

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF LOUISIANA

3 *****
4 STEVEN McCLURE, CLAYTON SMITH
5 AND MICHAEL BEHAN

Docket No. 01-257 (T)
New Orleans, Louisiana
Thursday, August 23, 2001
11:00 a.m.

6 v.

7 JOHN D. ASHCROFT, sued in
8 his capacity as Attorney
9 General of the United States
10 *****

11 TRANSCRIPT OF ORDERS AND REASONS
12 HEARD BEFORE THE HONORABLE G. THOMAS PORTEOUS
13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

15 FOR THE PLAINTIFF:

16 AMERICAN CIVIL LIBERTIES UNIC
17 FOUNDATION
18 BY: GRAHAM BOYD, ESQ.
19 160 Foster Street
20 New Haven, Connecticut 06511

21 - AND -

22 BOOTH & BOOTH
23 BY: VINCENT BOOTH, ESQ.
24 138 North Cortez Street
25 New Orleans, Louisiana 70119

FOR THE DEFENDANT:

UNITED STATES ATTORNEYS OFFICE
BY: JOHN MURPHY, ESQ.
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New Orleans, Louisiana 70130

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produced by computer.

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P R O C E E D I N G S
(THURSDAY, AUGUST 23, 2001)
(REASONS AND ORDER)

THE COURT: This matter comes before the Court pursuant to a claim. The claim was filed in a suit against John Ashcroft in his capacity as Attorney General of the United States seeking, among other things, a preliminary injunction against the enforcement of certain provisions of a plea agreement entered into by the Government and Barbecue of New Orleans, Inc. (hereinafter "BBQ"), barring the use and possession of certain inherently legal items such as glowsticks, pacifiers, personal massagers and masks, at raves held at the State Palace Theater. In addition to seeking an injunction, the ACLU seeks the following: 1) a declaration that the aforementioned items do not constitute "drug paraphernalia" as defined in 21 USC Section 863(d); 2) a declaration that the artists at rave parties have the right under the First Amendment to the United States Constitution to be free of government restrictions on their artistic use of the aforementioned legal items; and 3) a declaration that the rave attendees have the right under the Fourth and Fifth Amendments to the United States Constitution to be free of government measures requiring seizure and/or confiscation of legally possessed items.

1 Now, a preliminary injunction, which is the only
2 item I will deal with today, it does not appear that the Court
3 need address at this time the declaration of rights as to
4 whether or not this is or is not indeed drug paraphernalia.
5 Although the government seems to concede that in and of
6 themselves these items are not drug paraphernalia. But I do
7 not need to address that issue today, that issue is not
8 necessarily before me.

9 Nor do I necessarily need to address in great
10 detail the First Amendments of the artists or the Fourth and
11 Fifth, although they will be part and parcel of the decision as
12 to whether or not a preliminary injunction should be issued.

13 A preliminary injunction is an extraordinary
14 remedy, and in order to secure a preliminary injunction the
15 movant has the burden of proving four elements: 1) a
16 substantial likelihood of success on the merits; 2) the
17 substantial threat that the movant will suffer irreparable
18 injury if the injunction is not issued; 3) that the threat and
19 injury to the movant outweighs any damage the injunction might
20 cause to the opponent; and 4) that the injunction will not
21 disserve the public interest.

22 Now, in this particular case jurisdiction or
23 standing or case in controversy has been raised with respect to
24 these pleadings by the Government. In that regard the court is
25 persuaded by the Carlin case. In Carlin we had a situation,

1 and again, it did not involve a suit against the government, it
2 was a suit by Carlin Communications against a telephone
3 company, and it was a situation where there was an alleged
4 letter by a county attorney indicating a threat of prosecution
5 unless Mountain Bell stopped the service.

6 In that case that court said, and I quote: "In
7 Peterson v. City of Greenville, a city ordinance required
8 restaurants to segregate their customers by race. As to the
9 particular restaurateur involved, there was evidence that he
10 knew of the ordinance but not that he segregated the customers
11 because of the ordinance. The Court found that the segregation
12 was state action "even assuming, as respondent contends, that
13 the manager would have acted as he did independently of the
14 existence of the ordinance." Simply by "commanding a
15 particular result," the state had so involved itself that it
16 could not claim the conduct had actually occurred as a result
17 of private choice."

18 In this case the same conclusion applies here,
19 although the Government would suggest to this court that
20 Mr. Brunet acting on his own behalf and behalf of the
21 corporation voluntarily came in with this decision to do this.
22 It is this Court's belief that in this case the Government has
23 so involved itself that it cannot claim the conduct that
24 actually occurred as a result of private choice. Accordingly,
25 I believe there is standing, I believe there is case in

1 controversy and I believe there is governmental action
2 sufficient to go forward with the merits of the preliminary
3 injunction.

4 Now, as to this preliminary injunction, counsel
5 for movant correctly concedes that he cannot get an injunction
6 for something that the Brunets have voluntarily agreed to do,
7 which is the sale of these particular items. Your challenge is
8 to the second portion thereof, which deals with the
9 introduction of certain items.

10 As to that particular portion, this court is
11 satisfied that this is the situation that had the Brunets, and
12 still can this Court might suggest, if the Brunets and Barbecue
13 on their own want to not allow those things in their theater,
14 this court has no jurisdiction, nor would it ever seek to
15 preclude them from doing so. However, I am satisfied at the
16 present time that a sufficient showing has been made that this
17 is part and parcel of governmental conduct.

18 Accordingly, as to each item contained herein: (1)
19 I am satisfied that there is a substantial likelihood of
20 success on the merits in the movant's case, if they can
21 ultimately prove all of the allegations contained herein; 2)
22 there is a substantial threat that the movants would suffer
23 irreparable injury if the injunction is not issued. I base
24 this on the fact that the items have been previously seized and
25 I have no evidence to the contrary that that same result would

1 not occur in future concerts.

2 3) that the threat and injury to the movant
3 outweighs any damage the injunction might cause to the
4 opponent. I am satisfied and do believe that the Government is
5 correct in an allegation. It is certain that the governmental
6 interest in the present case is the interest in battling use of
7 the drug Ecstasy. I have no doubt about that. However, it
8 seems that a total ban on possessing and utilizing objects
9 which are inherently legal items is not a narrowly tailored
10 means of achieving the goal of curbing drug use. There are
11 other provisions in the plea agreement which seem to solve that
12 problem, specifically the portions that if they see this going
13 on they are to take certain actions. The movant does not seek
14 to stop that activity, nor should I believe they have any
15 authority to do so. Accordingly, I am satisfied that the
16 threat and injury to the movant outweighs any damage that it
17 might cause to the opponent.

18 And (4) will the injunction disserve the public.
19 In this particular case I believe the public has a right of
20 First, Fourth and Fifth Amendments that cannot be abrogated by
21 action of a court, action of a government, even if I may have
22 incorrectly included it. I am not, however, modifying the
23 terms and conditions of the plea agreement. The plea agreement
24 will remain as it is, the sentence will remain as it is. All
25 this court will do is issue a preliminary injunction and only

1 issue the preliminary injunction provisionally finding a class
2 in this particular case so that the injunction would not be
3 applicable only to the three named individuals, since that
4 would seem to be a subterfuge. And I will, in fact,
5 provisionally certify your class.

6 Accordingly, the defendant John Ashcroft, Attorney
7 General of the United States, his agents, employees, assigns
8 and all persons acting in concert or participating with him are
9 preliminary enjoined and restrained from enforcing the
10 following provision of the plea agreement in United States v.
11 Barbecue. "Further the defendant agrees that the subjects will
12 take all reasonable steps to prohibit the introduction of
13 infant pacifiers or any object in the shape of a pacifier,
14 objects that glow, including but not limited to glowsticks and
15 flashing rings; -- vapor rub products and vapor inhalers, dust
16 masks or masks of any description by any person entering a
17 concert or an event where admission is charged or at the State
18 Palace Theater, 1108 Canal Street, New Orleans, Louisiana
19 70112. This preliminary injunction only applies to those
20 items, only applies to those items as listed. Anything else
21 not requested is hereby specifically denied.

22 I might suggest that you had made some reference
23 to massage type instruments or whatever else, this injunction
24 does not cover those items, it is not requested nor was it part
25 of the sentence. So accordingly the preliminary injunction

1 will issue.

2 I'm instructing the parties to get with my
3 courtroom deputy to select dates for a class certification
4 hearing and a date for a permanent injunction hearing. The
5 court will just simply issue the order. I'll instruct my court
6 reporter to prepare a transcript of this dictated judgment in
7 the record which would serve as my reasons for judgment which I
8 will sign. This court is in recess.

9 THE DEPUTY CLERK: All rise.

10 MR. MURPHY: Your Honor, if the government could just
11 preserve its objection for the record.

12 THE COURT: Noted.

13 (WHEREUPON, THE PROCEEDINGS WERE CONCLUDED.)

14
15 REPORTER'S CERTIFICATE

16
17 I, Karen A. Iboe, CCR, Official Court Reporter, United
18 States District Court, Eastern District of Louisiana, do hereby
19 certify that the foregoing is a true and correct transcript, to
20 the best of my ability and understanding, from the record of
21 the proceedings in the above-entitled and numbered matter.



Karen A. Iboe
Karen A. Iboe, CCR, RPR
Official Court Reporter