Chapter 13—
Plain View and Open Fields Searches

Introduction

The plain view doctrine states that items within the sight of an officer who is legally in a place from which the view is made may be seized without a warrant as long as such items are immediately recognizable as subject to seizure. Items in plain view are not protected by the Fourth Amendment guarantee against unreasonable searches and seizures, thus no warrant or probable cause is necessary for a valid seizure. There are, however, three requirements for the plain view doctrine to apply:

1. The item must be within the officer's sight;

2. The officer must legally be in the place from which the item is seen; and

3. It must be immediately apparent to the officer that the item is subject to seizure.

The requirement that the item be within the officer's sight means that the item must be noted through the sense of sight and not through the use of the other four senses. If the officer is not legally in the place from which the item is seen, the seizure of the item is illegal and therefore cannot be used as evidence. It must also be immediately clear to the officer that the item seen is subject to seizure. If the officer does not immediately know the item is seizable (such as if the item is identified as seizable only after touching or looking at it more closely), the plain view doctrine does not apply because other senses were used to determine seizability.

"Inadvertence," meaning the accidental finding by the officer of the item rather than prior knowledge that the item is in a particular place, used to be a fourth requirement for plain view. In *Horton v. California* (496 U.S. 128 [1990]), however, the Court said: "The Fourth Amendment does not prohibit the warrantless seizure of evidence in plain view even though the discovery of the evidence was not inadvertent," thus doing away with the inadvertence requirement. In reality, most items seized under plain view are discovered by the officers inadvertently and not because they know beforehand that seizable items can be found in a location.

The open fields doctrine states that items in open fields are not protected by the Fourth Amendment and may be properly seized by an officer without a warrant or probable cause. Plain view and open fields are similar in that, in both situations, there is no need for a search warrant or probable cause for the police to be able to seize the items. They are different, however, in two ways:

1. Under the plain view doctrine, the seizable property is usually in a house or another enclosed place (such as a car), whereas under open fields the item is found in a non-enclosed area such as in a parking lot, a public street, or a park that is accessible to the public;

2. Under plain view, the item seized is limited to what is in the officer's sight. By contrast, items known or observed through the use of the officer's other senses (smell, hearing, touching, and tasting) also fall under open fields.

In *United States v. Dunn*, 480 U.S. 294 (1987), the Supreme Court held that the warrantless search of a barn that is not part of the curtilage of a house is valid. In that case, the Court listed four factors that determine whether an area is considered part of the curtilage and therefore not considered an open field. The *Dunn* case, briefed in this chapter, provides a list of four factors that determine whether an area is protected by the Fourth Amendment. These four factors are so vague, however, that they are of little practical help to law enforcement officers and judges in determining where the curtilage ends and where open fields begin.

The leading cases briefed in this chapter on plain view and open fields are *Oliver v. United States, United States v. Dunn*, and *Horton v. California*.

Texas v. Brown
460 U.S. 730 (1983)

CAPSULE: "Certain knowledge" that evidence seen is incriminating is not necessary under the plain view doctrine. Probable cause suffices.

FACTS: An officer stopped Brown's vehicle at night at a routine driver's license checkpoint. The officer asked Brown for his driver's license and shined his flashlight into the automobile. When Brown withdrew his hand from his pocket, the officer observed an opaque, green party balloon, which was knotted one-half inch from the tip, fall from Brown's hand onto the seat. Based on his experience, the officer knew that such balloons were frequently used to transport drugs. Responding to the officer's second request to produce a driver's license, Brown reached across and opened the glove compartment. The officer shifted his position to get a better view of the glove compartment and observed several small plastic vials, a quantity of a white powdery substance, and an open package of party balloons. After rummaging through the glove compartment, Brown informed the officer that he did not have a driver's license. The officer picked up the balloon, which had a white powdery substance in the tied-off portion, and showed it to another officer who also recognized the balloon as one possibly containing narcotics. The officers placed Brown under arrest. A search of Brown's vehicle incident to the arrest revealed several plastic bags containing a green leafy substance and a bottle of milk sugar (often mixed with heroin before selling). Brown was charged with and convicted of possession of heroin.

ISSUE: Must an officer have certain knowledge that an object in plain view is contraband or evidence of criminal activity before it may be seized under the "plain view doctrine?" NO.

SUPREME COURT DECISION: Items must be "immediately recognizable" as subject to seizure if they are to fall under the "plain view" doctrine, but "certain knowledge" that incriminating evidence is involved is not necessary. Probable cause is sufficient to justify a seizure. The use of a flashlight by an officer during the evening to look into the inside of a car does not constitute a search under the Fourth Amendment. The items discovered still fall under plain view.

REASON: "In the *Coolidge* [*v. New Hampshire*, 403 U.S. 443 (1970)] plurality's view, the 'plain view' doctrine permits the warrantless seizure by police of private possessions where three requirements are satisfied. First, the police officer must lawfully make an 'initial intrusion' or otherwise properly be in a position from which he or she can view a particular area. Second, the officer must discover incriminating evidence 'inadvertently,' which is to say, he or she may not 'know in advance the location of [certain] evidence and intend to seize it,' relying on the plain-view doctrine only as a pretext. Finally, it must be 'immediately apparent' to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure." [Citations omitted.] The "immediately apparent" language in *Coolidge*, however, does not require an officer to "know" that items are contraband or evidence of criminal activity; probable cause is sufficient.

CASE SIGNIFICANCE: There are four basic elements of the "plain view" doctrine. They are:

1. Awareness of the item must be gained solely through the sense of sight;
2. The officer must be legally present in the place from which he or she sees the items;
3. Discovery of the items must be inadvertent; and
4. The items must be immediately recognizable as subject to seizure.

This case clarifies the fourth requirement, saying that "immediate recognizability" does not mean "certain knowledge." All that is needed is probable cause. In this case, the officer shined his flashlight into the car's interior and saw the driver holding an opaque green party balloon, knotted about one-half inch from the tip. The officer also saw white powder in the open glove compartment. In court, the officer testified that he had learned from experience that inflated, tied-off balloons are often used to transport narcotics. The Supreme Court concluded that the officer had probable cause to believe that

the balloon contained narcotics and that a warrantless seizure was, therefore, justified under the plain view doctrine. Significantly, the Court said that "plain view is perhaps better understood ... not as an independent exception to the warrant clause, but simply as an extension of whatever the prior justification for an officer's access to an object may be."

Oliver v. United States
466 U.S. 170 (1984)

CAPSULE: "No Trespassing" signs do not effectively bar the public from viewing open fields, therefore the expectation of privacy by the owner of an open field does not exist. The police may enter and search unoccupied or undeveloped areas outside the curtilage without either a warrant or probable cause.

FACTS: Acting on reports that marijuana was being grown on petitioner's farm, but without a search warrant, probable cause, or exigent circumstances, police officers went to the farm to investigate. They drove past Oliver's house to a locked gate with a "No Trespassing" sign, and with a footpath around one side. Officers followed the footpath around the gate and found a field of marijuana more than one mile from the petitioner's house. Oliver was charged with and convicted of manufacturing a controlled substance.

ISSUE: Does the "open fields" doctrine apply when the property owner attempts to establish a reasonable expectation of privacy by posting a "No Trespassing" sign, using a locked gate, and when marijuana is located more than one mile from the house? YES.

SUPREME COURT DECISION: Because open fields are accessible to the public and the police in ways that a home, office, or commercial structure would not be, and because fences or "No Trespassing" signs do not effectively bar the public from viewing open fields, the expectation of privacy by an owner of an open field does not exist. Consequently, the police may enter and search unoccupied or underdeveloped areas outside the curtilage without either a warrant or probable cause.

REASON: "The test of a reasonable expectation of privacy is not whether the individual attempts to conceal criminal activity, but whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. Because open fields are accessible to the public and because fences or 'No Trespassing' signs, etc. are not effective bars to public view of open fields, the expectation of privacy does not exist and police are justified in searching these areas without a warrant."

CASE SIGNIFICANCE: This case makes clear that the "reasonable expectation of privacy" doctrine under the Fourth Amendment, as established in *Katz v. United States*, 389 U.S. 347 (1967), does not apply when the property involved is an open field. The Court stressed that steps taken to protect privacy, such as planting the marijuana on secluded land and erecting a locked gate (but with a footpath along one side) and posting "No Trespassing" signs around the property, do not establish any reasonable expectation of privacy. This case allows law enforcement officers to make warrantless entries and searches without probable cause in open fields, thus affording them greater access to remote places where prohibited plants or drugs might be concealed.

California v. Ciraolo
476 U.S. 207 (1986)

CAPSULE: The naked-eye observation by the police of a suspect's backyard, which is part of the curtilage, does not violate the Fourth Amendment.

FACTS: After receiving an anonymous telephone tip that Ciraolo was growing marijuana in his backyard, police went to his residence to investigate. Realizing that the area in question could not be viewed from ground level, officers used a private plane and flew over the home at an altitude prescribed by law. Officers trained in the detection of marijuana readily identified marijuana plants growing in Ciraolo's yard. Based on that information and an aerial photograph of the area, officers obtained a search warrant for the premises. A search was made pursuant to the warrant and numerous marijuana plants were seized. Ciraolo was charged with and convicted of cultivation of marijuana.

ISSUE: May officers make an aerial observation of an area within the curtilage of a home without a search warrant? YES.

SUPREME COURT DECISION: The Constitutional protection against unreasonable searches and seizures is not violated by the naked-eye aerial observation of a suspect's backyard, which is a part of the curtilage, by the police.

REASON: "That the area is within the curtilage does not itself bar all police observation. The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."

CASE SIGNIFICANCE: The term "curtilage" refers to the grounds and buildings immediately surrounding a dwelling. Ordinarily, the curtilage is not considered an open field and hence is protected against unreasonable searches and seizures. This means that searching a curtilage requires a warrant. In this case, however, the Court said that there was no need for a warrant because the search was in the form of a naked-eye aerial observation of a suspect's backyard and is, therefore, less intrusive. The Court said that the fact that the area is with the curtilage does not in itself prohibit all police observation. This case, therefore, expands police power to search the curtilage without a warrant, but only if the search is aerial in nature.

United States v. Dunn
480 U.S. 294 (1987)

CAPSULE: The warrantless search of a barn that is not part of the curtilage is valid. Four factors determine whether an area is considered part of the curtilage.

FACTS: After learning that a co-defendant purchased large quantities of chemicals and equipment used in the manufacture of controlled substances, drug agents obtained a warrant to place an electronic tracking beeper in some of the equipment. The beeper ultimately led agents to Dunn's farm. The farm was encircled by a perimeter fence with several interior fences of the type used to hold livestock. Without a warrant, officers entered the premises over the perimeter fence, interior fences, and a wooden fence that encircled a barn, approximately 50 yards from respondent's home. The officers were led to the barn by the odor of chemicals and the sound of a running motor. Without entering the barn, officers stood at a locked gate and shined a flashlight into the barn where they observed what appeared to be a drug laboratory. Officers returned twice the next day to confirm the presence of the laboratory, each time without entering the barn. Based on information obtained from these observations, officers obtained a search warrant and seized the drug lab from the barn and a quantity of controlled substances from the house. Dunn was charged with and convicted of conspiracy to manufacture controlled substances.

ISSUE: Is a barn located approximately 50 yards from a house and surrounded by a fence different from that of the house, part of the curtilage that cannot be searched without a warrant? NO.

SUPREME COURT DECISION: The barn that was searched by the police was not a part of the curtilage and, therefore, the warrantless search by the police was valid. Whether an area is considered a part of the curtilage of a home rests on four factors:

1. The proximity of the area to the home;
2. Whether the area is in an enclosure surrounding the home;
3. The nature and uses of the area; and
4. The steps taken to conceal the area from public view.

Applying these factors, the barn in this case could not be considered a part of the curtilage.

REASON: "Under *Oliver* [*v. United States*, 466 U.S. 170 (1984)] and *Hester* [*v. United States*, 265 U.S. 57 (1924)], there is no constitutional difference between police observations conducted while in a public place and while standing in an open field."

CASE SIGNIFICANCE: This case is important because, for the first time, the Court laid out the standards for determining whether a particular building falls within the curtilage of the main house. Applying the four factors enumerated above, the Court concluded that the barn searched by the police did not fall within the curtilage of the main building and therefore did not need a warrant in order to be searched. These four factors take into account such elements of reason as proximity, enclosure, uses, and steps taken to protect the area. The problem with these factors is that they are necessarily subjective and therefore lend themselves to imprecise application. Nonetheless, they are an improvement over the complete lack of guidelines under which the lower courts decided prior cases.

Arizona v. Hicks
480 U.S. 321 (1987)

CAPSULE: Probable cause to believe that items seen are contraband or evidence of criminal activity is required for the items to be seized under the "plain view" doctrine.

FACTS: A bullet fired through the floor of Hicks' apartment, injuring a man below, prompted the police to enter Hicks' apartment to search for the shooter, weapons, and other victims. The police discovered three weapons and a stocking cap mask. An officer noticed several pieces of stereo equipment that seemed to be out of place in the ill-appointed apartment. Based on this

suspicion, he read and recorded the serial numbers of the equipment, moving some of the pieces in the process. A call to police headquarters verified that one of the pieces of equipment was stolen. A subsequent check of the serial numbers of the other pieces of equipment revealed that they were also stolen. A search warrant was then obtained and the other equipment was seized. Hicks was charged with and convicted of robbery.

ISSUE: May an officer make a "plain view" search with less than probable cause to believe the items being searched are contraband or evidence of criminal activity? NO.

SUPREME COURT DECISION: Probable cause to believe that items being searched are, in fact, contraband or evidence of criminal activity is required for the items to be searched under the "plain view" doctrine.

REASON: "... [M]oving the equipment ... did constitute a 'search' separate and apart from the search for the shooter, victims, and weapons that was the lawful objective of [the officer's] entry into the apartment. Merely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of respondent's privacy interest. But taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry."

CASE SIGNIFICANCE: The "plain view" doctrine states that items within the sight of an officer who is legally in the place from which the view is made, and who had no prior knowledge that the items were present, may properly be seized without a warrant as long as the items are immediately recognizable as subject to seizure. This case holds that even after the officer has seen an object in plain view, he or she may not search or seize it unless there is probable cause to believe that the object is contraband or stolen property, or that it is useful as evidence in court. Therefore, if, at the moment the object is picked up, the officer did not have probable cause but only "reasonable suspicion" (as was the case here), the seizure is illegal. The "plain view" doctrine as the basis for warrantless seizure may be invoked by the police only if there is probable cause to believe that the item is contraband or useful evidence; it may not be invoked based on "reasonable suspicion" or any other level of certainty that is less than probable cause.

Horton v. California
496 U.S. 128 (1990)

CAPSULE: "Inadvertent discovery" of evidence is no longer a necessary element of the plain view doctrine.

FACTS: A police officer determined that there was probable cause to search Horton's home for the evidence of a robbery and weapons used in the robbery. The affidavit filed by the officer referred to police reports that described both the weapons and the stolen property, but the warrant that was issued only authorized a search for the stolen property. When the officer went to Horton's home to execute the warrant, he did not find the stolen property, but found weapons in plain view and seized them. At the trial, the officer testified that while he was searching Horton's home for the stolen property, he was also interested in finding other evidence related to the robbery. Horton argued on appeal that the weapons should have been suppressed during the trial because their discovery was not "inadvertent."

ISSUE: Is inadvertence a necessary element of the "plain view" doctrine? NO.

SUPREME COURT DECISION: "The Fourth Amendment does not prohibit the warrantless seizure of evidence in plain view even though the discovery of the evidence was not inadvertent. Although inadvertence is a characteristic of most legitimate plain view seizures, it is not a necessary condition."

REASON: Justice Stewart [in *Coolidge v. New Hampshire*, 403 U.S. 443 (1979)] concluded that the inadvertence requirement was necessary to avoid a violation of the express constitutional requirement that a valid warrant must particularly describe the things to be seized. He explained:

> The rationale of the exception to the warrant requirement, as just stated, is that a plain view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances."

In *Horton*, the Court stated: "We find two flaws in this reasoning. First, evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not

invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement. If the officer has knowledge approaching certainty that the item will be found, we see no reason why he or she would deliberately omit a particular description of the items to be seized from the application of a search warrant. Specification of the additional item could only permit the officer to expand the scope of the search. On the other hand, if he or she has a valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see why that suspicion should immunize the second item from seizure if it is found during a lawful search for the first.

"Second, the suggestion that the inadvertence requirement is necessary to prevent the police from conducting general searches, or from converting specific warrants into general warrants, is not persuasive because that interest is already served by the requirements that no warrant issue unless it "particularly describes the place to be searched and the persons or things to be seized," and that a warrantless search be circumscribed by the exigencies that justify its initiation."

CASE SIGNIFICANCE: This case does away with the requirement that for plain view to apply, the discovery of the evidence must be purely accidental. The police officer in this case knew that the evidence was there because it was in fact described in the officer's affidavit, but for some reason the warrant issued by the magistrate only authorized a search for the stolen property. Nonetheless, the officer saw the weapons in plain view during the search and seized them. Expressly rejecting the inadvertence requirement, the Court said that the seizure was valid because:

1. The items seized from petitioner's home were discovered during a lawful search authorized by a valid warrant.

2. When they were discovered, it was immediately apparent to the officer that they constituted incriminating evidence.

3. The officer had probable cause, not only to obtain a warrant to search for the stolen property, but also to believe that the weapons and handguns had been used in the crime he was investigating.

4. The search was authorized by the warrant.

Note that most seizures by the police under plain view are likely to be inadvertent, meaning that the police had no prior knowledge that the item was there. What Horton simply says is that even if the police know an item is to be found in a place, the item can be seized under plain view as long as the three elements mentioned above are present.

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