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Recent Decisions: Criminal Law-the Plain View Doctrine in Maryland-Warrantless Search of Premises and Seizure of Evidence Held Unconstitutional. Brown v. State, 15 Md. App. 584, 292 A.2d 762 (1972)

community, and nearly all fiscal control of local programs by local governments would be destroyed.

CONCLUSION

While the existence of inequities in the property tax system is granted, these inequities do not create an infringement of any constitutional rights, for as the Court has stated:

> To be able to find fault with a law is not to demonstrate its invalidity. It may seem unjust and oppressive, yet be free from judicial interference. The problems of government are practical ones. . . Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void under the fourteenth amendment.[20]

Therefore, the *Rodriguez* decision disallowing property taxation for public school financing may well be reversed for three reasons: (1) the requirement of an invidious discriminatory state action is absent herein, (2) the burden of proving damage has not been met, as recent studies question the assumption that equal educational opportunity is a function of increased spending, and (3) only federal socialized education would eliminate the present inequalities at the exorbitant cost of taking control of the schools away from the local parents.

S.H.O.

CRIMINAL LAW—THE PLAIN VIEW DOCTRINE IN MARYLAND—WARRANTLESS SEARCH OF PREMISES AND SEIZURE OF EVIDENCE HELD UNCONSTITUTIONAL. *BROWN V. STATE*, 15 Md. App. 584, 292 A.2d 762 (1972).

In *Brown v. State*,[1] officers investigating a series of burglaries questioned a suspect in the street. The officers requested and were denied permission to search his residence. The officers then proceeded to the suspect's residence, a rented room in a house belonging to a Mrs. Hall, ostensibly for the purpose of obtaining a description of the place to be used in the search warrant. The investigators identified themselves and were invited in by Mrs. Hall. From the hallway outside of the suspect's room, they observed through the already open door a box containing articles easily identifiable as part of the stolen goods from the burglaries under investigation. One of the officers reached into the room, without actually stepping into it, and seized the box.

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20. Metropolis Theater Co. v. City of Chicago, 228 U.S. 61, 69-70 (1913).

1. 15 Md. App. 584, 292 A.2d 762 (1972).

The court held that the seizure violated the fourth amendment and pointed out that while Mrs. Hall could and did give consent to the entry of the officers into her home, the "open view" of the box from the hallway did not automatically bring into effect the Plain View Doctrine. The Supreme Court of the United States has defined this doctrine in *Harris v. United States*,[2] where the court said:

> It has long been settled that objects falling in the plain view of an officer *who has a right to be in position to have that view* are subject to seizure and may be introduced into evidence. (emphasis added).[3]

However, as pointed out by the Supreme Court in *Coolidge v. New Hampshire*,[4] any evidence seized by police will, at least at the instant of seizure, be in open view. The *Brown* court, therefore, placed great emphasis on the question whether the police officers had a legal right to be in position to observe the evidence that was seized:

> The threshold, therefore, that concerns us here—in measuring whether there was or was not a prior valid intrusion—is the threshold to the appellant's room, not the threshold to Mrs. Hall's house. In this case, the relevant threshold had not been crossed, and without a warrant it could not be crossed.[5]

The first major problem that the *Brown* court had to decide was in which circumstances the Plain View Doctrine would come into effect. The court set forth two conditions that must be present to justify a "plain view" seizure. The first was that there must be a prior valid intrusion for an officer to be in position to have the view.[6] The second was that such a view must be inadvertent, that is, not planned in any way.[7]

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2. 390 U.S. 234 (1968).
3. *Id.* at 236.
4. 403 U.S. 443 (1971).
5. 15 Md. App. at 612, 292 A.2d at 778.
6. The court in Brown v. State, 15 Md. App. at 603, 292 A.2d at 733, gave four situations, by way of example—not limitation—which may justify the first condition, a prior valid intrusion into a constitutionally protected area; these are:
   a. A search incident to a lawful arrest inside a constitutionally protected area. Marron v. United States, 275 U.S. 192 (1927).
   b. Exigent circumstances that are present and known to the officer prior to the intrusion. Warden, Md. Penitentiary v. Hayden, 397 U.S. 294 (1967); *cf.* Fellows v. State, 13 Md. App. 206, 283 A.2d 1 (1971).
   c. A valid presence inside a constitutionally protected area for some legitimate purpose other than a planned search for evidence against the accused. Frazier v. Cupp, 394 U.S. 731 (1969).
   d. A warranted search of a given area for specified objects, in the course of which some other article of incriminating character is found by the searchers. *See* Marron v. United States, *supra*.
7. 15 Md. App. at 603, 292 A.2d at 773.

These conditions to bring into effect the Plain View Doctrine were derived from *Coolidge*;[8] however, recognizing their presence is not as simple as it might appear. Nowhere in *Coolidge* did the plurality of the Supreme Court Justices define the degree of inadvertency required to validate a discovery of evidence by a police officer. If an officer has the probable cause to secure a search warrant, he would logically have no legitimate reason for not listing the object that he expects to find in the search on the warrant.[9]

Thus, the second major problem in applying the Plain View Doctrine is for a court to define the inadvertency requirement in such a fashion as to enable the police to function according to prescribed rules.[10] Without such a definition of the requirement of inadvertency, police behavior would no doubt lack uniformity in regard to the seizure of evidence. Such a result might conceivably have an effect on the lower criminal courts, in time-consuming motions to suppress evidence.

In considering this second problem, one authority has concluded that a possible approach is for courts to insist on strict compliance with the requirement that police action leading to a plain view is in no way planned or predetermined.[11] Such an interpretation would eliminate the problem at the source—in the police investigation, which would in turn become narrower in scope.

In *Brown*, the inadvertency requirement of *Coolidge* was interpreted to forbid "the planned warrantless seizure." By this the court meant:

> There may not be a contrived investigatory reconnaissance aimed at evading the warrant requirement for a search or seizure. There may not be a planned "Plain View."[12]

The court indicated its desire to enforce a strict compliance with this condition to bring into effect the Plain View Doctrine.[13] In light of this position, the doctrine is likely to become less used but more useful in the future than it has been in the past.

In historical perspective, the Plain View Doctrine is the newest in a developing line of exceptions to the fundamental proposition that ". . . searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the fourth amendment. . . ."[14] Before its emergence as an independent doctrine in *Coolidge*, Plain View was applied as part of the exception to

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8. *Id.* at 602, 292 A.2d at 772.
9. MD. ANN. CODE art. 27, § 551 (1971); Frey v. State. 3 Md. App. 38, 237 A.2d 774 (1967); Hau v. State, 232 Md. 588, 194 A.2d 801 (1963).
10. The Attorney General of Maryland issues guidelines for the Police Department to follow. For example, *see* 55 OP. ATT'Y GEN. 313 (Md. 1971), for guidelines concerning the scope of search incident to arrest, as set forth by Chimel v. California, 395 U.S. 752 (1969).
11. Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 244-46 (1972).
12. 15 Md. App. at 609, 292 A.2d at 776.
13. *Id.* at 608 n. 39, 292 A.2d at 776 n. 39.
14. Katz v. United States, 389 U.S. 347, 357 (1967).

the necessity for a search warrant during searches incident to a lawful arrest.[15]

Historically, the permissible range of search connected with a valid arrest has not been constant.[16] In the periods of broad scope the Supreme Court has allowed seizure of items in plain view within the room or house in which the suspect had been arrested.[17] The current scope of search incident to a lawful arrest, in the course of which a plain view seizure may be made, was set forth in *Chimel v. California:*[18]

> . . . a search of the arrestee's person and the area within his immediate control—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Under the present limitations on a search incident to a valid arrest, even in light of *Chimel*, an officer can still seize contraband in plain view.[19] But due to the narrow scope of search suggested by the *Chimel* Court, the Plain View Doctrine as applied to evidence observed in the course of a constitutional search already in progress, or in the course of an otherwise justifiable intrusion into a constitutionally protected area, has become independent from the doctrine that was formerly applicable only during a search incident to a valid arrest.[20]

The *Brown* decision, in setting forth the criteria of the Court of Special Appeals, indicates Maryland's position on the Plain View Doctrine. By requiring a strict compliance with the condition that sighting of evidence be inadvertent, Maryland has adopted a position that appears to be in accord with the majority of courts dealing with the doctrine since *Coolidge.*[21]

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15. Abel v. United States, 362 U.S. 217, (1960); Harris v. United States, 331 U.S. 145 (1946).
16. The following is a chart showing broad and narrow ranges of search incident to an arrest, as decided by the Supreme Court of the United States:
    Periods of broad scope of search:
    1927–31 Marron v. United States, 275 U.S. 192 (1927).
    1947–48 Harris v. United States, 331 U.S. 145 (1947).
    1950–69 United States v. Rabinowitz, 339 U.S. 56 (1950).
    Periods of search with narrow scope:
    1931–47 Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).
    1948–50 Trupiano v. United States, 334 U.S. 699 (1948).
    1969–present Chimel v. California, 395 U.S. 752 (1969).
17. In cases such as these, the plain view was brought about by a search of the premises incident to arrest; sometimes an entire house was searched, as indicated in Chimel v. California, 395 U.S. 752 (1969). *See also* United States v. Rabinowitz, 339 U.S. 56 (1950) (search of an apartment).
18. 395 U.S. at 763.
19. *See* Himmel v. State, 9 Md. App. 395, 264 A.2d 874 (1970).
20. Scales v. State, 13 Md. App. 474, 478 n. 1, 284 A.2d 45, 47 n. 1 (1971).
21. United States v. Perry, 339 F.Supp. 209 (S.D. Cal. 1972); People v. Dickerson, 23 Cal. App. 3d 721, 100 Cal. Rptr. 553 (2d Dist. 1972); Lonquest v. State, 495 P.2d 51 (Wyo. 1972); Comm. v. Haefeli.__Mass.__279 N.E.2d 915 (1972); State v. Ruiz, 17 Ariz. App. 76, 495 P.2d 516 (Ct. App. 1972).

Thus far in the current year, only two reported decisions can be placed in the "minority," that is, in a group of courts which appear not to require a strict compliance with the condition that observation of evidence prior to seizure be inadvertent. The first of these, *Blincoe v. People*,[22] was decided by the Supreme Court of Colorado. In this case the facts indicate that an officer failed to find any occupants in a dwelling where he was present for the purpose of making inquiry about certain stolen property. The officer searched the curtilege (upon prior information) and found the defendant in hiding. The Colorado court held that the seizure of stolen goods on the premises was valid, as the evidence was in "plain view." The court found that the hidden defendant created an "emergency" which justified the prior intrusion needed to activate the Plain View Doctrine.

The *Blincoe* court misconstrues both conditions needed to apply the Plain View Doctrine. The hidden defendant did not bring about any recognized exception[23] to the requirement that a search warrant is needed before an intrusion can be made into a constitutionally protected area. Going to a premises upon receiving prior information that stolen goods are located therein does not bring about a view that is unplanned. Thus, the officer in *Blincoe* made an unlawful intrusion into a constitutionally protected area that could give him no "plain view" of evidence.

The second decision that appears to be in the minority (if not in error) is *State v. Alexander*,[24] from the Court of Appeals of Oregon. The facts in *Alexander* indicate that an undercover agent dressed in youthful appearing clothes was given consent to enter the defendant's premises. This agent in turn admitted uniformed officers who made a plain view seizure of marijuana. The Oregon court held that the view was not planned; however, the undercover agent was highly trained in the detection of narcotics. Such a holding clearly violates the spirit, if not the mandate, of *Coolidge*. Although the *Alexander* court appeared to be aware of the two preconditions for a plain view seizure, it stretched the inadvertency condition far beyond reasonable limits.

In contrast, recent decisions supporting the majority rule have given careful consideration to the inadvertence aspect of a plain view seizure, as did the *Brown* court. In *Lonquest v. State*,[25] a Wyoming court applied the Plain View Doctrine to the seizure of a shotgun and cartridges. When officers responded to a call in that case, they entered the defendant's premises and found his wife's body on the floor. As the officers did not know if the defendant (who was in a dazed condition)

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22. __ Colo. __, 494 P.2d 1285 (1972).
23. The *Blincoe* court mentions that the officer was given consent to enter the premises (a recognized exception to justify a prior intrusion), but the court does not use this fact in its rationale when considering the Plain View Doctrine.
24. __ Or. App. __, 495 P.2d 51 (Ct. App. 1972).
25. 495 P.2d 575 (Wyo. 1972).

or some felon perhaps still present committed the deed, they looked through the rooms in the house. Behind a door in the bedroom they observed the shotgun; the shells were in plain view on a table near the body. The court in *Lonquest* pointed out that an emergency existed which justified the prior intrusion, and that the investigation of a homicide that had just taken place established the required conditions for making an entry into a constitutionally protected area, thus allowing a valid "plain view" of the evidence.

A California court in *People v. Dickerson*[26] was consistent with the majority of courts when it held that the seizure of a baseball bat that was observed leaning against the side of a building was lawful, since no threshold was crossed to obtain the view. Such a seizure did not involve the entry into a constitutionally protected area, unlike the crossing of the "threshold" of the defendant's room in *Brown*.

By adopting a position of strict compliance with the inadvertency condition, the Maryland Court of Special Appeals in *Brown* has placed itself squarely within the majority of jurisdictions in regard to the Plain View Doctrine. Although this position might in the *immediate* future cause the State to lose some evidence obtained in police investigations, as in *Brown*, this position will in the long run avoid wasteful suppression hearings and endless appeals.

Thus, the court in *Brown* has taken a sound approach to a difficult problem. By requiring that the sighting of all evidence seized under the Plain View Doctrine be inadvertent, the court will minimize problems usually associated with such seizures. The guidelines set by this court will give law enforcement officials an opportunity to refine their evidence-gathering techniques until they conform to the most recent position of the Supreme Court. By virtue of this decision, Maryland has taken a forward-looking position on a most complicated area of law.

F.S.L.

26. 23 Cal. App. 3d 721, 100 Cal. Rptr. 533 (2d Dist. 1972).