before the military judge "accepted Appellant's plea, she twice reiterated her desire to plead guilty because she was 'in fact guilty of the offenses to which [she has] pled guilty.'"[2] In writing this, the Government implies that Appellant's conclusory assertions of her guilt is enough to sustain her plea of guilty to Charge V, Specification 2.

However, that is not the correct standard. As stated 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

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[1] Gov't Answer at 11.
[2] Gov't Answer at 4.

those facts."[3] Even if Appellant subjectively believes she is guilty of an offense, the factual circumstances must objectively support the guilty plea.[4] Further, a guilty plea that includes conclusions of law alone is insufficient to satisfy the requirements of R.C.M. 910(e).[5]

This Court has previously recognized that "by nature, a guilty plea case is less likely to have developed facts" because the facts presented during the military judge's providence inquiry are "not subject to the test of the adversarial process."[6] However, an Appellant's desire to plead guilty "should not obscure the necessity of establishing each element to each offense; speed and economy must cede to care."[7]

Typically, appellate courts give discretion to a military judge's decision to accept a guilty plea.[8] But "[i]f an accused sets up a matter inconsistent with the

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[3] *United States v. 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).
[4] *United States v. Garcia*, 44 M.J. 496, 497-98 (C.A.A.F. 1996).
[5] *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002) (holding that simple "yes sir" responses to questions about whether conduct was prejudicial to good order and discipline and service discrediting were only legal conclusions and did not establish a sufficient factual basis).
[6] *Jordan*, 57 M.J. at 238.
[7] *United States v. Barton*, 60 M.J. 62, 66 (C.A.A.F. 2004) (affirming the appellant's guilty plea to larceny while cautioning courts to take care to ensure a plea is in fact provident considering that pleading guilty involves relinquishing significant constitutional rights).
[8] *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2015).

plea at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea."[9] For example, in *United States v. Hardeman* the appellant plead guilty to unauthorized absence.[10] During the providence inquiry, Hardeman made statements indicating that he was not yet aware he was in an authorized absence status during the specifically charged time period.[11] He did so despite his stipulation of fact and conclusory assertions that he was guilty.[12] The military judge even made comments acknowledging this inconsistency but erred by failing to reject the plea or resolve the inconsistency.[13]

So too here. The government is correct in noting that appellate courts are not to "speculate post-trial as to the existence of facts which might invalidate an appellant's guilty plea[]."[14] But here there is nothing speculative about the inconsistency present in the record that gives rise to a "substantial basis in law and fact" [15] to question Appellant's guilty plea."

During the providence inquiry Appellant presented facts that were clearly contradictory to her guilty plea. The military judge abused his discretion by

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[9] *United States v. Goodman*, 70 M.J. 396, 399 (C.A.A.F. 2011).
[10] *United States v. Hardeman*, 59 M.J. 389 (C.A.A.F. 2004).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *United States v. Johnson*, 42 M.J. 442, 445 (C.A.A.F. 1995) (declining to speculate whether the appellant received a *written* order instead of a *verbal* order that would have contradicted express admissions).
[15] *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991).

accepting the plea without resolving the clear inconsistency. Despite Appellant's conclusory statements that she committed bank fraud, the facts presented during the providence inquiry indicate that she in fact executed a lawful sale of her car to BM2 Westerfield.

Appellant did not misrepresent her ownership interest in the car she sold to BM2 Westerfield. She clearly indicated that she transferred title and registration of her car to BM2 Westerfield in exchange for money.[16] The record contains no indication that any of the records presented to the credit union were falsified or exaggerated. The lower court opinion similarly recognized that "[a]t the time the loan was secured, the vehicle's registration and title were transferred into [BM2 Westerfield's] name . . . ."[17] Even the Government's own brief acknowledges that "Appellant transferred her car's title and registration to [BM2 Westerfield]."[18] The bank executed a loan for BM2 Westerfield to acquire ownership of the vehicle and in fact did that when he acquired title.

While Appellant's assertions of her guilt are certainly some evidence that she violated the Federal Bank Fraud Statute, her legal conclusions alone are not dispositive. There is a clear inconsistency apparent on the record, and the military

[16] J.A. at 0044.
[17] *United States v. Moratalla*, No. 201900073, 2020 CCA LEXIS 242 at *3 (N-M. Ct. Crim. App. July 27, 2020).
[18] Gov't Answer at 4.

judge abused his discretion when he failed to reject the plea or resolve the inconsistency.

2. The Government repeats the errors of the military judge and lower court by confusing the concepts of "ownership" and "possession." Appellant's continued possession of the car after she sold it to BM2 Westerfield is not dispositive.

While acknowledging that Appellant actually transferred her car's title and registration to BM2 Westerfield, the government asserts that "[t]he Military Judge correctly relied on Appellant's continued possession of the car after she used the loan money [BM2 Westerfield] gave her for her business as evidence of her fraudulent scheme."[19] The government similarly emphasizes that "although Appellant transferred the title and registration to [BM2 Westerfield] 'at the time that the paperwork was signed, and the funds were transferred, Appellant maintained control and possession of the vehicle.'"[20] The government asserts that this was "contrary to the promises made in the loan application" because Appellant "kept using the car while also having the money."[21]

The government's emphasis on these facts echoes the erroneous logic of both the military judge and the lower court by conflating the distinct concepts of

[19] Gov't Answer at 12-13.
[20] Gov't Answer at 5 (citing *Moratalla*, No. 201900073, 2020 CCA LEXIS 242 at *10).
[21] Gov't Answer at 4.

ownership and possession. When determining who has a secured interest in property, ownership—not possession—is material to the inquiry.[22] "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."[23]

Once BM2 Westerfield gained title to the car, he held presumptive ownership of it over Appellant.[24] Appellant's continued possession of the car was not "contrary"[25] to any promise made to the Credit Union. Appellant and BM2 Westerfield did exactly what they told the Credit Union they were going to do; they executed a sale of Appellant's car to BM2 Westerfield.

As the car's owner BM2 Westerfield was free to exercise all ownership rights, including lending his car to Appellant. The Credit Union would have no concern if he lent the car, so long as he continued to fulfill his loan payments. Had BM2 Westerfield defaulted on the loan, the Credit Union could still lawfully repossess the car.

The record is silent as to why BM2 Westerfield did not take immediate possession of the car because the military judge did not ask any clarifying

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[22] *See* Uniform Commercial Code § 9-103.
[23] *Smith v Allstate Ins. Co.*, 467 F.2d 104, 107 (5th Cir. 1972) (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).
[24] *Smith*, 467 F.2d at 107.
[25] Gov't Answer at 4.

questions. It is not the role of this Court to speculate as to why this occurred. Rather, it was incumbent upon the military judge to resolve the apparent inconsistency and he abused his discretion when he failed to do so.

The government's brief asserts that "presumptive ownership is irrelevant . . ."[26] But the government also acknowledges that title of the car *was* transferred to BM2 Westerfield.[27] The government fails to address the legal significance of the fact that BM2 Westerfield became the owner of the car. Instead, the government argues that Appellant "committed bank fraud regardless of whether she may have constructively sold BM2 Whiskey the car."[28] In doing so the government also fails to address the inconsistency between Appellant's legal conclusions that she committed bank fraud and the apparent fact that she executed a bona-fide sale of her property to BM2 Westerfield, which would not be fraudulent.

The government's brief attempts to compare the present case to *United States v. Pizano.*[29] The situation in the present case is distinguishable. In *Pizzano,* the appellant engaged in an actual "deceptive course of conduct" because she lied about being the sole owner of property, when she was actually a co-owner.[30] She

[26] Gov't Answer at 13.
[27] Gov't Answer at 5.
[28] Gov't Answer at 13-14.
[29] Gov't Answer at 10; *United States v. Pizzano,* 421 F.3d 707, 722 (8th Cir. 2005).
[30] *Pizano* at 721.

also lied in stating that she was applying for a loan to purchase a home in Texas, when the home she wanted to purchase was actually in Iowa.[31]

Nothing of the sort happened in this case. BM2 Westerfield told the Credit Union that he was applying for a loan to purchase Appellant's car. He then actually used the loan to purchase Appellant's car. There was no fraud.

3. Appellant agrees that this Court cannot reassess her sentence.

Appellant acknowledges that under Article 67(d), UCMJ, "[i]f [this Court] sets aside the findings and sentence, it may . . . order a rehearing. If it . . . does not order a rehearing, it shall order that the charges be dismissed."[32] In the concluding sentence of the Appellant's Brief, there is a request that this Court "reassess Appellant's sentence."[33] This clause of the final sentence was written in error. Appellant requests that this Court set aside the findings and sentence as to Charge V, Specification 2, order that this specification be dismissed, and authorize a rehearing on the sentence.

Respectfully submitted,

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[31] *Id.*
[32] 10 U.S.C. § 867(d) (2019).
[33] Appellant's Brief at 18.

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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 was transmitted by electronic means to efiling@armfor.uscourts.gov on 21 June 2021, and that a copy of the foregoing was transmitted by electronic means to Director, Appellate Government Division on 21 June 2021.

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