10-1978

Michigan v. DeFillippo

Lewis F. Powell Jr.

C.F.R. ? Grant

Grant (Writ)

Detroit Code (p2) authorizes an officer to make a Terry type stop where there is "reasonable cause to believe the behavior of the individual warrants investigation for criminal conduct," & authorizes officer - if person stopped refuses to identify himself - to take him to police station for identification.

no independent state grounds

Resp. was stopped (reasonable cause existed - see p 2) & was ambiguous as to his identity. As it was unlawful under the Code not to identify himself, Resp was arrested & searched (incident to arrest). Contraband was found. Mich S/Ct held Code section void for vagueness, & applied exclusionary rule to exclude fruit of the search.

PRELIMINARY MEMORANDUM

Summer List 7, Sheet 3

No. 77-1680 Cert to Michigan Ct Appeals (T. N. Burns, R. S. Burns, Brown)

MICHIGAN In my view, it was error to apply exclusionary rule. See my op. Byrum v. Ill

v. Police acted pursuant to City ordinance

DeFILLIPPO State/Criminal Timely & Unanimity

1. SUMMARY: The petr, prosecuting attorney for Wayne County, Mich., frames the issues presented by this case as (1) Whether an arrest made in good faith reliance on an ordinance that has not been declared unconstitutional is a valid arrest even though the ordinance is subsequently declared unconstitutional, and (2) If not, whether an ordinance which makes it unlawful for one validly stopped pursuant to Terry v. Ohio, 392 U.S. 1 (1968), to refuse or be unable to provide verifiable proof of his identity is

CFR. This is a possible grant.

I recommend granting the writ. Consider on Response or Conf.

Sam

unconstitutionally vague and also a violation of the 4th Amendment probable cause standard.

2. FACTS: Two Detroit police officers received a radio call to investigate two allegedly drunken persons in an alley. Upon arrival at the alley, the officers found respondent and a female, who had her pants down. She was intoxicated and was arrested for disorderly conduct. Defendant did not appear to be intoxicated, but when asked for his identification, he replied that he was Sgt. Mash, a Detroit police officer. When asked for his badge number, defendant replied that he was working for Sgt. Mash. Defendant was then arrested under a Detroit city ordinance making it unlawful for any person to refuse to identify himself when stopped by a police officer who has reasonable cause to believe that the behavior of the individual warrants further investigation for criminal activity.[1/] An immediate search of defendant turned up some marijuana, and phencyclidene was found later at the station in a pack of defendant's cigarettes.

Defendant was charged with possession of phencyclidene, and prior to trial he moved to suppress evidence obtained in the

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1/ Detroit City Code § 39-1-52.3 reads as follows:

> "When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this Section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity, the police may transport him to the nearest precinct in order to ascertain his identity."

search. The motion was denied, and the Michigan Ct of Appeals granted an interlocutory appeal. Petr argued that the Michigan court should not reach the issue of the ordinance's constitutionality because the police officer's good faith reliance on the ordinance, even if unconstitutional, should preclude application of the exclusionary rule. The Michigan court rejected this argument, reasoning that "if the ordinance is void for vagueness, subject to arbitrary and discriminatory application, and used as a pretext for unlawful search and seizure, suppression of evidence obtained pursuant to a search incident to arrest thereon will deter unlawful police conduct, and the exclusionary rule should therefore apply." (Petn. at 13) The court went to hold the ordinance unconstitutional because (1) it fails to give a person fair notice that his contemplated conduct is forbidden, (2) it makes criminal conduct which is innocent, (3) it undercuts the probable cause standard of the 4th Amendment by sanctioning full searches on suspicion. Finally, the court held that since the ordinance is void, the search incident to the arrest was unlawful and the evidence should have been suppressed.

3. CONTENTIONS:

Re Exclusionary Rule: There is a definite split in the circuits. The fifth circuit has consistently held that an arrest made pursuant to a statute subsequently held unconstitutional is not automatically rendered illegal absent some showing that police officials lacked a good faith belief in the validity of the statute. The fifth circuit reasons that no legitimate interest would be served by excluding evidence obtained as a result of an arrest made pursuant

to an ordinance subsequently invalidated. See United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971); United States v. Carden, 429 F.2d 443 (5th Cir. 1976), cert. denied, 429 U.S. 848 (1977). In contrast, the ninth circuit holds that such arrests are illegal and that evidence obtained through such arrests should be suppressed. The ninth circuit recognizes that exclusion of such evidence would serve no deterrent purpose with regard to officers who enforce the subsequently invalidated statutes in good faith, but reasons that exclusion of the evidence would deter legislators from enacting unconstitutional statutes. See Powell v. Stone, 507 F.2d 93, 98 (9th Cir. 1974), reversed on other grounds, 428 U.S. 465 (1976).

LA9

It is interesting to note that in Powell v. Stone, cert was granted on the issue presented here, but was not decided because of the court's conclusion on the habeas corpus issue. Moreover, the court denied cert in the fifth circuit cases (Carden and Kilgen) upholding the arrests.

Finally, the ninth circuit's rationale regarding the deterrent effect of the exclusionary rule upon legislatures was severely undercut by United States v. Janis, 428 U.S. 433 (1976), in which the court stated that "the prime purpose of the [exclusionary] rule, if not the sole one, is to deter future unlawful police conduct."

Re Constitutionality of the Ordinance: On this issue petr relies on a California case, People v. Weger, 251 Cal. 2d 584 (1967), which rejected a void for vagueness challenge to the identification portion of a similar ordinance. Petr also contends

that the Michigan court erred in stating that the ordinance allows "full searches on suspicion." According to petr, the ordinance allows a Terry v. Ohio/ stop, and makes/it a crime to refuse to identify oneself after a valid stop; the search is incident to the refusal to identify, not the stop. Good point

4. DISCUSSION: The question whether the exclusionary rule applies to evidence obtained as a result of an arrest made in good faith pursuant to a statute subsequently held unconstitutional definitely seems certworthy. Petr correctly identifies a split in the circuits on this issue. This Court has denied cert in fifth circuit cases holding the exclusionary rule not applicable in similar circumstances, but granted cert in a case, Stone v. Powell, in which the exclusionary rule was held to apply (although the issue was not reached). This case presents a better vehicle for consideration of the issue than did Stone v. Powell, because it arises in the context of a direct appeal, as opposed to collateral attack, of the conviction. Further, the disenchantment with the exclusionary rule revealed in this Court's recent decisions strongly suggests that the Michigan court erred and that the fifth circuit's reasoning will ultimately prevail over that of the ninth. The ninth's circuit theory that the criminal must go free because the constable or the lawmaker blundered/has is an expansion of the exclusionary rule which is not likely to be well received by this Court. Finally, two members of this Court have previously expressed the view that the exclusionary rule should not apply when "officers in good faith arrest an individual . . . pursuant to a statute that subsequently is declared

unconstitutional . . . ." Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell and Rehnquist, J.J., concurring), citing United States v. Kilgen, 445 F.2d 287 (5th Cir. 1971). As Justice Powell noted:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right."
>
> In cases in which this underlying premise is lacking, the deterrent rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence. Id. at 612.

There is no response. Grant.

7/14/78 Cooper Op in petn
sl

September 25, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ..... 19...
Assigned ..... 19...
Announced ....., 19...

No. 77-1680

MICHIGAN

vs.

DEFILLIPPO

Also motion of resp for leave to proceed ifp.

C. J.: Would not extend E/R to defer expiration

Granted

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	MERITS AFF	MOTION J	ABSENT	NOT VOTING
Burger, Ch. J.		✓								
Brennan, J.		✓	✓							
Stewart, J.		✓								
White, J.		✓								
Marshall, J.			✓							
Blackmun, J.		✓								
Powell, J.		✓								
Rehnquist, J.		✓								
Stevens, J.			✓							

PBS-2/20/79

Reversed.

Brown v Texas (appeal) - We need not reach Const. Q because the State failed to prove an element of the offense: that the stop was "lawful". I'd reverse in a brief P.C. There was insufficient ev. to convict.

Nich v DeFillippo (Detroit Ordinance) - Case involved man & woman (pants down) in alley. Police had probable cause to stop & "pat down" (Terry). This resulted in discovering marijuana, & then arrest was valid. We could Reverse on this ground.

If we reach the validity of Ordinance, I agree with Paul that there is a Fifth Amend. violation in making it a crime not to identify one self when stopped or arrested by a policeman. I would not, however, apply Exclusionary Rule where officer acted pursuant to a presumptively valid ordinance. There was no criminal ordinance; I understand that any stop was merely under one.

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: Paul

RE: Michigan v. DeFillippo, No. 77-1680; Brown v. Texas, No. 77-6673

DATE: February 20, 1979

These cases both involve a statute that punishes as a misdemeanor a refusal to identify oneself to a police officer, after a proper stop. DeFillippo also involves the issue whether evidence should be suppressed when seized pursuant to an arrest for violating a statute subsequently determined to be unconstitutional. Each case, however, presents an extraneous issue. In Brown, the evidence is clear that the initial stop was improper; it is less clear whether Brown properly raised or

preserved this point. In DeFillippo, the police had probable cause to pat down DeFillippo, regardless of whether he was under arrest or not. The pat down turned up the marijuana, which provided independent grounds for the arrest. Thus it is unclear whether the arrest for refusing to identify himself adds or subtracts anythings from the legality of the search. I first will deal briefly with these extraneous issues, and then address the questions that prompted the Court to grant cert.

Brown: Was Appellant "Lawfully Stopped"? No

As you indicated in your memorandum to me, the evidence established that the police had no grounds for stopping Brown to make their inquiries. This fact leads to two conclusions: (1) The stop violated the Fourth Amendment, and all evidence of what took place afterwards should have been suppressed; and (2) There was no evidence to support the element of the offense that a suspect be "lawfully stopped".

Unfortunately for appellant, he did not raise any Fourth Amendment claim at trial, and, as the State points out, he cannot assert such a claim now. This does not foreclose him, however, from asserting a "no evidence" claim under Thompson v. Louisville, 362 U.S. 199 (1960), which held that "it [is] a violation of due process to convict and punish a man without evidence of his guilt." Here the State failed to prove an element of the offense, namely that appellant was lawfully stopped. Appellant moved for acquittal on the basis of insufficient evidence at the close of the trial. If the Court were inclined to base its decision on a narrow ground, it could

reverse on this basis. As this is an appeal, I think a disposition on the merits one way or the other is necessary.

DeFillippo: The Relevance of the Arrest

Although the record is not completely unambiguous, it appears that the following sequence of events occurred: The police encountered DeFillippo and his friend in the alley under circumstances giving rise to reasonable suspicion. When DeFillippo was asked to identify himself, he claimed he was a police officer. The police asked him to prove it, and DeFillippo changed his story and admitted he had no identification. The police patted him down and discovered marijuana. They then took his cigarette pack and found tin foil inside. They handcuffed DeFillippo (and his charming companion), took them down to the station, and turned up the drug in the tin foil.

At the time of the pat down, the police believed DeFillippo was under arrest for failing to identify himself. But as the above facts indicate, at that time the police had probable cause under Terry v. Ohio to perform a pat down. Further, if the pat down was proper then the marijuana was in plain view, as the officer could feel the stems and leaves through the shirt and recognized it as contraband. Once the marijuana was retrieved, the police had probable cause to arrest DeFillippo and make the subsequent search that turned up the drug for possession of which he has been charged.

Last Term the Court said:

> "Although we have not examined this exact question at great length in any of our prior opinions, almost without exception in evaluating alleged

> violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him. The language of the Amendment itself proscribes only 'unreasonable' searches and seizures. In Terry v. Ohio, 392 U.S. 1, 21-22 (1968), the Court emphasized the objective aspect of the term 'reasonable.' . . .
>
> "We have since held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's actions does not invalidate the action taken as long as the circumstances, viewed objectively, justify the action. . . ." Scott v. United States, 436 U.S. 128, 137-138 (1978).

Applying this principle to the facts of this case, it would appear that the circumstances leading up to the pat down justified the action, even though subjectively the officers believed DePillippo was under arrest at that time. Accordingly, the Court could, if it wished, reverse the decision of the court below on the narrow ground that the search was proper regardless of the validity of the ordinance for violation of which DePillippo initially was arrested.

Constitutionality of the Michigan and Texas Ordinances

Although the Court need not reach the question, the nationwide prevalence of ordinances such as those at issue here cuts in favor of addressing their constitutionality. I think the vagueness argument is not well taken, as both the Detroit and Texas ordinances are sufficiently objective and precise to prevent the kinds of abuses with which Papachristou was concerned. The Fifth Amendment argument seems more substantial, however,

The strongest authority for the validity of these

ordinances is California v. Byers, 402 U.S. 424 (1971). That decision upheld against a Fifth Amendment claim a statute which required participants in an automobile accident to report their names and addresses to the authorities. For the reasons expressed by Mr. Justice Harlan in his long and careful concurring opinion, I think Byers should be limited to the context of motor vehicle regulation. I agree with Mr. Justice Harlan that the identification compelled is both testimonial and, in many situations, inculpatory. The great degree of government regulation justifies the compulsion with respect to motor vehicles (or income tax reporting). Extending such compulsion to anyone who is on the streets (although concededly in circumstances sufficiently suspicious to warrant a stop) would overleap the rationale of the Byers decision and conflict with Miranda. I would prefer to see the line drawn where Justice White seemed to draw it in his concurring opinion in Terry: the police properly may ask such questions, but a suspect cannot be compelled to answer.

Statutes such as the Model Penal Code's vagrancy statute can be distinguished. Under MPC § 250.6, failure to identify oneself is a factor, along with others, that may justify an arrest for loitering. This permits the police to take proper account of the suspicious circumstance but does not allow a prosecution solely for a refusal to testify. Perhaps even a better balance is struck by Uniform Arrest Act § 2, which regards a failure to identify as a ground for continued interrogation and detention but not for an arrest or prosecution.

Application of a Good Faith Exception to the Exclusionary Rule

It is not necessary to reach this issue in either of these cases. Brown's conviction can be reversed on the ground of a failure to prove a lawful stop; the Court can reach the issue of the ordinance's constitutionality in DeFillippo and still reverse the court below on the ground that the search was reasonable regardless of the arrest. Under Scott, if a search was objectively reasonable, the presence or absence of the officers' good faith is irrelevant. Hence the fact that the officers appeared to have acted in good faith here need not be addressed.

As I have indicated to you earlier in various conversations, I have doubts about the good faith exception referred to in Peltier and discussed by Justice White in Stone v. Powell. First, adoption of such a standard would entail overruling or limiting Almeida-Sanchez, Brignoni-Ponce, Mincey v. Arizona, Franks v. Delaware, Coolidge v. New Hampshire, and other cases where this Court recognized that evidence could be suppressed in spite of reliance by police officers on legislatively- or judicially-approved procedures. Second, I believe the purposes of the exclusionary rule are not directly only to police behavior. The prohibition of unreasonable searches and seizures applies as well to those searches that a legislature or other higher authority has licensed, and the exclusionary rule has a role to play in deterring legislatures from enacting unconstitutional statutes or ordinances. There certainly will be

statutes so blatantly overbroad that reliance on them will not constitute good faith. I would prefer to avoid the inquiry into the legislature's motives in licensing particular conduct, and apply the exclusionary rule to all those cases where the Fourth Amendment claim is properly presented (allowing, of course, for nonretroactivity and limitations on collateral relief).

FEB 21, 1979

Boffman
Baughman (for Nick)

Woman was arrested for "disorderly conduct". Reason was arrested for refusing to identify him

This is not a prosecution under the identification ordinance. It is a derivative prosecution. (Baughman says he knows of no prosecution under this ordinance).

There was no 4th Amend violation.

There clearly were grounds for a stop.

Search of person was incident to arrest for refusing to identify

@ Responding to my Q, counsel saw no 5th amend problem with ordinance. Giving name is not testimonial. Is like finger printing or other examples (blood, hand-writing).

An ordinance making it a crime not to give one name upon request - & nothing more - would violate 5th Amend. Ordinance here authorizes this only in connection with investigation of criminal conduct.

Rest was a warning to woman's conduct

Howard (Resp - appl'ed by us)

Not a Terry stop.

Cross-exam of officer makes clear that arrest was made only because he thought Rose had violated the identification statute.

Byrne notes that Mich Ct found or assumed that there was reasonable grounds to stop & probable cause to arrest, & went on to rule validity of ordinance. Now, Byrne observed, Resp's argument denying existence of cause, cannot be considered by us.

~~Per Curiam~~

Stewart, J. asked a pertinent Q as to whether E/Rule applies to this case. Counsel relies on Almeda Sanchez & other cases, saying we must overrule them case of my Brown v Ill was adopted. P.S. noted that fed statute authorized stop without warrant & then statute violated & speaks pwr of Const.

Howarth (Cont)

P. S. noted that ~~Commonwealth~~ doesn't apply to 4th amend cases

Reverse 6-3

77-1680 Michigan v. DeFillippo Conf. 2/23/79

The Chief Justice Reverse

Police had probable cause for arrest independent of Ordinance - the conduct in alley, the apparent impersonation of officer.

No 5th Amend issue. Person may refuse to give name & the only consequence is arrest. Here the prosecution was not for refusal to give name. See Notes in Book.

Mr. Justice Brennan Affirm

See Bill's letter of 2/23

(Bill did not hear argument because of snow)

Bill voted by Letter

Mr. Justice Stewart Reverse

Const. validity of ordinance is not at issue.

An arrest made in reliance on a presumptively valid ordinance is a valid arrest. Thus, the evi. should not have been excluded.

This is different from Edwards/Sanders.

Would not rely on "good-faith" analysis (e.g. my Brown v Ill.) - but we don't need that issue here.

(9th Ord. high and no warrant necessary

Mr. Justice White Reverse

Agree with P.S. — but would go all way as he did in his dissent in Stone

But don't need to go beyond P.S.'s basis.

Mr. Justice Marshall Affirm

Agree with W & B

(Missed argument because of snow)

Mr. Justice Blackmun Reverse

Would accept the "good faith" analysis, but agree with P.S

Mr. Justice Powell Reverse

I agree with P.S.'s resolution of this case.

Mr. Justice Rehnquist Reverse

Agree with P.S.

Mr. Justice Stevens Affirm

Agree with W & B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 5, 1979

Re: No. 77-1680, Michigan v. DeFillippo

Dear Chief,

I note that you will be writing the opinion for the Court in this case. Because I think there may have been some confusion in our Conference discussion, I write this note to you now in order to avoid later misunderstanding of my views.

A majority at the Conference voted to reverse the judgment in this case, but two quite different rationales for doing so were discussed. One was that there should be a "good faith" exception to the exclusionary rule. The other was that when a policeman makes an arrest upon probable cause to believe the arrestee has violated or is violating a validly enacted substantive criminal law, he has not violated the Fourth and Fourteenth Amendments, even though the law in question is later held to be constitutionally invalid. I would base reversal of the judgment entirely on the second of these rationales, and could not join an opinion that relied, even in part, upon the first of them. My understanding is that this is the view that ultimately prevailed, but, in any event, I wanted to clarify my own thoughts now.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

March 6, 1979

77-1680 Michigan v. DePillippo

Dear Chief:

This refers to Potter's letter to you of March 5.

My understanding was that there were five votes to reverse the judgment on the ground Potter specified: that the Fourth and Fourteenth Amendments are not violated when an officer makes an arrest upon probable cause to believe the arrestee has violated or is violating a presumptively valid substantive criminal law.

A decision on this ground would make it unnecessary to address the broader ground (that has had a good deal of appeal for me) that the exclusionary rule should not be applied when it is perfectly clear that the officer has acted in good faith and strictly in accord with what he reasonably believed was required in the performance of his duty.

Sincerely,

The Chief Justice

lfp/ss

PBS-4/30/79

Paul - Let's discuss. I'm particularly committed to the "good faith" qualification of the exclusionary rule which we rule I'll apply consistently with its purpose to deter misconduct by police.

MEMORANDUM TO: Mr. Justice Powell

FROM: Paul

RE: Michigan v. DeFillippo, No. 77-1680

DATE: May 30, 1979

But your second point interests me (p 2). Will you do a ¶ or two?

I do not mean to be hypercritical of the Chief, but I do believe there are some problems with his opinion. I think his efforts to distinguish Torres, Almeida-Sanchez, Sibron, and Berger are unpersuasive. Furthermore, I have substantial reservations about the good faith doctrine. First, it invites dangerously ambiguous situations by inviting legislatures to test how far they can go in enacting criminal statutes which, although unconstitutional, will permit valid arrests. Second, it eliminates what I perceive to be an important prudential constraint on judges who must pass on the constitutionality of these statutes. It seems reasonable to assume that courts, including this one, will be more likely to strike down criminal statutes such as vagrancy ordinances to the extent that the subsequent seaches will not be compromised. In short, I do not think the good faith rules applicable to damages suits under Pierson v. Ray should be imported into suppression proceedings.

But arguments as to duty of police are persuasive.

As I indicated in my bench memorandum, an opinion can be written in this case that avoids this entire issue. It would uphold the initial pat-down under Terry v. Ohio, find that the

marijuana was turned up in this perfectly legitimate search, and uphold the arrest on the basis of possession of marijuana. If you took this approach, you could concur in the judgment but not the opinion of the Court.

If you remain unpersuaded by my criticism of the good faith analysis, I still think there are problems with the Chief's opinion. He concedes, as I think he must, that some statutes are so blatantly unconstitutional that an arrest pursuant to them cannot be deemed in good faith. I think he brushes over too lightly the problems posed by this particular statute. Every cop on the beat is supposed to know that Miranda allows a suspect arrested on probable cause to remain silent. Yet this ordinance required exactly those persons protected by Miranda to respond to questioning. I suppose that in light of the Court opinion in Byers, an officer still might have a good faith belief that this statute is constitutional. But it seems important to me to flag the issue, and to indicate some allegiance to Justice Harlan's position in Byers (namely that compulsory identification statutes, although not per se unconstitutional, must be justified by a very substantial state interest).

What I propose, in short, would be an opinion concurring in the Court's opinion that elaborates briefly on the question of this statute's constitutionality. You need not commit yourself on this question, but you would be doing everyone a great service if you could somehow indicate that the

issue is substantial and that the result is not foreordained by Byers. Some day the Court is going to have to confront this question, and advance warning can be useful.

I still would prefer you choose the first alternative I have sketched above, but I hope you will consider taking at least one or the other.

Join
BRW
P.S
WHR

Dissent
WJB in an Fur.

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 29 1979

Recirculated: _____

Renewed
LFP
5/30
6/2
Join

First Draft

No. 77-1680, MICHIGAN v. DeFILLIPPO

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by this case is whether an arrest made in good faith reliance on an ordinance, which at the time had not been declared unconstitutional, is valid regardless of a subsequent judicial determination of its unconstitutionality.

(1)

At approximatately 10:00 P.M. on September 14, 1976, Detroit police officers on duty in a patrol car received a

radio call to investigate two persons reportedly appearing to be intoxicated in an alley. When they arrived at the alley, they found respondent and a young woman. The woman was in the process of lowering her slacks. One of the officers asked what they were doing, and the woman replied that she was about to relieve herself. The officer then asked respondent for identification; respondent asserted that he was Sergeant Mash, of the Detroit Police Department; he also purported to give his badge number, but the officer was unable to hear it. When respondent again was asked for identification, he changed his answer and said either that he worked for or that he knew Sergeant Mash. Respondent did not appear to be intoxicated.

Section 39-1-52.3 of the Code of the City of Detroit provides that a police officer may stop and question an individual if he has reasonable cause to believe that the individual's behavior warrants further investigation for criminal activity. In 1976 the Detroit Common Council amended § 39-1-52.3 to provide that it should be unlawful for any person stopped pursuant thereto to refuse to identify himself and produce evidence of his identity.[1/]

When he failed to identify himself, respondent was taken into custody for violation of § 39-1-52.3[2/]; he was searched by one of the officers who found a package of mar-

ijuana in one of respondent's shirt pockets, and a tinfoil packet secreted inside a cigarette package in the other. The tinfoil packet subsequently was opened at the station; an analysis established that it contained phencyclidine, another controlled substance.

Respondent was charged with possession of the controlled substance phencyclidine. At the preliminary examination, he moved to suppress the evidence obtained in the search following the arrest; the trial court denied the motion. The Michigan Court of Appeals allowed an interlocutory appeal and reversed. It held that the Detroit ordinance, § 39-1-52.3, was unconstitutionally vague and concluded that since respondent had been arrested pursuant to that ordinance, both the arrest and the search were invalid.

The court expressly rejected the contention that an arrest made in good faith reliance on a presumptively valid ordinance is valid regardless of whether the ordinance subsequently is declared unconstitutional. Accordingly, the Michigan Court of Appeals remanded with instructions to suppress the evidence and quash the information. People v. DeFillippo, 80 Mich. App. 197, 262 N.W.2d 921 (1977).

The Michigan Supreme Court denied leave to appeal. We granted certiorari, ___ U.S. ___ (1978), to review the

Michigan court's holding that evidence should be suppressed on federal constitutional grounds, although it was obtained as a result of an arrest pursuant to a presumptively valid ordinance. That holding was contrary to the holdings of the United States Court of Appeals for the Fifth Circuit that such arrests are valid. See United States v. Carden, 529 F.2d 443 (CA 5 1976); United States v. Kilgen, 445 F.2d 287 (CA 5 1971).

(2)

Respondent was not charged with or tried for violation of the Detroit ordinance. The State contends that because of the violation of the ordinance, i.e., refusal to identify himself, which respondent committed in the presence of the officers, respondent was subject to a valid arrest. The search that followed being incidental to that arrest, the State argues that it was equally valid and the drugs found should not have been suppressed. Respondent contends that since the ordinance which he was arrested for violating has been found unconstitutionally vague on its face, the arrest and search were invalid as violative of his rights under the Fourth and Fourteenth Amendment. Accordingly, he contends the drugs found in the search were cor-

rectly suppressed.

Under the Fourth and Fourteenth Amendments, an arresting officer may, without a warrant, search a person validly arrested. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search. United States v. Robinson, supra, at 235. Here the officer effected the arrest of respondent for his refusal to identify himself; contraband drugs were found as a result of the search of respondent's person incidental to that arrest. If the arrest was valid when made, the search was valid and the illegal drugs are admissible in evidence.

Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law. Ker v. California, 374 U.S. 23, 37 (1963); Johnson v. United States, 333 U.S. 10, 15 & n.5 (1948). Respondent does not contend, however, that the arrest was not authorized by Michigan Law. See Mich. Comp. Laws Ann. § 764.15. His sole contention is that since the arrest was for allegedly violating a Detroit ordinance later held unconstitutional, the search was likewise invalid.

(3)

It is not disputed that the Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense. Adams v. Williams, 407 U.S. 143, 148-149 (1972); Beck v. Ohio, 379 U.S. 89, 91 (1964). The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest. We have made clear that the kinds and degree of proof and the procedural requirements necessary for a conviction are not prerequisites to a valid arrest. See Gerstein v. Pugh, 420 U.S. 103, 119-123 (1975); Brinegar v. United States, 338 U.S. 160, 174-176 (1949).

When the officer arrested respondent, he had abundant probable cause to believe that respondent's conduct violated the terms of the ordinance. The ordinance provides that a person commits an offense if (a) an officer has reasonable cause to believe that given behavior warrants further investigation; (b) the officer stops him, and (c) the suspect refuses to identify himself. The offense is then complete.

Respondent's presence with a woman in the circumstances described in an alley at 10:00 P.M. was clearly, in the words of the ordinance, "behavior warrant[ing] further investigation." Respondent's inconsistent and evasive responses to the officer's request that he identify himself, stating first that he was Sergeant Mash of the Detroit Police Force and then that he worked for or knew Sergeant Mash, constituted a refusal by respondent to identify himself as the ordinance required. Assuming, arguendo, that a person may not constitutionally be required to answer questions put by an officer in some circumstances, the false identification violated the plain language of the Detroit ordinance.

The remaining question, then, is whether, in these circumstances, it can be said that the officer lacked probable cause to believe that the conduct he observed and the words spoken constituted a violation of law simply because he should have known the ordinance was invalid and would be judicially declared unconstitutional. The answer is clearly negative.

This Court repeatedly has explained that "probable cause" to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in

believing in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense. See Gerstein v. Pugh, supra, at 111; Adams v. Williams, supra, at 148; Beck v. Ohio, supra, at 91; Draper v. United States, 358 U.S. 307, 313 (1959); Brinegar v. United States, supra, at 175-176; Carroll v. United States, 267 U.S. 132, 162 (1925).

On this record there was abundant probable cause to satisfy the constitutional prerequisite for an arrest. At that time, of course, there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. A prudent officer, in the course of determining whether respondent had committed an offense under all the circumstances shown by this record, should not have been required to anticipate that a Michigan court would later hold the ordinance unconstitutional.

Police are charged to enforce laws until and unless they are declared unconstitutional. The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality--with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill served if its police officers took it

upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.

In Pierson v. Ray, 386 U.S. 547, 555 (1967), persons who had been arrested for violating a statute later declared unconstitutional by this Court sought damages for false arrest under state law and for violation of the Fourteenth Amendment under 42 U.S.C. § 1983. Mr. Chief Justice Warren speaking for the Court, in holding that police action based on a presumptively valid law was subject to a valid defense of good faith, observed: "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." The Court held that "the defense of good faith and probable cause, which the Court of Appeals found to be available to the officers in the common law action for false arrest and imprisonment, is also available to them in the action under § 1983." Id., at 557. Here, the police were not required to risk "between being charged with dereliction of duty if they [did] not arrest when they [had] probable cause" on the basis of the conduct observed.

(4)

We have held that the exclusionary rule required suppression of evidence obtained in searches carried out pursuant to statutes, not previously declared unconstitutional, which purported to authorize the searches in question without probable cause and without a valid warrant. See, e.g., Torres v. Puerto Rico, ___ U.S. ___ (1979); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Sibron v. New York, 392 U.S. 40 (1968); Berger v. New York, 388 U.S. 41 (1967). Our holding today is not inconsistent with these decisions; the statutes involved in those cases bore a different relationship to the challenged searches than did the Detroit ordinance to respondent's arrest and search.

Those decisions involved statutes which, by their own terms, authorized searches under circumstances which did not satisfy the traditional warrant and probable cause requirements of the Fourth Amendment. For example, in Almeida-Sanchez v. United States, supra, we held invalid a search pursuant to a federal statute which authorized the Border Patrol to search any vehicle within a "reasonable distance" of the border, without a warrant or probable cause. The Attorney General, by regulation, fixed 100

miles as a "reasonable distance" from the border. 413 U.S., at 268. We held a search so distant from the point of entry was unreasonable under the Constitution. In Berger v. New York, supra, we struck down a statute authorizing searches under warrants which did not "particularly describ[e] the place to be searched and the persons or things to be seized," as required by the Fourth and Fourteenth Amendments. 388 U.S., at 55-56.

In contrast, the ordinance here declared it a misdemeanor for one stopped for "investigation" to "refuse to identify himself"; it did not directly authorize the arrest or search.[3/] Once respondent refused to identify himself as the presumptively valid ordinance required, the officer had probable cause to believe respondent was commiting an offense in his presence and Michigan's general arrest statute, Mich Comp. Laws. Ann. § 764.15, authorized the arrest of respondent, independent of the ordinance. The search which followed was valid because it was incidental to that arrest. The ordinance is relevant to the validity of the arrest and search only as it pertains to the "facts and circumstances" we hold constituted probable cause for arrest.

The subsequently determined invalidity of the Detroit ordinance on vagueness grounds does not undermine the val-

idity of the arrest made for violation of that ordinance and the evidence discovered in the search of respondent should not have been suppressed. Accordingly, the case is remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

FOOTNOTES

1/ As amended, Code of the City of Detroit § 39-1-52.3 provided:

"When a police officer has reasonable cause to believe that the behavior of an individual warrants further investigation for criminal activity, the officer may stop and question such person. It shall be unlawful for any person stopped pursuant to this section to refuse to identify himself, and to produce verifiable documents or other evidence of such identification. In the event that such person is unable to provide reasonable evidence of his true identity, the police officer may transport him to the nearest precinct in order to ascertain his identity."

While holding the ordinance unconstitutional the Michigan Court of Appeals construed the ordinance to make refusal to identify oneself a crime meriting arrest. People v. DeFillippo, 80 Mich. App. 197, 201 n.1, 262 N.W.2d 921, 923 n.1 (1977).

The preamble to the amendment indicates that it was enacted in response to an emergency caused by a marked increase in crime, particularly street crime by gangs of

juveniles.

2/ The woman was arrested on a charge of disorderly conduct; she is not involved in this case.

3/ In terms the ordinance, § 39-1-52.3, authorizes officers to detain an individual who is "unable to provide reasonable evidence of his true identity." However, the State disclaims reliance on this provision to authorize the arrest of a person who, like respondent, "refuse[s] to identify himself." Tr. of Oral Arg. 5.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 30, 1979

No. 78-1680, Michigan v. DeFillippo

Dear Chief,

Please join me.

Sincerely yours,

The Chief Justice

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 30, 1979

Re: 77-1680 - Michigan v. DeFillippo

Dear Chief:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 30, 1979

RE: No. 77-1680 Michigan v. DeFillippo

Dear Chief:

I shall as promptly as possible circulate a dissent in the above.

Sincerely,

Bill

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 30, 1979

Re: No. 77-1680 - Michigan v. DeFillippo

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference

File

PBS-5/31/79

I am in substantial agreement with the essence of this draft - but I don't think it necessary to say this now. I may say it later.

DRAFT OPINION

TO: Mr. Justice Powell

FROM: Paul

RE: Michigan v. DeFillippo, No. 77-1680

DATE: May 31, 1979

Mr. Justice Powell, concurring.

Although I join the opinion of the Court, I write separately to address a question not expressly discussed therein. Whether the arresting officers in this case could in good faith have believed that the Detroit ordinance on which they relied was constitutional depends on an examination of our precedents concerning the right of a criminal accused to remain silent. Every policeman in the United States must be presumed to be aware of the Court's holding in Miranda v. Arizona, 384 U.S. 436 (1966), that upon arrest a criminal suspect must be advised of his right to remain silent. Furthermore, we have noted in another context that, "while it is true that the

should have grounds for questioning the validity of a procedure by which a person suspected of criminal activity is apprehended, and then required upon pain of criminal penalty to answer certain questions. Cf. Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring) ("Of course, the person stopped is not obliged to answers, answers may not be compelled, and refusal to answer furnishes no basis for an arrest . . . .").

I am satisfied, however, that in light of the plurality opinion of the CHIEF JUSTICE in California v. Byers, 402 U.S. 424 (1971), a reasonable person could well conclude that a law requiring the disclosure of one's identity does not compel a suspect to give "'evidence of a testimonial or communicative nature' within the meaning of the Constitution." Id., at 432, quoting Schmerber v. California, 384 U.S. 757, 761 (1966). On the basis of this assumption, I join the opinion of the Court. But it does not follow that this Court is committed to the same conclusion as to the requirements of the Constitution. Instead, we might follow the analysis taken by Mr. Justice Harlan in his concurring opinion in Byers, and conclude that although

and if so whether the Detroit ordinance at issue here can be held constitutional, are questions about which I express no views today.

June 4, 1979

No. 77-1680 Michigan v. DeFillippo

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 15, 1979

RE: No. 77-1680 - Michigan v. DeFillippo

Dear Bill:

Please join me.

Respectfully,

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 19, 1979

Re: No. 77-1680 - Michigan v. DeFillippo

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

T.M.

Mr. Justice Brennan

cc: The Conference

3/5/79 Typed Draft 5/26/79 2nd draft 6/5/79 3rd draft 6/20/79	will dissent 5/31/79 Typed draft 6/15/79 1st draft 6/27/79	Join CJ 5/30/79	Join CJ 5/30/79	Join CJ&B 6/15/79	Concurring opinion typed draft 6/18/79 1st draft 6/26/79	Join CJ 6/4/79	Join CJ 5/30/79	Join CJ 6/15/79