REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 159

September Term, 1996

DWIGHT EVANS

v.

STATE OF MARYLAND

Murphy, C.J.
Moylan,
Sonner,

JJ.

Dissenting opinion by Sonner, J.

Filed: January 29, 1997

ANDREW L. SONNER
JUDGE
50 Maryland Avenue
Room #302
Rockville, Maryland 20850

January 27, 1997

Hon. Joseph F. Murphy, Jr.
Chief Judge
Hon. Charles E. Moylan, Jr.
Hon. William W. Wenner
Hon. Robert F. Fischer
Hon. Dale R. Cathell
Hon. Arrie W. Davis
Hon. Glenn T. Harrell, Jr.
Hon. Ellen L. Hollander
Hon. James P. Salmon
Hon. James R. Eyler
Hon. Raymond G. Thieme, Jr.

Re: Dwight Evans v. State
No. 159, Sept. Term, 1996
Argued 12/4/96

Dear Judges:

For consideration at tomorrow's conference, I am enclosing my proposed dissenting opinion in the above-captioned case, in which I have corrected some minor "nits."

Sincerely,

Andy

Enclosure

I respectfully dissent. I would affirm the conviction for reasons that I have listed below. I believe the majority has reached a wrong decision because it has defined arrest incorrectly and, consequently, has wrongly determined that the police search in this case was violative of the constitutional rules established for permissible searches incident to arrest. The court's opinion defines arrest to be not only the taking, seizing and the detention of another, but also the placing of formal charges. The majority then finds that the failure to charge after a detention makes the detention an illegal arrest. The incorrect definition will have the consequence of forcing the police, after each custodial search without a warrant, to institute prosecution, or else endure the probable suppression of evidence they have gathered incident to the custodial detention.

This case arises from the conviction of a street-level drug dealer who was identified by an undercover police strategy named "Operation Mid-East," which targeted the area surrounding Monument and Port Streets in Baltimore City. On June 9, 1994, Officer Kenneth Rowell of the Baltimore City Police was working undercover during the early evening hours by walking through the area and asking people whom he suspected of being street dealers if "they were working." The first person he asked refused his solicitation. When Rowell approached appellant Dwight Evans, he answered in the affirmative, so Rowell informed him that he wanted "dimes," the current street term for $10.00 worth of cocaine. He then purchased

cocaine from appellant with a marked $10.00 bill. Officer Rowell was wearing a secreted body mike when he made the purchase, which allowed other officers who were working in concert with him to overhear the transaction. After he made the purchase, he walked sufficiently far away from appellant so that he could not be heard talking to the other officers over his body mike, and gave them a description of Evans. He next returned to his car and broadcast a second description over his police radio and waited until he received confirmation that the other officers had detained someone. He then drove by the location of the other officers and broadcast back to them that they had stopped the same person who had sold him the cocaine.

Officer Timothy Chester, who was then detaining appellant, searched him and recovered $163.00 in cash, including the marked bill that Rowell had used to make his purchases. Chester failed to discover any drugs, so he contacted Rowell and learned that Evans had taken the vial he had sold him from his "rear area." Officer Chester, then apparently in an "alleyway", while two female officers turned their backs, put on a rubber glove and extracted nine vials, "one by one", from appellant's rectum.[1] The contents of the vials were later analyzed and found to be cocaine.

The police then photographed appellant. When his father, who

[1]Officer Valencia Norris Vaughn, one of the two female officers, testified that she "believed" that the search occurred in an alleyway. Appellant's cousin testified for the defense and said she was with appellant when the police arrived and that they "put his hands on the hood of the police car and they searched him . . . then they searched his rectal area."

had been called by the police, came to where they were holding him and verified appellant's identification, they released him. They did not choose to file charges against him at that time because an aspect of their strategy for the enforcement effort in that neighborhood was to make arrests as part of a "mass sweep" at a later time. This would avoid exposing the undercover officers' activity and improve their ability to continue to make purchases of illegal narcotics there. As a major part of the strategy, the police intended to accumulate 60 to 80 controlled undercover purchases over a one to three month period and then, working with the State's Attorney's Office, charge the identified dealers who then were to be arrested on a "hit day."

Appellant eventually was charged in the Circuit Court for Baltimore City. At a suppression hearing, and again at the trial, he alleged that the search violated his constitutional rights because it was not incident to a lawful arrest. In this appeal, he has devoted the major part of both his brief and the oral argument to allege that the search of his rectum was an offensive and unwarranted intrusion that compels the suppression of the nine vials of cocaine that the police seized during the detention. The police officer made the search during daylight hours, in a public alleyway or street, in the presence of two female police officers who, the trial testimony showed, "turned their backs" during the time that the male police officer donned a rubber glove and

extracted nine small vials from the appellant's rectum "one by one."

It is hard to imagine a more intrusive search or one that would encroach more offensively into an area in which the public has a greater expectation of privacy and protection from governmental probing. As one court has phrased it:

> Physical examinations of sexual organs and/or body cavities by non-medical personnel, however, are not routine to our everyday lives. In addition to being medically unsound, the forceful probing and examining of the vagina and anus by strangers attacks the very dignity, privacy and integrity upon which our Constitution is founded.

Guy v. McCaulley, 385 F.Supp. 193 (E.D. Wis. 1974).

It is disquieting, to say the least, to contemplate supervising police officials requiring subordinate personnel to enforce the controlled dangerous substance laws by carrying rubber gloves as standard equipment and to conduct examination of body cavities in order to gather evidence. To say more, it seems most intolerable to permit the unbridled discretion of officers on the street to decide when and under what circumstances they can don rubber gloves and require arrestees to disrobe sufficiently to permit them to penetrate and probe body cavities for evidence.

Neither the Court of Appeals nor this Court has considered the constitutionality of the police practice of searching body cavities of those whom they have probable cause to believe are in possession of contraband narcotics. Forty-five years ago, the Supreme Court

expressed outrage about, and was offended by, police officials who took a defendant under arrest to a hospital and employed a physician to force him to regurgitate capsules of morphine. The Court said:

> [T]his course of proceedings by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Rochin v. California, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952). It would seem that body cavity searches should be subject to the same constitutional limitations that the Supreme Court has set out in *Rochin* for the search of stomach content.

In the case of *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), the Supreme Court permitted the extracting of a blood sample from an arrestee, but in doing so, the Court clearly mandated that the relatively unintrusive and simple process of puncturing the skin to take a blood sample must be performed by trained medical personnel in a hospital setting. For certain, had the search in *Schmerber* been performed by a police officer on the street under conditions similar to those under which appellant submitted to a rectal search, the resulting decision would have been different. Justice Brennan, speaking for the Court, noted that, "[Schmerber's] blood was taken by a physician in a hospital . . . according to accepted medical practices." Justice Brennan also noted that

> [the court was] not presented with the serious question which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment--for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

Id. at 771. (Emphasis added.) Justice Brennan went further:

> The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the state's minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusion, or intrusions under other conditions.

Id. at 772.

Neither *Rochin* nor *Schmerber* stands for the proposition that every special search of every defendant under arrest needs to be performed in a hospital or medical setting, or that the police need to obtain approval of every personal search from a neutral and detached official. Indeed, the Supreme Court in *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), held that "a full search of the person" incident to a custodial arrest "is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." But one cannot read *Robinson* to hold that every search of the person incident to arrest is *per se* reasonable. Searches that are incident to valid arrests may offend the Fourth Amendment if they violate "the dictates of reason because of . . . their

manner of perpetration." *United States v. Edwards*, 415 U.S. 800, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974).

It would seem that a proper interpretation of our Fourth Amendment protections can draw a definite and clear line that does not require the police to seek court approval in gathering evidence when they do so as part of routine arrest procedures, such as the taking of fingerprints or the photographing of those under arrest, but would restrict police discretion for those searches that, because of their offensive or intimate nature, trespass into the sphere where citizens reasonably expect privacy. But wherever the line is drawn, it would not likely permit the kind of search that appellant was subjected to in this case. The intrusion was not minor, and the conditions were not stringently limited. It coarsens our lives and diminishes the collective privacy of all citizens for the government, in the enforcement of its drug laws, to permit the police, when they have reason to believe that evidence is secreted in a body cavity, to then decide in a public place to enter that body cavity and probe around for drugs.

The majority opinion correctly points out that the only evidence of the offensive nature came out during the trial on the merits and not during the motion to suppress. And when that evidence did come out, appellant did not move, as he could have, to reopen the suppression hearing and reconsider the denial of the motion. The State argues, and the majority agrees, that this means

that appellant failed to preserve the issue. If appellant, either by way of argument or evidence, did not permit the court below to consider whether the evidence resulting from the search should have been suppressed on the ground that it was unreasonably intrusive, then it cannot raise the issue for the first time on appeal. *Trusty v. State,* 308 Md. 658, 521 A.2d 749 (1987); *Riddick v. State,* 319 Md. 180, 571 A.2d 1239 (1990).

I must reluctantly agree. The facts that we should have to evaluate the reasonableness of the search do not appear to be in dispute. Nevertheless, the State should always be afforded the opportunity to offer evidence in the circuit court of the necessity and the reasonableness of the search and to argue to that court why the law permitted the police practice. Except in rare instances, we should not reverse a decision on a ground that the trial judge was not afforded the opportunity to rule upon.

Based on the record we have before us, and after hearing the arguments on appeal, had the issue been properly preserved, I would reverse and remand. At a new trial, the State could still introduce the strong evidence that was not acquired as a result of the rectal search, which would include the seized marked $10.00 bill, the testimony of Officer Rowell, the purchased vial of cocaine, as well as the testimony of those officers who overheard his transaction broadcast over the body mike.

The majority, however, finds that the entire search is

unreasonable and violative of the constitutional rights of appellant on other grounds, namely, that the search was not incident to an arrest and that, therefore, it does not qualify as an exception to the warrant requirement. It is upon that issue I must disagree.

I believe that the majority has gone astray by expanding the application of the Fourth Amendment's exclusionary rule in a manner that does not provide protections from unwarranted government interference in citizens' daily lives. It paradoxically reduces police discretion in a manner that will subject some defendants to more harsh treatment in the criminal justice process and, at the same time, condemn police searches in cases in which the police have done no wrong.

The majority decision disapproves of the taking of the appellant into custody and then not subjecting him immediately to what, in some jurisdictions, is referred to as "booking," the process by which arrested persons are formally charged. Under Maryland procedure, it would mean that the arresting officers in this case would have had to go before a district court commissioner to begin the charging process. Rule 4-212(f) of the Maryland Rules provides, "When a defendant is arrested without a warrant, the defendant shall be taken before a judicial officer of the district court without unnecessary delay and in no event later than 24 hours after arrest." Rule 4-213(a) then provides for what is to occur at

the appearance and is titled "In District Court Following Arrest." The section reads, "When a defendant appears before a judicial officer of the district court pursuant to an arrest, the judicial officer shall proceed as follows . . . ." (Emphasis supplied.) The rule goes on to explain the procedure for advising the defendant of the charges and rights, as well as the processing of the initial paper work and determination of bond or pretrial release. What is obvious from the rules is that our Maryland procedure envisions arrest as independent and distinct from charging. To define “arrest” as the majority does, so as to include the placing of charges, confounds the term by confusing it with "prosecution."

The Fourth Amendment does not seek to regulate searches incident to prosecution, but those that are incident to arrest. No one can seriously contend that appellant was not "arrested" by the police when he was stopped and detained and then subjected to two searches--one in which the police recovered money, and then the later search in which they recovered the nine vials of cocaine. The constitutional protections should apply, and in my opinion do apply, to the police activity in detaining in custody those whom they wish or need to search with or without a warrant. Our appellate analysis and decision here should be confined to a determination of whether, at the time of the police restriction of Evans's liberty, the police had the necessary probable cause to permit them to arrest and to make a reasonable search, or whether

the search was justified by some other exception to the warrant requirement.

I believe that there can be no sound argument that the police participating in Operation Mid-East did not have probable cause to arrest appellant. Indeed, the appellant's brief and oral argument conceded that the police were detaining appellant with probable cause. The majority, however, here contends that the police lost their power to search when, after taking appellant into custody, they thereafter failed to take the additional step of placing formal charges against him. The majority takes the position that, to constitute an "arrest," the police are required to go further than just taking someone into custody. The majority concludes that since any seizure resulting from the police activity--whatever it is to be called--does not result from a valid arrest, the seized goods must be considered to have been taken from the defendant in violation of the Fourth Amendment.

In support of such an interpretation, the majority opinion cites two United States Supreme Court cases, *Gustafson v. Florida*, 414 U.S. 260, 265-66, 94 S. Ct. 488, 38 L. Ed. 2d 456 (1973) and *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973). I read those cases differently. Both consider whether the defendant was in custody and whether the police had, in fact, made an arrest. They clearly do not define arrest as including a police charging procedure. Instead, they simply hold

that the police activity in those cases constituted arrests, nothing more. The same can be said for *Bouldin v. State*, 276 Md. 511, 350 A.2d 130 (1976), cited by the majority, in which Chief Judge Murphy, writing for the Court, defined arrest as follows:

> the taking, seizing, or detaining of the person of another (1) by touching or putting hands on him; (2) or by any act that indicates an intent to take them into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person arrested.

Id. at 515-16. That seems to me to be just what we have here. Nowhere in *Bouldin* does the Court indicate that an arrest requires that the police, who have taken the person in custody, continue on to the charging procedure or suffer the consequence that what they have done will not be defined as an arrest for application of the laws controlling search and seizure.

The majority also cites Cornish v. State, 215 Md. 64, 137 A.2d 170 (1957), in which Judge Hammond, in defining arrest, noted that the detention must be accompanied by an intent to prosecute the person detained for crime. That does not appear to bolster the definition of arrest that the majority proposes here. The short answer to *Cornish* is that all of the evidence clearly indicated that the police intended to prosecute all of those arrested as a result of Operation Mid-East; indeed, there would be no case before the Court today if that had not been their intention with regard to appellant. *Cornish* clearly does not hold that the police may not

free the defendant and formally charge him later.

The majority cites another Maryland case, *McChan v. State*, 238 Md. 149, 207 A.2d 632 (1965), for the principle that the arrests that result in seizures must be "formal." I read the case as requiring that there be an intent to arrest and, again, that the purpose of the arrest be for criminal prosecution. Nowhere in *McChan* is there the mention of formal charging as an element of arrest, or a statement that detention without an immediate charge runs afoul of the Fourth Amendment protections.

In the case of *People v. Evans*, 371 N.E.2d 528 (1977), the Court of Appeals of New York labeled a search illegal when it resulted from an arrest by the police that did not lead to formal charging. The case is remarkably similar to the case we have decided today or, as the majority has put, it is "on all fours." The defendant even has the same last name. But being on all fours does not necessarily mean that it is well reasoned or reflect intelligent public policy.

Requiring the police to charge every person they detain and search forwards no valid public interest, much less any of the values that the Fourth Amendment's exclusionary rule is meant to protect. The violations of privacy or detention and search will have already occurred. Intrusions had occurred in both the Maryland and New York *Evans* cases. The Fourth Amendment protection against illegal searches and seizures and the privacy interest that

the exclusionary rule is believed by some to protect will not, in any way, be serviced by attaching a further requirement that the police lodge a formal charge after they have searched.

One of the justifications for the exclusionary rule is the belief that "blundering constables"[2] will be deterred from illegal arrests if they are deprived of the opportunity to offer evidence from illegal arrests. How will the police be deterred by the rule we fashion here today? We are saying to the police that legal detentions, not accompanied by a formal charge, will result in the suppression of evidence. We incorrectly hold that the valid arrests based on sufficient probable cause will also have to subject defendants to the bail process, require them to obtain counsel, and possibly to experience all the other impositions on accused persons that are well known to accompany the criminal process.[3] This additional requirement for the police can hardly be one that will be welcomed by those who have occasion to be stopped by the police or, indeed, be welcomed by citizens in general, many

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[2]Justice Benjamin Cardozo said, while on the Court of Appeals of New York, in a decision that refused to apply the exclusionary rule to illegal searches in state prosecutions, "There has been no blinking the consequences. The criminal is to go free because the constable has blundered." *People v. Defore*, 242 NY 13, 21, 150 N.E. 585, 587 (1926).

[3]In *Klopfer v. State*, 386 U.S. 219, 222, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967), the Supreme Court explained just how charging itself, even without a conviction, can deprive those accused of fundamental rights. Pending charges may subject a defendant to "public scorn and deprive him of employment, and almost certainly will deprive him of his speech, associations, and participation in unpopular causes," and will also subject a defendant to the "anxiety and concern accompanying public accusation." *United States v. Ewell*, 383 U.S. 116, 12, 86 S. Ct. 773, 776, 15 L. Ed. 2d 627 (1966). In *Gerstein v. Pugh*, 420 U.S. 103, 115, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975), the Court pointed out that arrest resulting in formal charges may lead to pretrial confinement interrupting one's source of income and that even "pretrial release may be accompanied by burdensome conditions that affect liberty."

of whom value being subjected to as little government interference as possible.

Nor does the requirement improve justice by restricting police discretion and the authority that they ordinarily exercise to choose not to charge immediately, or possibly not to charge at all. There are numerous and varied reasons why the police may choose to set arrested defendants free rather than "book" them. One, of course, is the strategy here that the police employed in the operation designed to rid the neighborhood around Monument and Port Streets of the scourge of street drug dealing. Certainly, even if one is opposed to the mass arrest approach and the public attention that will accompany a "hit day," any opposition to such a strategy does not rise to the level of a constitutional or Fourth Amendment violation, at least on any of the facts presented through this appeal.

A second reason for not immediately charging could be to entice a possible informant to lead to higher up participants in the drug distribution network, a long-standing and common police practice. And a third might simply be mercy or, perhaps stated more accurately, the common sense appreciation of the recognized limits of the courts and the criminal justice process to solve the social problems that lead to police involvement. Experience has shown that often the extreme remedy of formal prosecution may exacerbate rather than relieve problems. The criminal justice

system, in the last two or three decades, has generated a number of programs for the police and prosecutors to divert defendants from the formal and adversarial process and into community service and treatment. The rule we announce today augers against that well-accepted practice.

A fourth reason not to charge might be for the law enforcement officer who is not completely sure whether the person whom he has taken into custody has violated a law. Or the police officer may not be sure just exactly what the charge should be and may wish to consult with superiors or with the State's Attorney's Office. It would be far better to establish a rule that encourages consultation rather than establish one that punishes conscientious police for their desire to do what is proper, as well as lawful.

I believe that the police deferring the formal charging in this case was proper, as well as lawful and, therefore, I believe that the decision of the court below should have been upheld.