IN THE COURT OF APPEALS OF MARYLAND

No. 113

September Term, 1960

DALE H. DREWS, et al.

v.

STATE OF MARYLAND

Brune, C. J.
Henderson
Hammond
Prescott
Horney,
JJ.

Opinion by Hammond, J.

Filed: January 18, 1961

The four appellants were convicted by the court sitting without a jury of violating Code (1957), Art. 27, Sec. 123, by "acting in a disorderly manner to the disturbance of the public peace" in a "place of public resort or amusement." Two of appellants are white men, one is a white woman, and the other a Negress. Accompanied by a Negro who was not tried, they had gone as a group to Gwynn Oak Amusement Park in Baltimore County, which as a business policy does not admit Negroes, and were arrested when they refused to leave after being asked to do so.

Appellants claim that there was no evidence that the Park is a place of public resort or amusement, that if there were such evidence the systematic exclusion of Negroes prevents the Park from being regarded as such a public place, that they were not guilty of disorderly conduct and, finally, if the Park is a place of public resort or amusement their presence there was in the exercise of a constitutional right, and their arrest and prosecution amounted to State action to enforce segregation in violation of the Constitution of the United States.

There is no direct statement in the record that the Park is a place of public resort or amusement but we think the evidence clearly permitted the finding the trial court made that it is. There was testimony which showed, or permitted the inference, that the Park is owned by a private corporation, that

it has been in operation each summer for many years, that among its attractions are a miniature golf course and a cafeteria, that appellants' conduct occurred on "All Nations Day" which usually attracts a large crowd, that on that day the Park was so crowded there was but elbow room to walk, and that the Park's policy was to welcome everyone but Negroes. The trial court properly could have concluded the Park is a place resorted to by the general public for amusement. Cf. Iozzi v. State, ___ Md. ___.

A lawmaking body is presumed by the Courts to have used words in a statute to convey the meaning ordinarily attributed to them. In recognition of this plain precept the Courts, in construing zoning, licensing, tax and anti-discrimination statutes, have held that the term place of public resort or amusement included dance halls, swimming pools, bowling alleys, miniature golf courses, roller skating rinks and a dancing pavilion in an amusement park (because it was an integral part of the amusement park), saying that amusement may be derived from participation as well as observation. Amos v. Prom, Inc., 117 F. Supp. 615; Askew v. Parker (Cal. App.), 312 P. 2d 342; Jaffarian v. Building Com'r (Mass.), 175 N. E. 641; Jones v. Broadway Roller Rink Co. (Wis.), 118 N. W. 170, 171; Johnson v. Auburn & Syracuse Electric R. Co. (N. Y.), 119 N. E. 72. Section 123 of Art. 27 proscribes conduct which disturbs the public peace at a place where a number of people are likely to congregate, whether it

is on governmental property or on property privately owned. This is made clear by the prohibition of offensive conduct not only on any public street or highway but in any store during business hours, and in any elevator, lobby or corridor of an office building or apartment house having more than three dwelling units, as well as in any place of public worship or any place of public resort or amusement. We read the statute as including an amusement park in the category of a place of public resort or amusement.

We find no substance in the somewhat bootstrap argument that the regular exclusion of Negroes from the Park kept it from being within the ambit of the statute. 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 innkeepers 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 Garifine v. Monmouth Park Jockey Club, 148 A. 2d 1. See also Greenfeld v. Maryland Jockey Club, 190 Md. 96; Good Citizens Community Protective Assoc. v. Board of Liquor License Commissioners, 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.

It has been noted in the cases that places of public accommodation, resort or amusement properly can exclude would-be patrons on the grounds of improper dress or uncleanliness, Amos v. Prom, Inc., supra (at page 629 of 117 F. Supp.); because they are under a certain age, are men or are women, or are unescorted women, Collister v. Hayman (N. Y.), 76 N. E. 20; or because for some other reason they are undesirables in the eyes of the establishment. Greenfeld v. Maryland Jockey Club; Good Citizens Community Protective Assoc. v. Board of Liquor License Commissioners; Slack v. Atlantic White Tower System, Inc., all supra. See 86 C. J. S. Theaters and Shows Secs. 31 and 34 to 36. We have found no decision holding that a policy of excluding certain limited kinds or classes of people prevents an enterprise from being a place of public resort or amusement, and can see no sound reason why it should.

Appellants' argument that they were not disorderly is that neither the mere infringement of the rules of a private establishment nor a simple polite trespass constitutes either a breach of the peace or disorderly conduct. We find here more than either of these, enough to have permitted the trier of fact to have determined as he did that the conduct of appellants was disorderly.

It is said that there was no common law crime of disorderly conduct. Nevertheless, it was a crime at common law

to do many of the things that constitute disorderly conduct under present day statutes, such as making loud noises so as to disturb the peace of the neighborhood, collecting a crowd in a public place by means of loud or unseemly noises or language, or disturbing a meeting assembled for religious worship or any other lawful purpose. Hochheimer on Crimes and Criminal Procedure, Sec. 392 (2nd Ed.); 1 Bishop on Criminal Law, Sec. 542 (9th Ed.); Campbell v. The Commonwealth, 59 Pa. St. Rep. 266.

The gist of the crime of disorderly conduct under Sec. 123 of Art. 27, as it was in the cases of common law predecessor crimes, is the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite, a number of people gathered in the same area. 3 Underhill, Criminal Evidence, Sec. 850 (5th Ed.), adopts as one definition of the crime the statement that it is conduct "of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby." Also, it has been held that failure to obey a policeman's command to move on when not/to do so may endanger the public peace, amounts to disorderly conduct. Bennett v. City of Dalton (Ga. App.), 25 S. E. 2d 726, appeal dismissed, 320 U. S. 712, 88 L. Ed. 418. In People v. Galpern (N. Y.), 181 N. E. 572, 574, it was said, xxxx under a New York statute making it unlawful to congregate with others on a public street and refuse to move on when ordered by the police,/that refusal to obey an order of a police officer, not exceeding his authority, to move on "even though conscientious -

may interfere with the public order and lead to a breach of the peace," and that such a refusal "can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order." See also In re Neal, 164 N. Y. S. 2d 549 (where the refusal of a school girl to leave a school bus when ordered to do so by the authorities was held to be disorderly conduct, largely because of its effect on the other children); Underhill, in the passage cited above, concludes that "failure to obey a lawful order of the police, however, such as an order to move on, may amount to disorderly conduct." See also People v. Nixson (N. Y.), 161 N. E. 463; 27 C. J. S. Disorderly Conduct Sec. 1(4) f; annotation 65 A. L. R. 2d 1152; compare People v. Carcel (N. Y.), 144 N. E. 2d 81; and People v. Arko, 199 N. Y. S. 402.

Appellants refused to leave the Park although requested to do so many times. A large crowd gathered around them and the Park employee who was making the requests, and seemed to "mill in and close in" so that the employee sent for the Baltimore County police. The police, at the express direction of the manager of the Park, asked the appellants to leave and again they refused, even when told they would be arrested if they did not. Admittedly they were then deliberately trespassing. That they intended to continue to trespass until they were forcibly ejected is made evident by their conduct when told they were under arrest.

The five joined arms as a symbol of united defiance and then two of the men dropped to the ground. Two of appellants had to be carried from the Park, the other three had to be pushed and shoved through the crowd. The effect of the appellants' behavior on the crowd is shown by the testimony that its members spit and kicked and shouted threats and imprecations, and that the Park employees feared a mob scene was about to erupt. The conduct of appellants in refusing to obey a lawful request to leave private property disturbed the public peace and incited a crowd. This was enough to sustain the verdict reached by Judge Menchine.

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: "The 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.

While there can be little doubt that the Park could have used its own employees to eject appellants after they refused to leave, if it had attempted to do so there would have been real danger the crowd would explode into riotous action. As Judge Thomsen said in Griffin v. Collins, 187 F. Supp. 149, 153, in denying a preliminary injunction and a summary judgment in a suit brought to end the segregation policy of the Glen Echo Amusement Park near Washington: "Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders

him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights."

The Supreme Court has not spoken on the point since Judge Thomsen's opinion. The issue was squarely presented for decision in Boynton v. Virginia, ___ U. S. ___, 5 L. Ed. 2d 206, but the Court chose to decide the case on the basis that the conviction of a Negro for unlawfully remaining in a segregated bus terminal restaurant violated the Interstate Commerce Act, which uses broad language to forbid a carrier from discriminating against a passenger. 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 States." It was at least one step removed from State enforcement of a policy of segregation and violated no constitutional right of appellants.

JUDGMENTS AFFIRMED, WITH COSTS.

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STATE OF MARYLAND

Henderson, C.J.
Hammond
Prescott
Horney
Marbury
Oppenheimer,
JJ.

Opinion by Horney, J.

Oppenheimer, J., dissents

Filed: October 22, 1964

The appellants were convicted in 1960 of violating Code (1957), Art. 27, § 123, by "acting in a disorderly manner to the disturbance of the public peace" in a place of "public resort or amusement." On the appeal to this Court, the convictions were affirmed in Drews v. State, 224 Md. 186, 167 A.2d 341 (1961). Having found that Gwynn Oak Amusement Park in Baltimore County was a place of public resort or amusement within the meaning of the statute, we held that the conduct of the appellants -- two of whom were white men, one a white woman, and the other a colored woman -- during the course of a demonstration protesting the segregation policy of the park, by joining arms and dropping to the ground after they had refused to obey a lawful request to leave the privately owned park, was disorderly in that it "disturbed the public peace and incited a crowd." We also held that the action taken by the county police, in arresting the appellants for disorderly conduct (after the police at the request of the park manager had asked them to leave and again they refused), did not constitute state enforcement of racial discrimination in violation of the Fourteenth Amendment of the United States. A direct appeal was thereafter taken to the Supreme Court of the United States, which, in a per curiam filed June 22, 1964, in Drews v. Maryland, 378 U.S. 547, vacated the judgments and remanded the case to this Court "for consideration in light of Griffin

v. Maryland [378 U.S. 130] and Bell v. Maryland [378 U.S. 226]," decided on the same day as Drews.

In Griffin v. State, 225 Md. 422, 171 A.2d 717 (1961), where the park officer was authorized to make arrests either as a paid employee of a detective agency then under contract to protect and enforce the racial segregation policy of the operator of Glen Echo Amusement Park in Montgomery County or as a nonsalaried special deputy sheriff of the county, we affirmed the conviction of the appellants for trespassing on private property in violation of Code (1957), Art. 27, § 577, when they refused to leave the premises after having been notified to do so. But the Supreme Court in Griffin v. Maryland, supra, held that the arrest of the appellants by the park officer was state action in that he was possessed of state authority and purported to act under that authority, and reversed the judgment. In Bell v. State, 227 Md. 302, 176 A. 2d 771 (1962), where the appellants had entered the private premises of a restaurant in Baltimore City in protest against racial segregation, sat down and refused to leave when asked to do so on the theory that their action in remaining on the premises amounted to a permissible verbal or symbolic protest against the discriminatory practice of the owner, we affirmed the convictions for criminal trespass for the reason that the right to speak freely and to make public protest did not import a right to invade or remain on privately owned property so long as the owner retained the right to choose his guests or

customers. The Supreme Court granted certiorari. In the interim between the decision of this Court and the decision of the Supreme Court, both the city and state enacted "public accommodation laws." When the Supreme Court decided Bell v. Maryland, supra, it reversed the judgment of this Court and remanded the case for a determination by us of the effect of the subsequently enacted public accommodation laws on pending criminal trespass convictions.[1]

On the remand of this **Drews** case, the appellants raise two questions. In effect they contend: (i) that their arrest and conviction constitutes state action in the light of the decision in Griffin v. Maryland, supra; and (ii) that to uphold their conviction now for acts arising out of sit-in demonstrations at Gwynn Oak Amusement Park would be to deny them due process and equal protection because the State's Attorney for Baltimore County has failed to prosecute approximately two hundred other cases charging the same offense.

(i)

In reconsidering the convictions of the "Drews" appellants in the light of Griffin v. Maryland, supra, we find nothing therein which compels or requires a reversal of our decision in Drews v. State (224 Md. 186). Significantly, the question as to whether the same result would have been reached

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1. See Bell v. State, Md. , A.2d (1964), decided on the remand on or about the same time as this case.

by the Supreme Court had the arrests in Griffin been made by a regular police officer, as in the Drews case, was not decided. The arrests and subsequent convictions of the appellants for ciminal trespass were held in Griffin to constitute state action because the arresting officer, a park employee, was also a special deputy sheriff. In Drews, however, the appellants not only refused to leave the amusement park peacefully after they had been requested to do so, but acted in a disorderly manner when the arresting officers, who were county police officers, not park employees, undertook to eject them. The record in Drews does not show, nor has it ever been contended, that the park employee, who assisted the arresting officers, had power (as was the case in Griffin) to make arrests. By reversing Griffin and remanding Drews, the Supreme Court must have had some doubt as to whether the two cases were distinguishable. We think there are important differences in the two cases between the reasons or causes for the arrests and the type of police personnel that made the arrests, and that such distinctions are controlling.

In Drews, where the trespassers conducted themselves in a disorderly manner when the police undertook to forcibly eject them from the amusement park in an effort to prevent them from further inciting the gathering crowd by remaining in the park after they had been requested to leave by the park manager as well as the county police, the arrests

were made by policemen who were not employed by the park, who were not paid by the park, and who were under no orders of any park official. The very fact that the police made no move to eject the trespassers from the park until they were requested to do so by the manager shows the complete absence of any cooperative state action. Nor was there any evidence that the State desired or intended to maintain the amusement park as a segregated place of amusement. In these circumstances, it seems clear to us that the arrest of the Drews appellants (who were both white and colored) for disorderly conduct did not constitute state enforcement of racial discrimination. To hold otherwise would, we think, not only deny the park owners equal protection of the laws, but could seriously hamper the power of the State to maintain peace and order and, when imminent as was the case here, to forestall mob violence or riots.

We deem it unnecessary to elaborately discuss the only two cases cited by the appellants -- State v. Brown, 195 A.2d 379 (Del. 1963), and Wright v. Georgia, 373 U.S. 284 (1963). Neither is apposite here and, assuming they are, both are clearly distinguishable on the facts. Even if the arrest of the Drews appellants for disorderly conduct was the result of or arose out of their ejection from the park for trespassing on private property, there was no violation of a constitutional guarantee. We reiterate what was recently said in In Matter of Cromwell, 232 Md. 409, 413, 194 A.2d 88 (1963), that "we find no violation of the Fourteenth Amendment in the assertion of a

private proprietor's right to choose his customers, or to eject those who are disorderly." We see no reason to reverse the convictions in this case.

The reason for the remand of the case for consideration in the light of Bell v. Maryland, supra, is not clear. The judgments in Bell were vacated and the case remanded to enable this Court to pass upon the effect of supervening public accommodation laws on the criminal trespass law. Since there is no provision in the public accommodation law enacted by the State (Code, 1964 Supp., Art. 49B, § 11) with respect to amusement parks, we need not decide the effect of the supervening legislative enactment on the convictions in this case.

(ii)

The second contention of the appellants -- that the failure of the State to prosecute others for the same or similar offenses is a denial of due process or equal protection -- is without merit and has no bearing on the convictions in this case. Guilt or innocence cannot be made to depend on the question of whether other parties have not been prosecuted for similar acts. Callan v. State, 156 Md. 459, 466, 144 Atl. 350 (1929). Nor is the exercise of some selectiveity in the enforcement of a criminal statute, absent a showing of unjustifiable discrimination, violative of constitutional guarantees. Oyler v. Boles, 368 U.S. 448 (1962). See also Moss v.Hornig, 314 F.2d 89 (C.A.2d 1963).

JUDGMENTS REINSTATED AND REAFFIRMED; APPELLANTS TO PAY THE COSTS.

IN THE COURT OF APPEALS OF MARYLAND

NO. 113

SEPTEMBER TERM, 1960

DALE H. DREWS, et al

v.

STATE OF MARYLAND

Henderson, C.J.
Hammond
Prescott
Horney
Marbury
Oppenheimer,
JJ.

Dissenting Opinion
by
OPPENHEIMER, J.

Filed: October 22, 1964

Oppenheimer, J. dissenting:

In Griffin v. Maryland, 378 U.S. 130 (1964), the Supreme Court of the United States reversed the judgments against the defendants affirmed by us in Griffin v. State, 225 Md. 422, 171 A.2d 717 (1961) on the ground that the arrests were the products of State action taken because the defendants were Negroes, and therefore racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. In Griffin, the arresting officer, Collins, was a deputy sheriff of Montgomery County employed by and subject to the direction and control of the amusement park. The record shows that in this case the special policeman, Officer Wood, was in the employ of the amusement park but it does not show whether or not he had been deputized by Baltimore County. Pursuant to the instructions of the park's management, Wood told the defendants the park was closed to Negroes, ordered them to leave and, when they did not, sent for the Baltimore County police. He and the county police together removed the defendants from the park.

If Wood, the "special officer" in this case, had virtually the same authority from Baltimore County that Collins had from Montgomery County, it seems to me immaterial that he called in the Baltimore County police to help him evict the defendants. He was the proximate cause of the

arrests. If his authority stemmed from the State, then under Griffin v. Maryland, supra, the State was a joint participant in the discriminatory action.

On the facts, it also seems immaterial that the convictions here were for disorderly conduct rather than for trespass as in Griffin. In resisting the command of the officers to leave the park, the defendants used no force against the officers or anyone else; they held back or fell to the ground. Such failure to obey the command, if the command itself was violative of the Constitution, would not sustain the convictions. Wright v. Georgia, 373 U.S. 284, 291, 292 (1963).

The Baltimore County Code authorizes the county to appoint special police officers to serve for private persons or corporations. Baltimore County Code, Sections 24-13 and 35-3 (1958). I would remand this case to the Circuit Court for Baltimore County for the taking of additional testimony to determine whether or not Wood was appointed by Baltimore County under these sections of its Code. If he was, the convictions should be reversed.