IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1963

No. [redacted] 12

ROBERT MACK BELL, ET AL.,
Petitioners,

v.

STATE OF MARYLAND,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of Maryland in this case, reported as *Bell v. State*, 227 Md. 302, 176 A. 2d 771, and the Memorandum Opinion of Judge Byrnes, Criminal Court of Baltimore City, are fully set forth in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The Petitioners allege that the Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. 1257(3). The Respondent denies that the Supreme Court has jurisdiction over this case.

QUESTIONS PRESENTED

1. Do the Petitioners present a case of sufficient importance to warrant further review?

2. Does the arrest and conviction, pursuant to a general State trespass statute, of Negro students protesting racial segregation who, over the objection of the owner, seated themselves in the dining area of a privately-owned restaurant in a privately-owned building, and who refused to leave the premises when so ordered by the owner, under the facts of this case, constitute prohibited State action within the meaning of the Fourteenth Amendment of the United States Constitution?

3. Did the arrest and conviction of Petitioners under the Criminal Trespass Statute in this case deny the Petitioners, who were engaged in a "sit-in demonstration" in a private restaurant, the freedom of speech and assembly guaranteed by the First and Fourteenth Amendments to the Constitution of the United States?

4. Was the conviction of Petitioners obtained under a statute so vague as to give no fair warning that their conduct was prohibited and so as to constitute a violation of due process of law secured by the Fourteenth Amendment?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Section 1, Fourteenth Amendment to the Constitution of the United States.
2. First Amendment to the Constitution of the United States.
3. Section 577, Article 27, Annotated Code of Maryland (1957 Edition); Chapter 66, Laws of Maryland, 1900. (See Petition at page 3.)

STATEMENT OF FACTS

The State adopts the Petitioners' Statement of Facts.

ARGUMENT

I. PETITIONERS HAVE NOT PRESENTED A CASE OF SUFFICIENT IMPORTANCE TO WARRANT FURTHER REVIEW.

The Petitioners in this case have not presented to the Supreme Court a case of sufficient magnitude to warrant further review. The issue in this case as it applies to Hooper's Restaurant is no longer significant. Since the conviction of the Petitioners, the City Council of Baltimore City has passed an ordinance (Baltimore City Ordinance No. 1249, June 8, 1962; see Appendix, *infra*, p. 11) barring refusal of service in Baltimore restaurants solely on racial grounds.

Circumstances leading to the conviction of the Petitioners could not again arise by reason of the above cited ordinance. The Supreme Court should not grant certiorari in this case, the issues of which have become purely academic, inasmuch as the Petitioners have achieved by political means in this community the result sought in the courts. See *United States v. Abrams*, 344 U.S. 855; *Community Services, Inc. v. United States*, 342 U.S. 932; *Sokol Brothers v. Commissioner*, 340 U.S. 952; *Beal v. United States*, 340 U.S. 852; Stern, *Denial of Certiorari Despite a Conflict*, 66 Harvard Law Review 465 (1953). Furthermore, the Supreme Court has had before it on previous occasions cases involving the constitutional questions presented in this Petition and the Court in those instances refused to consider the constitutional issues presented here. *Boynton v. Virginia*, 364 U.S. 454; *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *Garner v. Louisiana*, 368 U.S. 157.

II. THE ARREST AND CONVICTION, PURSUANT TO A GENERAL STATE TRESPASS STATUTE, OF NEGRO STUDENTS PROTESTING RACIAL SEGREGATION, WHO OVER THE OBJECTION OF THE OWNER SEATED THEMSELVES IN THE DINING AREA OF A PRIVATELY-OWNED RESTAURANT IN A PRIVATELY OWNED BUILDING, AND WHO REFUSED TO LEAVE THE PREMISES WHEN SO ORDERED BY THE OWNER, UNDER THE FACTS OF THIS CASE, DOES NOT CONSTITUTE PROHIBITED STATE ACTION WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The Petitioners argue that the decision below conflicts with decisions of the Supreme Court which condemn the use of state power to enforce a "state custom" of racial segregation. There is nothing in the record to support the bald assertion that there is in the State of Maryland a custom of racial segregation. There was no such finding of fact by the trial court. Almost three years ago, a considerable period considering the rapid evolution of race relations, Chief Judge Thomsen of the United States District Court of Maryland found, as a matter of fact, that in February of 1960 there was no "custom, practice, and usage of segregating the races in restaurants in Maryland." *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124, 126, 127, aff'd Fourth Cir., 284 F. 2d 746. In that decision, after reviewing facts presented by both sides on the question of custom and usage, Chief Judge Thomsen stated: "Such segregation of the races as persists in restaurants in Baltimore is not required by any statute or decisional law of Maryland, nor by any general custom or practice of segregation in Baltimore City, but is the result of the business choice of the individual proprietors, catering to the desires or prejudices of their customers". *Ibid*, page 127, 128. Furthermore, in view of the fact that the elected representatives of the people of Baltimore have passed an ordinance condemning racial segregation in restaurants

in the city, it can hardly be said that the action of the court in finding the Petitioners guilty of trespass in fact was pursuant to and in support of an entrenched public policy of racial segregation.

The State action under the facts of this case was not prejudicial to Petitioners' constitutional rights. State action in *Garner v. Louisiana*, 368 U.S. 157, was initiated by the police. Petitioners were denied no rights of property. *Shelley v. Kraemer*, 334 U.S. 1. In remaining on the premises of the restaurant, they had none. A considerable time elapsed between the hostess's refusal to seat the Petitioners and their arrest. The record shows that they pushed past the hostess to obtain seats in the dining area (T. 13). There was then a long conversation between the leader of the group and the manager and owner of the restaurant (T. 33). The Petitioners were requested to leave but refused to do so (T. 26). The Police were summoned. When they arrived the members of the Negro group were the only persons remaining in the restaurant (T. 37). The Trespass Statute was read to the group in the presence of the police (T. 37). Some of the group left, but the remainder refused (T. 38). Employees of the restaurant took down names and addresses of those remaining (T. 37). Since the Police refused to arrest the Petitioners without a warrant, Mr. Hooper went to the Central Police Station to obtain warrants (T. 38). The Magistrate called the leader of the group on the telephone, discussed the situation and arrangements were made for a trial on the following Monday (T. 38). Warrants were neither served nor were Petitioners taken into custody (T. 38, 39). It can hardly be said that Petitioners were victimized by oppressive State action under these circumstances.

The State Trespass Statute under which Petitioners were convicted is declaratory of the undoubted common law

right of an owner of property to eject any person who shall enter his private property or remain thereon without his permission and provides for criminal enforcement thereof. *Bell v. State,* 227 Md. 302, 176 A. 2d 771; *Williams v. Howard Johnson's Restaurant,* 268 F. 2d 845. The right of a person to protect his property, including business property, necessarily includes the right to eject persons trespassing thereon. At common law the occupant of any house, store, or other building has the legal right to control and permit whom he pleases to enter and remain there and he also has the right to expel from the room or building anyone who abuses the privilege which has been given him. Therefore, while the entry by a person on the premises of another may be lawful by reason of an implied invitation, his failure to depart at the request of the owner will make him a trespasser and will justify the owner in using reasonable force to eject him. 4 Am. Jur., *Assault and Battery,* Section 76, page 167; American Law Institute, *Restatement, Torts,* Section 77; cases collected in 9 A.L.R. 379, "Right to Eject Customers from Store;" *Martin v. Struthers,* 319 U.S. 141.

To prohibit the State through its inherent police power and its law enforcement officials to assist the owner of private property to forcibly eject trespassers (i.e, persons unlawfully remaining on the private premises) would subject the owner to the onus of employing his own means to achieve this purpose should he wish to do so. The violence which could result in some parts of the country is hardly a desirable social solution in these racial rights controversies. The conduct of the parties in this Maryland case was unusual and, we submit, exemplary.

The Petitioners contend that a restaurant, such as Hooper's, is so "affected with the public interest" that its right to choose its clientele, however discriminatory, can-

not be enforced when such discrimination is based upon race alone (Petition, page 13). In support of this proposition Petitioners have cited no cases involving restaurants. *Garner v. Louisiana,* 368 U.S. 157, involving a department store lunch counter, was decided on other grounds. *Munn v. Illinois,* 94 U.S. 113, involves rate regulation of a public utility and is not germane to restaurants. In fact, the Supreme Court has refused to hold that where a privately-owned restaurant is involved, in the absence of the general taxpaying public's ownership of the facilities, or interstate commerce, that the Supreme Court will extend Federal protection against racial discrimination on the basis of the Fourteenth Amendment. *Burton v. Wilmington Parking Authority,* 365 U.S. 715; *Boynton v. Virginia,* 364 U.S. 454.

Petitioners have cited the case of *Shelley v. Kraemer, supra,* in support of the Petition. That case, however, involved unwarranted restraint upon the alienation and use of real property solely on the basis of race. The facts in the instant case do not involve the denial to the Petitioners of any rights of property and, therefore, these cases are not in conflict.

III.

THERE IS NO CONFLICT BETWEEN THIS CASE AND DECISIONS OF THE SUPREME COURT SECURING THE RIGHT OF FREEDOM OF SPEECH AND ASSEMBLY UNDER THE FIRST AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION.

Petitioners have cited no case that extends Federal protection of freedom of speech and assembly to an unprivileged demonstration in the interior of a privately-owned restaurant on privately-owned property. The Supreme Court has not gone that far. The picketing cases cited by Petitioners involve the special field of labor relations, which

is necessarily concerned with the rights of individual employees who have, depending on the circumstances, an implied license to demonstrate as a part of bargaining activities on the private premises of the employer by reason of their contract of employment. There is no such relationship between the Petitioners and the owners of this restaurant. *Marsh v. Alabama*, 326 U.S. 501, involves religious solicitation on the *streets* of a company town, which can hardly be considered analogous; nor should the court be impressed with the analogy of picketing in the Pennsylvania Railroad Station in New York City, hardly a quiet dining room. *People v. Barisi*, 86 N.Y.S. 2d 277.

In *Martin v. Struthers*, *supra*, at page 147, Mr. Justice Black stated as follows:

> "Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. *The dangers of distribution can so easily be controlled by traditional legal methods*, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.
>
> "*Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off.* General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away." (*Emphasis supplied.*)

Applying this dicta to the facts of this case, the record indicates that the restaurant owner was not only fully apprised of Petitioners message as evidenced by their actions as well as words, but that he indicated that he wished them to leave. Furthermore, by the time the police had arrived, there were no more customers present in the dining room and pickets were parading outside of the restaurant. Under these circumstances it can hardly be said that Petitioners' rights of expression were violated by their trespass conviction. In addition, according to the testimony of their leader, Petitioners expected to be arrested, and the trial court could well have found under these circumstances that their arrest was a part of their expression of their cause and enhanced the publicity given thereto (T. 46, 48, 55, 56).

> "Q. Now, Mr. Quarles, you remained even though you knew you were going to be arrested? A. Yes, sir.
>
> "Q. Is that part of your technique in these demonstrations? A. Yes, sir" (T. 55, 56).

For the foregoing reasons, it is submitted that neither does the Maryland Court of Appeals' decision conflict with decisions of the Supreme Court securing the right of freedom of expression, nor was the Maryland Court in error in affirming Petitioners' conviction on this ground.

IV.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF THIS COURT BARRING CONVICTIONS UNDER CRIMINAL STATUTES WHICH GIVE NO FAIR WARNING THAT PETITIONERS' CONDUCT WAS PROHIBITED.

The point is raised for the first time in the petitions and was neither raised in the trial court nor in the Maryland Court of Appeals. According to the transcript, *inter alia*, the leader of the Petitioners, Quarles, fully understood the

meaning of the trespass statute and recognized that Petitioners were to be arrested if they remained in the restaurant after being told to leave and having the Trespass Statute read to them (T. 53, 54, 55, 56, 58).

The statute under which Petitioners were convicted is a general trespass statute, of the type referred to in *Martin v. Struthers, supra,* as being on the books of at least twenty states, while similar statutes of narrower scope are on the books of at least twelve more. See n. 10, at page 147, *Martin v. Struthers,* 319 U.S. 141. The statute was enacted in 1900, and has never been found to be so vague and indefinite as to fail to apprise a violator of prohibited acts thereunder.

CONCLUSION

WHEREFORE, for the foregoing reasons, the State of Maryland respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

BALTIMORE CITY ORDINANCE NO. 1249, JUNE 8, 1962.

SECTION 1. Be it ordained by the Mayor and City Council of Baltimore, That Sections 8, 9, 11 and 12 of Article 14A of the Baltimore City Code (1950 Edition), title "Human Relations," sub-title "Baltimore Equal Employment Opportunity Commission," as said sub-title was ordained by Ordinance No. 379, approved April 18, 1956, and amended by Ordinance No. 409, approved July 6, 1960, be and they are hereby repealed and re-ordained, with amendments; that a new Section 10A be and it is hereby added thereto, to follow immediately after Section 10 thereof; that the name of the sub-title be and it is hereby changed to "Baltimore Equal Opportunity Commission," and all to read as follows:

8. The Mayor and City Council of Baltimore finds that the population of this city is composed of peoples of many divers racial, religious and other ethnic groups. The practice of discrimination in employment against members of these groups and the consequent failure to utilize the productive capacities of individuals to their fullest extent deprives large segments of the population of this city of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensified racial, religious and ethnic intolerance thereby resulting in grave injury to the public health and welfare. The practice by divers places of public accommodation of refusing to accommodate and serve members of these groups also tends to exacerbate intergroup relations thereby impairing the public welfare. It is hereby declared to be the

public policy of this City to foster the employment of all persons in accordance with their fullest capacities, and to accommodate and serve persons in divers places of public accommodation, regardless of the race, color, religion, ancestry or national origin of such persons.

9. . . . The term "place of public accommodation" includes a hotel, motel, inn or restaurant, meaning establishments commonly known or recognized as regularly engaged in the business of providing sleeping accommodations, or serving meals, or both for a consideration, and which are open to the general public. The term "place of public accommodation" does not apply to those establishments commonly known and recognized as boarding houses or rooming houses, to lunch counters or refreshment stands maintained in places of recreation or amusement such as bowling alleys, billiard halls, or swimming pools. Also the term "place of public accommodation" does not apply to those establishments dealing in alcoholic beverages where the average daily receipts of the sale of alcoholic beverages exceeds the average daily receipts of the sale of food nor to that part or parts of such restaurant establishments which part or parts are primarily devoted to the sale of alcoholic beverages.

The term "commission" means the Baltimore Equal Opportunity Commission created herein.

10A. An owner or operator of a place of public accommodation or an agent or employee of said owner or operator shall not, because of the race, color, creed or national origin of any person, refuse, withhold from, or deny to such person any of the accommodations, advantages, facilities and privileges of such place of public accommodation.