Case No. 16-SPR103

In the
United States Court of Appeals
for the Eleventh Circuit

Rudie Belltower,

Appellant

v.

Tazukia University,

Appellee

On Appeal from the United States District Court
for the Southern District of Alabama

Brief of Appellant

Alabama Attorney
Alabama Law Firm
P.O. Box 123
Tazukia, AL 12345
Telephone: (555) 555-5555
a.attorney@alabamalawfirm.com

Table of Contents

Table of Contents i

Table of Authorities ii

Statement of Jurisdiction 1

Statement of the Issues 1

Statement of the Case 1

Statement of the Facts 2

Summary of Argument 3

Argument 5

I. The District Court erred in granting summary judgment on behalf of Tazukia University 5

A. Mr. Belltower's intent is a genuine issue of material fact 5

B. The subjective-intent standard is the prevailing standard in the Eleventh Circuit 6

C. The Court must find Mr. Belltower's online comment is entitled to protection under the First Amendment to the United States Constitution 7

Conclusion 12

Table of Authorities

Cases

ACLU of Florida v. Miami-Dade County School Bd., 557 F.3d 1177 (11th Cir. 2009) 5

B&G Enters., Ltd. v. United States, 220 F.3d 1318 (11th Cir. 2000) 5

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). 8

Coalition for the Abolition of Marijuana v. City of Atlanta, 219 F.3d 1301 (11th Cir. 2000) 5

Elonis v. United States, 135 S. Ct. 2001 (2015) 6

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 9

National Fire Insur. Co. of Hartford v. Fortune Const. Co., 320 F.3d 1260 (11th Cir. 2003) 5

Planned Parenthood v. Amer. Coalition of Life, 290 F.3d 1058 (9th Cir. 2002) 10

Reno v. ACLU, 521 U.S. 844 (1997) 8

St. Charles Foods, Inc. v. America's Favorite Chicken Co., 198 F.3d 815 (11th Cir. 1999) 6

Texas v. Johnson, 491 U.S. 397 (1989) 7

Thornton v. E.I. Du Pont de Numours & Co., 22 F.3d 284 (11th Cir. 1994) 5

Cases (Continued)

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)7

U.S. v. Cassel, 408 F.3d 622 (9th Cir. 2005).....9

United States v. Alaoud, 347 F.3d 1291 (11th Cir. 2003).....7

United States v. Martinez, 736 F.3d 981 (11th Cir. 2013).....7

Virginia v. Black, 538 U.S. 343 (2003).....9

Watts v. United States, 394 U.S. 705 (1969).....8

Whatley v. CNA Ins. Co., 189 F.3d 1310 (11th Cir. 1999).....5

Statutes

28 U.S.C. § 1291.....3

28 U.S.C. § 1331.....2

Constitutional Provisions

U.S. Const. amend. I.....7

Federal Rules of Appellate Procedure

Fed. R. App. P. 4(a)(1)(A).....3

Federal Rules of Civil Procedure

Fed. R. Civ. P. 56(c).....5

Statement of Jurisdiction

The District Court had subject-matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 as the action arose under the First Amendment to the United States Constitution. On April 21, 2016, the District Court entered summary judgment in favor of Tazukia University. Appellant Rudie Belltower filed a timely notice of appeal pursuant to Fed.R.App.P.4(a)(1)(A). This Court has appellate jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

Statement of the Issues

Did the District Court err in granting summary judgment on behalf of Tazukia University finding his comment constituted a "true threat"?

Is Rudie Belltower's online comment advocating for concealed carry on campus entitled to protection under the First Amendment to the United States Constitution?

Statement of the Case

On April 14, 2016, Rudie Belltower filed suit in the U.S. District Court for the Southern District of Alabama alleging that Tazukia University violated his rights under the First Amendment to the United States Constitution after expelling him for his online comment. On April 21, 2016, Tazukia University moved for summary judgment. Mr. Belltower opposed the motion, arguing that summary

judgment was not appropriate because there was a genuine issue of material fact as to whether he intended to subjectively threaten anyone. The District Court granted Tazukia University's motion, holding that Mr. Belltower's comment was a true threat and therefore not entitled to First Amendment protection. On May 5, 2016, Rudie Belltower filed a notice of appeal in the U.S. Circuit Court for the Eleventh Circuit seeking review of the District Court's decision.

Statement of the Facts

On April 7, 2016, student Rudie Belltower made the following online comment on a Second Amendment blog in response to the ongoing debate about concealed carry on campus:

> I couldn't care less whether Tazukia changes their policy on campus carry because any rule that infringes my rights under the Second Amendment is voided by the Supremacy Clause. For the same reason, I don't need a permit to exercise my constitutional rights. If one of those campus cops or anyone else tries to violate my rights when I am lawfully armed on campus, I will defend the United States Constitution to the utmost, including the use of deadly force. Give me liberty or give me death!

The school's monitoring software notified school authorities of Mr. Belltower's comment. The disciplinary committee met to discuss what disciplinary action should be taken against Mr. Belltower, if any. The committee voted to expel him. The campus police gave him a trespass warning and told him he would be arrested if he returned to campus.

Summary of Argument

The District Court erred in granting summary judgment for Tazukia University because there was a genuine issue of material fact as to whether Mr. Belltower's comment should be reviewed under the objective-intent standard and the subjective-intent of the true threat doctrine and whether his comment is entitled to protection under the First Amendment to the United Constitution. Summary judgment is only appropriate when "'there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.'" Whatley v. CNA Ins. Co., 189 F.3d 1310, 1313 (11th Cir. 1999) (quoting Fed.R.Civ.P.56(c)).

Tazukia University argues that Mr. Belltower's comment should be reviewed according to what an "objective person" would perceive to be threatening, but the objective-intent standard is no longer the prevailing standard in this Circuit. After the Supreme Court's decision in Elonis v. United States, 135 S. Ct. 2001 (2015), this Court overturned its decisions relying on the objective-standard. See U.S. v. Martinez, 800 F.3d 1293, 1269 (11th Cir. 2015) ("In light of the Supreme Court's holding in Elonis, our holdings in United States v. Martinez, 736 F.3d 981 (11th Cir. 2013) and United States v. Alaoud, 347 F.3d 1291 (11th Cir. 2003) are overruled").

Furthermore, even if the subjective-intent standard is adopted, Mr. Belltower's comment would fail to meet the definition of a "true threat." Mr.

Belltower did not intend to threaten campus police or school faculty because his comment was not directed at any particular person or group of people. Rather, he made a comment on a public online blog about an ongoing political issue about concealed carry on campus. While Mr. Belltower may have exaggerated to get his point across, and it may have caused discomfort to some school officials, his comment is nevertheless entitled to First Amendment protection as a legitimate form of political expression upheld by the Supreme Court in Watts v. United States, 394 U.S. 705 (1969), Virginia v. Black, 538 U.S. 343 (2003) and NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

Argument

I. The District Court erred in granting summary judgment on behalf of Tazukia University

A. Mr. Belltower's intent is a genuine issue of material fact

The Eleventh Circuit reviews district court decisions on summary judgment *de novo*. See, e.g., B&G Enters., Ltd. v. United States, 220 F.3d 1318, 1322 (11th Cir. 2000); Thornton v. E.I. Du Pont de Numours & Co., 22 F.3d 284, 288 (11th Cir. 1994). Summary judgment is only appropriate when "'there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.'" Whatley v. CNA Ins. Co., 189 F.3d 1310, 1313 (11th Cir. 1999) (quoting Fed.R.Civ.P.56(c)).

Ordinarily, the Eleventh Circuit "review[s] district court fact findings only for clear error," but "First Amendment issues are not ordinary." ACLU of Florida v. Miami-Dade County School Bd., 557 F.3d 1177, 1203 (11th Cir. 2009). In cases involving the Free Speech Clause to the First Amendment, the Court reviews the "district court's findings of 'constitutional facts,' as distinguished from ordinary historical facts, *de novo*." Id.

While Mr. Belltower and Tazukia University do not dispute that Mr. Belltower made the comment, there is a dispute over Mr. Belltower's intent. Mr Belltower's intent is critical in determining whether he made a "true threat," or if

his comment is protected by the First Amendment. Because Mr. Belltower's intent can only be ascertained from testimony, summary judgment was inappropriate. "[I]f reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment." Warrior Tombigbee Transp. Co. v. M/V Nan Fung, 695 F.2d 1294, 1296-1297 (11th Cir. 1983) (finding summary judgment "may be inappropriate where the parties agree on the basic facts, but disagree about the factual inferences that should be drawn from these facts").

B. The subjective-intent standard is the prevailing standard in the Eleventh Circuit

The District Court erred in adopting the objective-intent standard in granting summary judgment for Tazukia University. The objective-intent standard has been abrogated by the Supreme Court in Elonis v. United States, 135 S. Ct. 2001 (2015) and by this Court. In Elonis, the Supreme Court reversed the defendant's conviction under 18 U.S.C. § 875(c) (2015) prohibiting "any communication containing any threat . . . to injure the person of another." 135 S.Ct. at 2013. The Court found basing liability on "whether a 'reasonable person' regards the communication as a threat, regardless of what the defendant thinks," was insufficient to support a conviction. Id. at 2011. After Elonis, this Court overturned United States v. Martinez, 736 F.3d 981 (11th Cir. 2013) and United States v. Alaoud, 347 F.3d 1291 (11th Cir. 2003) relying on the objective-intent standard.

See U.S. v. Martinez, 800 F.3d 1293, 1269 (11th Cir. 2015) ("In light of the Supreme Court's holding in Elonis, our holdings in Martinez and Alaoud are overruled").

C. The Court must find Mr. Belltower's online comment is entitled to protection under the First Amendment to the United States Constitution

The First Amendment to the United States Constitution prohibits the government from "abridging the freedom of speech . . . or the right of the people to peaceably assemble." U.S. Const. amend. I. The exercise of these constitutional rights to engage in political expression "has always rested on the highest rung of the hierarchy of First Amendment values." Carey v. Brown, 447 U.S. 455, 467 (1980).

The Supreme Court has recognized that First Amendment rights are afforded to students in public schools and universities. "Students in school as well as out of school are 'persons' under our Constitution," who are "possessed of fundamental rights which the State must respect." Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 511 (1969).

A student's First Amendment rights "do not merely embrace classroom hours," but "the cafeteria, or on the playing field, or on the campus" where the student may "express [his or her] opinions, even on controversial subjects." Tinker, 393 U.S. at 513. As more students use Internet blogs and social media websites to

express opinions on issues of importance to them, the First Amendment's guarantees of free speech have been extended to protect online speech. See, generally, Reno v. ACLU, 521 U.S. 844, 863 (1997) ("[T]he Internet—as the most participatory form of mass speech yet developed, is entitled to the highest protection from governmental intrusion") (internal quotation marks omitted) (internal citations omitted).

However, the Supreme Court has acknowledged there are "well-defined" and "narrowly limited" classes of speech which are not entitled to First Amendment protection. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1942). Among those categories are "true threats," defined as "statements where the speaker *means to* communicate a serious expression of *an intent* to commit an act of unlawful violence to a particular individual or group of individuals." Virginia v. Black, 538 U.S. 343, 360 (2003) (emphasis added). See, also, U.S. v. Cassel, 408 F.3d 622, 631 (9th Cir. 2005) ("A natural reading of the language [in Black] embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to threaten the victim").

The Supreme Court has been careful to draw a distinction between "true threats" and legitimate forms of political expression protected by the First Amendment. The Court first addressed a "true threat" case in Watts v. United

States, 394 U.S. 705 (1969). At an anti-war demonstration in Washington, D.C., Robert Watts made the statement, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." Watts, 394 U.S. at 706. Watts was subsequently arrested, charged, and convicted under 18 U.S.C. § 871(a) (2015) for "knowingly and willfully . . . [making] a threat to take the life of or to inflict bodily harm upon the President of the United States."

The Court reversed Watts's conviction, finding his statement was "political hyperbole" and failed to satisfy the willfulness requirement of the statute. Id. at 708. Watts's statement was a "very crude, offensive method" of stating his opinion about the President, id., but when considering the context, the "expressly conditional" nature of the statement, and the reaction of the listeners, it could not be reasonably construed as a true threat. Id. The "language of the political arena . . . is often vituperative, abusive, and inexact." Id. (internal citations omitted).

The Supreme Court was presented with a second "true threat" case in Virginia v. Black, 538 U.S. 343 (2003). Barry Black, a member of the Ku Klux Klan, was arrested, charged and convicted under Va. Code Ann. § 18.2-423 (1996) prohibiting cross burning with "an intent of intimidating any person or group of persons," where any such burning "shall be prima facie evidence of an intent to intimidate a person or group of persons." Black, 538 U.S. at 350.

The Court reversed Black's conviction and struck down the prima facie provision of the statute as unconstitutional, because it failed to distinguish between cross burning as an intimidation tactic and cross burning as a legitimately constitutional form of political expression. Id. at 365. The Court found "sometimes the cross burning is a statement of ideology, a symbol of group solidarity," concluding "[b]urning a cross at a political rally would almost certainly be protected expression." Id. at 365-366 (internal citations omitted).

The Supreme Court has recognized and reaffirmed the principle that the "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-928 (1982). The constitutional guarantees of free speech "do not permit a State to forbid or proscribe advocacy of the use of force or of law violation," except when such advocacy is "*directed* to inciting or producing imminent lawless action and is *likely* to incite or produce such action." Claiborne, 458 U.S. at 927 (emphasis added).

In determining whether speech constitutes a "true threat" or a legitimate form of political expression protected by the First Amendment, an inquiry into whether the speech was communicated in private or in a public forum is critical. Private speech is directed at a particular person or group of people. Public speech, however, "seeks to move public opinion and to encourage those of like mind," and

as "part of public discourse enjoys far greater protection than identical speech made in a purely private context." Planned Parenthood v. Amer. Coalition of Life, 290 F. 3d 1058, 1099 (9th Cir. 2002).

Throughout our nation's history, universities and colleges have been a cornerstone for freedom of speech and expression. From the draft-burning demonstrations during the Vietnam War to the designation of "free speech zones" and "safe spaces" today, students have taken to their campus to speak out on the issues that are most important to them.

While students will necessarily engage in speech that is distasteful and offensive to some students and school faculty, unpopular speech is still protected by the First Amendment. The protection of student speech, even unpopular speech, is critical in ensuring higher education remains a place for the democratic debate of ideas; to censor or discipline student speech is to dilute the quality of democracy.

This case implicates the core principles the First Amendment was designed to protect, and this Court would be wise to ensure that they are upheld.

Conclusion

For the reasons set forth above, Mr. Belltower requests this Court reverse the District Court's summary judgment on behalf of Tazukia University and remand the case for further review.

Respectfully submitted,

_____

Alabama Attorney
Alabama Law Firm
P.O. Box 123
Tazukia, AL 12345
Telephone: (555) 555-5555
a.attorney@alabamalawfirm.com