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 APPELLEE ON REMAND

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STATEMENT OF THE CASE

Appellants were convicted by the Circuit Court for Baltimore County, Maryland, sitting without a jury, of violating Article 27, Section 123, of the Annotated Code of Maryland (1957 Edition), "by acting in a disorderly manner to the disturbance of the public peace" in a "place of public resort or amusement". The convictions were affirmed on appeal to this Court, *Drews, et al. v. State,* 224 Md. 186, decided January 18, 1961. A direct appeal was thereafter taken to the Supreme Court of the United States, which Court, on June 3, 1964, vacated the judgments and remanded the case to this Court "for consideration in light of *Griffin v. Maryland* (378 U.S. 130, 12 L. Ed. 2d 754) and *Bell v. Maryland* (378 U.S. 226, 12 L. Ed. 2d 822)". *Drews, et al. v. Maryland,* No. 3, October Term, 1963 (..... U.S. ....., 12 L. Ed. 2d 1032).

QUESTIONS PRESENTED

The State accepts the questions presented by Appellants.

STATEMENT OF FACTS

On Sunday, September 6, 1959, Appellants, being three caucasians and one Negro, accompanied by another Negro who was not tried, went to Gwynn Oak Park, a public amusement park in Baltimore County, owned and operated by a private corporation. The management of the park as a business policy did not admit Negroes and the Appellants were requested by a private park guard to leave the premises. The Appellants refused and, as a result, a crowd began to gather. The private police officer enlisted the assistance of Baltimore County policemen who were stationed on a public road nearby to eject the group from the park. Baltimore County policemen arrived and requested that the Appellants leave the park. Upon receiving instructions from the park management, the Baltimore County policemen advised the Appellants that they had a choice of withdrawing or being arrested. They refused to leave, at which time they interlocked their arms and two of them dropped on the ground in a prone position. As a result of this conduct, the crowd which had gathered became unruly and began hollering, spitting and kicking at the Appellants as well as the officers, creating a mob scene. The Appellants were thereupon taken by the County Police from the scene and transported to a nearby police station where a warrant was sworn out by the amusement park management.

Thereafter, the State filed a criminal information charging violation of Article 27, Section 123, of the Annotated Code of Maryland, *supra*, and the Appellants elected to be tried by the Court sitting without a jury. The trial court,

by its opinion dated May 6, 1960, found that from the facts and circumstances there was clear and convincing proof that public disorder reasonably could be expected if Appellants were allowed to remain in the park, and that the continued refusal of the Appellants to leave at the request of the police constituted "acting in a disorderly manner to the disturbance of the public peace".

On appeal to this Court, the Appellants raised four questions, to wit:

1. What constitutes a place of public resort or amusement within the meaning of Article 27, Section 123 of the Annotated Code?

2. Was there evidence to establish the public character of Gwynn Oak Park, the scene of the actions with which Appellants were charged?

3. Did any acts of Appellants constitute acting in a disorderly manner to the disturbance of the public peace?

4. Did conviction of Appellants infringe upon the rights, privileges and immunities guaranteed to them by the Fourteenth Amendment to the Constitution of the United States?

This Court, notwithstanding the fact that the Appellants did not raise constitutional questions in the lower court, found by its opinion that the amusement park had a legal right to maintain a business policy of excluding Negroes, a private policy in which the State neither legislated or assisted. The Court further found that the arrest of the Appellants was not because the State desired or intended to maintain the park as a segregated place of amusement, but, rather, because the Appellants were inciting a crowd by refusing to obey a valid directive to move from a place where they had no lawful right to be. This Court con-

cluded that the action of the State in arresting and convicting the Appellants on warrants sworn out by the amusement park for disorderly conduct did not constitute "such action as may fairly be said to be that of the State's".

ARGUMENT

I.

THE ARREST AND CONVICTION OF APPELLANTS DID NOT CONSTITUTE AN UNCONSTITUTIONAL EXERCISE OF STATE POWER WITHIN THE RATIONALE OF THE SUPREME COURT'S DECISION IN *GRIFFIN v. MARYLAND* (378 U.S. 130).

In its opinion in this case, *Drews v. State, supra,* at Page 191, this Court held:

> "* * * Early in the common law the duty to serve the public without discrimination apparently was imposed on many callings. Later this duty was confined to exceptional callings as to which an urgent public need called for its continuance, such as innkeeper and common carriers. Operators of most enterprises, including places of amusement, did not and do not have any such common law obligation, and in the absence of a statute forbidding discrimination, can pick and choose their patrons for any reason they decide upon, including the color of their skin. Early and recent authorities on the point are collected, and exhaustively discussed, in the opinion of the Supreme Court of New Jersey in *Garfine v. Monmouth Park Jockey Club,* 148 A. 2d 1. See also *Greenfeld v. Maryland Jockey Club of Baltimore,* 190 Md. 96; *Good Citizens Community Protective Ass'n v. Board of Liquor License Commissioners of Baltimore City,* 217 Md. 129, 131; *Slack v. Atlantic White Tower System, Inc.,* 181 F. Supp. 124; *Williams v. Howard Johnson's Restaurant,* 268 F. 2d 845."

Continuing, this Court said at pages 193-194:

> "We turn to appellants' argument that the arrest by the County police constituted State action to enforce

> a policy of segregation in violation of the ban of the Equal Protection and Due Process clauses of the Fourteenth Amendment against State-imposed racial discrimination. The Supreme Court said in the racial covenant case of *Shelley v. Kraemer,* 334 U.S. 1, 13, 92 L. Ed. 1161, 1180: '(T)he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful'. The Park had a legal right to maintain a business policy of excluding Negroes. This was a private policy which the State neither required nor assisted by legislation or administrative practice. The arrest of appellants was not because the State desired or intended to maintain the Park as a segregated place of amusement; it was because the appellants were inciting the crowd by refusing to obey valid commands to move from a place where they had no lawful right to be. Both white and colored people acted in a disorderly manner and the State, without discrimination, arrested and prosecuted all who were so acting."

This Court concluded by stating that in the absence of controlling authority to the contrary, "it is our opinion that the arresting and convicting of Appellants on warrants sworn out by the Park for disorderly conduct, which resulted from the Park enforcing its private, lawful policy of segregation, did not constitute 'such action as may fairly be said to be that of the State's' "; and that such action was "at least one step removed from State enforcement of a policy of segregation and violated no constitutional right of Appellants".

Since this Court's decision in *Drews,* the Supreme Court has had before it a number of "sit-in" cases squarely presenting the crucial constitutional issue as to whether the Fourteenth Amendment, of its own force, forbids a state

to arrest and prosecute those who, solely because of their race, have been asked to leave a privately-owned place of public accommodation (not covered by any public accommodation legislation), but have refused or declined to do so. In none of these cases, however, has a majority of the Court found it necessary to reach this fundamental question and, as a result thereof, the law as enunciated by this Court in the *Drews* case remains undisturbed.[1] In the absence of further light upon the subject, therefore, it is believed that this Court will adhere to the basic constitutional precepts expressed in the *Drews* case, as reiterated and reaffirmed in *Griffin & Greene v. State*, 225 Md. 422, reversed on other grounds, 378 U.S. 130, 12 L. Ed. 2d 754, and *Bell v. State*, 227 Md. 302, reversed on other grounds, 378 U.S. 226, 12 L. Ed. 2d 822.

The reason for the remand of this case for consideration in light of *Bell v. Maryland, supra,* is by no means clear. The judgments in *Bell* were vacated and reversed in order to afford this Court an opportunity to pass upon the effect, if any, wrought upon the State's criminal trespass law by the supervening enactment of the State and City public accommodations legislation. The present case, unlike *Bell,* involves convictions for disorderly conduct and not trespass, and in a facility, (amusement park) not covered by any public accommodations law — State, County or Federal. Nothing in *Bell,* therefore, is even remotely sugges-

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[1] The question was presented in one posture or another in the following recent Supreme Court decisions: *Lombard v. Louisiana,* 373 U.S. 267, 10 L. Ed. 2d 338; *Peterson v. City of Greenville,* 373 U.S. 244, 10 L. Ed. 2d 323; *Griffin v. Maryland, supra; Robinson v. Florida,* ... U.S. ..., 12 L. Ed. 2d 771; *Barr v. Columbia,* ... U.S. ..., 12 L. Ed. 2d 766; and *Bouie v. Columbia,* ... U.S. ..., 12 L. Ed. 2d 894. In *Bell v. Maryland, supra,* three members of the Court advocated the affirmative constitutional view of this question, while three other members of the Court were of the opposite mind.

tive of an intention by the Supreme Court to override this Court's constitutional pronouncements as set forth in *Drews*.

The *Griffin* case involved convictions for trespass in a racially segregated private amusement park in Montgomery County, and was reversed on the narrow ground that the action taken by Collins, a special deputy sheriff under contract to and in the employ of the private owner, was State action for the purposes of the Fourteenth Amendment; and being such, the State had become in reality a joint participant in the challenged activity. The question of whether the same result would have been reached had the arrests been made by a regular police officer, as was done in the present case, was not decided in *Griffin*. On this point, therefore, *Drews* continues to be controlling in Maryland. In any event, *Griffin* and *Drews* are hardly to be considered parallel cases, since the former involves trespass convictions while the latter involves convictions for disorderly conduct.

In light of the above, therefore, Appellants' reliance on the law of Delaware would seem to be misplaced. The fact that the Supreme Court may have had "doubts" as to the applicability of the *Griffin* rationale to the *Drews* facts furnishes little justification for this Court to overrule its holdings in the *Drews* and *Bell* cases.

II.

APPELLANTS HAVE NOT BEEN DENIED DUE PROCESS OR EQUAL PROTECTION OF THE LAW BECAUSE THE STATE HAS FAILED TO PROSECUTE OTHERS FOR THE SAME OR LIKE OFFENSES.

Appellants contend that where the State prosecutes one person and not the other for the same acts there is a denial of equal protection of the law under the Fourteenth Amend-

ment and the prosecution is, therefore, void. The contention appears to be predicated upon the belief that approximately two hundred persons were arrested in 1963 at Gwynn Oak Park either for trespass or disorderly conduct in the course of racial demonstrations calculated to induce the proprietor of that facility to integrate. Appellants state further that since the State's Attorney has done nothing to date to bring the cases on for trial, it is unlikely that such prosecutions will ever materialize and, hence, Appellants' reason that Fourteenth Amendment considerations are such as should prohibit continuation of their convictions.

It is, of course, the governing law, applicable in the present case, that matters appearing otherwise than by the record will not be considered on appeal, and a judgment of conviction cannot be impeached by evidence outside the record. 7 M.L.E., *Criminal Law,* Section 652.[2]

Assuming the fact that there were arrests in 1963, as depicted by Appellants, and that these cases have not as yet been brought on for trial, it is, nevertheless, well settled that the prosecution of one guilty person, while others equally guilty are not prosecuted, is not a denial of equal protection of the law, nor is the mere laxity in enforcement of the law by public officials a denial of equal protection. *Sims v. Cunningham,* 124 S.E. 2d 221 (Va., 1962); *Bailleaux v. Gladden,* 370 P. 2d 722 (Ore., 1962), cert. den. 371 U.S.

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[2] It is believed that in practically all such cases to which Appellants refer jury trials were prayed before a magistrate. The State's Attorney, in the exercise of the broad discretion vested in him as to the prosecution of criminal cases — *Ewell v. State,* 207 Md. 288 and *Brack v. Wells,* 184 Md. 86 — may have preferred to withhold immediate prosecution since the constitutional issues involved in the cases were presently pending before the Supreme Court of the United States for decision. Insofar as is known, the defendants have not made any demand for a speedy trial, and it must be presumed that they acquiesce in the State's Attorney's action. See *Woodland v. State,* 235 Md. 347.

841, 9 L. Ed. 2d 84; *Application of Finn,* 356 P. 2d 685 (Calif., 1960); *Maloney v. Maxwell,* 186 N.E. 2d 728 (Ohio, 1962); *Highland Sales Corp. v. Vance,* 186 N.E. 2d 682 (Ind., 1962); *State v. Hicks,* 325 P. 2d 794 (Ore., 1958). This Court recognized the validity of this proposition in *Callan v. State,* 156 Md. 459 (1928), where on a prosecution for violating Sunday laws evidence that others had been guilty of similar acts without being prosecuted was held inadmissible, the Court noting at Pages 466-467 that the guilt or innocence of the traversers was not to be made to depend upon the question of whether other parties had been guilty of similar acts without being prosecuted or convicted. In order to show that unequal administration of a statute offends the equal protection clause, an intentional or purposeful discrimination must be shown — *Snowden v. Hughes,* 321 U.S. 1, 88 L. Ed. 497 (1944) and *Moss v. Horning,* 314 F. 2d 89 (2d Cir., 1963) — and relief therefor is at most limited to cases where class discrimination is proved. *Oyler v. Boles,* 368 U.S. 448, 7 L. Ed. 2d 446 (1962). Appellants allege no such intentional or purposeful discrimination in the present case. The case of *Yick Wo v. Hopkins,* 118 U.S. 356, 30 L. Ed. 220 (1886), relied upon by Appellants, is manifestly inapplicable as the above cases demonstrate. See, however, in addition to the above cases, *People v. Montgomery,* 117 P. 2d 437 (Calif., 1941) and *Society of Good Neighbors v. Van Antwerp,* 36 N.W. 2d 308 (Mich., 1949), distinguishing *Yick Wo.*

CONCLUSION

Appellants' direct appeal to the Supreme Court of the United States from the judgments of conviction in this case squarely presented the question as to whether Appellants' presence at Gwynn Oak Park was in the exercise of constitutionally guaranteed rights so that their arrest and prosecution under the circumstances amounted to State action to enforce segregation in violation of the Federal Constitution. The Supreme Court did not decide the issue, leaving the law as articulated by this Court in this case undisturbed and intact. In the absence of Supreme Court authority to the contrary, it necessarily follows that this Court's decision in *Drews* is controlling, and the convictions appealed from must be affirmed.

Respectfully submitted,

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