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Recent Developments: Eanes v. State: Restrictions on the Volume Level of Protected Speech Held Constitutional

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liams, 319 Md. at 494, 573 A.2d at 814 (citing *Sard,* 281 Md. at 439, 379 A.2d at 1014).

Next, the court looked at each applicable health statute in detail, noting their procedural and substantive due process requirements. Williams argued that § 10-708 did not provide for proper notice, the right to attend the meeting, the right to a written decision, or the right to an appeal. *Id.* at 492, 573 A.2d at 813.

After addressing the applicable health statutes, the court focused upon the Supreme Court cases of *Youngberg v. Romeo,* 457 U.S. 307 (1982) and *Washington v. Harper,* 110 S. Ct. 1028 (1990). The court used these cases to support the rationale that due process considerations could be satisfied if professional judgment was used to override the patient's objections. *Williams,* 319 Md. at 495, 573 A.2d at 813.

Although *Youngberg* did not deal with forcible administration of antipsychotic drugs, the case did address what rights a person involuntarily committed to a state institution possessed under the due process clause of the fourteenth amendment. The Court in *Youngberg* concluded that such an individual could be restrained to the extent deemed necesary by the medical profession. *Williams,* 310 Md. at 497, 573 A.2d at 814 (citing *Youngberg,* 457 U.S. at 324). In reaching this decision, the Supreme Court stated "it was necessary to balance the liberty of the individual and the demands of an organized society." *Id.* at 495, 573 A.2d at 814, (citing *Youngberg,* 457 U.S. at 320). Specifically, the court reasoned that although the committed individual possessed certain rights, the state also had legitimate reasons for restraining a committed individual's liberty. *Id.*

Additionally, the Supreme Court stated that deference should be given to the decisions made by the medical staff of an institution in that judges and juries were not better qualified than medical professionals in determining which procedures best protect an individual's liberty interests. *Id.* at 496, 573 A.2d 814 (citing *Youngberg,* 457 U.S. at 322-23).

Unlike *Youngberg*, the recently decided case of *Harper* deals specifically with whether a state had the right to forcibly administer antipsychotic drugs to an involuntarily committed prisoner. In answering in the affirmative, the Court held that the state had a rational basis for administering the drugs to the inmates, regardless of their displeasure. *Williams*, 319 Md. at 499, 573 A.2d at 816.

It found that, substantively, the state's administrative policy was a "rational means of furthering the state's legitimate objectives of administering drugs for treatment purposes under the direction of a licensed psychiatrist." *Id.* at 502, 573 A.2d at 817 (citing *Harper,* 110 S. Ct. at 1042). Procedurally, the Court stated that nothing in the Constitution prohibited the state from permitting medical personnel to make that decision "under fair procedural mechanisms." *Id.* at 503, 573 A.2d at 818 (citing *Harper*, 110 S. Ct. at 1042).

Although the court of appeals noted that Williams was not a prisoner in a penal institution, as was the patient in *Harper*, it stated that *Harper* set forth procedural due process guidelines for determining whether Williams' constitutional rights were violated. *Id.,* at 508, 573 A.2d at 820. The court concluded that because § 10-708 did not provide Williams with notice of the final review proceeding, or the ability to present evidence, or the ability to cross examine witnesses, it did not afford the requisite procedural due process protections to which Williams was entitled. *Id.* at 509-10, 573 A.2d at 821.

The court ruled, therefore, that it was error to enter summary judgment against Williams, and it was error to deny Williams' motion for partial summary judgment. Consequently, the court held that the common law rule, as set forth in *Sard v. Hardy,* requiring a patient's consent before the administration of such drugs, applied in William's case. *Id.* at 510, 573 A.2d at 821 (citing *Sard*, 281 Md. at 439, 379 A.2d at 1014).

The court of appeals concluded that additional procedural due process protections were owed to Williams even though the Supreme Court, in *Harper*, specifically did not require such protections. In so holding, it is obvious that the Maryland court wished to give involuntarily committed individuals additional guarantees of due process protection above and beyond what the Supreme Court required.

— *Kathleen Dunivin Schmitt*

Eanes v. State: RESTRICTIONS ON THE VOLUME LEVEL OF PROTECTED SPEECH HELD CONSTITUTIONAL

In *Eanes v. State,* 318 Md. 436, 569 A.2d 604 (1990), the Court of Appeals of Maryland held that a statute limiting the volume level of protected speech does not violate the first amendment to the United States Constitution.

While speaking against abortion in front of the Hagerstown Reproductive Clinic ("Clinic"), Jerry Wayne Eanes ("Eanes") made no threat of violence, no effort to physically restrain those entering the Clinic, and made no attempt to block access to the Clinic. *Eanes,* 318 Md. at 441, 569 A.2d at 606. Additionally, Eanes did not use obsenity, profanity or attempt to incite violence. Eanes spoke without artificial amplification, yet, was alleged to have spoken so loudly that he was heard above the noise generated by traffic. Throughout the day, local residents and people employed in the vicinity made several complaints to the local police regarding the loudness of Eanes' speech. *Id.*

After the police department had received numerous complaints concerning the volume level of the demonstrator, the police warned Eanes to lower his voice. Eanes ignored the warning and was arrested for disturbing the peace in violation of Md. Ann. Code art. 27, § 121 (1989). Section 121 makes it unlawful for anyone to "wilfully disturb any neighborhood in [any Maryland] city, town or county by loud and unseemly noises." Md. Ann. Code art. 27, § 121 (1989). Eanes was found guilty in the District Court of Maryland for Washington County. *Eanes,* 318 Md. at 442, 569 A.2d at 607.

On appeal, Eanes, citing *Diehl v. State,* 294 Md. 466, 451 A.2d 115 (1982), *cert. denied,* 460 U.S. 1098 (1983), contended that only speech not protected by the first amendment was subject to a statutory prohibition against "loud and unseemly noises." *Eanes,* 318 Md. at 443, 569 A.2d at 607. The court, disagreed with Eanes' interpretation, and explained that the prohibition against "loud and unseemly noises" in *Diehl* sought to regulate objectionable content of speech. Whereas in *Eanes,* the court pointed out, it was the volume level which was objectionable, not the

content of the speech. *Id.* at 444, 569 A.2d at 607-08.

The court began its analysis by distinguishing between content-neutral and content-based statutes. The court noted that to pass constitutional muster, content-based restrictions in a public forum must serve a compelling state interest and be narrowly drawn to achieve that end. *Id.* at 447, 569 A.2d at 609 (citing *Perry Educ. Ass'n v. Perry Local Educationers' Ass'n,* 460 U.S. 37, 45 (1983)). Alternatively, content-neutral regulations of time, place and manner must be "narrowly tailored to serve a significant government[al] interest, and leave open ample alternative channels of communication." *Id.* at 447-48, 569 A.2d at 609 (quoting *Frisby v. Shultz*, 487 U.S. 474, 481 (1988)).

The court held that Section 121 was a content-neutral regulation of manner of expression that served to limit, under proper circumstances, loudness of delivery. To hold otherwise, the court noted, would improperly render the statute invalid. *Id.* at 448, 569 A.2d at 610 (citing *City of College Park v. Cotter,* 309 Md. 573, 589, 525 A.2d 1059, 1067 (1987)). The court explained that statutes are presumed to be constitutional, such that when one interpretation would render the statute unconstitutional and another would render the statute valid, the statute must be interpreted in such a manner to be constitutional. *Id.*

The court next examined the type of forum at issue. *Id.* at 446, 569 A.2d at 609. Eanes spoke on the street and sidewalk. The court concluded that streets and sidewalks are traditional public forums where the right to free speech cannot be broadly and absolutely denied. *Id.* at 447, 569 A.2d at 609 (citing *Boos v. Barry,* 485 U.S. 312, 318 (1988); *Hudgens v. NLRB,* 424 U.S. 507, 515 (1976)).

Given the context of a public forum, the court went on to consider the three requirements of a constitutionally permissible content-neutral statute. First, there must exist a substantial governmental interest. Second, the statute must be narrowly tailored. Finally, ample alternative channels of communication must be left open. *Id.* at 447-48, 569 A.2d at 609.

The court began by determining whether a substantial governmental interest existed. Following United States Supreme Court decisions, the court concluded that "government ha[s] a substantial interest in protecting its citizens from unwelcome noise." *Id.* at 449, 569 A.2d at 610 (quoting *Ward v. Rock* Against Racism, 491 U.S. 781, 796 (1989)). This governmental interest in the protection of the unwilling listener from undue noise intrusion in the privacy of ones' home has been extended by the Supreme Court to include the protection of the unwilling listener in a public forum. *Id.* at 450, 569 A.2d at 610 (citing *Frisby*, 487 U.S. at 484; *Ward,* 491 U.S. at 791). The extension of protection afforded to the unwilling listener in a public forum, the court explained, involved the notion of a "captive audience" which is defined as the "unwilling listener or viewer who cannot readily escape from the undesired communication, or whose own rights are such that he or she should not be required to do so." *Id.* at 451, 569 A.2d at 611. The *Eanes* court, therefore, held that Section 121, affording protection to a captive audience from "unreasonably loud and disruptive communications emanating from the street," was a content-neutral restriction which served a substantial governmental interest. *Id.* at 453, 569 A.2d at 612.

The narrowly tailored statutory requirement, the court determined, was satisfied "so long as the . . . regulation promotes a substantial government[al] interest that would be achieved less effectively absent the regulation." *Id.* at 454, 569 A.2d at 613 (quoting *United States v. Albertini,* 472 U.S. 675, 689 (1985)). The court concluded that the protection of the captive audience, those persons employed and living in the vicinity of the Clinic, would be achieved less effectively absent the volume level regulation. *Id.* at 484-55, 569 A.2d at 613.

The court considered the availability of alternative channels of communication which included speaking at a lower volume, individual contact, and distribution of literature or the carrying of a sign. The court deemed all of these alternatives to be less instrusive on unwilling listeners. Therefore, the court held that Section 121 does not inhibit the use of various alternative channels of communication. *Id.* at 456, 569 A.2d at 613-14.

Eanes also alleged on appeal that Section 121 was void for vagueness. The court noted that a provision was vague if it is not sufficiently explicit to inform persons what conduct will render them liable to its penalties. *Id.* at 458-59, 569 A.2d at 615 (citing *Bowers v. State,* 283 Md. 115, 120, 389 A.2d 341, 345 (1978)). The court referred to this as the fair notice principle which "is grounded on the assumption that one should be free to choose between lawful and unlawful conduct." *Id.* at 459, 569 A.2d at 615 (quoting *Bowers,* 283 Md. at 121, 389 A.2d at 345). The court rejected Eanes' contention that there should be specific decible guidelines and went on to add that a "[s]tatute which is both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited" is not vague simply because it involves an imprecise normative standard. *Id.* at 459, 569 A.2d at 615 (quoting *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)).

Alternatively, the Court noted that a statute may be void if it allows for irrational and selective enforcement. *Id.* at 464, 569 A.2d at 617 (citing *Bowers,* 283 Md. at 122, 389 A.2d at 346). However, a statute is not vague merely because it allows the exercise of discretion on behalf of law and judicial enforcement officials. *Id.* The Court found, therefore, that Section 121 does not permit arbitrary or discriminatory enforcement. *Id.* at 464, 569 A.2d at 618.

The court concluded that prior warning by police authority is required in order that a speaker is made aware that his speech is unlawfully disruptive. *Id.* at 463, 569 A.2d at 617. Eanes had been asked by residents and persons in the surrounding business community to reduce his volume of speech and the local police department had warned Eanes that his loudness was disrupting the peace. Consequently, the court found that Eanes was sufficiently warned and was aware that further communication at the offensive volume level would result in prosecution. *Id.* at 466-67, 569 A.2d at 619. Therefore, the court held that Section 121 was constitutional on its face and as applied. *Id.* at 466-67, 569 A.2d at 619-20.

The court then addressed Eanes' contention that Section 121 was overboard because it had a chilling effect on the freedom of speech. *Id.* at 464, 569 A.2d

at 618 (citing *City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 796-98 (1984)). A statute should not be struck down for being overbroad, "unless there is a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Id.* at 465, 569 A.2d at 618 (quoting *Taxpayers for Vincent,* 466 U.S. at 801). Section 121 contains applicable enforcement standards, and does not reach beyond conduct which can be regulated consistent with the first amendment. The court concluded, therefore, that Section 121 was not overbroad. *Id.*

Judge Eldridge argued vehemently against state restrictions on the volume level of protected speech in his dissent. Judge Eldridge was of the opinion that *Diehl* stood for the proposition that the phrase "loud and unseemly" could only serve to limit speech which "presented a clear and present danger of violence, or [speech] not intended as communications but merely as a guise to disturb other persons." *Id.* at 470, 569 A.2d at 620 (Eldridge, J., dissenting). He found Section 121 unconstitutional as applied because the limitations on speech made the delivery of speech a crime. *Id.* at 473, 569 A.2d at 622 (Eldridge, J., dissenting). Judge Eldridge went on to note that "[a]nnoyance at ideas can be cloaked in annoyance at sound." *Id.* at 475, 569 A.2d at 623 (quoting *Saia v. New York,* 334 U.S. 558, 562 (1948)) (Eldridge, J., dissenting). He then criticized the majority which found that "[s]ound is one of the most intrusive means of communication," and pointed out that "sound, in the form of the spoken word, is the most basic thing protected by the First Amendment." *Id.* at 476, 569 A.2d at 624 (Eldridge, J., dissenting).

Judge Eldridge found the court's requirement of prior warning an illusory, ineffective protection as any time government authorities desire to suppress first amendment activity, they could easily find complainants to give prior warnings. *Id.* at 490, 569 A.2d at 630 (Eldridge, J., dissenting). He believed that Eanes' speech was within his constitutional guarantees and concluded his dissent expressing his fear for those persons who speak on controversial topics. *Id.* at 500, 569 A.2d at 635-36.

The Court of Appeals of Maryland "balanc[ed] one's right to express himself and other's right to be free from disruption." *Id.* at 467, 569 A.2d at 619. The Court concluded that Section 121 is content-neutral, narrowly tailored to serve a substantial governmental interest and leaves open ample alternative channels of communication. Eanes was given fair notice that the volume level of his speech would be subject to prosecution if it was not lowered. Therefore, the statute did not violate Eanes' right to free speech.

— Kimberly A. Doyle

Jones v. State: THE FOURTH AMENDMENT IS VIOLATED WHEN POLICE STOP A BICYCLIST WITHOUT REASONABLE ARTICULABLE SUSPICION

In *Jones v. State,* 319 Md. 279, 572 A.2d 169 (1990), the Court of Appeals of Maryland, held that a police stop of a bicyclist for investigatory purposes based on a hunch, without a reasonable articulable suspicion justifying the stop, violated the fourth amendment. The court reasoned that a seizure occurred when the officer commanded the bicyclist to stop, thus affording fourth amendment protection.

Carl Lee Jones was riding his bicycle at 3:20 a.m. carrying a grocery bag hanging from the handlebars and, apparently, drycleaning bags across his shoulders and travelled from the general direction of a drycleaning store. The area where Jones was riding had been the scene of several recent burglaries. Officer Brown spotted Jones and in language to the effect of "hey, could you come here," commanded him to stop. Once stopped, the officer noticed a bulge in Jones' jacket pocket that appeared to be a handgun. A pat down search yielded a .25 caliber pistol. A subsequent search of the grocery bag yielded various quantities of cocaine, marijuana, and other paraphernalia. Jones was arrested and charged with possession and intent to distribute cocaine, possession of marijuana, and unlawful wearing and transporting of a handgun.

Prior to trial, Jones made a motion to suppress the evidence on the ground that the search and seizure was illegal because of the illegal stop. *Jones,* 319 Md. at 280, 572 A.2d at 170. The trial court denied his motion based on its finding that the initial encounter was not a seizure. Jones was convicted. *Id.*

The court of special appeals affirmed the conviction, finding the initial encounter was a "mere accosting", and not a seizure under the fourth amendment. *Id.* at 282, 572 A.2d at 171. The court determined that the stop was a "mere accosting" because there was no show of force or weapons used to effectuate the stop; and, therefore, the trial court properly denied the motion to suppress. *Id.* The court of appeals granted certiorari.

The issue on appeal was whether the stop was a legal seizure under the fourth amendment. Jones argued that an illegal stop and seizure occurred when the police ordered the stop of his bicycle without reasonable articulable suspicion. *Id.* The state posited two competing arguments. Either there was no error by the trial judge and therefore, the stop was consensual rather than custodial in nature and was not a seizure. Alternatively, if the stop was a seizure, there was sufficient articulable suspicion to justify the stop. *Id.*

The court began its analysis by stating the general rule that a police stop is a seizure when a reasonable person would feel that his freedom to walk away was restrained. *Id.* at 282, (citing *Terry v. Ohio,* 392 U.S. 1 (1968)). Additionally, the court, in distinguishing a seizure from a "mere accosting" held that a seizure occurs when an individual to whom questions are posed does not feel free to disregard the questions and walk away. *Id.* at 283, 572 A.2d 171 (citing *U.S. v. Mendenhall,* 446 U.S. 544 (1980)). Adopting a totality of the circumstances approach to determine what constitutes a seizure, the court stated that one or all of the following factors may persuade a trial court that a seizure occurred: (1) threatening presence of several officers; (2) show or use of a weapon; (3) physical contact by the officer; or (4) authoritative tone or language by the officer indicating an order rather than a request. *Id.*

Applying the *Mendenhall* factors, the court noted in *Florida v. Royer,* 460 U.S. 491 (1983), that merely approaching an individual and asking questions constituted a voluntary stop and was not a seizure unless the person approached was detained. Rejecting the use of a bright line test, the court instead posited