

Robinson Named Chair of Elder Law Committee



Robinson

Buffalo attorney **Edward C. Robinson** has been named chair of the BAEC's Elder Law Committee. He replaces **Anthony Szczygiel**, who recently resigned due to his retirement.

The Elder Law Committee shares information among members and the public regarding issues of major concern to the elderly and the practitioners representing them. Such issues include access to health care, Medicaid, asset planning, housing, community resources and institutional placement, pension benefits, health care decision making, private and Medicare health insurance, administrative proceedings, attorneys' fees, veterans' benefits, and exploitation of the elderly.

For further details or to join the Committee, call 852-8687. [B]



Missing Records

The Bar Association frequently receives calls from clients, court staff and member attorneys who are attempting to locate the records of deceased attorneys. If you have any information concerning the files of a deceased member, please contact Darren Canham at 852-8687 or dcanham@eriebar.org so that we can update our records. Your assistance is greatly appreciated!

cyberlaw: the brave new e-world

By Anne F. Downey



When a Rap Leads to a Rap Sheet: *Elonis v. United States*, 575 U.S. ____ (2015)

In an interview around the time of his Senate confirmation hearings, Chief Justice John Roberts said that "the more justices that can agree on a particular decision, the more likely it is to be decided on a narrow basis, and I think that's a good thing..." The Chief Justice certainly seemed to be operating on this principle when he authored the majority opinion in *Elonis v. US*, which was decided on June 1, 2015.

The facts of the case center upon an angry man, Anthony D. Elonis, who lived near Bethlehem, PA. Anthony's marriage to Tara Elonis was on the rocks, he had been arrested for trespassing related to a domestic dispute, he lost his job at Dorney Park and Wildwater Kingdom, and he moved back home with his parents. Elonis set up a Facebook account under the nickname Tone Dougie and used this social media soapbox to spew hatred upon various targets. When Tara obtained an order of protection, he posted "Fold up your PFA and put it in your pocket. Is it thick enough to stop a bullet?" Also concerning his wife, he wrote "There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts."

Elonis had plenty of hate for others too. He wrote "Enough elementary schools in 10-mile radius to initiate the most heinous school shooting ever imagined. And hell hath no fury like a crazy man in a kindergarten class." When he lost his job, he hinted at committing violent acts at Wildwater Park. The former employer contacted the FBI, which began investigating Elonis. When Elonis was visited by FBI agent Denise Stevens and her partner, he posted that it took all the strength he had not to slit Steven's throat and leave her bleeding to death.

Elonis was arrested in December 2010 and charged with five counts of violating 18 U.S.C. 875(c), which prohibits the interstate transmission of "any communication containing any threat to injure the person of another." During the jury trial in October 2011, Elonis took the stand in his own defense and insisted that he would never actually hurt anyone. He characterized the postings as harmless raps, a means of venting for therapeutic reasons. It probably did not help his case that, according to one reporter, Elonis appeared to

be smirking at Assistant U.S. Attorney Sherri Stephan during cross examination.

After closing arguments, the judge instructed the jury that it need not determine Elonis' intent but rather whether a reasonable person would regard Elonis' statements as threats. The jury deliberated for approximately two hours and found Elonis guilty on four counts (he was acquitted on one count of threatening his former coworkers).

Facing a maximum sentence of 20 years, in September 2012 Elonis was sentenced to 44 months, with three years' supervised release. In April 2013, Elonis sent a letter to Ms. Stephan noting that his release from prison was rapidly approaching and that he was researching ordinances in the municipality where Stephan resided. He wrote "I simply do not wish to run afoul of any of them when I set fire to a cross in your yard."

After being released in February 2014, Elonis was arrested in April 2015 on charges related to allegedly assaulting the mother of his new girlfriend by throwing a metal pot at her head. In May 2015, the federal magistrate ordered that Elonis be detained prior to trial on the violation of his supervised release.

Meanwhile, concerning the October 2011 conviction, the defense appealed the case to the Third Circuit. In October 2013, the Third Circuit affirmed, holding that Section 875(c) requires only the intent to communicate words that the defendant understands and that a reasonable person would view as a threat.

The case went up on appeal to the U.S. Supreme Court, which heard oral arguments in December 2014. The June 2015 decision was a 7-1 ruling, authored by Chief Justice Roberts. The high court reversed the conviction and remanded the case. Justice Alito issued a concurrent opinion, and Justice Thomas dissented.

The Court held that the Third Circuit's standard for intent, requiring only negligence with respect to the communication of a threat, was not sufficient to support a conviction under Section 875(c). The majority opinion stated that basing Elonis' conviction on whether a reasonable person would find his posts threatening was inconsistent with the conven-

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tional requirement for criminal conduct, namely awareness of some wrongdoing. They declined to opine whether a mental state of recklessness would also suffice.

The majority also declined to address the First Amendment issues. Justice Roberts stated succinctly, "Given our disposition, it is not necessary to consider any First Amendment issues."

As one commentator noted, "It may be that [the Elonis] decision attracted seven votes precisely because it decided so little."

Alito's concurring opinion asserted that recklessness is sufficient and that the majority should have so held in order to resolve a split in the Circuits.

"Accordingly, I would hold that a defendant may be convicted under Section 875(c) if he or she consciously disregards the risk that the communication transmitted will be interpreted as a true threat," Alito said. He also stated that a recklessness standard should not be at odds with the First Amendment.

Thomas' dissent discussed the split in the Circuits.

"Rather than resolve the conflict, the Court casts aside the approach used in nine Circuits and leaves nothing in its place," he said. "Lower courts are thus left to guess at the appropriate mental state for Section 875(c). All they know after today's decision is that a requirement of general intent will not do."

He noted that the majority opinion carefully left open the possibility that recklessness is sufficient, but he himself would have found general intent to be enough.

On June 24, 2015, Judge Stengel of the U.S. District Court for the Eastern District of Pennsylvania granted Elonis a conditional release on \$50,000 bail, with orders to stay away from Tara, Ms. Stephan, and the former coworkers. The order granted Elonis permission to use the Internet "for legitimate purposes."

As of late September, there was a Facebook account for Anthony Douglas Elonis, with certain posts available for the public to see. He talks about the criminal justice system, but none of the posts I saw were likely to land him in legal trouble. We shall see how the rest of the story unfolds. [B]

The Bar Association of Erie County's Young Lawyers Committee

PRESENTS

An Evening with the Judiciary

Wednesday, November 4, 2015 » 5:00 -7:00 p.m.

TEMPLETON LANDING

2 Templeton Terrace » Buffalo, New York

Please join the Young Lawyers Committee and local judges for an opportunity to get to know the judiciary.

This is a one-of-a-kind event that you do not want to miss!!!

The event is open to all attorneys in practice 10 years or less.

Hors d'oeuvres and beverages will be served.

The cost of this event is \$15 for BAEC members and \$20 for non-members.

Not a BAEC member?

Join today at www.eriebar.org or by calling 852-8687.

RSVPS ARE MANDATORY!

Reserve your space online today at www.eriebar.org or call Susan Kohlbacher at 852-8687.

Law Day Award Nominations Sought

Each year, bar associations across the country pay tribute to the American justice system on Law Day. Traditionally observed on or around May 1, Law Day is a focal point for many community activities. The Bar Association of Erie County's Law Day luncheon and awards ceremony marks the culmination of months of law-related educational activities, including a high school mock trial tournament and community outreach.

Our long-standing Law Day tradition involves honoring local attorneys and non-attorneys who have distinguished themselves in service to the law and the ideals of the Constitution. The Bar Association of Erie County will present several awards on Law Day, including the prestigious **Liberty Bell Award**, bestowed in appreciation of outstanding service to the community. This award is presented to individuals or organizations that have distinguished themselves in at least one of the following areas:

- Promoting a better understanding of our Constitution and the Bill of Rights;
- Encouraging a greater respect for law and the courts;
- Stimulating a deeper sense of individual responsibility so that citizens recognize their duties as well as their rights;
- Contributing to the effective functioning of our institutions of government; and
- Fostering a better understanding and appreciation of the rule of law.

Last year's Liberty Bell Award was presented to **Kathleen C. Hochul**, Lieutenant Governor of the State of New York.

Special Service Award

Traditionally presented to a non-lawyer who is connected with a governmental agency or the courts, this award recognizes outstanding service to the legal community. Nominees are notable for their cooperation with members of the legal profession; efficient handling of their duties; and willingness to extend themselves to the benefit of the legal profession and the public. Last year's Special Service Award was conferred on **Bernadette Maguda**, Lead Case Technician for the Social Security Administration Office.

Police Officer Award

The Police Officer Award is given to a law enforcement officer in Erie County whose service is in keeping with the Constitutional imperative to balance the rights of society against the rights of the accused. The BAEC's Criminal Law Committee selects the recipient of this award based on the following qualities:

- Conduct which demonstrates an understanding of the Constitution and especially the Bill of Rights;
- Conduct which encourages respect for the law and the rule of law;
- Conduct which promotes and contributes to a better understanding of, respect for, and effective functioning of the judicial process;
- Cooperation with the legal community; and
- Conduct which demonstrates a concern for society and appreciation for the dignity of all persons.

Any law enforcement officer whose jurisdiction encompasses any part of Erie County is eligible for this award. Last year's award was presented to **Joseph Dubreville**, Special Agent (Retired), Department of Homeland Security and **Christopher S. Weber**, Senior Investigator, New York State Police.

Justice Award

This award is presented to a lawyer or non-lawyer whose efforts have substantially contributed to the improvement of the Justice System. The Justice Award is only given when circumstances warrant. It is not necessarily presented on an annual basis. Last year, the award was presented to the Family Court Help Desk/Federal Court Pro Se Assistance Program and the UB Law Pro Se Civil Litigation Support Practicum.

Media Award

The Media Award is presented to single out achievements in print and electronic media and products in media and the arts which strengthen the system of justice and freedom under the law. The 2015 recipient of this award was **Adam Zyglis**, Editorial Cartoonist, The Buffalo News.

How to Nominate a Candidate for a Law Day Award

Nomination forms for candidates for all the Law Day Awards are available online at www.eriebar.org. The deadline for receipt of nominations for 2016 Law Day Awards is **Friday, January 1, 2016.** [B]