

Tuesday, February 6, 2007

Boston cops and prosecutors throw a cream pie in their faces.

Here is what apparently caused the Boston hubbub. This video comes from the website of one of the two men who put up the message boards. During the four years that I studied and worked in and around Boston through 1985, I got to know many of its highways, bridges, and neighborhoods. Even in that context, I am left scratching my head why Boston police and prosecutors have turned to the criminal law to address First Amended-protected speech involving promotion of a television show, no matter how tasteless was the promotion and no matter how much fear and expense the promotion caused. Last week, fear ran rampant in Boston from signboards for a television show promotion, with many worrying that these were terrorist devices. Even if the fear of many was legitimate -- and such hysteria did not strike other cities where the signboards were placed, possibly because the signboards were placed in more suspicious places in Boston, or perhaps they were not -- the prosecution of the two who placed the signboards is not. The pair apparently is being prosecuted for violating Massachusetts's hoax device law, which provides as follows: Ann. Laws of Mass. GL ch. 266, § 102A1/2. Possession of Hoax Device. "(a) Whoever possesses, transports, uses or places or causes another to knowingly or unknowingly possess, transport, use or place any hoax device or hoax substance with the intent to cause anxiety, unrest, fear or personal discomfort to any person or group of persons shall be punished by imprisonment in a house of correction for not more than two and one-half years or by imprisonment in the state prison for not more than five years or by a fine of not more than \$5,000, or by both such fine and imprisonment." (b) For the purposes of this section, the term "hoax device" shall mean any device that would cause a person reasonably to believe that such device is an infernal machine. For the purposes of this section, the term "infernal machine" shall mean any device for endangering life or doing unusual damage to property, or both, by fire or explosion, whether or not contrived to ignite or explode automatically. For the purposes of this section, the words "hoax substance" shall mean any substance that would cause a person reasonably to believe that such substance is a harmful chemical or biological agent, a poison, a harmful radioactive substance or any other substance for causing serious bodily injury, endangering life or doing unusual damage to property, or both." (c) This section shall not apply to any law enforcement or public safety officer acting in the lawful discharge of official duties." (d) The court shall, after a conviction, conduct a hearing to ascertain the extent of costs incurred, damages and financial loss suffered by local, county or state public safety agencies and the amount of property damage caused as a result of the violation of this section. A person found guilty of violating this section shall, in all cases, upon conviction, in addition to any other punishment, be ordered to make restitution to the local, county or state government for any costs incurred, damages and financial loss sustained as a result of the commission of the offense. Restitution shall be imposed in addition to incarceration or fine; however, the court shall consider the defendant's present and future ability to pay in its determinations regarding a fine. In determining the amount, time and method of payment of restitution, the court shall consider the financial resources of the defendant and the burden restitution will impose on the defendant." The foregoing criminal law is limited to using devices that could reasonably be seen as explosive or capable of causing fire, and that are possessed or used with the intent to cause fear. The police and prosecutors are overreaching to use such a law against people who at worst were involved in a television show promotion that may have been in bad taste. (After writing this last sentence, I watched the above video, which I consider to be very entertaining and not in bad taste). The last time I checked, the First Amendment protects bad taste, as it should, but that also means we are forever saddled with Muzak. Jon Katz. **ADDENDUM I** By the afternoon of February 5, 2007, Turner Broadcasting and the Massachusetts attorney general reached a \$2 million settlement to avert any civil or criminal liability against Turner Broadcasting and the marketing company involved in the promotion that gave rise to this incident. However, separate from this \$2 million settlement is the status of the two gentlemen being prosecuted for placing the signboards in various locations in and around Boston. The state attorney general's office continues discussions with their attorneys. A robust First Amendment comes at a high price, and it appears that the Massachusetts government has been trying to pass along that price in contravention of the First Amendment. **ADDENDUM II** The two men who posted the signboards are being prosecuted not only for violating Massachusetts's hoax device law, but also for disorderly conduct. The Constitution is more valuable than gentility. However, courts repeatedly permit disorderly conduct convictions to enforce gentility and public obedience to police and other official powers.

Posted by Jon Katz in Criminal Defense at 02:00