

## K. PLAIN VIEW

QUESTION: MAY ONE SEIZE WHAT ONE SEES?

ANSWER: IT DEPENDS UPON WHERE ONE IS WHEN ONE SEES IT.

You may, without a warrant, seize any contraband or evidence of a crime that is in your "plain view." That is, "when the contraband or evidence is observed from a place in which you are lawfully present." Your initial intrusion must be justified either by a warrant or by an exception to the warrant requirement. The plain view exception to the warrant requirement allows officers, in the execution of a valid search warrant, to seize articles which, although not included in the warrant, are reasonably identified as contraband or known evidence of another crime.

The "plain view" exception to the warrant requirement will not apply if the officer has made an improper search (invalid warrant, no probable cause, etc.) or arrest.

The Plain View Doctrine as stated in Brown v Texas (see bulletin no. 68) has three minimum requirements.

1. The officer must lawfully make an "initial intrusion" or otherwise be in a proper position from which he can view a particular area.
2. The officer must discover the incriminating evidence inadvertently and cannot use plain view as a pretext.
3. It must be immediately apparent that the items observed may be evidence of a crime, contraband or otherwise subject to seizure.

In Horton v California (see bulletin no. 145), the Supreme Court ruled that incriminating evidence need not be discovered inadvertently, overruling that particular requirement in Brown v Texas.

If an officer observes contraband during the course of a lawful traffic stop, it is subject to warrantless seizure under the plain view doctrine. However, if a vehicle is stopped for a reason that cannot be articulated, such as traffic violation or investigative stop of suspect vehicle, seizure of any evidence observed will be suppressed.

### OPEN FIELD DOCTRINE:

An open field is not an area protected under the Fourth Amendment. It has been said that the distinction between the search of a dwelling and the search of an open field, not within the curtilage, is as old as the common law.

**PLAIN VIEW**  
**SELECTED CASES**

**ANDERSON v State** (Expectation of Privacy) bulletin no. 9. In the process of executing a search warrant for drugs, the police discover a 35mm slide transparency. The slide, upon being held to a light, depicted the defendant engaged in unlawful sex acts with a minor. The Court ruled that the defendant had an expectation of privacy in the slide. The discovery of the slide could not be inadvertent because it was unlikely that the drugs would be concealed by the slide.

**KLENKE v State** (Plain View Search) bulletin no. 15. In the process of serving a search warrant to seize property taken during a burglary, the police discovered items taken in other burglaries. Although these additional items were not listed on the warrant, they were subject to seizure as outlined per the requirement of the Plain View Doctrine:

1. The officers knew the items were stolen.
2. The officers were lawfully present (serving the warrant) when the property was seized.
3. The additional items were immediately apparent as property that had been stolen in other burglaries. There was not any suggestion that the officers were on a "fishing expedition" regarding the seized items.

**State v SPIETZ** (Plain Sight Is Not Plain View) bulletin no. 18. The police, while making an arrest outside the residence, observed drugs inside the house through an open door and subsequently made a warrantless entry into the residence and seized the drugs. The Court ruled the evidence inadmissible, since there was no evidence of exigency as there were no other occupants in the residence who may have destroyed the evidence and the search was not considered as incident to the subject's arrest. The Court stated that an officer should have remained to guard the residence while a search warrant was being obtained.

**PISTRO v State** (Plain View Search by Public Access) bulletin no. 20. While investigating the theft of a truck, police officers left the public road and entered the private driveway of the suspect. While en route to the residence, the officers observed parts of the truck through a garage window. Entry of the driveway was not considered trespassing, as the driveway was implicitly open to public use by anyone desiring to speak to the occupants of the house.

**State v MYERS, et al** (Search Incident to Legitimate Entry) bulletin no. 28. In early morning during routine security check of buildings, police discovered an unlocked door to a theater and, upon entry, discovered the manager and his associates using drugs. The Court ruled that the police are expected to make such security checks and the crime was inadvertently discovered while performing these duties, thus the evidence was in their plain view.

**PAYTON v New York** (Warrantless Entry into Private Residence to effect Arrest) bulletin no. 34. Police, without a warrant, made a forced entry into an apartment to effect an arrest. The defendant was not present at the time, however, in plain view, was a shell casing. The shell casing was seized and subsequently introduced as evidence at the trial. The evidence (shell casing) was suppressed because of the warrantless entry.

State statutes cannot be enacted that enable police to violate the constitution. Twenty-five states (including Alaska) have enacted statutes that allow police to make warrantless entry into a private residence based on probable cause. The US Supreme Court ruled that these statutes were unconstitutional because they violated the Fourth Amendment. The court stated that the Fourth Amendment has drawn a firm line at the entrance to a house and that absent exigent circumstances, that threshold may not be reasonably crossed without a warrant.

**CHILTON v State** (Plain View Search) bulletin no. 35. While on routine foot patrol, officers taking a path between several streets observed a subject standing in front of a window using drugs. The officers contacted

and arrested the subject. The government was not able to prove that the officers had not trespassed by using the path and the evidence was suppressed because of unlawful intrusion. (SEE FIRST REQUIREMENT OF PLAIN VIEW DOCTRINE).

**SUMDUM v State** (Warrantless Entry into Motel Room) bulletin no. 37. The motel manager had assumed guest (suspected of involvement in burglary) had left without paying his bill, opened the door to the room while the police were in the open public hallway and saw the defendant lying on a bed. Entry into the room was permissible because the suspect was in the "plain view" of the police who had probable cause to arrest him. The subsequent search of his person produced evidence, which was justified as incident to arrest.

**McGEE v State** (Warrantless Seizure of Handgun for Test Firing) bulletin no. 38. In course of investigating an assault, the police officer inquired if subject owned an automatic weapon. The subject entered his residence and returned with the suspected weapon. The officer requested the subject's permission to seize the weapon for test firing, but was denied permission without a warrant. The officer seized the weapon that was identified as the weapon used in the assault. The Court ruled the weapon admissible because it was in the officer's "plain view" when subject produced the weapon and if not seized at that time the suspect could have disposed of it.

**UPTGRAFT v State** (Vehicle Search - Plain View Incident to Arrest) bulletin no. 44. Information developed after armed robbery led to "investigative stop" of suspect vehicle. Evidence observed inside the car led to probable cause to arrest and subsequent search of the vehicle.

**Texas v BROWN** (Plain View Search of Automobile) bulletin no. 68. The police established a drivers license checkpoint which required all vehicles to stop. During this particular stop, while the subject was extracting his license and registration, the officer noticed a balloon tied in the fashion in which he knew drugs were transported. The Court ruled that the balloon was in the officer's plain view and the contents were "immediately apparent" to the officer, thus making the seizure lawful and subsequent search lawful as incident to the subject's arrest.

**DAVIS v State** (no bulletin). The Court ruled that although the police did observe the illegal fish in a shed, their method of observation, being on their knees looking under a crack in the door, was not plain view and a warrant was required.

**State v DAVENPORT** (no bulletin). Although police were unsuccessful in their attempt to seize a weapon used in an assault as provided in the search warrant, they did seize several furs that were known to have been taken in a burglary six months prior. The officers were lawfully on the premises and the furs were "immediately apparent." There was no evidence to suggest that the officers used the warrant (for the gun) as a pretext to seize the furs.

**OLIVER v U.S.** (Warrantless Search on "Open Field") bulletin no. 82. Whereupon entering a field through a fence posted "No Trespassing," police discovered acres of marijuana growing. The Court ruled that the defendant had no exception to privacy because the field was not in the area (curtilage) surrounding his house. (SEE OPEN FIELD DOCTRINE.)

**New York v CLASS** (Entry into Vehicle to Examine Vehicle Identification Number) bulletin no. 102. Police had made a lawful vehicle stop for traffic violations. Second officer attempted to obtain VIN from dashboard; however, papers on the dashboard obscured the VIN. Entry into the vehicle to examine VIN was proper and evidence (gun) observed and seized was in plain view.

**Arizona v HICKS** (Probable Cause Required to Seize Evidence in Plain View Resulting from Emergency Entry) bulletin no. 110. During the course of an emergency search following a shooting, police seized expensive stereo components from a residence because they "looked out of place." Although it was later determined that the components had been stolen, the police lacked that specific knowledge (immediately apparent) at the time of seizure so the court suppressed the evidence.

**California v GREENWOOD and VAN HOUTEN** (Seizure of Garbage as Abandoned Property) bulletin no. 119. Garbage bags left on a public street "outside the curtilage of the home" are subject to a warrantless search and seizure. There is no expectation of privacy when trash is discarded in this manner.

**Michigan v CHESTERNUT** (Investigatory Seizure of a Person Absent Probable Cause) bulletin no. 123. Police are not required to have a "particularized and objective" basis for following (not pursuing) a person who runs from a patrol car on routine patrol, as long as a reasonable person would feel he was free to leave (i.e. not seized). While following, the officers observed the defendant abandon property that they recovered and used as probable cause for an arrest.

**Florida v RILEY** (Plain View Observation of Greenhouse From Helicopter) bulletin no. 127. Plain view observation of drug activity by helicopter upheld since the helicopter was flying legally and private/commercial aircraft could have legally observed the marijuana grow operation. The grow operation was not visible from ground level.

**Maryland v BUIE** (Protective Search of Residence) bulletin no. 139. When executing a warrant in a home or building where there is reasonable suspicion that other people might be in the house that could pose a danger to the arresting officers, a limited sweep of adjoining portions of the house where "an attack could be launched" can be done. This protective sweep is not a full search incident to arrest, but any material in plain view which the officer had probable cause as evidence of a crime can be seized.

**DEAL v State** (Search of Vehicle Incident to Arrest - Inadvertent Discovery of Evidence of Another Crime) (no bulletin). While an officer searched a vehicle subject to search incident to arrest, he noticed in plain view evidence of another crime. This material was inadvertently discovered during the search incident to arrest and was immediately apparent as evidence because the person arrested was a suspect in another crime and the evidence was immediately associated with that crime. This is a 1980 case that was referenced in a recent decision.

**HORTON v California** (Plain View Seizure of Evidence Not Discovered "Inadvertently") bulletin no. 145. The "plain view" doctrine does not require that evidence seized during a "lawful" search (by warrant or valid exception to the warrant requirement) be discovered inadvertently. In this case, a valid search warrant was served and evidence in plain view was discovered that was not listed on the warrant, even though the officers fully expected to find it. The items were immediately apparent as evidence and seized under the plain view doctrine.

**GRAY v State** (Inventory Search Subject to Incarceration) bulletin no. 149. A person arrested for a minor misdemeanor offense where bail has been set and the person is given a reasonable opportunity to post bail before being incarcerated, cannot be subjected to remand and booking procedures, although a pat down search is permissible. In this case, emptying of pockets is not considered part of a pat down search and drugs found during this search were suppressed.

**BROWN v State** (Plain View Seizure of Regurgitated Balloon Containing Drugs) bulletin no. 156. An inmate had a contact visit with another person who handed a balloon to the inmate, which was immediately swallowed by the inmate. A corrections officer observed this. The defendant was given a medication that forced him to regurgitate. The balloon was seized and opened without a warrant. The intrusion (by the corrections officer) was lawful. It was immediately apparent that the balloon probably contained contraband and it was also in plain view.

**California v HODARI** (Investigatory Chase of Person Who Abandoned Drugs Before Arrest) bulletin no. 157. To constitute a seizure of a person, there must be either application of physical force or submission to a "show of authority." A police officer involved in a foot pursuit (not simply following) did not seize the suspect until he was tackled. Drugs abandoned during the chase, but before the seizure were not the fruit of a seizure.

**Minnesota v DICKERSON** (Investigatory Seizure of Crack Cocaine Based on "Plain Feel") bulletin no. 178. During a Terry "stop and frisk," a warrantless seizure of evidence can be based on the object being "immediately apparent by plain feel." In this case, the seizure of cocaine was not valid because the

contraband was not immediately apparent as cocaine until repeated manipulation by the officer, but the concept of "plain feel" was validated.

**HARRISON v State** (Warrantless Entry Into Private Residence Based on Emergency Aid Doctrine) bulletin no. 181. A trooper went to serve a warrant and noticed through a window someone "face down" on the kitchen table. Repeated knocking on the door did not elicit a response. The trooper entered the residence to check on the welfare of the person and noticed, in plain view, what she thought to be drugs on the same table. A warrant was obtained to seize the drugs and the person was subsequently arrested. The initial entry was based on an emergency and the drugs observed in "plain view" were used as a basis for obtaining a search warrant.

**WHREN and BROWN v U.S.** (Traffic Stop for a Minor Violation by Plainclothes Officers Passes "Reasonable Officer Test") bulletin no. 202. Officers made traffic stop when a suspicious vehicle aroused their suspicions. The vehicle made an illegal turn at unreasonable speed. The constitutional reasonableness of a traffic stop does not depend on the actual motivations of the individual officers. The usual rule is "probable cause to believe the law has been broken outbalances private interest in avoiding police contact."

**Maryland v WILSON** (Ordering a Passenger out of a Lawfully Stopped Vehicle) bulletin no. 214. Police ordered a passenger out of a vehicle and when the passenger exited the police observed a quantity of crack cocaine fall to the ground. The passenger was arrested. The Supreme Court considered this additional intrusion on the passenger as minimal, but did not consider in this case whether the passenger could be detained the entire duration of the stop.

**MICHEL v State** (Public Access with "No Trespassing" Signs) bulletin no. 228. "No Trespassing" signs posted at a residence does not reasonably exclude legitimate inquiries and visitors that would take someone to a person's door. When troopers visited the front door, they smelled marijuana and subsequently obtained a search warrant.

**KYLLO v U. S.** (Use of Thermal Imaging Is A Search – Not Plain View) bulletin no. 250. Federal agents suspected KYLLO had a "grow operation" going on in his residence. He lived in a triplex. The agents scanned his residence with a thermal imaging device. The device indicated that the residence was "hot." A search warrant was obtained and evidence collected. The court said that using this device consisted of an intrusion into a constitutionally protected area.

**State v COWLES** (Covert Video Monitoring) bulletin no. 256. UAF police installed a concealed camera above the desk of COWLES, whose office was a ticket booth where she accepted money. They caught her stealing. Because her office was in view of the public and she shared space with a co-worker she had no expectations of privacy.

**CARTER v State** (Guests Expectation of Privacy in Hotel Room – Property Not In Plain View When Unlawfully Evicted By Police) bulletin no. 269. Police do not have authority, unless granted by hotel management, to enforce 1 o'clock checkout time to evict a person from their room. Nor is evidence in their "plain-view" while the person is removing his personal effects after being ordered to vacate the room. The police had no lawful right to be in the room.