

Counterman v. Colorado

Counterman v. Colorado was decided on June 27, 2023 by the U.S. Supreme Court
Colorado: Defendant appeals his conviction for Stalking on First Amendment grounds.

Issue:

Whether the defendant's Facebook messages amounted to true threats to form the basis for his stalking charge?

Facts:

The defendant stalked the victim for many years, sending her hundreds of Facebook messages, despite her numerous attempts to block him. His messages ranged from friendly to threatening and implied that he had her under surveillance. The messages put the victim in fear and caused her to change her daily life for her safety. Colorado charged the defendant with Stalking under a statute making it unlawful to "repeatedly . . . make any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress." The only evidence the State introduced at trial were his Facebook messages. The defendant moved to dismiss the charge on First Amendment grounds, arguing that his messages were not "true threats" and therefore could not form the basis of a criminal prosecution. In line with Colorado law, the trial court assessed the true-threat issue using an "objective 'reasonable person' standard." Under that standard, the State had to show that a reasonable person would have viewed the Facebook messages as threatening. Because that was so, the court ruled, the First Amendment posed no bar to prosecution.

Holding:

Reversed conviction. The Court held that that the State must prove in true-threats cases that the defendant had some understanding of his statements' threatening character. The Court then held that a recklessness mens rea standard suffices for the First Amendment purpose at issue. The Court explained: "Given that a subjective standard here shields speech not independently entitled to protection—and indeed posing real dangers—we do not require that the State prove the defendant had any more specific intent to threaten the victim." In this case, since the defendant was prosecuted in accordance with an objective standard, where the State had to show only that a reasonable person would understand his statements as threats and did not have to show any awareness on his part that the statements could be understood that way, the Court found his conviction to be a violation of the First Amendment. The Court began by restating that true threats of violence are outside the bounds of First Amendment protection and punishable as crimes. However, the Court held that the First Amendment still requires proof that the defendant had some subjective understanding of the threatening nature of his statements. The Court further held that a mental state of recklessness is sufficient. Thus, the State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence. The Court explained that the First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were "intended" (not just likely) to produce imminent disorder. The Court reasoned that the recklessness standard offers "enough 'breathing space' for protected speech," without sacrificing too many of the benefits of enforcing laws against true threats.

Bottom Line:

Virginia's stalking statute appears to be vulnerable to the same challenge as the Colorado statute in this case. Va. Code § 18.2-60.3 provides, in part: "Any person ... who on more than one occasion engages in conduct ... directed at another person with the intent to place, or when he knows or reasonably should know that the conduct places that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person's family or household member is guilty of a Class 1 misdemeanor..." Thus, under the Virginia Code, the standard for determining fear is "an objective one. In Virginia, under current law, the mens rea element for stalking is satisfied if the evidence shows the defendant should have known his conduct would cause fear. Virginia code § 18.2-60.3(A) does not require intent to cause fear or actual knowledge that the actions caused fear. Thus, the portion of the Virginia stalking code section, § 18.2-60.3(A) that sets out a mens rea of "reasonably should know" is likely also unconstitutional under this Supreme Court ruling, if the behavior at issue is a "true threat" or other activity protected by the First Amendment. Note, however, that not all stalking behavior is protected by the First Amendment (including such stalking behaviors as trespassing, technological or other surveillance, damaging property, etc.).

Full Case at: https://www.supremecourt.gov/opinions/22pdf/22-138_43j7.pdf