

2nd Circ. Upholds Convictions Of Former NYS Judge

By **Andrea Keckley**

Law360 (November 16, 2022, 3:56 PM EST) -- A panel of Second Circuit judges upheld a former Brooklyn judge's convictions for obstructing a probe of former Municipal Credit Union CEO Kam Wong in an unpublished opinion Wednesday, finding that her arguments lack merit and pointing out that her 15-month sentence fell below the pre-sentence report's guidelines.

Sylvia Ash, a former State Supreme Court justice, was convicted of conspiracy to obstruct justice, obstruction of justice and making false statements to federal officers for conduct that included wiping a mobile phone containing Wong's texts. Wong was sentenced to 66 months in prison in 2019 for embezzling nearly \$10 million from the credit union.

"We are disappointed in the circuit's decision and agree with the arguments made by appellate counsel regarding the errors made by the district court at trial," Morrison & Foerster LLP partner Carrie Cohen, who represents Ash, told Law360 Pulse on Wednesday.

Ash, the presiding justice in the Supreme Court's commercial division in Brooklyn, was tried by a jury in the U.S. District Court for the Southern District of New York before Judge Lewis A. Kaplan. Prosecutors told the jury that Ash backed Wong out of a misguided sense of loyalty and a desire to keep taking pricey credit union perks. She resigned in March, three months after her conviction.

One of the errors Ash's team argued that the district court made was premising her sentence on conduct associated with a count of obstructing justice that jurors had acquitted her of.

"Here, it is clear to us that any error in the use of acquitted conduct did not affect Ash's sentence," the three-judge panel said in its opinion.

The opinion says Ash's sentence was less than what even she thought the guidelines called for. According to the filing, while the pre-sentence report's guidelines called for a sentence of 46 to 57 months, Ash argued that her guidelines should be 30 to 37 months.

In her appeal, Ash took issue with the lower court's explanation to the jury of the meaning of acting corruptly in the context of the second count of obstructing justice, but the circuit court shot this argument down as well.

Ash sat on the credit union's board of directors from May 2008 until August 2016, serving as chair during her last year there. According to court documents, she did not disclose the benefits she received in

connection with her board position on state financial disclosure forms she was required to file yearly.

In her appeal, Ash says Judge Kaplan should not have overruled defense objections to including evidence of valuable benefits she received by virtue of her board seat and her failure to disclose them. However, the circuit court said the evidence was admissible "as it tended to show motive and consciousness of guilt."

Another piece of evidence Ash thinks should have been suppressed was an iPhone X that, according to court documents, she returned to the credit union through counsel after having a factory reset done on it at an Apple store. The credit union gave the iPhone to the government and allowed it to be used in a search.

Ash argues that the lower court was wrong to deny a motion to suppress any information obtained from a search warrant based on the seizure of the iPhone because the government violated her due process rights by using the credit union's internal investigation to gather evidence, maintaining that she was effectively compelled to hand the phone over. But the circuit court judges did not agree.

"Ash only argues that MCU's communications demanding the return of the iPhone X 'raised the specter' of legal action" and thus implicitly threatened Ash, their opinion read. "Even assuming that MCU's communications are wholly attributable to the government, these arguments are not enough to show that the communications overcame Ash's will. To the contrary, the communications told Ash not to delete data off the iPhone X, but she did so anyway, demonstrating that Ash did not feel compelled to comply exactly as MCU told her."

Circuit Judges Pierre Leval, Denny Chin and Eunice Lee sat on the panel for the Second Circuit.

The U.S. Attorney's Office for the Southern District of New York declined Law360 Pulse's request for comment.

Ash is represented by Carrie Cohen and Nathan Reilly of Morrison & Foerster LLP and by Justine Harris of Sher Tremonte LLP.

The government is represented by Eli Mark, Daniel Richenthal, Jonathan Rebold and Danielle R. Sassoon of the U.S. Attorney's Office for the Southern District of New York.

The case is USA v. Ash, case number 1:19-cr-00780, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Pete Brush. Editing by Karin Roberts.