

# A VICTORY FOR FREE SPEECH



Harvey Mars is counsel to Local 802. Legal questions from members are welcome. E-mail them to [HsmLaborLaw@HarveyMarsAttorney.com](mailto:HsmLaborLaw@HarveyMarsAttorney.com). Harvey Mars's previous articles in this series are archived at [www.HarveyMarsAttorney.com](http://www.HarveyMarsAttorney.com). (Click on "Publications & Articles" from the top menu.) Nothing here or in previous articles should be construed as formal legal advice given in the context of an attorney-client relationship.

**A**NTHONY DOUGLAS ELONIS is a free man...for now! But who is he and why does his story matter? As you may recall from my April column, Mr. Elonis (who also calls himself "Tone Dougie") decided to post what he called "rap verses" on his Facebook page that contained extremely violent and graphic images about his ex-wife who had left him and who had taken their two small children with her. He also wrote disturbing messages to his ex-employer, local elementary schools and the FBI. For example, one of his Facebook "verses" went like this: "Little agent lady stood so close, took all the strength I had not to turn the b\*\*\*\* ghost. Pull my knife, flick my wrist and slit her throat." This was written after an FBI agent had visited his home to investigate the postings he had made. For posting this online, along with other similarly frighteningly violent messages, Mr. Elonis was convicted and was sentenced to 44 months in jail.

Now his conviction has been overturned. On June 1, the Supreme Court issued its determination that his conviction was based upon an improper interpretation of the federal criminal statute, 18 U.S.C. §875(c), which makes it a federal crime "to

*The Supreme Court rules that even the creepiest Facebook posts **aren't criminal** unless the writer intended a true threat. This ruling protects perverts... but it also protects songwriters, artists and anyone using avant-garde imagery in their writing...*

transmit in interstate commerce any communication containing any threat... to injure another." *Elonis v. United States*, 575 U.S. \_\_\_ (2015). The significance of this decision cannot be understated. In my previous column, I noted that this decision could have far-reaching implications for songwriters, poets and even Facebook users. In fact, anyone who posts lyrics, sends e-mail or communicates creatively online should have been concerned with how the court was going to rule in this case. Fortunately, it seems the justices got it right.

The Supreme Court knocked down the lower court's interpretation of the statute that was used to convict Mr. Elonis. The lower court had applied a standard that was unrelated to Mr. Elonis' intent and motivation. Rather, the court applied a standard that relied solely upon the fact that a "reasonable person" would feel threatened by the words Mr. Elonis used and would view his statements as a serious expression of an intent to inflict bodily injury. (That is a standard applied to negligence cases.)

Actually, it is clear from the verses highlighted above that anyone would have felt threatened by the words Mr. Elonis used. I certainly do. However, that is not enough to impose criminal liability. The question that needed to be answered was whether Mr. Elonis truly intended the words to pose a threat that he had every intention of carrying out. This is what is known as a "true threat" in the parlance of First Amendment jurisprudence.

The defining characteristic of criminal liability in American law is that a criminal action is composed of two parts: the illegal act (otherwise known

as the "actus reus") and criminal intent (known as "mens rea"). Both must exist in conjunction in order for criminal liability to be found. Thus, if someone kills another person, but without criminal intent (such as where mental illness exists or where the death was caused by an innocent accident), he cannot generally be convicted of murder. There are certain exceptions. For example, a person who acts with "depraved indifference or recklessness" with respect to the life of another could be found guilty of murder even if he did not intend to kill that person. An example of depraved indifference is where a person starts shooting a gun out of his window at a crowded street – but without the specific intent to kill or harm anyone. That person may very well be convicted of murder.

In Mr. Elonis' case, the jury that convicted him was not instructed by the judge to determine whether he actually intended to threaten those identified in his "rap songs." In fact, when he posted his verses, Mr. Elonis indicated that he considered his words to be art and that his postings were "therapeutic" in nature. While it might have simply been easier and cheaper for him to seek psychiatric help, the fact that he indicated that his postings were therapy – and not actually meant to threaten an FBI agent, his ex-wife and local elementary school students with their lives – reduces the possibility that the "actus reus" component will be satisfied here.

As noted by Chief Justice Roberts, who wrote the majority opinion, it is a basic precept in the law that wrongdoing must be conscious to be criminal. Here Mr. Elonis, who is now subject to retrial under the court's newly enunciated

standard, could very well have lacked the criminal intent necessary to criminalize his verses.

It should be noted, however, that the court did not determine whether the recklessness standard referred to in the example above applied to this law. It could be argued that while Mr. Elonis did not intend that his verses would be a threat, he was aware that others would – and posted them anyway, knowing that his targets would view them in that fashion. The lower court must now decide this. Mr. Elonis may be found guilty again.

Where does all of this leave us as musicians and artists? First, even though the words that Mr. Elonis wrote were vile and disturbing, we may nevertheless see this decision as positive. On the one hand, it's undeniably true that tasteless Facebook posts or irresponsible e-mails can cause harm. In the case of Mr. Elonis, his employer fired him and his ex-wife got a protective order. Despite this, the court's decision really is a victory for free speech, especially for those of us who engage in avant garde or fringe art that may use disturbing imagery. Still, we must all be careful of the communications we launch into cyberspace. While there may be limited criminal liability for posting threatening messages that are not intended to be a threat, there may still be civil liability, where intent is not as significant. Defamation and harassment claims do still exist. However, for the most part, artists like Eminem (whose lyrics were invoked in this court decision) and Mr. Elonis (a/k/a Tone Dougie) can purge their inner demons through verse with impunity.