IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 12

ROBERT MACK BELL, ET AL.,
Petitioners.

v.

STATE OF MARYLAND,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR RESPONDENT

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OPINION BELOW

The opinion of the Court of Appeals of Maryland (R. 10) is reported in 227 Md. 302, 176 A. 2d 771 (January 9, 1962). The Memorandum Opinion of the Criminal Court of Baltimore, Byrnes, J., March 23, 1961 is unreported (R. 6).

JURISDICTION

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

QUESTIONS PRESENTED

1. Does a state criminal trespass conviction of Negroes protesting a racial segregation policy in a private restaurant constitute state action proscribed by the Fourteenth Amendment in a municipality where neither law nor local custom require segregation?

2. Were Petitioners denied due process of law because their convictions under the Maryland Criminal Trespass Statute were based upon no evidence of the proscribed conduct, or because the statute gave no fair warning of the prohibited conduct?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Section 1, Fourteenth Amendment to the Constitution of the United States.

2. Section 577, Article 27, Annotated Code of Maryland (1957 Edition); Chapter 66, Laws of Maryland, 1900 (see Amended Brief for Petitioners, Pages 4 and 5).

STATEMENT OF FACTS

The facts in *Bell v. Maryland* differ considerably from the facts in the sit-in cases previously before this Court. Here, the demonstrators entered a private restaurant in a privately-owned building in Baltimore City (R. 30). Neither the municipality in which the restaurant was located nor the State had a restaurant segregation law. Nor was there any evidence of a local custom of segregation in the community (R. 50). The demonstrators, who passed through the street-level lobby of the restaurant, were met at the entrance to the private dining area of the restaurant by the hostess, who normally seats customers

(R. 23). She was standing at the top of four steps (R. 23). Petitioners were barred from further entry into the dining room by the hostess and the Assistant Manager on the sole ground that the owner of the restaurant feared a loss of clientele if Negroes were permitted to eat in the private dining areas of the restaurant (R. 24, 32, 43). In spite of this notice not to enter, the demonstrators nevertheless pushed by the hostess and took seats at tables throughout the dining room, one or two at a table, and in the grille in the basement (R. 25, 47). Meanwhile a long conversation took place between the leader of the group and the manager and owner of the restaurant (R. 32). The Petitioners were requested to leave but refused to do so (R. 28). The police were summoned. When they arrived the members of the Negro group were the only persons remaining in the restaurant (R. 39). The Trespass Statute, Section 577, Article 27, Annotated Code of Maryland (1957 Edition) was read to the group in the presence of the police (R. 28, 39). Some of the group left, but the remainder refused (R. 39). Employees of the restaurant took down the names and addresses of those remaining (R. 39). Since the police refused to arrest the Petitioners without a warrant, Mr. Hooper, the owner, went to the Central Police Station to obtain warrants (R. 39). The magistrate spoke with the leader of the group on the telephone; and the Petitioners agreed to come down to the police court on Monday morning and submit to trial (R. 40). One and one-half hours after their initial entry, Petitioners left the restaurant (R. 41). The leader of the demonstrators later testified that the group remained on the premises even though they knew they were going to be arrested; and that being arrested was a part of their technique in demonstrating against segregated facilities (R. 49).

ARGUMENT

I.

A STATE CRIMINAL TRESPASS CONVICTION OF NEGROES PROTESTING A RACIAL SEGREGATION POLICY IN A PRIVATE RESTAURANT DOES NOT CONSTITUTE STATE ACTION PROSCRIBED BY THE FOURTEENTH AMENDMENT IN A MUNICIPALITY WHERE NEITHER LAW NOR LOCAL CUSTOM REQUIRE SEGREGATION.

Conspicuously absent from the facts in this case is State action. In order to be constitutionally prohibitive, State action must "coerce," "command", and "mandate" the racial discriminatory practice leading to conviction of the petitioners. *Lombard v. Louisiana*, 373 U.S. 267. There is neither such command, coercion, nor mandate here. The State's involvement is not to a degree that it may be held *responsible* for the discrimination.

Maryland at the time of the arrest of the Petitioners did not have a statute requiring segregation of restaurants and other places of public accommodation. Cf. *Peterson v. Greenville*, 373 U.S. 244. Nor did the City of Baltimore, the situs of the subject restaurant, have an ordinance prohibiting equal access to restaurants. *Ibid.* The evidence adduced at the trial did not reveal that the proprietor refused service on the basis of any express official State or municipal policy. Cf. *Lombard v. Louisiana, supra.* It was not unlawful for the restaurant owner to serve the demonstrators; nor was it unlawful for them to eat in the restaurant if the owner had served them. Cf. *Peterson v. Greenville, supra; Gober v. Birmingham*, 373 U.S. 374.

The neutrality of the State here is implicit in the acts of its officers. The police, when summoned by the proprietor refused to arrest the Petitioners (R. 40). The police insisted that the owner swear out warrants before a Police Magistrate. The arrests were never made by

the police even though one and one half hours after their initial entry, the Petitioners were still in the restaurant refusing to leave. The proprietor, nevertheless, had advised the Petitioners that they would be arrested if they failed to leave and he read the trespass statute to them (R. 29, 48). The Petitioners were not placed in custody. In fact, they made arrangements with the Magistrate by telephone to come to the court the following Monday, voluntarily, to submit to trial (R. 40, 50).

Community custom did not dictate the result in the *Bell* case. No evidence was produced before the trial court to show the existence of an overriding custom or "climate" of segregation in the community causing unequal enforcement of otherwise innocuous State laws solely to exclude Negroes on the basis of their race. In fact the evidence reveals exactly the opposite conclusion. Quarles, leader of the demonstrators, testified that in a number of other restaurants where the demonstrators had sought service, they sat, were served and ate (R. 50). In such a fluid situation in the immediate community, it could hardly be concluded now by the mere recitation of empty statutes not even before the trial court (Bell brief, p. 31, n. 13), that Jim Crow ruled the roost. Furthermore, over 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*, pages 127, 128.

The reason given by the owner of the restaurant for refusing service to Petitioners was that in his opinion his particular clientele did not wish to eat with Negroes.*

> "I tried to reason with these leaders, told them that as long as my customers were deciding who they want to eat with, I'm at the mercy of my customers. I'm trying to do what they want. If they fail to come in, these people are not paying my expenses, and my bills. They didn't want to go back and talk to my colored employees because every one of them are in sympathy with me and that is we're in sympathy with what their objectives are, with what they are trying to abolish, but we disapprove of their methods of force and pushed their way in" (R. 32, 33).

This statement was corroborated by Petitioner Quarles' own statement:

> "I was asking him, well, why wasn't it these Negroes he thought so much of weren't capable of sitting at his tables to eat? He said, well, it's because my customers don't want to eat with Negroes" (R. 43).

Petitioners' argument that the State of Maryland has denied to Petitioners equal protection of its laws is based upon the erroneous theory that the State of Maryland has caused the Petitioners' convictions of a crime from which persons other than Negroes would be immune. In the absence of legislation to the contrary, the State is not

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* Although the nominal owner of the restaurant is a corporation, of which Mr. Hooper is President, he is referred to herein as the owner of the restaurant in the same manner as he is referred to as the owner in the testimony (R. 30, 31).

charged with the positive duty of prohibiting unreasonable discrimination in the use and enjoyment of facilities licensed for public accommodation. *Williams v. Howard Johnson's Restaurant,* (4th Cir.) 268 F. 2d 845; *Slack v. Atlantic White Tower System, Inc.,* 181 F. Supp. 124, aff'd, (4th Cir.) 284 F. 2d 746. The owner of a restaurant, having the legal right to select the clientele he will serve, may, to enforce this right, use reasonable force to repel or eject from his place of business any person whom he does not wish to serve for whatever reason. See cases collected in 9 A.L.R. 379 and 33 A.L.R. 421; also 4 Am. Jur., *Assault and Battery,* Section 76, page 167; *Restatement of the Law of Torts,* Section 77; *Martin v. Struthers,* 319 U.S. 141.

So long as such right of the proprietor exists, to leave, as his sole remedy, the application by him of force would surely offend the principles of an ordered society. Cf. *Griffin v. Collins,* 187 F. Supp. 152. However, in calling upon a peace officer of the State to eject any person, the owner may employ only such means involving the State as do not single out and enforce sanctions against a particular racial class of persons. This is the gist of the State action argument.

Petitioners' theory is incorrect because where the application of the criminal trespass statute operates equally against all persons whom the proprietor wishes to exclude or eject, and the State is not significantly involved in the owner's selection, then the neutral use of the State law enforcement process to enforce the proprietor's selection of clientele is not prohibited by the Fourteenth Amendment. Cf. *Shelley v. Kraemer,* 334 U.S. 1; *Barrows v. Jackson,* 346 U.S. 249.

Petitioners further contend that licensing of restaurants by the State is a significant factor. However, State action with respect to licensed facilities depends upon whether

interdependence between State and its licensees is to an extent that the State participates in and can regulate decisions of its licensees relating to private discrimination on the basis of race or color. *Burton v. Wilmington Parking Authority*, 365 U.S. 715; *McKibbin v. Michigan Corporation & Securities Commission*, 369 Mich. 69, 119 N.W. 2d 557 (1963). Where the statutory fee, imposed by the State upon a business enterprise operated for a profit, is a mere tax on the business and not a regulatory license, there can be no State involvement in the decisions of the internal management of the business. *Spencer v. Maryland Jockey Club*, 176 Md. 82, 4 A. 2d 124, app. dismissed, 307 U.S. 612. Where the licensing is regulatory in the exercise of the police power, however, the Legislature may prescribe reasonable rules within the scope of the regulation. Any restaurant operated for profit in Maryland must obtain a license whether it operates as an exclusive club or is open to the public generally. Maryland Code (1957 Edition), Article 56, Section 178. This license is a statutory fee or tax. The distinction between those food service facilities that must pay the statutory fee and those that are exempt therefrom, is whether or not the business operates for profit. Ibid, Sec. 8. There is no statutory exemption for facilities that operate as exclusive clubs or place restrictions upon clientele. The police and health statutes apply to all establishments regardless of profit or selection of clientele. Maryland Code, Article 43, Secs. 200-203.

It is settled law in Maryland and in other jurisdictions that the licensing of a place of public amusement does not constitute a franchise requiring the owner to furnish entertainment to the public or admit everyone who applies. *Greenfield v. Maryland Jockey Club*, 190 Md. 96, 57 A. 2d 335; *Marrone v. Washington Jockey Club*, 227 U.S. 633; *Madden v. Queens County Jockey Club*, 296 N.Y. 249, 72 N.E. 2d 697; 1 A.L.R. 2d 1160, cert. den. 332 U.S. 761; cases

collected in 1 A.L.R. 2d 1165, 60 A.L.R. 1089, 30 A.L.R. 651. Nor does the refusal to contract, based solely upon the race of the party seeking the bargain, offend the guarantees of the Fourteenth Amendment. *Reed v. Hollywood Professional School,* 169 Cal. App. 2d 887, 338 P. 2d 633; *Gardner v. Vic Tanny Compton,* 182 Cal. App. 2d 506, 87 A.L.R. 2d 113.

Shelley v. Kraemer, supra, has no application here. In that case the constitutional right violated by the State's enforcement of restrictive covenants was a property right—the right to the use and enjoyment of property already purchased. In the case before this Court, Petitioners were denied no rights or property. Under the present status of the law they had none. *Civil Rights Cases,* 109 U.S. 3. This Court's holding that each person in the community has a right to remain on private premises of another operated as a business, licensed or otherwise, without the permission of the owner, would be tantamount to conferring upon ever person an inchoate property right in the business premises, becoming vested at the moment of entry. In the absence of legislation creating or taking away property rights involved here, such a holding would not be proper exercise of the judicial function.

In conclusion, in order to make *Shelley v. Kraemer* logically consistent with the result in the case at bar urged by these Petitioners, this Court must hold that these Negroes had an inalienable right to enter and receive food service in Hooper's Restaurant, which right could not be denied them by Mr. Hooper on the basis of their race alone. Anything short of such a holding would be begging the question; for if this Court holds that Petitioners' rights were merely dependent on the existence of notices posted upon the door, the basic civil rights issue will merely be shifted to the street.

II.

PETITIONERS WERE NOT DENIED DUE PROCESS OF LAW SINCE THEIR CONVICTIONS UNDER THE MARYLAND CRIMINAL TRESPASS STATUTE WERE BASED UPON EVIDENCE OF THE PROSCRIBED CONDUCT, OR, IN THE ALTERNATIVE, BECAUSE THE STATUTE GAVE FAIR WARNING OF THE PROHIBITED CONDUCT.

There are ample facts in the record showing violation of the Maryland trespass statute. Petitioners entered the lobby of Hooper's Restaurant through a revolving door. Petitioners were notified by the hostess (R. 24, 42) and Assistant Manager (R. 43, 47) of the restaurant that they would not be permitted to enter and be seated in the private dining areas of the restaurant. Nevertheless, part of the group of demonstrators ascended the four steps separating the lobby from the dining room and pushed by the hostess to gain entry to the dining room. Part of the group, also ignoring the management's warning, descended the steps from the lobby to the grille on the lower floor (R. 43, 47).

Clearly, under the facts of this case, Petitioners, after notification by the owner's agent not to do so, entered and crossed over the premises and private property of another in violation of the Maryland Criminal Trespass Statute. That Petitioners were so notified was admitted by Quarles, leader of the group, in his testimony (R. 42, 43). As to the demonstrators who went to the grille downstairs, Quarles stated:

> "Q. Why did some of the students go downstairs? Didn't you say they went downstairs because they couldn't be seated upstairs? A. After they were blocked forcibly by the manager and hostess, they proceeded downstairs to seek service" (R. 46, 47).

Judge Byrnes, who presided at the trial, in his Memorandum Opinion (R. 6, 7) found as a matter of fact that

the testimony disclosed that the defendants entered the restaurant and requested the hostess to assign them seats; but she refused, informing Petitioners that it was not the policy of the restaurant to serve Negroes. She said she was following the instructions of the owner of the restaurant. Commenting on the evidence, Judge Byrnes stated:

> "Despite this refusal, defendants persisted in their demands and, brushing by the hostess, took seats at various tables on the main floor and at the counter in the basement" (R. 7).

It is submitted that the evidence before the trial judge in this case goes far beyond the mere refusal to leave after lawful entry, the basis of the attack on the application of the Maryland statute. On the basis of the foregoing references to the testimony, and Judge Byrnes' comments thereon, it is clear that there was evidence of notice to the Petitioners by the owner; and that such evidence was considered by the trial judge. Cf. *Krauss v. State*, 216 Md. 369, 140 A. 2d 653 (1958).

It should be noted that the Maryland statute refers both to "entry upon" and "crossing over" such premises. The Petitioners in this instance were notified by the owner's agent not to enter the dining areas of the premises. If the Court should construe the statute to require notification of entry, as to those portions of the premises, such notification was given. But here, under the Maryland statute, it is unnecessary to go that far. The Maryland statute merely requires that the owner notify the potential trespasser not to "cross over" his property. Implicit in such a warning is the command to halt and advance no further on the owner's premises, when so notified.

The construction of the statute advanced here is consistent with the fact that Maryland has two criminal trespass statutes. The second count of the indictment was drawn pursuant to Section 576 of Article 27 of the Mary-

land Code (1957 Ed.). This Section of the criminal trespass act prohibits the entry of "posted" premises. Clearly, such statute pertains to notification by means of posting signs at the boundary of such property. However, by the addition of the words "crossing over", Section 577 surely refers to the failure of the trespasser to continue beyond the point where, upon discovery, the owner had notified him to halt. The words of the statute are clear and a reasonable construction is called for. It should be noted that the statute proscribes *either* entry upon *or* crossing over.

However, even if the Supreme Court, in reviewing the record before it, finds *no* evidence that the Petitioners were duly notified not to enter or cross over the dining areas of the restaurant, it has before it ample evidence that Petitioners refused to leave the premises when so requested. The Maryland Court of Appeals, in construing the Maryland Trespass Statute, has stated that statutory references to "entry upon or crossing over", cover the case of remaining upon land after notice to leave. *Bell v. State,* 227 Md. 302, 176 A. 2d 771 (R. 11); *Griffin v. State,* 225 Md. 422, 171 A. 2d 717 (1961). See also, *State v. Avent,* 253 N.C. 580, 118 S.E. 2d 47, vacated and remanded *on other grounds, Avent v. North Carolina,* 373 U.S. 375.

The Maryland Trespass Statute is neither void for vagueness nor unconstitutionally applied because the terms used are clear and have well-settled meanings. In *Alford v. United States,* 274 U.S. 264, this Court upheld the conviction of a person under a statute penalizing the building of a fire "near" any forest in the public domain. The Court said that the word "near" taken in connection with the danger to be prevented, laid down a plain enough rule of conduct for anyone who seeks to obey the law. Similarly in *Omaechevarria v. Idaho,* 246 U.S. 343, this Court held that men familiar with range conditions and desirous of

observing the law would have little difficulty in knowing what was prohibited by a statute forbidding the herding of sheep on any cattle "range," "usually" occupied by any cattle grower. It has been held further that a criminal statute penalizing a bank employee for receiving money, checks, or other property as a deposit in the bank when he has knowledge that it is insolvent, is not unconstitutionally vague although "insolvent," which has several meanings, was not defined in the statute. *Eastman v. State,* 131 Ohio State 1, 1 N.E. 2d 140, appeal dismissed 299 U.S. 505.

This Court has said in effect that persons of ordinary intelligence engaged in an activity coming within the purview of a criminal statute are in a position to know what that statute proscribes. *McGowan v. Maryland,* 366 U.S. 420, 428; *United States v. Harriss,* 347 U.S. 612, 617. The Petitioners here fall within this rule. Petitioners were engaged in an activity — namely, demonstrating against segregation in private establishments — which was, to say the least, risky. One of the risks of which they were aware was arrest (R. 49). It was testified that one or two of the group had been arrested previously for demonstrating in Hooper's Restaurant (R. 35, 56, 57); and the Trespass Statute was read to them at that time (R. 58). On that occasion the owner had to use physical force to keep demonstrators from entering the outside door (R. 59). Additionally in the present case the Petitioners arrived at the restaurant carrying picket signs which some of the group proceeded to display outside the door after Petitioners were refused service (R. 44). Under these circumstances, it could hardly be said Petitioners were misled by the application of the Maryland Trespass Statute here. In fact, it is quite apparent that they knew, prior to entering, that they were not welcome in Hooper's Res-

taurant; and their arrest, trial, and attendant publicity thereof, were an intrinsic part of their method of expressing protest (R. 49). Furthermore, if Petitioners had really been ingenuously ignorant of the proscriptions of the Maryland statute, they would certainly have raised the issue at their trial in their defense. The record does not show that Petitioners did not know they would subject themselves to criminal penalties for remaining on the private premises of another after having been warned to leave.

In conclusion, Petitioners were not denied due process of law because their convictions under the Maryland Criminal Trespass Statute were based upon some evidence that (1) they entered the dining areas of the restaurant after warning not to do so; (2) they crossed over a portion of the premises after warning not to do so; or (3) they had actual notice prior to entry that they would be in violation of the Maryland Criminal Trespass Statute if they sought food service in Hooper's Restaurant. Further, the Maryland Criminal Trespass Statute gave fair warning, and they had actual knowledge, that to remain on the private premises of another after warning was proscribed by the statute.

CONCLUSION

It is respectfully submitted, for the reasons set forth herein, that the judgments below should be affirmed.

Respectfully submitted,

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