New Jersey Appellate Division "Saves" Portion of New Jersey's Bias Intimidation Statute.

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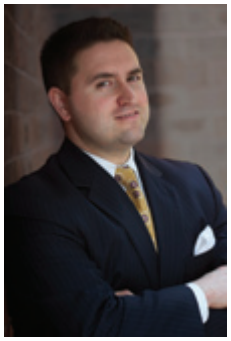

The New Jersey Appellate Division decided, and in the process "saved," a very important piece of legislation in New Jersey – the bias intimidation statute. In State v. Pomianek, decided on January 31, 2013, the defendant David Pomianek, a public employee, was convicted by a jury of harassment by communication, N.J.S.A. 2C:33-4(a), and harassment by alarming conduct, N.J.S.A. 2C:33-4(c) for his conduct towards an African-American co-worker. Based on those two predicate offenses, the jury convicted defendant of bias intimidation pursuant to N.J.S.A. 2C:16-1(a)(3).

On appeal, the defendant challenged his conviction, arguing, among other things, that the bias intimidation statute is unconstitutional. Specifically, the defendant argued that, as written, the bias intimidation statute would punish *his* conduct based on the *victim's perception* of the defendant's conduct, without requiring the State to prove *defendant's biased intent* in committing the underlying crime. The Appellate Division agreed with the argument and reversed the conviction, however, in doing so, the Appellate Division also "saved" the statute, N.J.S.A. 2C:16-1(a)(3), by "reading into it" the requirement that the State prove a defendant's biased intent.

What does the bias intimidation statute actually punish?

At its core, the statute serves to punish an individual who commits a "predicate" or "underlying" crime (*think* assault, harassment, etc.) with a purpose to intimidate an individual or group of individuals because of race, color, religion, gender, disability, sexual orientation, gender identity or expression, national origin, or ethnicity.

What is the punishment?

Here is where the statute really serves to protect minority groups and to deter would-be bigots: if an individual is convicted of an underlying crime (say a third-degree assault) and the State can prove that the Assault was perpetrated with the purpose to intimidate, the underlying crime is "bumped-up" one degree. So, for a third-degree Assault, the defendant would be sentenced as a second-degree offended.

So how did they save it?

Well, for those of you that do not know this, in the 1992 decision in R.A.V. v. St. Paul the Supreme Court of the United States struck down a municipal ordinance that prohibited "hate speech" on First Amendment (speech) grounds. That statute punished:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

The Supreme Court held that the ordinance impermissibly criminalized *speech* or other *expressive activity* based on its content and on the viewpoint of the speaker. The Supreme Court added: "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." However, the Supreme Court later held in the 2003 case, Virginia v. Black, that a Virginia statute outlawing cross-burning when performed *for the purpose* of intimidation was Constitutional.

How did the Appellate Division save New Jersey's Bias Intimidation Statute?

The Court "inferred" – which is why I say they "saved" it – that the Bias Intimidation Statute, N.J.S.A. 2C:16-1, requires proof of intent with respect to each element of the offenses defined in subsection 1(a)(3). Stated more plainly, a defendant must (1) intend to commit the predicate offense (the assault, harassment, etc.); and (2) must also intend to intimidate the victim because of his or her membership in a protected class and (3) intend to cause the victim to perceive the underlying offense as being bias-motivated.

This is a very important decision for victims and potential victims of race-, gender-, religious-, sexual orientation- motivated crimes.