

1st Circ. Vacates Most Of Atty's Marijuana Bribe Conviction

By **Chris Villani**

Law360 (January 16, 2025, 1:08 PM EST) -- The First Circuit vacated a pair of fraud convictions for a Massachusetts attorney charged in a marijuana bribery scheme, finding that sending an iMessage through an Apple cellphone is not enough to satisfy the wire fraud element requiring interstate communication.

The **57-page opinion** issued Wednesday wiped out Sean O'Donovan's convictions for honest services fraud but left intact a single guilty finding for federal programs bribery.

O'Donovan, a lawyer and former Somerville alderman, was convicted in October 2023 of attempting to bribe a police chief in Medford with payments to the chief's brother in exchange for the chief giving O'Donovan's retail cannabis client, Theory Wellness, a good ranking in a competition for an operating license.

The First Circuit agreed with O'Donovan that an FBI forensic witness should not have been called by the government in an attempt to establish that his messages traveled from his phone in Massachusetts to the recipient's phone — also in Massachusetts — through the internet and likely across state lines.

"The testimony had no grounding in the examiner's own perception or experience, and, as cross-examination showed, it could not meaningfully be probed or tested," U.S. Circuit Judge Seth R. Aframe wrote for the panel. "Nor was it deduced from a process of reasoning familiar in everyday life."

The testimony, the court found, should have been excluded, and the fact that U.S. District Judge William G. Young allowed the jury to hear it unfairly tipped the scales in the government's favor.

"It plainly contributed to the verdict — as the examiner's testimony was the only proof presented to satisfy [the statute's] interstate-commerce element," Judge Aframe wrote.

The First Circuit also wrestled with an issue that has divided circuits around the country: whether the use of the internet alone is enough to establish that a web transmission "traveled across state lines in interstate commerce."

The Ninth and Tenth circuits have said that it is not, while the First, Third and Fifth circuits have held that it is sufficient. Wednesday's opinion acknowledged the circuit split but found that "the law-of-the-circuit doctrine compels us to reject the defendant's challenge here."

"The en banc process ... is the means through which this court reconsiders decisions by prior panels, absent limited circumstances that are not present here," Judge Aframe wrote.

O'Donovan's attorney, Martin G. Weinberg of Martin G. Weinberg PC, said he may ask the full panel to weigh in.

"We are both preparing for Mr. O'Donovan's resentencing based on the court's having vacated two of three counts of his conviction," Weinberg told Law360 on Thursday, "and actively considering seeking en banc review on whether iMessage texts sent from one Massachusetts location to another Massachusetts location satisfies the interstate element of honest services fraud, an issue that the

panel agreed has divided the appellate courts."

A government representative declined to comment.

The panel did affirm O'Donovan's conviction for federal programs bribery, which was not unwound by the arguments over iMessages.

O'Donovan had argued that the jury should have been instructed that the alleged bribes need to be made in exchange for an "official act" by the public servant being bribed.

But Judge Aframe said that every circuit court that has considered the issue has determined that the statute does not require a so-called official act, and that O'Donovan would have been convicted on that count either way.

"At trial, the defendant did not dispute that he wanted the chief to rank Theory Wellness favorably and then advocate to the mayor on its behalf. Nor could he have, considering his numerous recorded conversations with [the chief's brother] in which he requested that the chief take precisely those actions. Both plainly constitute official acts," Judge Aframe wrote. "The chief's ranking of applicants to obtain a host community agreement is a quintessential exercise of official authority on a 'focused and concrete' question or matter."

Also unsuccessful was O'Donovan's argument that the bribery count should fall because the jury never received an entrapment instruction. O'Donovan claimed the evidence showed the chief's brother, who was working with federal agents, fed O'Donovan lies about the chief's interest in the scheme, including that the application was at serious risk. Those lies are what induced O'Donovan to make the payments to the brother, he argued.

"The possibility that an important venture will fail is a typical motive for offering a bribe," Judge Aframe wrote. "Statements made to remind the defendant of that possibility — which had preoccupied him from the start — or to suggest that failure was looming do not, without more, amount to government overreach."

The First Circuit did not take a stance on whether Judge Young should reconsider the two-year prison term he initially imposed on O'Donovan in light of two-thirds of the conviction being wiped away. The First Circuit had agreed in June to grant O'Donovan bail while the appeal played out.

U.S. Circuit Judges David J. Barron, William J. Kayatta Jr. and Seth Aframe sat on the panel for the First Circuit.

The government is represented by David M. Lieberman of the U.S. Department of Justice, and Kristina Barclay of the U.S. Attorney's Office for the District of Massachusetts.

O'Donovan is represented by Martin G. Weinberg of Martin G. Weinberg PC, Michael Pabian of Michael Pabian Law Office LLP, and Timothy R. Flaherty.

The case is U.S. v. O'Donovan, case number 24-1200, in the U.S. Court of Appeals for the First Circuit.

--Additional reporting by Brian Dowling and Julie Manganis. Editing by Haylee Pearl.