IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1960

No. 113

DALE H. DREWS, ET AL.,
Appellants,

v.

STATE OF MARYLAND,
Appellee.

REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF OF APPELLANTS ON REMAND

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STATEMENT OF THE CASE

This case has been set for hearing pursuant to a *per curiam* opinion of the Supreme Court, dated June 22, 1964, and an Order of this Honorable Court, dated July 31, 1964. A full statement of the case is found at pages 1 and 2 of the original Appellants' brief, filed with this court.

QUESTIONS PRESENTED

1. Did the arrest and conviction of Appellants constitute State action, in light of the Supreme Court decision in *Griffin v. Maryland?*

2. Is there a denial of due process and equal protection in continuing to uphold the conviction of Appellants for acts arising out of sit-in demonstrations at Gwynn Oak

Park when the State's Attorney of Baltimore County has failed to prosecute approximately 200 cases charging the same offense?

STATEMENT OF FACTS

The facts of this case are set out in the original Appellants' brief at pages 3 through 5.

ARGUMENT

I.

RECONSIDERATION IN LIGHT OF THE OPINION OF THE SUPREME COURT IN *GRIFFIN v. MARYLAND* SHOULD LEAD TO A REVERSAL OF THE CONVICTIONS OF THE APPELLANTS.

The majority of the Supreme Court in *Griffin v. Maryland*, 378 U.S. 130, 84 S. Ct. 1770 (1964), found under the facts of that case that there had been sufficient State participation in the arrest of the petitioners to establish "State action" forbidden by the Fourteenth Amendment. It is to be expected that the State will contend that the pivotal point in the *Griffin* case, distinguishing it from this case, was the special position of the arresting park detective as a deputized police officer, and that, consequently, the State was doing more in *Griffin* than even-handedly effectuating the "management's desire to exclude designated individuals from the premises". It had "undertake[n] an obligation to enforce a private policy of racial segregation" by virtue of the fact that the park detective was also a deputy sheriff of Montgomery County and had acted under color of this office.

Such a distinction is thin, and limits *Griffin* to its particular facts. To make it, therefore, is to render meaningless the action of the Supreme Court in remanding the instant case for consideration in light of *Griffin*. Obviously the Supreme Court felt that there was doubt about the

proposition that there is a substantial constitutional difference between two situations, in one of which (*Drews*) two persons separately perform certain acts, and in the other (*Griffin*) one person, acting at different times in two different capacities, performs the same acts. Yet, the position that we expect the State to urge would merely preserve and reiterate the very distinction about which the Supreme Court had doubts.

The distinction is not a viable one. This Honorable Court has already so determined in its holding that *Griffin* was controlled by *Drews*. *Griffin & Greene v. State*, 225 Md. 422, 430 (1961). At that time this Honorable Court reasoned that the arrest and prosecution in one were lawful because the arrest and prosecution in the other were lawful. Now the Supreme Court, whose determinations of such constitutional issues under the Fourteenth Amendment take precedence, has ruled that the arrest and conviction in one were constitutionally improper. It follows that the arrest and conviction in the other were unconstitutional, too.

This conclusion is recognized by the recent holding by the Supreme Court of Delaware in a case factually indistinguishable from *Drews* insofar as the constitutional issue is concerned. *State v. Brown*, ... Del. ....., 195 A. 2d 379 (1963). That case involved the constitutionality of the State's entertaining a trespass prosecution against one who refused to leave a hotel restaurant after being requested to do so. The owner obtained a warrant which was executed by the police. Chief Justice Terry, relying on *Shelley v. Kraemer*, 334 U.S. 1 (1943) and *Barrows v. Jackson*, 346 U.S. 249 (1953), stated, 195 A. 2d at 386, that:

> ". . . the State may not compel the Negro patron to leave the place of public accommodation. To do so would place the weight of State power behind the discriminatory action of the owner or proprietor."

The opinion went on to state that such "judicial sanction of a policy of racial discrimination" through acting on a trespass prosecution is not action within "merely a neutral framework" but rather amounts to the State's "intervening on the side of private discrimination".

II.

THERE IS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION IN SINGLING OUT APPELLANTS FOR PROSECUTION AND CONVICTION WHEN THE CIRCUMSTANCES OF THEIR CASES, INVOLVING AN ATTEMPT BY PEACEFUL PERSUASION TO END DISCRIMINATORY PRACTICES, ARE NO DIFFERENT FROM MANY OTHER CASES WHICH THE STATE'S ATTORNEY DOES NOT PROSECUTE.

The Supreme Court remanded this case for reconsideration in the light of *Bell v. Maryland,* ..... U.S. ....., 84 S. Ct. 1814 (1964). The Court has suggested in that case that the intervening enactment of legislation making acts such as those for which Appellants were convicted lawful is grounds for reversal. The precise argument cannot be made here inasmuch as Baltimore County has not as yet adopted proposed civil rights legislation, and the act of the State Legislature, Chapter 29 of the Acts of 1964 (Extra Session, March, 1964), does not appear to extend to amusement parks. However, the manner in which the law is enforced is as important as the statutory language. While a statute is not rendered ineffective through non-use [*Louisville & N. R. Co. v. United States,* 282 U.S. 740, 759 (1931); *Snowden v. Snowden,* 1 Bland (Md. Chan.) 550, 556-58 (1829)], it may not be applied discriminatorily to members of the same class. The Supreme Court established long ago that the Fourteenth Amendment prevents the unequal enforcement of valid laws as well as any enforcement of invalid laws. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). See also *Hillsborough v. Cromwell,* 326 U.S. 620, 623 (1946), and the cases cited therein.

It is common knowledge of which the court should take judicial notice that Gwynn Oak Park, the scene of the alleged offenses of Appellants, was the subject of sit-in demonstrations in the summer of 1963. The demonstrations achieved their objective, for the park abandoned its segregation policy. In the course of the demonstrations, however, approximately 200 arrests were made. The State's Attorney has done nothing about bringing the cases on for trial, and it appears extremely unlikely that any prosecution will ever take place. Considerations of due process and equal protection under the Fourteenth Amendment and the Maryland Constitution, as well as those set forth in the opinion of the Supreme Court in *Bell v. Maryland, supra,* should prohibit the continuation of the convictions of Appellants. The convictions have never become final, inasmuch as they have been on appeal in the Supreme Court, and, consequently, for reasons stated in *Bell v. Maryland, supra,* this Court still has jurisdiction to act to reverse.

CONCLUSION

For the foregoing reasons, the convictions of Appellants should be reversed.

Respectfully submitted,

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