Westlaw Journal
COMPUTER & INTERNET
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 33, ISSUE 1 / JUNE 19, 2015

WHAT'S INSIDE

ONLINE THREATS

In Facebook threat case, Supreme Court says intent required

By Melissa J. Sachs, Esq., Senior Legal Writer, Westlaw Journals

In a 8-1 opinion, the U.S. Supreme Court has overturned a Pennsylvania man's conviction for posting rap lyrics on Facebook that threatened to kill his estranged wife, an FBI agent, former co-workers and elementary school students.

Elonis v. United States, No. 13–983, 135 S. Ct. 2001 (U.S. June 1, 2015).

The issue before the justices whether a jury could convict Anthony D. Elonis based on Facebook posts that a reasonable person would consider a threat.

Chief Justice John G. Roberts and six other members of the nation's highest court said the answer was no because a defendant's specific mental state mattered, not merely whether a reasonable person would consider the Facebook posts to be a threat.

Justice Clarence Thomas dissented from the majority opinion, and Justice Samuel A. Alito Jr. only concurred in its judgment.

THE CRIME

A Pennsylvania federal jury convicted Elonis for violating 18 U.S.C. § 875(c), a federal statute that makes it illegal to communicate a threat to injure another person in interstate commerce.

REUTERS/Dado Ruvic

Based on the trial court's erroneous instructions, however, the jury only needed to find Elonis communicated a statement that a reasonable person would consider a threat, Chief Justice Roberts wrote for the majority.

"Such a 'reasonable person' standard is a familiar feature of civil liability in tort law, but is inconsistent with 'the conventional requirement for criminal conduct — awareness of some wrongdoing,'" Chief Justice Roberts said.

CONTINUED ON PAGE 20

COMMENTARY

SEC cybersecurity investigations: A how-to guide

Lisa J. Sotto, Scott H. Kimpel and Matthew P. Bosher of Hunton & Williams discuss the U.S. Securities and Exchange Commission's cybersecurity enforcement practices and how to handle a cybersecurity investigation.

SEE PAGE 3

41737758

Facebook threat

CONTINUED FROM PAGE 1

Here, the government at least needed to prove Elonis knew "the character of what was sent, not simply its contents and context," the majority opinion said.

Christopher Kratovil, a litigator at **Dykema Cox Smith** who was not involved with the case, said this is a narrow win for free speech advocates because it adds a hoop for prosecutors to jump through to make their case.

"In the wake of *Elonis*, no one will go to jail for an ill-advised Tweet or Facebook post, provided that the allegedly criminal speech resulted from negligence or stupidity rather than from intent to threaten," he said.

"For the purposes of a criminal prosecution, the defendant speaker's state of mind and intent matter," Kratovil added.

The high court reversed the 3rd U.S. Circuit Court of Appeals, which upheld Elonis' conviction.

The majority opinion, however, was silent on how the 3rd Circuit should handle the case on remand. It also dodged the question of Elonis' free speech rights and whether the First Amendment protected his allegedly threatening rap lyrics.

Justice Roberts said it was unnecessary to delve into those issues based on the court's ruling.

UNANSWERED QUESTIONS

Kent S. Scheidegger, legal director of the Criminal Justice Legal Foundation, wrote about the holes in the majority's opinion on the Crime and Consequences Blog.

"Unfortunately, the court left unanswered two major questions — one on the required mental state for the offense and the other on the limits of the First Amendment," he wrote in a June 1 post.

Justice Alito wrote a concurring opinion criticizing the majority for not articulating what mental state the statute requires.

"[A] defendant may be convicted under Section 875(c) if he or she consciously disregards the risk that the communications transmitted will be interpreted as a true threat," Justice Alito wrote.

In other words, recklessness is sufficient to find Elonis and other potential defendants guilty, Justice Alito said.

On this point, the CJLF's Scheidegger noted how the majority at least rejected Elonis' argument that Section 875(c) requires prosecutors to show a defendant purposefully communicated a threat.

The CJLF had submitted an *amicus* brief in the case on this point.

If the Supreme Court accepted Elonis' argument, it would overprotect those making a threat rather than the intended victims, the brief said. *Elonis v. United States*, No. 13-983, *amicus brief filed,* 2014 WL 5202059 (U.S. Oct. 6, 2014).

"Persons who want to make social or political commentary can easily stay far away from the unprotected zone without any diminution of their ability to make their point," the brief said. "Victims, on the other hand, need protection from threats that are veiled or that skate on the edge of what is allowed."

FIRST AMENDMENT

Justice Alito also rejected Elonis' arguments that posting the violent lyrics was therapeutic and that the lyrics were constitutionally protected works of art.

"The fact that making a threat may have a therapeutic or cathartic effect for the speaker is not sufficient to justify constitutional protection," Justice Alito wrote.

Additionally, threatening or violent statements posted on social media directed at a victim are different from rap lyrics performed in public or recorded, Justice Alito said.

"To hold otherwise would grant a license to anyone who is clever enough to dress up a real threat in the guise of rap lyrics, a parody or something similar," he wrote.

He also disagreed with Elonis' argument that a recklessness standard would violate the First Amendment.

Justice Alito said the case should return to the 3rd Circuit to decide if Elonis' failure to argue for a recklessness standard prevents the reversal of his conviction or whether the jury instructions were harmless error.

"In the wake of *Elonis*, no one will go to jail for an ill-advised Tweet or Facebook post," provided the speaker had no intent to threaten, said Christopher Kratovil of Dykema Cox Smith.

LONE DISSENT

Justice Thomas wrote in a dissenting opinion that Elonis was properly convicted under Section 875(c).

"[T]here is nothing absurd about punishing an individual who, with knowledge of the words he uses, and their ordinary meaning in context, makes a threat," he wrote.

Justice Thomas also criticized the majority for not deciding the appropriate mental state that applies under the criminal statute.

"This failure to decide throws everyone from appellate judges to everyday Facebook users into a state of uncertainty," Justice Thomas wrote. WJ

Attorneys:
Petitioner: John P. Elwood, Vinson & Elkins, Washington

Respondent: Deputy U.S. Solicitor General Michael R. Dreeben, Washington

Related Court Document:
Opinion: 135 S. Ct. 2001