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Cases:

Supreme Court of the United States

October Term, 1960

No. 164

WILLIAM H. BURTON,

Appellant,

—v.—

THE WILMINGTON PARKING AUTHORITY, a body corporate and politic of the State of Delaware, and

EAGLE COFFEE SHOPPE, INC., a corporation of the State of Delaware,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

Statement

Since neither appellee takes issue with the statement of the facts as contained in appellant's opening brief, no further development of the facts is occasioned.

However, to avoid seeming to concur by silence, it is appropriate here to undertake to correct an erroneous statement of fact relating to the nature of the proceedings instituted in this Court by appellant, set forth at the beginning of the "Argument" in the brief of appellee, Eagle Coffee Shoppe, Inc.

It is not correct, as stated there, that "Petitioner [appellant] brought this case here solely on appeal" and subsequently, "after respondents [appellees] requested this Court not to take jurisdiction of the appeal," appellant then "countered" with the contention that the Court should grant certiorari.

Actually, the "Motion to Dismiss or Affirm" of appellee, The Wilmington Parking Authority, appellee Eagle filing none, was filed, as under Rule 16 of the *Revised Rules* of this Court it should have been, after appellant's position as to the alternative grounds for review had been made clear at p. 9 of his previously filed Jurisdictional Statement.

From that statement and the Notice of Appeal, it is apparent that appellant asserted from the outset, as the burden of his claim for review by this Court on appeal, the invalidity of 24 Delaware Code §1501, as construed and enforced by the court below. It is not a diminution of that position that appellant also recognizes that the conflict of the decision below with decisions in other state and federal courts on the important constitutional question of whether property of government can be employed in a racially discriminatory manner affords a sound alternative basis for consideration by this Court, i.e., certiorari.

ARGUMENT

I. The Utilization of the Statute by the Court Below

Appellees in their answering briefs seek to minimize the importance of the utilization of 24 Del. C., §1501, both by themselves and by the court in the decision below. Appellee Eagle's brief states, pp. 5-6, that in answers to the complaint the defendants (appellees) "referred to the statute by way of defense separate and apart from their main defense." The brief continues:

> "[T]he two Delaware Courts realized the interpretation of the statute was a relatively unimportant matter and need not even have been considered in determining the rights of the parties."

(a) Appellant readily acknowledges that the Vice Chancellor, in the trial court, found it unnecessary to consider the statute in deciding that plaintiff had a right to service in the restaurant. At the root of that decision was the relationship the Vice Chancellor found between Eagle and the Authority: the restaurateur, Eagle, tenant of the Authority in this "vital public facility," was obliged to carry out the Authority's duty as a state agency "not to deny to Delawareans the equal protection of the laws." Because the Vice Chancellor found the tenant not to be a purely private restaurateur, there was no need, the trial judge concluded, to consider a statute which the defendants, appellees here, in pleading[1] and argument[2] before him, insisted authorized a *private* restaurant keeper to practice racial discrimination.

(b) But this appeal obviously is not from that decision; it is from the contrary decision and judgment of the

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[1] R-6, 8, 9, 11.

[2] Appellant's Brief and Appendix, p. 7 and ff. 1 and 2.

Supreme Court of Delaware. That court held Eagle a private operator and "subject to the provisions of 24 Del. C., §1501, which does not compel the operator of a restaurant to give service to all persons seeking such." Thus the court below explicitly utilized the statute to effect appellant's exclusion. Moreover, since the only circumstance alleged by appellees as bringing the refusal to serve appellant under the statute was appellant's being a Negro, the judicial ruling necessarily held the statute sanctioned Eagle's racially discriminatory conduct. Eagle concedes "the legality of the statute * * * was challenged" (Eagle's brief, p. 7). The Court's sustention of the statute against this challenge is clear and establishes the jurisdiction of this Court.

(c) Eagle now asserts (its brief, p. 9), despite its pleading the statute in its answer and motion for summary judgment, that it "rests its right to discriminate against Negroes" on the common law.

We suggest that Eagle only blurs the issue when it now contends that its defense is founded on a common-law right to operate its business as it sees fit, defines that defense in terms of a right to discriminate against Negroes, and seeks to analogize its alleged defense to that of the defendant in *Rice* v. *Sioux City Memorial Park Cemetery.*[3] The contention Eagle essays is that since its reliance on a common-law right to discriminate is "only by way of defense," there is no "judicial enforcement of that defense."

In the *Rice* case a claim for damages for breach of contract was based on a cemetery's refusal to honor an interment contract by declining to inter an Indian. The interment contract, held by the latter's wife with the cemetery, contained a restrictive covenant limiting burials to Caucasians. The Iowa court denied relief on the ground that *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), held a restrictive covenant was only unenforceable, not void, and, there-

[3] 245 Iowa 147, 60 N. W. 2d 110 (1953).

fore, judicial recognition of it as a defense, i.e., as giving the right to stand on its terms against one who sued in violation of its terms, was not state action.

The analogy Eagle seeks to make with the *Rice* defense fails. Eagle was not standing on a right to exclude "any and all," as the court below at one point implied it had a right at common law to do. Eagle's stand was that it had a right to exclude appellant because the statute authorizes the exclusion of Negroes. This contention the court below adopted: "We think, however, that Eagle is primarily a restaurant and thus subject to the provisions of 24 Del. C., §1501, which does not compel the operator of a restaurant to give service to all persons seeking such," i.e., authorizes exclusion of offensive persons, meaning, in the context of the case, only Negroes. If the statute declared that, such legislative action is barred by the Fourteenth Amendment. If it has such meaning only because this meaning is read into it and enforced by the court below, that judicial action also is barred by the Fourteenth Amendment. This is the essence of the appeal.

We would make it clear, then, that this appeal is not from Eagle's belated assertion in its brief that the basis of its "right to discriminate" is the common law, but from the action of the court below in effectively giving validity to a state statute, which, on pleading and argument by appellees, the court held to authorize racial discrimination. Even if the court had effectuated a so-called common-law rule authorizing unreasonable discrimination, this would be state action violative of the Fourteenth Amendment, of which long ago it was declared:

> "It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws."
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> *Civil Rights Case,* 109 U. S. 3, 11 (1883).

(d) If the Delaware General Assembly had employed language stating that a restaurateur might exclude Negroes, qua Negroes, such discriminatory state legislative action unquestionably would violate the equal protection clause of the Fourteenth Amendment. See *Williams* v. *Howard Johnson's Restaurant,* 268 F. 2d 845, 847 (4th Cir., 1959), where it is clearly indicated that if there had been a Virginia statute requiring the exclusion of Negroes from public restaurants, it would be barred by the Fourteenth Amendment. While once it was accepted, without proof, that there was a rational basis for legislative racial classification, as in *Plessy* v. *Ferguson,* 163 U. S. 537 (1896),[4] where racial classification was upheld in a Louisiana statute requiring racial segregation in public transportation, any notion that a rational basis exists today is seriously impugned by the rejection of such legislative classification in *Brown* v. *Board of Education,* 347 U. S. 483, 494 (1954), and its subsequent application to theatres, *Muir* v. *Louisville Park Theatrical Ass'n.,* 347 U. S. 971 (1954), public housing and a variety of situations referred to in appellant's opening brief.

With respect to food service in interstate railway[5] and bus[6] travel, the Interstate Commerce Act is construed to prohibit racial classification, even though an explicit prohibition in that regard is not written into the language of the act. In an industry as pervasive, commonplace and vitally important in our modern, industrialized society as the purveyance of food in prepared meals, it is obvious that a state should not be permitted to make or enforce a classification which would deny to an ethnic group equal treatment in the right to such an essential.

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[4] Cf. *Browder* v. *Gayle,* 142 F. Supp. 707 (M. D. Ala., 1956), aff'd, 352 U. S. 903 (1956), holding a law permitting racial segregation in intrastate transportation unconstitutional under the Fourteenth Amendment.

[5] *Henderson* v. *United States,* 339 U. S. 816, 70 S. Ct. 843.

[6] *Boynton* v. *Virginia,* 81 S. Ct. 182.

II. Equal Protection Is Not to Be Avoided by Resort to Labels

Appellees, striving to find a touchpiece to dissipate the constitutional restrictions imposed on state action in relation to public property, seize upon a remark in *Derrington* v. *Plummer*,[7] that "in certain circumstances" (Authority's brief, p. 11), a lease could be made by a county to a private person and the leased property be unaffected by the Fourteenth Amendment. See also Eagle's brief, pp. 12-13. But this dictum the court rigidly circumscribes and limits to "surplus" property, not needed by the governmental entity. That is not the situation here, where the statute creating the Authority imposes the limitation that such leasing "be necessary and feasible for the financing and operation" of the parking facility.[8] Since it is clear that the public purpose of the Authority could not be achieved without the rental income from the space occupied by Eagle, that space could not accurately be denominated "surplus."

Surplus property not being involved here, any authority which appellee Eagle may deduce from *Ashwander* v. *Tennessee Valley Authority*,[9] which relates to the permissibility of disposal by the federal government of excess, or surplus, electric energy (generated as a by-product to production of war munitions and incidental to federal control over navigation), has no application here. Nor does that case have any element of discriminatory denial of access to government property or discriminatory use of property in the ownership or control of which the hand of government continues.

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[7] 240 F. 2d 922 (5th Cir. 1956).

[8] 22 Del. C., § 504, Appellant's Appendix, p. 48.

[9] 297 U. S. 288, 56 S. Ct. 466 (1936), cited at p. 13, Eagle's Brief.

Eagle points to *Dorsey* v. *Stuyvesant Town Corp.*[10] as inconsistent with the definition of "state action" in *Cooper* v. *Aaron,* 358 U. S. 1 (1958), cited in appellant's opening brief, p. 15. This Court in that case declared "state participation through any arrangement, management, funds or property" is sufficient to invoke Fourteenth Amendment restraint against racial discrimination. In *Dorsey* the Court of Appeals of New York rejected the contention that benefits accruing to an urban redevelopment corporation through acquisition of land with the aid of the state's power of eminent domain, together with the closure and conveyance of streets and tax exemption, denoted governmental character sufficient to make applicable the Fourteenth Amendment to ban racial discrimination in the renting of dwellings erected by the corporation on that land. We suggest that in the light of expanding concepts of state and municipal functions and corresponding expansion of the concept of state action, the four-three *Dorsey* decision of more than a decade ago is now incorrect. The aid given by the city to the redevelopment corporation specifically to accomplish the city's purpose of removing substandard and insanitary structures and providing decent housing was substantial, and there was sufficient city participation to make the Fourteenth Amendment applicable. The later decision in *64th Street Residences* v. *City of New York,*[11] unanimously entered by the same court, without mentioning the *Dorsey* opinion, by implication weakens its authority on the "state action" point. In the latter case, the court indicates that if Fordham University, a Catholic institution, alone were excluded from bidding on land acquired by the city for redevelopment purposes (which were akin to those in the *Dorsey* case), the University would be deprived of constitutional rights under the Fourteenth, as well as the First, Amend-

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[10] 299 N. Y. 512, 87 N. E. 2d 541 (1949).

[11] 4 N. Y. 2d 268, 150 N. E. 2d 396 (1958).

ment. Certainly Fourteenth Amendment rights would not have been involved if the urban redevelopment plan did not involve state action.

Finally, the theory that there is "special" or "extra" state-owned property free of constitutional prohibitions against racial discrimination, which Eagle advances, is, on its face, unsound. Obviously it contains the real probability and danger that by mere indulgence in invidious semantics, i.e., by terming a government facility "special" or "extra" (or "extra-special") discriminatory denial of use may be effectuated. This is precisely the predicament in which appellant finds himself with respect to the restaurant in this case. The statute was enforced to authorize his exclusion from the restaurant because, in the construction the court makes of the vague language of the statute, appellant, simply, as a Negro, is "offensive". Surely, terms of such uncertain content should not be further enlisted to avoid accordance of the equal protection of the laws, and the effect given to such language by the court below should be rejected by the invalidation of the statute by this Court.

Respectfully submitted,

LOUIS L. REDDING
LEONARD L. WILLIAMS
923 Market Street
Wilmington 1, Delaware
Counsel for Appellants

Wilmington, Delaware
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