

Cyberbullying Statute Struck Down

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Categories : [Crimes and Elements](#), [Uncategorized](#)

Tagged as : [bishop](#), [cyberbullying](#), [first amendment](#), [north carolina supreme court](#), [speech](#), [state supreme court](#)

Date : June 13, 2016

Last week, the state supreme court unanimously ruled that a provision of North Carolina's cyberbullying statute, [G.S. 14-458.1](#), "violates the First Amendment." The case is *State v. Bishop*, and the opinion is [here](#). I previously wrote [here](#) about the court of appeals ruling upholding the statute. This post summarizes the case and discusses the new opinion.

Facts. Here's what I wrote before, based on the opinion of the court of appeals:

The defendant and the victim were students at the same high school. The defendant posted several comments on Facebook about the victim, including a post calling him "homosexual"; a comment referring to a message the victim had sent to another student on Facebook as "excessively homoerotic in nature"; a statement, in response to another student's suggestion that they "kick [the victim's] ass" that the defendant "never got the chance to slap [the victim] down before Christmas break"; and crude comments about the victim's genitals. The victim became distraught as a result of these and other comments, and his mother contacted law enforcement. The defendant acknowledged making the comments at issue.

The supreme court's opinion summarizes the facts somewhat differently, generally portraying the online activity as more of a back-and-forth. For example, it noted that there were multiple exchanges between the defendant and the complainant that "included comments and accusations about each other's sexual proclivities, along with name-calling and insults."

Procedural history. The defendant was charged with cyberbullying under G.S. 14-458.1(a)(1)(d). He was convicted in district court and again in superior court, and appealed.

The court of appeals rejected the defendant's First Amendment challenge, generally finding that the provision targets conduct, not speech:

The [c]yber-bullying [s]tatute is not directed at prohibiting the communication of thoughts or ideas via the Internet. It prohibits the intentional and specific conduct of intimidating or tormenting a minor. This conduct falls outside the purview of the First Amendment.

To the extent that the law creates any incidental burden on speech, the court concluded that the burden was no greater than necessary to serve the law's purpose.

Supreme court opinion. The supreme court reversed. It summarized that the provision

restricts speech, not merely nonexpressive conduct; that this restriction is content based, not content neutral; and that the cyberbullying statute is not narrowly tailored to the State's asserted interest in protecting children from the harms of online bullying.

As to the impact on speech, the court wrote that "[p]osting information on the Internet—whatever the subject matter—can constitute speech as surely as stapling flyers to bulletin boards or distributing pamphlets to passersby—activities long

protected by the First Amendment.” That the statute is content based is apparent from the fact that it “criminalizes some messages but not others.” Therefore, the court reasoned, the statute must be analyzed under strict scrutiny. And while “protecting children from online bullying is a compelling governmental interest,” the provision in question is not the least restrictive means of serving that interest. The statute applies even if the intended victim never becomes aware of the posting, and it contains elastic and undefined terms like “torment” and “personal” that could allow the statute to criminalize virtually any information posted about a minor with unkind intent. Thus, while the goal of the statute may be “laudable,” the court concluded that it sweeps too broadly. It reversed the defendant’s conviction.

Comments. A few thoughts about the opinion. First, I suppose the State could ask the Supreme Court of the United States to review the matter. The state supreme court is the final arbiter of state law and this opinion involves a state statute. Yet the decision turns as much on the proper interpretation of the First Amendment – a federal question – as it does on the interpretation of the cyberbullying law. Still, I don’t view the case as a particularly likely candidate for Supreme Court review, especially given the lack of a dissent in the state supreme court.

Second, the opinion doesn’t discuss and so doesn’t directly invalidate any other provision of the statute. Indeed, some portions of the statute address conduct that is more clearly defined and less likely to encompass legitimate or valuable speech than the provision at issue in *Bishop*. For example, subdivision (a)(1)(a) criminalizes “[b]uild[ing] a fake profile or Web site” with the intent to intimidate or torment a minor. Such conduct is fraudulent in nature and so may be distinguishable from the part of the statute that was struck down in *Bishop*. However, *Bishop* may provide a basis for challenging other provisions of the statute, like the one prohibiting posting images of a minor with the intent to torment or intimidate.

Finally, defendants previously convicted under the provision invalidated in *Bishop* may be entitled to relief. Under G.S. 15A-1415(b)(5), a noncapital defendant may file a motion for appropriate relief at any time after verdict alleging that “[t]he conduct for which the defendant was prosecuted was protected by the Constitution of the United States.”

As always, I’m interested in readers’ thoughts about the case and its implications.