

In The Matter Of:

*State of Tennessee, ex rel., Randy Rayburn, et al v.
Robert E. Cooper, Jr., Tennessee Attorney General*

*Bench Ruling of Chancellor Claudia Bonnyman
November 20, 2009*

*Vowell & Jennings, Inc.
214 Second Avenue North
Suite 207
Nashville, Tennessee 37201
615-256-1935*

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Min-U-Script® with Word Index

**IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE**

**STATE OF TENNESSEE, ex rel.,)
RANDY RAYBURN,)
JOHN (JANE) DOES NOS. 1-13,)
AUSTIN RAY, and)
FLANEUR LLC d/b/a MELROSE,)**

Plaintiffs,)

vs.)

**ROBERT E. COOPER, JR.,)
TENNESSEE ATTORNEY GENERAL,)**

Defendant.)

**CIVIL NO.
09-1284-I**

BENCH RULING OF:

CHANCELLOR CLAUDIA BONNYMAN

November 20, 2009

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P R O C E E D I N G S

THE COURT: Lawyers and parties, this is a bench ruling, and it will include all my definitions and judgment of the law. But when cases were clear as that, in case that it's probably going to go to the Court of Appeals, then we make every effort we can to render a bench ruling taking things under guidelines.

This lawsuit was brought by the plaintiffs in part of a declaratory judgment that legislation passed in 2009, and codified at TCA Section 39-17-1305(c). It's unconstitutional or otherwise illegal. The plaintiffs -- some of the plaintiffs are citizens who are gun permit holders. Other plaintiffs are restaurant owners and wait staff at restaurants. All the plaintiffs moved for a a partial summary judgment that the statute or the section of the statute was unconstitutional because it's void for vagueness. And the Attorney General filed a the cross motion to dismiss the void of vagueness claims brought by these plaintiffs. The plaintiffs and the State agree there are no material facts in dispute, and the question is one of law. There are other

1 issues in the overall case, but these other
2 issues are not the subject of summary judgment.

3 Because the question is one of
4 law, the Attorney General by intent did not file
5 a statement of undisputed facts to support his
6 cross judgment, and also the State, who's been
7 added as a defendant in this general comment or
8 statement of the case.

9 I don't want the Court of Appeals
10 to be looking for -- to do what I did, which was
11 to look for statements of undisputed facts from
12 all the parties because they're just not there.
13 There's a reason why they're not there. The
14 Attorney General responded to the plaintiffs'
15 statement of undisputed facts that the
16 statements were either opinions, and not fact;
17 or were an interpretation of the law, and not
18 fact; or were a legal argument policy statement,
19 and not fact.

20 The first plaintiffs and the
21 intervening plaintiffs advanced an identical
22 statement; that is, they advanced a statement of
23 undisputed fact that were the same statements.
24 So the time spent by the Court in understanding
25 the facts in the case are limited to facts which

1 set the context or the background for the
2 lawsuit.

3 Now the Rayburn plaintiffs, which
4 included Mr. Randy Rayburn and John Doe
5 plaintiffs, also moved for summary judgment
6 based on their theory that there's been an
7 unconstitutional delegation of police power;
8 that is, that the statute creates an
9 unconstitutional delegation of police power in
10 that the restaurants can opt out by -- in part
11 opt out by placing signs in their -- on their
12 private properties. And the Rayburn plaintiffs
13 and intervening plaintiffs -- I'm sorry -- the
14 Rayburn plaintiffs and the John Doe plaintiffs
15 also take the position that there is a
16 preemption, that OSHA preempts this statute
17 under its general duty clause.

18 The issues in the case: The
19 plaintiffs, that is the John Doe plaintiffs 10
20 and 11, state that the statute is so vague, that
21 it offends due process guarantees in the federal
22 and statute constitutions.

23 First, the plaintiff gun permit
24 holders contend because they cannot know which
25 place is serving alcohol, wine, or beer, meet

1 the definition of restaurant under the act,
2 there's no fair warning about what's prohibited,
3 so people carrying guns lawfully may act
4 accordingly.

5 Second, say the plaintiffs, the
6 State's failure to provide a definition of
7 "restaurant," which can be known, invites the
8 arbitrary and discriminatory enforcement of a
9 criminal law. In other words, the police cannot
10 know what place is a restaurant under the act.

11 The Melrose plaintiffs contend that
12 they meet the definition of restaurant under TCA
13 39-17-1305; and they face the possibility that
14 police may charge them with aiding and abetting
15 if they serve alcohol to a permit holder who
16 carries a gun. The Melrose plaintiffs contend
17 the option of posting a sign, which is found at
18 TCA 39-17-1359, may not protect them from
19 prosecution. The Melrose plaintiffs adopt the
20 John Doe plaintiffs' arguments of vagueness.

21 The remaining plaintiffs, Mr.
22 Rayburn and the other John Does, first raise the
23 void of vagueness issues from the perspective of
24 wait staff and restaurant owners. They move for
25 a partial summary judgment based upon the

1 unconstitutional delegation of police powers and
2 preemption by virtue of Tennessee's OSHA's
3 general duty clause.

4 The Rayburn plaintiffs contend
5 there's no fair warning to their customers, to
6 them, or to customers; and they're exposed to
7 arbitrary prosecution by law enforcement.

8 The Rayburn plaintiffs advance
9 that the idea that no-gun postings option leaves
10 it to restaurant owners whether to ban guns
11 where alcohol is served, even though in general,
12 firearms are not allowed where alcohol is
13 served.

14 Last, the Rayburn plaintiffs
15 contend that, as I've stated before, that OSHA
16 requires a safe work environment, and it trumps
17 TCA 39-17-1305.

18 The Attorney General seeks
19 dismissal of the plaintiffs' claims on summary
20 judgment because Chancery Court does not have
21 subject matter jurisdiction over declaratory
22 judgment cases which challenge validity of a
23 criminal law. Only the -- according to the
24 State, only the Criminal Courts or Circuit
25 Courts with the criminal jurisdiction have

1 subject matter jurisdiction, and that these
2 courts of equity do not.

3 The Attorney General also asserts
4 that the plaintiffs' lawsuit is not justiciable
5 because the entire controversy depends upon
6 hypothetical situations in theory rather than
7 actual legal issues. The restaurant owners,
8 according to the State, may avoid any possible
9 problem by opting for a no-weapons policy on
10 their private properties. The owners' fear of
11 prosecution, according to the State and the
12 Attorney General, is not a real fear because if
13 he does not reasonably know a gun permit holder
14 has a gun, a charge of aiding and abetting is
15 not proper or appropriate.

16 The plaintiffs who wish to carry
17 weapons into restaurants selling alcohol will
18 invalidate a law; and therefore, be unable to
19 carry at all times where alcohol is served. And
20 the State makes the argument that this is an
21 illogical conclusion if you believe that the
22 plaintiffs have a true motivation.

23 The Attorney General seeks
24 dismissal for another reason. The district
25 attorney generals are not parties; and a

1 declaration of statement provides that all
2 persons who have an interest must be made
3 parties.

4 The Attorney General and the State
5 have no authority to enforce TCA 37-17-1305; nor
6 to interfere with the district attorney
7 generals' prosecutorial discretion. The
8 Attorney General and the State also take the
9 position that 39-17-1305 is not vague. All the
10 criteria for a restaurant in the definition as
11 the statute are knowable by the ordinary
12 citizen. If a permit holder has a doubt, he
13 should not carry his weapon. As a practical
14 matter, a mistake by a permit holder is not
15 criminal intent; and the gun carrier would not
16 be prosecuted.

17 Now the Attorney General also --
18 and the State also assert that TCA 39-17-1305 is
19 not preempted by OSHA. There's no authority
20 otherwise. The Attorney General and the State
21 contend the option to post "no weapons" at TCA
22 39-17-1305(9) is proper because it only
23 addresses private property, and not a public
24 thoroughfares.

25 And last, the State contends that

1 if any part of the restaurant definition is
2 unconstitutionally vague, and it violates due
3 process; and here the Attorney General and the
4 State were looking specifically at the last
5 criteria for a restaurant; that is that the
6 restaurant be primarily in the business of
7 serving food, or getting its income from food.
8 Then the Court can remove that offending
9 provision without altering the intent of the
10 state legislature.

11 Now, of all of those issues that
12 the Court has summarized that the parties are
13 advancing, the issues that the Court will decide
14 today are: Is there subject matter
15 jurisdiction? Is TCA 39-17-1305(c)
16 unconstitutional because it's void for
17 vagueness; and therefore, it violates the the
18 due process clauses of the constitution? Or
19 does OSHA preempt the state statute? Five:
20 Does the statute allow the unconstitutional
21 delegation of state police powers?

22 And the Court summarizes its
23 decision here that the Court finds it does have
24 subject matter jurisdiction in the case. The
25 Court finds that TCA 39-17-1305(c) does violate

1 the due process rights of the plaintiffs,
2 generally, the plaintiffs, gun permit holders
3 because the language, "the serving of such meals
4 shall be the principle business conducted,"
5 cannot be known to the ordinary citizen.

6 Inquiry would not be satisfactory or helpful.

7 The Court finds the plaintiffs'
8 other theories are not supported by authority
9 such that the theories have merit; and the
10 motion for summary judgment or a partial summary
11 judgment is denied as to the other plaintiffs'
12 theories.

13 As to the findings of fact, there
14 are no material facts in dispute. The facts
15 available to the Court which bear upon the legal
16 issues are whether the definition of
17 "restaurant" in TCA-39-17-1305 can be easily
18 known or can be known at all. In addition,
19 certain of the plaintiffs have shown -- and
20 these are the general permit holders -- have
21 shown that they intend to carry a gun into
22 restaurants which serve alcohol. And the
23 officials charged with the regulations
24 enforcement, that is a police chief or sheriff,
25 has threatened to use sanctions against persons

1 who violate TCA 39-17-1305.

2 As to the principles of law in the
3 case, rather than read legislation into the
4 record, the Court will attach to a bench ruling
5 a copy of TCA 39-17-1305 and TCA 39-17-1359 as
6 Collective Exhibit 1; and I'll make those
7 available to the court reporter.

8 And then as to the principles of
9 law, as a fundamental component of both the due
10 process clause of the United State Constitution
11 and the Law of the Land clause of the Tennessee
12 Constitution is that a law is void for vagueness
13 if its prohibitions are not clearly defined.
14 Gray Med vs. City of Rockford, 408 US 104, a
15 1972 U.S. Supreme Court case. And the Court
16 also cites State vs. Wilkins, 655 SW 2nd, 914, a
17 Tennessee Supreme Court case, 1983.

18 The Supreme Court has explained
19 that vague laws offend several important values.
20 First, because we assume when a man is free to
21 steer between lawful and unlawful conduct, we
22 insist that laws give the person of ordinary
23 intelligence a reasonable opportunity to know
24 what is prohibited so that he may act
25 accordingly. Vague laws may attract the

1 innocent by not providing fair warning.

2 Second, if arbitrary and
3 discriminatory enforcement is to be prevented,
4 laws must provide explicit standards for those
5 who apply them. And this is the citation from
6 Gray Med at page 108.

7 The more important of these two
8 factors is the presence of minimal guidelines to
9 direct law enforcement. And here the Court is
10 citing Collinder vs. Lawson, 461 US 352, a 1983
11 U.S. Supreme Court case. Nevertheless, the
12 Supreme Court has warned the root of the
13 vagueness doctrine is a rough idea of fairness.
14 It's not a principle designed to convert into a
15 constitutional dilemma the practical
16 difficulties in drawing criminal statutes, both
17 general enough to take into account a variety of
18 human conduct, and sufficiently specific to
19 provide fair warning that certain kinds of
20 conduct are prohibited. This is from Colton vs.
21 Kentucky, 407, US 104, a U.S. Supreme Court case
22 decided in 1972. And the language is also
23 stated or quoted in State vs. Stricklin, a
24 southwest -- a Tennessee Supreme Court case in
25 1975.

1 As to the subject matter
2 jurisdiction, which I really should have
3 evaluated first because if the Court doesn't
4 have subject matter jurisdiction, the void for
5 vagueness analysis doesn't matter. But going
6 slightly backwards, I did do some work, like all
7 the parties did, to find enough cases --
8 reported cases in Tennessee that set a pattern,
9 which we would like to have a case that just
10 sets out like a law that says that a Chancery
11 Court sitting as a board of equity, which it
12 does, has subject matter jurisdiction over
13 declaratory action judgment actions which
14 evaluate criminal laws. There are plenty of
15 cases in Tennessee which say that the Chancery
16 Court must not enjoin the enforcement of
17 criminal statutes; and I think all the lawyers
18 in the room realize that that's the case. But
19 looking for and finding a case which just says,
20 "Yes, Chancery Court does have jurisdiction on
21 declaratory judgment actions to evaluate
22 criminal laws," the way this Court came to its
23 conclusion that it has subject matter
24 jurisdiction is by looking at four cases and the
25 ALR. And those cases are Parlor vs. Buckner, in

1 which the Chancery Court entertained a lawsuit
2 which looked at whether it can determine the
3 constitutionality of laws declaring the
4 operation of poolrooms is unlawful under the
5 declaratory judgment act. And although there's
6 some language in this case, which discusses
7 whether there were property rights involved,
8 which would be a special case; the general
9 language in the case seems to indicate that the
10 property rights are not the real issue; that the
11 real issue is whether the plaintiffs have a
12 special interest in the question of the
13 constitutionality of a penal statute distinct
14 from the interest of the public generally. And
15 the Court stated in that case: "We're of the
16 opinion that a person so situated is entitled to
17 bring and maintain an action for the
18 determination of the proper construction or
19 constitutionality of such statutes under the
20 provisions of a declaratory judgment act." And
21 the bill in the present case, which this Court
22 must resolve in Chancery Court, was properly
23 filed against the sheriff in view of the
24 development of the bill, that the sheriff had
25 given notice of his intent to proceed against

1 the complainant. And then this Court goes on to
2 say that the Chancery Court cannot issue an
3 injunction, but it does appear that the Supreme
4 Court in this case held that the lawsuit was
5 properly brought in the Chancery Court; and that
6 was a 1927 case.

7 And then the next case is -- that
8 this Court is relying on to find subject
9 jurisdiction is Clinton Books vs. City of
10 Memphis, in which Justice Janice Holder held
11 that the Circuit Court acting as a court of
12 equity, lacked jurisdiction to enjoin
13 enforcement of the criminal statute, but she
14 sent the case back for the Circuit Court to rule
15 on the merits of the business' constitutional
16 claims. And I don't know why she would have
17 sent it back to Circuit Court, or that the
18 Supreme Court would have sent it back to Circuit
19 Court, if the Circuit Court had not had
20 jurisdiction over the question. And what the
21 record needs to show is that in Clinton Books
22 vs. City of Memphis, which is a 2006 Supreme
23 Court case -- a state Supreme Court case, the
24 Circuit Court was -- did not have original
25 jurisdiction over criminal cases. And the

1 Circuit Court in many ways exercised in Clinton
2 Books the same jurisdiction that this Chancery
3 Court is exercising today. It has to be noted
4 that the city of Memphis and Shelby County has a
5 separate criminal court. So now we see that a
6 civil court of record has subject matter
7 jurisdiction for purposes of getting the case
8 sent back to them to the rule on the merits of a
9 declaratory judgment addressing a criminal
10 statute.

11 The next case the Court looked at
12 to determine subject matter jurisdiction is
13 Campbell vs. Sundquist. And in that case, the
14 Circuit Court in Davidson County addressed a
15 criminal case; did not issue an injunction. And
16 I think he was -- I don't believe Judge Kirtz
17 was asked to issue an injunction, but in that
18 case, the Court of Appeals said that --
19 addressed the merits of a declaratory judgment
20 action. And Appeals Court Judge Hansel did not
21 believe -- did not necessarily say that the
22 Circuit Court had subject matter jurisdiction,
23 but the other judges did; and that's the law of
24 the land.

25 And then the last case is Grubb

1 vs. Mayor and Alderman of Morrison. This is a
2 1947 case. And you'll see if I didn't have it
3 in here. Well, this says Chancery Court had
4 jurisdiction of a suit by the holders of their
5 permit for a declaratory judgment as to the
6 levity of a city ordinance prohibiting the sale
7 of beer, and which did not involve a property
8 right in 1947, because the property right was
9 not recognized at that time. It's been
10 recognized since. But at that time, the
11 chancellor was found to have jurisdiction over
12 that particular declaratory judgment. And those
13 are the cases on which the Court is relying.

14 In ALR, 10 ALR 3rd, 727, throw
15 some light on why it is that Tennessee doesn't
16 have maybe a bright-line case addressing this
17 subject. And that ALR article analysis is: "It
18 now seems reasonably well settled that in an
19 otherwise proper case, declaratory relief may be
20 granted notwithstanding the fact that the
21 declaration is as to validity of a statute
22 having criminal and for penal provisions. And
23 it seems lake clear under the modern practice in
24 most courts that declaratory relief will not
25 denied merely because the petitioner, by

1 violating the statute or ordinance in question,
2 to have the issue of guilt tried out in a
3 criminal prosecution. In the earlier cases
4 following general attitude through the equity
5 courts, the view seemed to be that a declaration
6 would be readily given where property rights
7 were threatened than where purely personal
8 rights were involved. But modern trend seems to
9 be toward the protection of the personal, as
10 well as property rights. Accordingly, where the
11 petitioner is threatened with an
12 unconstitutional deprivation of either property
13 or personal rights; and to remit him to the
14 ordinary processes of criminal law would, under
15 the circumstances, deprive him of a speedy and
16 an effective remedy. And it seems that the
17 courts will now readily entertain an action for
18 declaratory relief. However, the petition must
19 present actual and justiable controversy. The
20 case must be one in which the declaration will
21 be effective to settle the question, and
22 terminate the controversy; and all the parties
23 whose rights are substantially and directly
24 affected by the declaration must be before the
25 court." So it's not that it's free for all, but

1 it does appear that Chancery has subject matter
2 jurisdiction of this case.

3 As to the arguments and applying
4 the law to the case, under current law, firearms
5 are prohibited where alcohol is served. And
6 this is at 39-17-1305(a). As currently written,
7 the law is clear and unambiguous as "currently"
8 meaning before the exception was presented.

9 It's easily understood and easily applied by
10 business owners and authorized owners of
11 firearms. This statute in its section (a) makes
12 it a criminal offense for a patron to carry a
13 firearm into any establishment that serves
14 alcohol. While it remains unlawful in Tennessee
15 to carry firearms into establishments that serve
16 alcohol, the new provisions of section (c) of
17 this same statute creates a new exception that
18 allows persons who are authorized to carry
19 firearms into restaurants so long as that person
20 is not consuming alcohol, beer, or wine. The
21 exception, which is section (c) of the statute,
22 replaces what historically has been a bright-
23 line rule with the new exception fraught with
24 ambiguity. The new exception of the prohibition
25 against firearms where alcohol is served creates

1 ambiguity where none existed before, and is
2 vague on its face in that it fails to satisfy
3 the constitutional standards of fair warning and
4 fair enforcement.

5 Law enforcement officials are no
6 better suited to make the difficult judgment
7 call as to whether the serving of meals
8 constitutes the principal business of an
9 establishment; such that the presence of a
10 handgun on the premises would be legal or
11 illegal. The lack of clarity, an explicit
12 standard, specifically directed to whether the
13 restaurant is in the business of primarily
14 serving of meals -- the principal business of
15 serving meals, fails to discuss either fair
16 enforcement standards as well.

17 And as further analysis, the Court
18 finds that the other criteria in the statute,
19 which have to do with determining whether the
20 restaurant is open for serving meals five days a
21 week, or serving one meal a day, it's not
22 difficult for the ordinary person or patron to
23 discern because most restaurants, which serve
24 food, want the public to know that they serve
25 food; and advertise the service of food in

1 writing on the walls, in writing on the menus,
2 in writing in ads. And the Court finds and
3 believes that the ordinary citizen can make
4 inquiry of restaurant workers -- or excuse me --
5 restaurant worker -- entity workers as to the
6 service of meals, and the frequency of the
7 service of meals; and that this information can
8 be fairly, easily known to the patron. However,
9 the language that the Court has pointed out as
10 being unfairly vague cannot be easily known, and
11 may never be known by a patron as a matter of
12 fact.

13 And going back now to the issues
14 in this case: Does the Chancery Court have
15 subject matter jurisdiction over this
16 declaratory judgment act which addresses a
17 criminal statute? And the Court has found that,
18 yes, the Chancery Court does have subject matter
19 jurisdiction.

20 Is TCA 39-17-1305 unconstitutional
21 because it's void for vagueness? And the Court
22 finds here that the specific language that the
23 Court has focused upon; that is that the
24 business is in "the principal business of the
25 serving of meals or food" is void for vagueness.

1 The next issues, does OSHA preempt
2 this state statute? And the Court finds here
3 that there is a failure of authority for such a
4 theory.

5 Number five: Does the statute
6 allow the unconstitutional delegation of the
7 state police power? And here the Court agrees
8 with the State and the Attorney General that
9 there is a distinction between the facts in this
10 case, which allow the private property owner to
11 regulate its own private -- exclusively private
12 space; and that the cases cited by the
13 plaintiffs raise the issue of private owners
14 regulating and managing public space when, in
15 fact, the law at issue in those cases was that
16 -- was there to enhance the public welfare, and
17 to protect the public.

18 And lawyers, I'm just asking the
19 plaintiffs to order just the bench ruling; to
20 file that bench ruling; and then please submit a
21 judgment. And I think this should be a -- I
22 think probably all of you will agree, it would
23 be a Rule 54. Do you think? I sort of got the
24 impression because you filed a partial summary
25 judgment motion, and the State responded; that

1 you would want this issue to be examined for the
2 rest of the cases.

3 MR. SMITH: Yes, your Honor. We
4 can respond in the final order.

5 THE COURT: Okay. I think maybe
6 one of you mentioned that to me at the
7 injunction hearing, but I don't want to make
8 that decision for you.

9 MR. SMITH: Thank you.

10 THE COURT: Okay. So if you
11 include that in the order, and then incorporate
12 the bench ruling, I think that will get it.

13 MR. SMITH: And we will add the
14 State as parties also because that's by
15 agreement.

16 THE COURT: Okay. Because that's
17 by agreement.

18 MR. SMITH: Thank you.

19 THE COURT: Okay. I think that's
20 it. We're in adjournment.

21 COURT OFFICER: All rise.

22 (The proceedings were adjourned at 12:45
23 p.m.)
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REPORTER'S CERTIFICATE

I, VICKI S. GANNO, Registered Professional Reporter, Certified Court Reporter, and Notary Public for the State of Tennessee, hereby certify that I reported foregoing proceedings; that the proceedings were stenographically reported by me; and that the foregoing proceedings constitute a true and correct transcript of said proceedings to the best of my ability.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in events of this action.

Signed this 24th day of November, 2009.

**VICKI S. GANNO, RPR, CCR, Notary Public
State of Tennessee at Large
My Commission expires January 7, 2013**

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