

IN THE
COURT OF APPEALS OF MARYLAND

September Term 2002

No. 6

LARRY BLEDSOE, GEORGE KOPP, AND JOSEPH JOHNSON,

Appellants

v.

STATE OF MARYLAND,

Appellee

ON WRIT OF CERTIORARI TO THE
CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY

**REPLY BRIEF OF APPELLANTS LARRY BLEDSOE, GEORGE KOPP, AND
JOSEPH JOHNSON**

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ARGUMENT

A. Appellants' Double Jeopardy Rights Mandate That This Case Not Be Sent to Trial.

Appellants' double jeopardy rights prevent this case from going to trial. The District Court's February 14, 2002, ruling in favor of Appellants --E.68 and 82 -- was in substance a ruling on the sufficiency of the evidence, made after considering the mutually stipulated evidence before the District Court, so that Constitutional and common law double jeopardy principles bar this prosecution from going to trial. The applicable case law squarely settles this issue. *See Finch v. U.S.*, 433 U.S. 676 (1977), *State v. Shaw*, 282 Md. 231 (1978), and *State v. Despertt*, 73 Md. App. 620 (1988).

Appellee's brief complains too late about the authority of the District Court to grant Appellant's Motion to Dismiss or in the Alternative Motion for Judgment of Acquittal ("Motion"). For one thing, Appellant never preserved this complaint for appeal. *See, e.g.* E.47-49. For another thing, Appellee actively participated in formulating the agreed statement of facts on December 19, 1999, that the District Court used to decide Appellant's Motion. E.49, L. 9-15 (adding an additional stipulation that the Showcase Theater "was a for profit enterprise, that this wasn't a charitable, nude dancing club, raising money for the Salvation Army or something"). Not content merely to submit an agreed statement of facts, Appellee followed up eleven days later, on December 30, 1999, with an opposition motion that referenced, E.14, and attached additional evidence (a flyer). E. 18.

When Appellants filed their Motion, numerous applicable appellate court decisions

already existed that put Appellee on notice that Appellee's foregoing participation in presenting evidence would create a double jeopardy bar to successfully appealing Appellants' victory on the Motion. *See, e.g., Finch v. U.S.*, 433 U.S. 676 (1977), *State v. Shaw*, 282 Md. 231 (1978), and *State v. Despertt*, 73 Md. App. 620 (1988). Nevertheless, the record is entirely devoid of a sufficient timely objection by Appellee to refrain from presenting evidence for purposes of deciding the Motion. *See, e.g.* E.47-49..

The District Court granted Appellants' Motion on the basis of a factual finding -- which relied on the parties' joint statement of facts, E.47-49 -- that the manner in which the Showcase operates places the Showcase outside the definition of "public place" that is provided in Prince George's County Code § 1-102(28). *See, e.g., Finch v. U.S.*, 433 U.S. 676 (1977), *State v. Shaw*, 282 Md. 231 (1978), and *State v. Despertt*, 73 Md. App. 620 (1988) (collectively, barring a retrial under such circumstances). On that basis, there were no other operative facts that the Appellee could have provided to change the outcome of the case. In other words, the District Court's ruling on Appellants' Dismissal Motion prevents a trial of Appellants, due to the double jeopardy bar. *State v. Despertt*, 73 Md. App. 620. The District Court went one step further by finding that, even if the Showcase is a public place, the Ordinance is unconstitutional as applied to the Showcase. E.81.

Appellee puts misplaced reliance on *Serfass v. U.S.*, 420 U.S. 377 (1975). *First*, *Serfass* is superseded in time a by *Finch v. U.S.*, 433 U.S. 676 (1977), *supra*. *Second*, the result in *Serfass* (finding no double jeopardy bar to a trial after a pretrial dismissal) results from a trial court dismissal that was based on a finding of procedural error below, rather

than a ruling on the sufficiency of the evidence.

Serfass has no application to the circumstances here. The very first paragraph of the *Serfass* opinion explains why:

We granted certiorari to decide whether a Court of Appeals has jurisdiction of an appeal by the United States from a pretrial order dismissing an indictment based on a legal ruling made by the District Court after an examination of records and an affidavit setting forth evidence to be adduced at trial.

Serfass, 420 U.S. at 379. In the Appellants' case, on the other hand, the District Court made a ruling on the sufficiency of the evidence, finding that the Showcase was not a public place under Prince George's. County Code § 1-102(28). *Serfass* "clearly did not involve [an] acquittal[] on the merits." See *U.S. v. Martin Linen Supply* 430 U.S. 564, 576 (1977) (Stevens, J., concurring).

Clearly, double jeopardy protection does not absolutely require that a jury first be seated and that the first piece of evidence be presented thereafter. *Daff v. State*, 317 Md. 678, 685 (1989); *Farrell v. State*, 364 Md. 499, 509-10 (2001).

Appellee tries to argue that double jeopardy protection does not apply here to Appellants so long as the District Court did not have jurisdiction to grant Appellants' Motion. However, even an erroneous dismissal by a trial judge does not weaken the double jeopardy protections afforded to a defendant. *Block v. State*, 286 Md. 266; 270-71 (1979). Moreover, a District Court's "judgment is not invalidated because of an improper exercise of [its] jurisdiction." *Parks v. State*, 287 Md. 11, 16 (1980); *see also Daff*, 317 Md. at 685 (1989); and *Farrell v. State*, 364 Md. at 509-10. Moreover, Appellee claims no more than

"scant" Maryland authority to back up its claim. Appellee's Brief at 10. Also, Appellee puts misplaced reliance on *U.S. v. DeLaurentis*, 230 F.3d 659 (3d. Cir. 2000), because *DeLaurentis* involved disputed facts, whereas all parties agreed to the operative facts at Appellants' December 19, 1999, Motion hearing; and *DeLaurentis* comes from a non-controlling jurisdiction, whereas this Court's *Block* and *Parks* cases, *supra*, dispose of this issue in Appellants' favor.

Appellee concludes its double jeopardy argument by claiming that very speculative public policy favors its position. However, we have in place one quarter century of case law, *supra*, that disposes of this issue in Appellants' favor; speculative public policy concerns cannot overcome that.

B. Appellants Will Be Denied Their Speedy Trial Rights If This Case Goes to Trial

The four-part test of *Divver v. State*, 356 Md. 379 (1999), establishes that Appellants will be denied their speedy trial rights if this case goes to trial. Appellee dances around this issue by not even going through a full four-part *Divver* analysis. Specifically:

"When the [pre-trial] delay is of a sufficient length, it becomes "presumptively prejudicial," thereby triggering a "balancing test [which] necessarily compels courts to approach speedy trial cases on an ad hoc basis."
[citations omitted]. The factors to be weighed are [1] 'length of delay, [2] the reason for the delay, [3] the defendant's assertion of his right, and [4] prejudice to the defendant.' [citation omitted]. Because whether a period is presumptively prejudicial, or not, depends upon the length of a pre-trial delay, the first factor 'is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance.' [citation omitted]. And this factor cannot be applied until it is determined from what point the period of delay is measured." [citation omitted].

Divver, 356 Md. at 388 (quoting *State v. Henson*, 335 Md. 326, 332-33 (1994)).

Appellants' original Brief establishes that speedy trial protections bar a retrial., as summarized and further illustrated below. Appellee erroneously claims that only a trial court can handle this four-part analysis, even though the trial court would be relying on the same record that the Court of Appeals now has in making this determination.

As to the *first* prong -- the length of the delay -- nearly two years elapsed between the District Court's February 2002 granting of Appellants' Motion and the January 2002 entry of the Circuit Court's reversal of the District Court. In *Smith v. State*, 276 Md. 521, 527 (1976), a lesser trial delay of sixteen months was deemed to have triggered the four-part balancing test of *Divver, supra*.

Appellee erroneously claims that speedy trial concerns should not count the time during which this appeal was pending final resolution in Circuit Court. However, such concerns do not apply where, as here, the appellate process does not proceed in an orderly fashion. See *U.S. v. Loud Hawk*, 474 U.S. 302, 312-14 (1986). Here, by the Circuit Court's own admission, the appellate process was not orderly. E.112-113, 116, and 123.

As to the *second* prong -- reason for the delay -- no good reason has been given for the delay. There were in fact two unreasonable delays, those being the eleven months that intervened between the State's noting its appeal in February 2000 and the Circuit Court's holding oral argument thereon in January 2001; and the second being the eleven months that intervened between the January 2001 holding of oral argument and the entry of the Circuit

Court's judgment in January 2002.

The record is devoid of a good reason for the first delay, which caused Circuit Court oral argument to take place eleven months after the State noted an appeal. Circuit Court Judge Krauser acknowledged at the Circuit Court's November 2, 2000, hearing on Appellants' motion to dismiss the appeal that, at the time the State filed its appeal notice, the court clerk's office had no mechanism to handle a State's appeal from the District Court. E.112. Judge Krauser further stated that she and Judge Missouri realized that notices "needed to be sent by the clerk's office that the clerk's office was unprepared to send. So we in fact drafted the notice to make sure that it comported with the rules..." *Id.*

The record is also devoid of any explanation, let alone a good explanation, for the second delay, which is the eleven months that it took Circuit Court Judge Krauser to issue her appellate opinion in this case. Knowing full well that she had taken eleven months to issue her written opinion, Judge Krauser had every opportunity to include in her written opinion the reason for this eleven month delay. Judge Krauser chose not to do so. Consequently, without any explanation in the record for this eleven month delay in issuing Judge Krauser's opinion, Appellants urge that this delay be considered unreasonable. *See Divver*, 356 Md. at 389 (confirming that a nine-month trial delay may be wholly unreasonable under the circumstances).

The foregoing delay factors are properly assigned to the Appellant, because "employees of a court's assignment office or of a state hospital, as well as prosecutors, policemen and judges, must be considered representatives of the State." *Smith v. State*, 276

Md. at 527.

As to the *third* prong -- assertion of the right to a speedy resolution -- the Appellants properly asserted their right to a speedy resolution of the State's appeal to the Circuit Court. On October 3, 2000, Appellants' counsel filed a motion to dismiss, alleging that the State had not provided Appellants with the District Court transcripts or record. on a timely basis; this amounted to a complaint in the failure to provide a speedy appellate process. At the November 2, 2000, hearing on Appellants' motion to dismiss the appeal. Judge Krauser took strong exception to the December 17, 1999, transcript's still not being in the Court's jacket. Nevertheless, despite Judge Krauser's own disappointment with the delay in getting the case heard in Circuit Court, Judge Krauser proceeded to cause an additional eleven-month delay in issuing her appellate opinion.

Appellee erroneously claims that Appellants did not properly assert their speedy trial right. Even, assuming, *arguendo*, the truth of this, Md. Rule 8-131(a) enables this Court to decide issues not raised in the court below where deciding such an issue is necessary or desirable to guide the lower court to avoid the expense and delay of another appeal. *See also* Md. Rule 8-131(b)(1).

As to the *fourth* prong -- the prejudice from the delay -- the Appellants will clearly be prejudiced by the delay. With this over two-year delay in bringing this case to trial also come faded memories of witnesses and the greater risk of the loss of material evidence. Besides, "an affirmative demonstration of prejudice by the defendant is not necessary in order to prove a violation of the Sixth Amendment speedy trial right." *Smith v. State*, 276

Md. at 532.

Moreover, because each count against Appellants is punishable by less than one year (each count is punishable by up to six months incarceration), the Maryland law's statute of limitations provisions bar the Circuit Court's remand to District Court. Specifically, Md. Ann. Code Cts. & Jud. Proc. art. § 5-106 mandates, in relevant part, that "a prosecution for a misdemeanor shall be instituted within 1 year after the offense was committed." When we calculate the amount of time that constituted an unreasonable delay in getting this case resolved on appeal in the Circuit Court, we easily arrive at a one-year period, that should help establish that the statute of limitations bars a trial of Appellants.

C. The Ordinance Cannot Be Lawfully Applied to Appellants

The Ordinance cannot be lawfully applied to Appellants. *First*, the Ordinance only applies to acts in public places, and the Showcase is not a public place within the meaning of the Ordinance, as already explained in Appellant's original Brief. *Second*, assuming *arguendo* that the Ordinance applies to the Showcase, enforcement of the Ordinance against the Showcase would amount to an outright and unconstitutional ban on fully nude dancing in all adult nightclubs in Prince George's County.

1. The Showcase Theater Is Not a Public Place

The Showcase is not a public place within the definition of this phrase in the Prince George's County Code, Code § 1-102(28), nor is it a public place within the ordinary sense of the phrase, for purposes of a criminal prosecution.

Moreover, Prince George's County had the option to apply a more expansive

definition of public place, such as the public place definition found in Prince George's County Code § 14-101(a)(5) (which is limited to Juvenile Curfew, and does not apply to the county's anti-nudity ordinance). However, the county chose not to do so, at its own peril. Nor does the self-serving reference to *Barnes v. Glen Theatre*, 501 U.S. 560 (1991) in the legislative summary, A-10, assist Appellee, because *Barnes* did not address the meaning of public place in the ordinance it considered, nor did *Barnes* list a definition of public place. Finally, particularly because this Ordinance carries criminal penalties, Appellants could not reasonably be held to have known the contents of the Ordinance's legislative summary.

2. The Ordinance is Not Constitutional as Applied to Appellants

Even assuming *arguendo* that the Ordinance applies to Appellants, as explained in Appellant's original brief, enforcement of the Ordinance against the Appellants would amount to an outright and unconstitutional ban on fully nude dancing in all adult nightclubs in Prince George's County.

Moreover, Appellee cannot properly claim that an outright ban on fully nude dancing is constitutionally permitted at the Showcase without reasonable reliance on sufficiently accurate studies showing negative secondary effects from fully nude dancing in the County. *Los Angeles v. Alameda Books*, ___ U.S. ___; 122 S. Ct. 1728 (2002); *Erie v. Pap's A.M.*, 529 U.S. 277, 296-97 (2000).

CONCLUSION

Appellants have established the grave injustice they will suffer if their case is not dismissed. Moreover, the implications of this case extend beyond Appellants' case, on such

issues as guaranteeing subsequent speedy trials when the State appeals a District Court dismissal, defining when double jeopardy applies where there is a District Court dismissal, and defining the limitations on ordinances that criminals nude dancing without even reasonably relying on secondary effects evidence. All these issues should be expected to arise on numerous occasions in Maryland's trial courts; however, the case law is lacking in specific enough guidance to the trial courts for achieving just results on these matters.

For all the foregoing reasons, Appellants seeks an order reversing the Circuit Court's decision and requiring the dismissal of this prosecution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Reply Brief of Appellant were mailed by first-class mail, postage prepaid, to the following parties, this 26th day of August, 2002, to:

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