2001

The State of Utah v. Willie Folkes : Brief of Appellant

Utah Supreme Court

Vernon B. Romney, Attorney General.
Jack W. Kunkler; Ronald J. Yengich.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent

vs.

WILLIE FOLKES,

Defendant-Appellant

Case No. ~~27009~~ 14330

BRIEF OF APPELLANT

Appeal from a conviction of possession of a controlled substance with intent to distribute for value in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, presiding.

JACK W. KUNKLER and
RONALD J. YENGICH
Salt Lake Legal Defender Assoc.
343 South Sixth East
Salt Lake City, Utah 84102
Attorneys for Appellant

VERNON B. ROMNEY
Attorney General
236 State Capitol Building
Salt Lake City, Utah
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent vs. WILLIE FOLKES, Defendant-Appellant	: : : : : : 	Case No. 27009

BRIEF OF APPELLANT

Appeal from a conviction of possession of a controlled substance with intent to distribute for value in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, presiding.

JACK W. KUNKLER and
RONALD J. YENGICH
Salt Lake Legal Defender Assoc.
343 South Sixth East
Salt Lake City, Utah 84102
Attorneys for Appellant

VERNON B. ROMNEY
Attorney General
236 State Capitol Building
Salt Lake City, Utah
Attorney for Respondent

TABLE OF CONTENTS

CASES CITED

(continued) Page

(continued) Page

CONSTITUTIONAL PROVISIONS

(continued) Page

OTHER AUTHORITIES

Ann. Search and Seizure: Plain View, 29 L. Ed. 2d 1067

Comment, Probable Cause to Seize and the Fourth Amendment: An Analysis, 34 Albany L. Rev. 658 (1970)

Comment, Search and Seizure: Probable Cause for Seizure, 7 Suffold U. L. Rev. 184 (1972)

Kamisar et. al. Modern Criminal Procedure (1974)

Knipers, Suspicious Objects, Probable Cause and the Law of Search and Seizure, 21 Drake L. Rev. (1972)

Ringel, Searches, Seizures, Arrests and Confessions, (1975)

Rintamaki, Plain View Searching, 60 Military L. Rev. 25 (1973)

Scurlock, Basic Principles of the Administration of Criminal Justice with Particular Reference to Missouri Law, 38 U. Mo. Kansas City 167 (1970)

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent	:	
vs.	:	
WILLIE FOLKES, Defendant-Appellant	:	Case No. 14330

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of unlawful possession of a controlled substance with intent to distribute for value Utah Code Ann. §58-37-8(1)(ii) (1953), in the Third District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, Willie Folkes, was convicted by a jury of the crime of unlawful distribution of a controlled substance with intent to distribute for value on November 12, 1974, before the Honorable Jay E. Banks, of the Third Judicial District Court. The defendant was sentenced by the court to serve, one to fifteen years in the Utah State Prison, the indeterminate term of imprisonment which is provided by law.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the judgment of guilt entered against him and a new trial.

STATEMENT OF FACTS

At approximately 2:00 a.m. on May 26, 1974, two policemen (Officers Bell and Niemann) were stationed on the roof of the Rio Grand Products Building making observations of the street below for the purpose of facillitating the arrest of certain individuals unconnected with the present case (R. 3,32, 33, 51). While in the process of gathering data for those arrests, Officer Bell heard voices emanating from a second story apartment of the Baywood Apartment house which is immediately adjacent to the Rio Grand Products Building. Officer Bell testified that he saw a hand holding a syringe reach from a window of that apartment and squirt a clear substance into the alleyway (R.33). Officer Bell watched this activity for a short period of time and then signalled to his partner (Niemann) to join him beneath the window (R.33,34). The officers then together sat down immediately adjacent to the window of the apartment on the window ledge. The officers, desirous of getting close to the window to observe the activities occurring inside the apartment, positioned themselves on each side of the window at a distance of one foot from the defendant (R.37,51). Sitting in this position, the officers observed the movements and overheard the conversations of the appellant and the other occupants of the apartment by peering through the apartment's kitchen window. The officers observed activities which led them to

believe that illegal drug use was in progress (R.3, 33, 34, 37). Officer Bell, from his vantage point, was able to observe the appellant walk into the bedroom and obtain an amber colored bottle from which gelatin capsules were produced (R. 36,37). Officer Bell at no time communicated this information to Officer Niemann. Officer Niemann did not observe this activity in connection with the amber colored bottle (R.6). After two and one half hours of this observation, one of the officers made a noise which drew the attention of the appellant. The appellant signalled to the other occupants of the apartment to be quiet while he proceeded into the bedroom to investigate the noise (R.40). The appellant opened the bedroom window and stuck his head through it. At that time, Officer Niemann identified himself, and with revolver drawn, entered the apartment through the bedroom window (R. 6,41). Officer Bell then stuck his revolver through the screen of the kitchen window and ordered one of the occupants to stand where he was. Once Officer Niemann had secured the kitchen area, Officer Bell entered the apartment by climbing through the bedroom window and climbing over the bed next to the window. The appellant and the other occupants were then arrested in the kitchen (R. 6, 41). Upon the defendant's arrest he was handcuffed with his hands behind his back in the kitchen (R. 6, 94, 99). Officer Niemann then proceeded to make a cursory search of the entire apartment (R.84). The search disclosed an amber colored bottle on a dresser in the bedroom (R.6,84). The bedroom was dark and the officer could not detect what, if anything, was in the bottle (R. 6,7). Officer Niemann had never seen the bottle during the alleged illegal drug activity, and indeed, saw it for the first time when he searched the bedroom (R. 89, 90). The search was

undertaken after the defendant had been arrested and handcuffed away from the bedroom in the kitchen. The bottle, containing gelatin capsules filled with heroin, was introduced as evidence against the defendant at his trial. The police surveillance and arrest were made without a search or arrest warrant (R.8).

ARGUMENT

POINT I

THE SURVEILLANCE TECHNIQUE EMPLOYED BY THE POLICE, CONSTITUTED AN INVASION OF THE APPELLANT'S RIGHT TO PRIVACY SUCH THAT ANY EVIDENCE OBTAINED AS A RESULT THEREOF SHOULD HAVE BEEN EXCLUDED AT TRIAL.

The seminal case on right to privacy in Utah is State v. Kent, 20 U.2d 1, 432 P.2d 64 (1967). In this case, based on an informant's tip that the defendant was involved in a number of drugstore burglaries, a police officer requested permission and obtained it from a motel manager to use a hidden vantage point to maintain surveillance of the defendant in his motel unit. With the consent of the manager, the police officer entered the attic of the motel and peered through a ventilator located in the ceiling of the bathroom of the unit in which the defendant was staying. From this vantage point, the officer observed the entire bathroom and part of the bedroom. This surviellance was undertaken prior to the officer's procurement of a search warrant. In Kent this Court held that such surveillance was an unlawful invasion of the defendant's privacy rendering all the evidence seized by the police as a result of this surveillance and subsequent search inadmissible in the prosecution of the defendant for unlawful possession of a narcotic drug. The Court reached this conclusion notwithstanding the fact that the observation of the defendant had not required the police to

take any affirmative action such as removing vent covers or technically trespassing under common law property concepts.

Applying reasoning that foreshadowed the United States Supreme Court case of Katz v. United States, 389 U.S. 347 (1967), this Court dismissed the State's contention that the defendant's conviction and the trial court's denial of his motion to suppress the evidence should be affirmed on the ground that there was no physical trespass or unlawful entry into the premises of the defendant. Citing Silverman v. United States, 365 U.S. 505 (1961), this Court said that the determination of whether there has been an intrusion into a constitutionally protected area of privacy does not rest on whether there has been a trespass according to local property law. Instead, it was noted that although there may or may not be a trespass according to property laws, the gravamen of the harm is the injury to the individual's constitutionally protected right to privacy. The court emphasized that the home, even though it is merely a room in a motel, is a sanctuary, and a place where an individual has a right to be "free from outside intrusion and observation; a place inviolate where he could repose in security." (432 P.2d at 69) The obvious historical implications of intruding into one's abode in a free democratic society were noted by this Court. Fourth Amendment protections are just as inviolable in a motel room; and with only a few exceptions, a motel manager's consent was held not constitutionally sufficient to justify an officer making a warrantless search of a tenant's premises:

> We are of the opinion the defendant, in renting the motel unit, obtained the exclusive right to use it, which included the right to privacy. It is true that this right may be forfeited by illegal use of the property, but such unlawful utilization must first be established by legal means. (20 U.2d at 1, 8, 432 P.2d at 68-69)

The ratio decidendi enunciated in Kent inheres in the instant case with the same compelling logic. Although there was no initial trespass or physical entry into the appellant's apartment, it is clear that under Kent, the surveillance made by the officers who eavesdropped without a search warrant by sitting on the appellant's window ledge violated the right to privacy in one's own home assured by the Fourth Amendment and Article One, Section Fourteen of the Utah Constitution.

Private conversations as well as physical items are within the protection of the Fourth Amendment's prohibition of unreasonable searches and seizures. The landmark United States Supreme Court case of Katz v. United States, 389 U.S. 347 (1967), also stands for the proposition that eavesdropping activities employed by the government constitute a search and seizure within the meaning of the Fourth Amendment. In Katz, the government officers overheard the defendant's private telephone conversation by means of an electronic eavesdropping devise attached to the exterior of a telephone booth. In holding that the overheard conversations were the product of an illegal search and seizure, the United States Supreme Court said:

> "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a search and seizure within the meaning of the Fourth Amendment." (389 U.S. at 353).

In emphasizing that the Fourth Amendment protects not only property interests but protects all private activities of an individual, the Court in Katz, further stated:

> "For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection [Citations Omitted] But what he seeks to preserve as private, even in an area accessible to the public may be constitutionally protected." (Emphasis Supplied)
> (389 U.S. at 351)

It is evident from Katz, and Kent that the Fourth Amendment to the United States Constitution[1] protects that which one seeks to preserve as private as well as an individual's property rights. This protection extends far beyond tangible personal items and includes intangibles such as private conversations. Hence, a judicially authorized search warrant based on probable cause is a mandatory requirement for the seizure of private conversations and activities. Berger v. New York, 388 U.S. 41 (1967).

Prior to the Katz and Kent decisions, surveillance activities, standing alone, without actual physical entry by the police upon the premises, did not constitute a search and seizure within the meaning of the Fourth Amendment. Olmstead v. United States, 277 U.S. 438 (1928) Goldman v. United States, 316 U.S. 129 (1942). However, the United States Supreme Court in Katz, overruling Olmstead and Goldman, both specifically rejected the contention that a search, for purposes

1. As well as Article I, Section 14 of the Constitution which provides in language similar to the Fourth Amendment: "The right of the people to be secure in this persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation describing the place to be searched, and the person or thing to be seized."

of the Fourth Amendment, required physical entry onto the premises and held that police surveillance of private conversations, without actual entry or penetration onto premises, constituted an illegal search and seizure. At one juncture the Court said:

> "[I]t becomes clear that the reach of that Amendment [the Fourth Amendment] cannot turn upon the presence or absence of a physical intrusion into any given enclosure . . . The fact that the electronic device employed . . . did not happen to penetrate the wall of the booth can have no constitutional significance." (389 U.S. at 353) (Emphasis Supplied)

Applying Katz, to the present case, it is important to recognize that the appellant's private conversations and activities which took place from 2:00 to 4:00 a.m. on May 26, 1974, within the confines of his private residence, were not exposed to the public and were to be preserved as private. Hence, the surveillance made by two police officers who were eavesdropping without a search warrant by sitting on the appellant's window ledge for several hours two stories above the ground, peering into his kitchen in the middle of the night and mentally recording his private conversations and movements so as to produce them at trial, constituted a shocking invasion of the appellant's privacy and an illegal search and seizure within the meaning of the Fourth Amendment and Article One, Section 14 of the Federal and State Constitutions, respectively. The illegal search and seizure was made prior to arrest, by means of the surveillance despite non-entry by the police. Because the evidence obtained as a result of an invasion of the appellant's privacy was admitted at trial after a suppression hearing and over objections made by appellant's counsel, the appellant's conviction must be reversed.

The Katz decision and the rationale of Kent have been applied in many cases where the factual setting has been strikingly similar to that of the present case. In Lorenzana v. Superior Court, 9 Cal 3rd 626, 108 Cal. Rptr. 585, 511 P.2d 33 (1973), the California Supreme Court held that evidence, both audio and visual, obtained as the result of police peering into the defendant's apartment, was the product of an illegal search and seizure and inadmissible at trial.

The police in Lorenzana peeked through the defendant's window and observed him emptying some powdery contents of a tied-off rubber balloon onto a newspaper. Concluding that the substance was heroin, the police entered the apartment, arrested the defendant, and seized narcotics. Considering the Fourth Amendment claims made by the defendant, the court ruled that the observations made and the conversations overheard by the police who were standing next to the house in an area not open to public use were the products of an illegal search and seizure. If the surveillance had been made from an area normally used by the public, the evidence received therefrom would have been legally obtained and admissible at trial. But because the evidence was obtained by police stationed at a non-public vantage point, the surveillance activities constituted an illegal search and seizure of the defendant's conversations and movements. Holding that the defendant's reasonable expectation of privacy had been invaded, the court excluded the testimony of the police officers at trial.

The facts of the present case likewise indicate that police observed movements and overheard conversations from a vantage point outside the realm of public use and access. One would be hard pressed to conclude that the appellant would expect that members of the public would normally peek into his second story apartment window at 2:00 a.m. in the morning. Therefore, according to Lorenzana, any evidence, whether audio or visual, obtained by the police as a result of the use of their non-public vantage point, located on the window ledge of a private apartment two stories above the ground at 2:00 a.m. must be excluded at trial. Katz properly applies in such a situation and hence the trial court's finding that the evidence so obtained was admissible constitutes reversible error.

The assertion that the police had been authorized by the owner of the Rio Grand Products Building to use its roof for the purpose of observing prostitutes on the street below, does not vitiate the unlawful intrusion into the defendant's privacy, even though initial police observerations were made from the roof of the Rio Grand Building and not from the defendant's window ledge. The test for determining the legality of police surveillance activities is not whether the police had permission to use a non public vantage point, but whether the vantage point was in fact not normally used by or accessable to the public such that its use by the police would be an invasion of privacy reasonably to be expected by appellant.

In People v. Fly, 34 Cal. App. 3rd 665, 110 Cal. Rptr. 158 (1973), the police received permission from defendant's neighbor to use his (the neighbor's) backyard as a vantage point for observing plants growing in the defendant's backyard. The police used a telescope to

identify the plants as marijuana and then arrested the defendant. In refusing to decide whether the use of the telescope was unlawful, the court concluded:

> "We do not reach that issue [regarding the telescope] because we conclude that, on the record in this case, the evidence supports the finding that the officer viewed the yard on both occassions, from a vantage point as to which the defendant had a reasonable expectation of privacy." (110 Cal. Rptr. at 159) (Emphasis Supplied).

According to Fly, it makes no difference that police have permission to use a particular vantage point for observations. With or without permission, if the vantage point is one as to which the defendant had a reasonable expectation of privacy, any evidence obtained by the police from that vantage point has been obtained as the result of an unwarranted invasion upon the defendants privacy. If an invasion of privacy has been made, it is of no significance that police had non-judicial permission to make that invasion.

A test has been formulated for determining whether police surveillance from a particular vantage point is an unreasonable invasion of the privacy of those being observed. In Cohen v. Superior Court, 5 Cal. pp. 3rd 429, 85 Cal. Rptr. 354 (1970), the police observed illegal drugs on a table inside the defendant's home by standing on the fire escape of an apartment building and looking through the window of the defendant's fourth story apartment. The court, in determining the legality vel non of the surveillance, expressed the following test:

"The test to be applied in determining whether observations into a residence violates the Fourth Amendment is whether there has been an unreasonable invasion of the privacy of the occupants, not the extent of the trespass which was necessary to reach the observation point. (85 Cal. Rptr. at 358) (Emphasis Supplied).

Applying Fly, and the test of Cohen, to the present case, it becomes immaterial that the police obtained permission to use the roof of an adjacent building as a vantage point. The material conclusion thatmust be reached is that the police, even while they were on the roof of the adjacent building and before they sat down on the appellant's window ledge, were utilizing a non-public vantage point as to which the defendant had a reasonable expectation of privacy. Regardless of any non-judicial permission to use the roof any observations made therefrom constituted an illegal search and seizure because the police had not received judicial authorization to utilize a non public vantage point as to which the defendant and other occupants of his second story apartment nearby would have a reasonable expectation of privacy. Cohen and Fly, supra. Therefore, to protect the appellant's and the public's constitutional right of privacy, precious to a free and open society, his conviction must be reversed. Katz, supra, See also Olivera v. State, 315 So. 2d 487 (Fla. App. 1975), Storry v. State, 452 P. 2d 822 (Okl. Cir. 1969), Pate v. Municipal Court, 11 Cal App 3rd 721, 89 Cal. Rptr. 893 (1970).

POINT II

THE SEARCH OF THE APPELLANT'S BEDROOM AFTER HE HAD BEEN ARRESTED AND HANDCUFFED IN THE KITCHEN WAS BEYOND THE AREA WITHIN HIS IMMEDIATE CONTROL, AND THEREFORE VIOLATED HIS RIGHT TO PRIVACY, SO THAT ANY EVIDENCE OBTAINED AS A RESULT THEREOF SHOULD HAVE BEEN SUPPRESSED AT TRIAL.

In dealing with the law of search and seizure as mandated by the Fourth and Fourteenth Amendments of the United States constitution and Article One, Section Fourteen of the Utah Constitution we begin with the proposition that any search conducted outside of the judicial process is per se unreasonable. State v. Kent, 20 U.2d, 9, 432 P.2d 64 (1967). The rule has long been established that whenever practicable an officer must secure a search warrant before intruding into constitutionally protected areas. Trupiano v. United States, 334 U.S. 699 (1948). The interposition of a neutral and detached magistrate at the point where the probable cause determination is made is essential to safeguard an individual's Fourth Amendment rights because a police officer's judgment is necessarily colored by his prior involvement in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 10, 14 (1948). The Court enunciated this principle in McDonald v. United States, 334 U.S. 451 (1948):

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals . . . And so the constitution requires a magistrate to pass on the desires of the police before they violate

> the privacy of the home. We cannot be true to the constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." (334 U.S. at 455, 456)

Moreover, the burden of justifying such an extra-judicial search falls squarely upon the State. United States v. Jeffers, 342 U.S. 48, 51 (1951). To meet this burden the State must bring the search within one of the time tested and well qualified exceptions to the search warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

One such exception to the warrant requirement is a limited search incident to a lawful arrest. The seminal case on this issue is Chimel v. California, 395 U.S. 752 (1969). In that case police officers armed with an arrest warrant arrived at the defendant's home, identified themselves to the defendant's wife, and requested and received permission to wait inside the home for the defendant. When the defendant arrived, he was placed under arrest, and permission was requested to "look around". Over the defendant's objection, the police conducted an intensive search of the entire house. Although no search warrant had been issued the police justified the search as one incident to a lawful arrest. After completing the search which occupied between forty-five and sixty minutes the police seized numerous items. At his trial, the State introduced a number of the items which had been seized during the warrantless search of his home. On appeal, the defendant attacked his conviction on the ground that the aforementioned items had been unconstitutionally seized.

The United States Supreme Court agreed with the defendant that the search had exceeded the constitutionally permissible scope of a search incident to an arrest. After a review of the case law which had uniformly emphasized the preference for a judicially approved search warrant, the court explained that the exigencies of the arrest situation mandated a limited exception to the warrant requirement.

The Court felt that a limited search for weapons and destructible evidence justified dispensing with the warrant requirement at the point of arrest. However, in defining the constitutionally permissible scope of such a search, the court emphasized that the search incident to a lawful arrest must be "strictly tied to and justified by the circumstances which rendered its initiation permissible." (395 U.S. at 762). Based on this principle, the Court concluded that a search of the defendant's entire house following his arrest exceeded the limited scope of the very specific purpose which justified dispensing with the warrant requirement for a search conducted incident to a lawful arrest. Mindful that neither the premeditated nor the fortuitous circumstances of being arrested in one's home should license law enforcement officials to conduct general searches unsupported by probable cause, the court precluded this possibility by carefully circumscribing the scope of the search incident to a lawful arrest as limited to 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." (395 U.S. at 736). Seeking

to preserve the Fourth Amendment protections by removing all doubt as to what are the outer limits of the phrase "immediate control," the court went on to say:

> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs . . . . Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant. The "adherence to the judicial processes" mandated by the Fourth Amendment requires no less. (395 U.S. at 763)

Specifically rejecting the state's contention that a search of a man's house when he is arrested is "reasonable", the Court stated,"Under such an unconfined analysis Fourth Amendment protection in this area would approach the evaporation point." (395 U.S. at 765). Accord: Vale v. Louisiana, 399 U.S. 30 (1970).

Thus, it is eminently clear that the mandate of the Fourth Amendment, as interpreted and applied to the states through the Fourteenth Amendment by the United States Supreme Court in Chimel prohibits precisely that type of warrantless search and seizure as was conducted in the instant case.[2] The appellant was arrested and handcuffed along with all the other arrestees in his kitchen (R. 6, 94, 99). Following his arrest in the kitchen, one of the officers made

---

2. This Court has also ruled such broad scale searches after an arrest to be unreasonable. State v. Richards, 26 Utah 2d 318, 489 P.2d 422 (1971 ruled a search of the defendant's vehicle parked across the street from his home unreasonable, after defendant's arrest pursuant to a warrant.

a search of the apartment (R. 84) and seized an amber colored bottle found in the bedroom (R. 6). It was subsequently determined that the bottle contained gelatin capsules of heroin used as evidence against the appellant at his trial.

Moreover, the scope of an unwarranted search incident to an arrest as delineated in Chimel applies with particularly compelling force to the facts of the instant case. Significantly, the Chimel court specifically overruled both Harris v. United States, 331 U.S. 145 (1947), and United States v. Rabinowitz, 339 U.S. 56 (1950). Rabinowitz involved the search of a single room incident to an arrest; Harris involved the search of a four-room apartment incident to an arrest. In both cases, the searches were predicated on the principle that law enforcement authorities had "[t]he right 'to search the place where the arrest is made in order to find and seize things connected with the crime . . . ." (339 U.S. at 61). The Chimel Court specifically rejected this reasoning.

The conclusion is therefore inescapable that the warrantless search of the appellant's bedroom when he was arrested, handcuffed, and restrained by a police officer cannot be justified as a search incident to an arrest. Indeed, the search and seizure in the instant case falls precisely into that category of general exploratory searches condemned by the Chimel Court in construing the Fourth Amendment:

> Application of sound Fourth Amendment principles to the facts of this case produces a clear result. The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, "unreasonable" under the Fourth and Fourteenth Amendments (395 U.S. at 768) (Emphasis Supplied).

Failing to qualify as a "search incident to an arrest" exception to the warrant requirement, the Court in Chimel made it clear in that the police should have obtained a search warrant before violating the petitioner's privacy any further. In the instant case, the police failed to do so. Appellant contends that Chimel and the great weight of authority support the contention that this failure to obtain a search warrant was fatal to the search of the bedroom. As the Court stated:

> The State has made various subsidiary contentions, including arguments that it would have been unduly burdensome to obtain a warrant specifying the coins to be seized and that introduction of the fruits of the search was harmless error. We reject those contentions as being without merit. (395 U.S. at 768 fn. 16)

Appellant's contention that the search of his bedroom was beyond the area within his immediate control is buttressed by a decision from our own Tenth Circuit Court of Appeals. In United States v. Baca, 417 F. 2d 103 (10th Cir. 1969), the court concluded that the area within an arrestee's immediate control could be diminished when an arrestee was handcuffed with his hands behind his back. In Baca the appellant was arrested in his home for a parole violation. After handcuffing the appellant behind his back, his apartment was thoroughly searched by the arresting officers. The search included the inside of bureau drawers, night stand, and under the bed. The court concluded that these and any similar areas were hardly under "any type of control by Baca inasmuch as he was handcuffed with his hands behind his back and was unable even to dress himself." (417 F.2d at 105). In reversing and remanding the case, the Tenth Circuit went on to refer to the

Chimel case for the additional proposition that the general requirement that a search warrant be obtained is not to be lightly dispensed with. In this light, the Court stated that it was difficult to understand how or why it was not practicable for one of the officers to obtain a search warrant based on the probable cause which they had obtained by entering the Baca's apartment to effect his arrest. The ratio decidendi enunciated in Baca clearly inheres in the instant case where the challenged search of the bedroom followed the appellant's arrest and handcuffing behind his back in a kitchen of his apartment. (R. 6, 7, 94, 99).

This court has also had occassion to pass on a Chimel problem in State v. Sims, 30 U. 2d 251, 516 P.2d 354 (1973). In that case, when the defendant-suspect went to his bedroom to change his clothes, the police accompanied him for their own protection. Upon entering the bedroom, evidence later introduced at the defendant's trial came into the officer's "plain view." Justice Crockett, writing for the court, reasoned that the intrusion into the bedroom was justified under the rationale of Chimel to prevent the defendant-suspect from either escaping or obtaining a weapon. Sims may stand for the proposition that the area within an arrestee's immediate control was not limited to the room in which the arrest was made if the arrestee was not restrained and could still move from room to room. However, Sims is distinguishable from the instant case for two obvious reasons. First, the gravamen of the Chimel exception to the warrant requirement is that the exigencies inhering in the arrest situation necessitate a limited

search. In Sims, the defendant was not under arrest when the police accompanied him into the bedroom. Second, in Sims the defendant-suspect had essentially unrestrained freedom of movement in his apartment since he was not under arrest or otherwise in custody. In the instant case, the appellant was both under arrest and handcuffed behind his back. Baca stands for the proposition that the area within the appellant' immediate control, if anything, is diminished under such circumstances.

The burden is on the State to demonstrate what exemption from the requirement that a search warrant be obtained justifies the warrantless search in the instant case. United States v. Jeffers, 342 U.S. 48, 51 (1951). The testimony at the trial offers no explanation for the search of the appellant's bedroom (R. 84). In the absence of some legitimate justification by the police for invading the appellant's privacy the search and seizure must be deemed to be unconstitutional, and the fruits of the illegal search should have been suppressed by the trial court. Wong Sun v. United States 371 U.S. 471 (1963). The introduction of the tainted fruits constituted prejudicial error and hence the Appellants convictions should be reversed.

POINT III

THERE BEING NO PROBABLE CAUSE TO BELIEVE THAT THE AMBER COLORED BOTTLE CONTAINED CONTRABAND, WEAPONS, OR EVIDENCE OF A CRIME, THE OFFICER'S EXAMINATION AND INTRUSION INTO THE BOTTLE WAS UNREASONABLE, AND THUS THE SUBSEQUENT SEIZURE OF THIS ITEM WAS CONSTITUTIONALLY INVALID

The United States Supreme Court and this Court carving out the judiciously limited exceptions to the search warrant requirement have

indicated that contraband, evidence and weapons which are in "plain view" may be seized. Coolidge v. New Hampshire, 402 U.S. 443 (1971). State v. Sims, 30 U.2d 251, 516 P.2d 354 (1973). However, such "plain view" seizures are constitutionally reasonable under Coolidge only if four conditions are met: (1) The officer must be "lawfully present" where the search and seizure take place; (2) The seizable object must be in plain view; (3) Its incriminating nature must be immediately apparent; and (4) Its discovery must be "inadvertent." Coolidge v. New Hampshire, supra, and Ringel, Searches, Seizures, Arrests and Confessions Section 162 (1975 Supp. at 94).

The appellant submits that the search and seizure in the instant case must fall on all four grounds enumerated above. The discussion in Point II of this brief discusses the question of whether the officer was "lawfully present" in the bedroom; he was not. The officer, having listened outside the appellant's apartment for several hours prior to gaining entrance through the bedroom window, knew that no confederates were in the bedroom (R. 6, 82, 83) when he walked into the bedroom to conduct the search (R. 84). Thus, the State cannot justify the intrusion into the bedroom on the ground that it was necessary for the safety of the officers.

Moreover, the testimony from the suppression hearing and the trial supports the appellant's position that the search and seizure in the instant case must fall on grounds "two", "three", and "four" above.

Even assuming arguendo that the object was in plain view, it may not be seized unless its incriminating nature is immediately apparent. Ringel, supra at 62. The purpose of this requirement as stated

by the Court in Coolidge v. New Hampshire, is to prevent the plain view exception from being used "to extend a general exploratory search from one object to another until something incriminating at last emerges." Coolidge v. New Hampshire, 403 U.S. 444, 466 (1971).[3] It was only on this basis that the Court allowed the seizure of "mere evidence" in Warden v. Hayden, 387 U.S. 294 (1967). In that case the Court upheld the reasonableness of the warrantless seizure of the clothes of an arrested robbery suspect, where the clothes matched the description of the robbers' clothes and fell into "plain view" upon the arrest of the suspect. The crucial point is that plain view seizures are allowed as constitutionally reasonable when and only when probable cause exists to believe the item is seizable. As was stated by the Court in Sanford v. Texas 379 U.S. 476 (1965):

> The Fourth Amendment prohibits general warrants giving inferior officials roving commission to search where and to seize what they please.[4]

---

3. The necessity of the illegal nature of the object being readily apparent is supported by the concurring opinion of Mr. Justice Stewart in Stanley v. Georgia, 374 U.S. 557 (1967) which is cited with approval in the Coolidge case. In Stanley officials who had entered a building under the color of a lawfully procured search warrant specifying gambling equipment also seized several reels of film which on their face were not objectionable. Subsequently the defendants were charged with the possession of obscene film. Justice Stewart in an opinion joined by Brennan and White, J.J. described the seizure of the film as "unwarranted and unconstitutional" because "[t]his is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection." (394 U.S. at 571, Stewart J. concurring). Accord: Shipman v. Alabama, Ala., 282 So. 2d 700 (1973); Armour v. Totty, Tenn., 486 S.W. 2d 537 (1972

4. Or as indicated in Berger v. New York, 388 U. S. 41 (1967) in the context of electronic surveillance searches and seizures, the requirement of the Fourth Amendment to the Constitution that a search warrant shall particularly describe the things to be seized prevents the seizure of one thing under a warrant describing another. (388 U.S. at 58) Accord Marron v. United States, 275 U.S. 192, 196 (1927)

The colloquy between the officer who conducted the warrantless seizure and the defense attorney at the suppression motion amply illustrates that the facts in the instant case do not establish the plain view exception (R.6,7):

> Q. What made you pick up that bottle? Why did you pick that bottle up?
>
> A. It was there, so I picked it up.
> . . . .
>
> Q. Did you see what was in it before you picked it up?
>
> A. No, the room was dark, and it was in an amber bottle, and that's why I picked it up to look.

Thus, because the bedroom was dark and the bottle was amber, the officer did not know what it contained when it fell into his sight; in fact by his own admission he had no idea what it contained. A bottle sitting on a table is not incriminating on its face. The plain view exception requires that the officer must have an immediate knowledge that the seized item is contraband, evidence, or a weapon. That is to say, before governmental authorities may seize evidence or search into containers they must have probable cause to believe that (1) the containers contain contraband and (2) that the substance or evidence is in fact seizable as fruits, instrumentalities, contraband, or evidence of a crime. By the officer's own testimony that knowledge is absent in the instant case.[5]

5. The Utah plain view cases are not to the contrary: State v. Martinez 23 U.2d 62, 457 P.2d 613 (1969), involved a trench coat resembling that worn by the robber; State v. Allred, 16 U.2d 41, 395 P.2d 535 (1964), involved safety boots and coveralls matching the description of those stolen in a burglary; State v. Martinez, 28 U.2d 80, 498 P.2d 651 (1972), involved stolen stereo tape deck and two tapes; and State v. Sims, supra involved long strands of light brown hair matching those of the victim.

In all of the Utah cases, the incriminating nature of the seized item was readily apparent to the police officers. No investigation or examination of the item was necessary to ascertain its incriminating character. The necessity of the apparent character or identity of the seized item is fundamtental to the concept of plain view. Certainly the common sense connotation of the phrase as well as the well developed case law requires no less.

The Tenth Circuit Court of Appeals has followed this rationale as well. In Faubion v. United States, 424 F. 2d 437 (10th Cir. 1970), the court speaking through Circuit Judge Hicky, suppressed weapons seized in the warrantless search of the defendants luggage where there was apparently no probable cause to search the luggage and no reason for the government agents to have failed to attempt to procure a search warrant. As was noted in that case:

> The fact that the police have custody of a prisoner's property for the purpose of protecting it while he is incarcerated does not alone constitute a basis for the exception to the warrant requirement. Preston v. United States 376 U.S. 369 . . . Brett v. United States, 412 F. 2d 401, 406 (5th Cir. 1969).

In a case factually close to the one at the bar, the Court of appeals of Maryland held the search and concommitant seizure of marijuana and methadone unreasonable. Taylor v. State 9 Md. App. 420, 269 A. 2d 870 (1970). In Taylor, the defendant was lawfully stopped by a uniformed police officer and was asked to show the officer his drivers license and registration card. While talking to the defendant the officer noticed some brown envelopes and opened them. The envelopes and their contents were then seized and further analysis showed that they contained marijuana and methadone which

formed the basis of the defendant's conviction.

In reversing the defendant's conviction the court stated the issue as follows:

> The officers right to seize the brown envelopes within the car was not therefore dependent upon or limited by the rules authorizing searches and seizures incident to a valid arrest; it depended upon whether he had probable cause to believe that the brown envelopes observed within the vehicle contained prohibited narcotics. (264 A.2d at 873) (Emphasis Supplied).

The court concluded that on the record there was no showing of the requisite probable cause to know the envelopes contained prohibited and thus seizable narcotics. Although conceeding that the officer's expertise in such matters was important, the court concluded that from the record there was no showing of such expertise and that the conclusory statement of the officer was not a sufficient foundation upon which a showing of probable cause could be based:

> As heretofore indicated Officer Puepke testified that from his "past experience," he knew that the "brown envelopes" which he observed "are used for narcotic drugs." He did not state the basis for or any facts supporting his mere conclusion, nor was his expertise in the field sought to be established. In short, beyond Officer Puepke's "take it or leave it" conclusion that the brown envelopes were used for narcotics, there was nothing before the trial judge to permit him to intelligently assess whether Puepke's belief had a factual basis amounting to probable cause in the constitutional context. (264 A.2d at 893)

In the instant case there is no showing of even such a mere conclusion of expertise. On the contrary, the officer testified that he picked up the bottle because it was there, and for no other reason. Applying the rationale of Taylor to the evidence in the instant case the evidence must likewise be suppressed.

Another case similar to the instant one, which predates Taylor also supports the contention of the appellant herein. In Carver v. Kropp, 306 F. Supp 1329 (U.S.D.C.E.D. Mich. 1969) the defendant had been arrested for attempted rape, inter alia. Incident to the arrest the officer searched the defendant discovering five two-inch by three-inch envelopes and what appeared to be a large amount of money. Upon finding these items the defendant became highly upset and started to stutter and stammer. (306 F. Supp. at 1330). The officer opened the envelopes and found what proved to be heroin. The District Court upon defense motion suppressed the evidence at the Habeas Corpus hearing, finding the search and seizure constitutionally impermissible.

Noting that each envelope was not transparent and that each envelope contained approximately one tablespoon of heroin per envelope, and that there was no showing that the officer had any basis for believing the envelopes contained heroin, the Court suppressed the evidence.

> When the officer discovered the sealed envelope, did he have reasonable grounds to believe that the possession of the envelope was itself a felony?
>
> The envelope was not transparent and there was no trace of its contents on its outside. At the suppression hearing the officer did not claim that before he opened the envelope he thought it contained narcotics. In any event, it appears that before he opened the envelope the officer had at most a suspicion not reasonable cause to believe that it contained narcotics.
>
> The officer apparently thought he had a right to open the envelope because, as he testified, "the duties of a police officer are to seize any offensive weapons or incriminating articles from a defendant before he has a chance to dispose of them." A police officer does not, however, have a right as an incident of an arrest to

> conduct a general search for incriminating articles . . . [citing Terry v. Ohio, 392 U.S. 1 (1968)] . . .
>
> In this case the officer did not believe that the envelope contained a weapon and he did not have the right to open the envelope. Accordingly, I hold that the search of the envelope was unreasonable. (306 F. Supp. at 1331)

Of note also is the case of State v. Gwinn, Del. Supr. 301 A.2d at 91 (1973) where the Supreme Court of Delaware suppressed marijuana seized pursuant to an inventory of the defendant's vehicle. The court noted that although the police had the right to lawfully inventory the impounded vehicle, there was no reason to search a satchel found in the vehicle's locked trunk. The record in that case indicated nothing unusual or suspicious about the satchel, and that although the satchel was plainly visible its contents were not. (301 A.2d at 294). The court ruled:

> This brings us to the question of whether the contents of the closed satchel found in the trunk of the automobile came within the "plain view" doctrine. We think not. The record indicates nothing unusual or suspicious about the satchel. While the satchel itself was in "plain view" of the officer as he inventoried the contents of this auto trunk, the contents of the satchel were not in his "plain view" and do not fall within that doctrine.
>
> The opening of the satchel and an inventory of its contents were not necessary for the stated protective purpose. An effective sealing device or chain-lock device suitable for suitcases and other baggage found in a motor vehicle during an inventory would have sufficed for the security purposes sought. A detailed inventory of the contents of baggage appear to be an impractical and unnecessary, and therefore unreasonable, intrusion under the circumstances. Baggage usually contains innumerable personal items. The police should be relieved of the too-burdensome obligation of such inventory; and the citizen should be relieved of such impractical and unnecessary intrusion of his privacy. In this connection, it is

noteworthy that towaway and impoundment are daily consequences of certain parking violations. (301 A.2d at 294). [6]

Perhaps the seminal case on this issue comes from the State of Oregon. In State v. Elkins 245 Or. 279, 422 P.2d 250 (1966) the defendant was arrested for public intoxication and a search of his person uncovered an unlabelled bottle containing three kinds of capsules and pills. The officer testified he seized the pills because he was suspicious and not because he recognized them as contraband. On analysis the pills proved to be unlawfully possessed methadone. The Oregon Supreme Court held the seizure of the substance unlawful on the ground that "before the Officer had the right to seize the implements of a crime committed in his presence, other than that for which the arrest was made, he must have reasonable

---

6. In circumstances similar to those in the instant case the Supreme Court of Alaska, in Erickson v. State, Alaska, 507 P.2d 598 (1973) refused to approve the seizure of marijuana discovered in a suitcase. The court reasoned that it was the suitcase and not the marijuana which was in plain view and absent articulable reasons for believing the suitcase contained contraband the intrusive search of its contents was unjustified and hence unreasonable. The California Supreme Court in a similar situation also refused to apply the "plain view" exception. People v. Marshall, 69 Cal. Rptr. 585, 442 P.2d 665 (1968).

Also in People v. Brisendine, 13 Cal. 3d 528, 119 Cal. Rptr. 315, 531 P.2d 1099 (1975), the court held that the State was not allowed to justify the opening and searching of an opague plastic bottle on the exception to the warrant requirement for objects or contraband falling in plain view.

grounds to believe that the article is contraband.[7] (422 P.2d at 252) the court stated the policy behind its ruling as follows:

> If the rule were otherwise an officer who desired to inculpate an arrested person in another crime, could seize everything in such person's immediate possession and control upon the prospect that on further investigation some of it might prove to have been stolen or to be contraband. It would open the door to complete temporary confiscation of all an arrested person's property which was in his immediate possession and control at the time of his arrest for the purposes of a minute examination of it in an effort to connect him with another crime. Such a practice would be as much an exploratory seizure as one made upon an arrest for which no probable cause existed. Intolerable invasions of a person's property rights would be invited by an ex-post facto authorization of a seizure made on groundless suspicion . . . If contraband may be legally seized when the officer does not have reasonable grounds to believe it is such,

---

7. The case is examined in Kamisar et. al., Modern Criminal Procedure (1974) at 332 n. 5. And, the principle has been recognized by the commentators as a correct statement of search and seizure doctrine.

For example, in an annotation "Search and Seizure-Plain View," 29 L. Ed. 2d 1067, the following comment appears: "It has been suggested that even if an object is observed in 'plain view,' the 'plain view' doctrine will not justify seizure of the object where the incriminating nature of the object is not apparent from the 'plain view' of the object." (Emphasis Supplied)

See Comment, "Probable Cause to Seize and the Fourth Amendment: An Analysis," 34 Albany L. Rev. 658 (1970). This comment explores precisely the issue at bar, i.e., "the status of a seizure where the seizing officer did not know, or have probable cause to believe, that the item seized was a fruit, instrumentality, or contraband evidencing another crime." The author's conclusion is that such a seizure contravenes the Fourth Amendment. More recent writings on the subject simply accept this principle as a settled rule. See e.g. Knipers, "Suspicious Objects Probable Cause, and the Law of Search and Seizure," 21 Drake L. Rev. 252, 263 (1972); Scurlock, "Basic Principles of the Administration of Criminal Justice with Particular Reference to Missouri Law." 38 U. Mo. Kansas City 167, 198 (1970); Comment, "Search and Seizure Probable Cause for Seizure," 7 Suffolk U.L.Rev. 184,190 (1972) Rintamaki, "Plain View Searching," 60 Military L Rev. 25, 39 (1973).

> it will lead to many interferences with property when the officer's groundless suspicions are wrong. Nor can we be sure that the prevention of indiscriminate seizures of property upon lawful arrest will have no effect upon rights of privacy. If indiscriminate seizures are allowed upon lawful arrest it will tend to promote more arrests upon tenuous fanciful grounds. (422 P.2d at 254)

Numerous other cases have followed the Elkins rationale. The Courts of Alabama, Delaware, Colorado, New Mexico, Idaho and Maryland have explicitly rejected the idea that officers may seize objects on suspicion and in following Elkins have required a probable cause determination before an object may be seized. This Court has apparently not ruled on the precise issue.

In State v. Harwood, 94 Idaho 615, 495 P.2d 160 (1972), the Supreme Court of Idaho in an able opinion by Mr. Justice Shepard specifically followed Elkins in a case factually different than that at the bar. In Harwood the defendant's conviction for illegal possession of a game animal was reversed where the game warden was not able to show articulable facts which indicated that the seized animal carcass was in fact contraband. (495 P.2d at 164). Similarly in People v. LaRocco, 178 Colo. 196, 496 P.2d 314 (1972) the defendants conviction for forgery of an out of state drivers license was reversed. In LaRocco, the police pursuant to a search warrant seized an Illinois drivers license inter alia when the warrant specified other instrumentalities and evidence. The court rejected the states argument that the "plain view" doctrine justified the seizure of the Illinois license, noting that "officers merely suspected the license of being contraband

and that not having been specified in warrant" a nexus must have been shown connecting it with the criminal activity being investigated under the search warrant." Warden v. Hayden, 387 U.S. 294." (496 P. 2d at 316). The court stated the basis of its ruling as follows:

> To countenance seizure of evidence not specified in the warrant and unrelated to the criminal matters under investigation would open wide the doors to general searches and seizures based upon mere suspicion but not upon probable cause as constitutionally required . . . [Quoting from Mr. Justice Stewart's concurrence in Stanley v. Georgia, supra] . . .
>
> Not having demonstrated that the items here seized were fruits, instrumentalities, contraband, or evidence connected with the criminal activity being investigated under the search warrant, and no probable cause being shown for their seizure, the order of suppression was proper. (496 P.2d at 316).

In the same factual context see also Young v. State, Del. Supr. 339 A.2d 723 (1975) and State v. Paul, 80 N.M. 521, 458 P.2d 596 (1969). In Young, a prosecution from misdemeanor theft, the Delaware Supreme Court held the seizure unreasonable where officers who justifiably detained the defendant and saw a television set in his car, did not have probable cause to seize the set. In Paul, the New Mexico Court, suppressed the seizure of the defendants trousers and boots which were not specified in a search warrant authorizing a search of the defendants premises for coins taken in a school burglary. The Court suppressed the evidence indicating that the plain view doctrine without more (probable cause) would not justify such a seizure.

In cases factually more apposite to the one at the bar, the courts have followed the Elkins rule. Shipman v. State, 282 So. 2d 700 (1973), Dixon v. State, 23 Md. App. 19, 327 A.2d 516 (1974), State v. Florance, Or. App., 575 P.2d 195 (1972) rev'd other grds. 527 P.2d

195 (1974) and United States v. Thomas, 16 U.S. C.M.A. 306, 36 C.M.R. 462 (1966). An extensive review of the facts of each case appears unnecessary, basically each case concerned the seizure of substances which government agents suspected to be contraband drugs. Mr. Justice Bloodworth in Shipman v. State provides an exhaustive review of the cases in their factual context.[8]

In each case the Court reversed specifically citing to Elkins inter alia for the proposition that before officers may seize evidence of other crimes they must have probable cause to believe the evidence is in fact contraband. In each case the testimony was similar (if not approaching the identical) to that of Officer Niemann in the instant case.[9]

8. In Thomas military officers seized a bottle which was subsequently found to contain heroin. In Dixon officers seized pills which were found to be barbituates. In Florence the material seized was from plastic bags containing what proved to be cocaine. In Shipman the evidence was contained in cellophane bags which proved to be heroin.

9. In Thomas "there was no evidence that Lively or Tarvin [the arresting officers] suspected the accused of using or possessing narcotics or had any reason on which to base such a conclusion" (36 CMR at 463). In Dixon Officer Greisz testified that he had "no idea" what the pills were but seized them as part of the police departments inventory procedure and then "decided to have them tested" (327 A.2d at 523). In Florence there was no evidence that the officer recognized the substance as illegal contraband (515 P.2d at 197, 200). The Supreme Court of Oregon found that on the record the officer had sufficient expertise to determine the evidence to be contraband- but did not disturb its holding in Elkins (527 P.2d at 1212). In Shipman the officer who saw the cellophane bags "testified he did not know what was in the packages except that it appeared to be some white substance. At one point he indicated it was white powder." (282 So. 2d at 701).

In all the cases the Court suppressed the evidence seized and based their deicsions on the purpose of the Fourth Amendment and the analogus state constitutional provisions which exist in an effort to prevent general exploratory searches. In all the cases direct authority from the United States Supreme Court was indicated as controlling. The Coolidge opinion, Marron v. United States, and Mr. Justice Stewart's concurrence in Stanley v. Georgia were deemed controlling. The reason for the rule is nowhere better stated than by Mr. Justice Bloodworth and cited with approval by the Maryland Court in Dixon v. State:

> The reason for this rule is apparent. If the rule were otherwise, an officer, acting on mere groundless suspicion, could seize anything and everything belonging to an individual which happened to be in plain view on the prospect that on further investigation some of it might prove to have been stolen or to be contraband. It would open the door to unreasonable confiscation of a person's property while a minute examination of it is made in an effort to find something criminal. Such a practice would amount to the 'general exploratory incriminating at last emerges' which was condemned in Coolidge v. New Hampshire, supra. Ex post facto justification of a seizure made on mere groundless suspicion, is totally contrary to the basic tenets of the Fourth Amendment.
>
> For an item in plain view to be validly seized, the officer must possess some judgment at the time that the object to be seized is contraband and that judgment must be grounded upon probable cause. (282 So. 2d at 704 and 327 A.2d at 524).

Finally, the intrusion into the bedroom and the seizure of the bottle only after the officer examined the bottle to ascertain what it contained belies that the discovery of its contents was not "inadvertent." Inherent in the concept of the plain view exception to the requirement that a warrant be obtained before invading a defendant's privacy is the idea that without any purpose or effort

by the officer, an item of an incriminating nature falls inadvertently into his sight. Since the officer could not ascertain what was in the bottle, when the bottle fell into his sight, and because the bottle, was not itself plainly contrband, evidence, or a weapon, the officer was prohibited from examining it. At the point that the officer picked up the bottle, he lacked probable cause to seize the item. Picking up the bottle and carefully scrutinizing it to determine what it was is not an inadvertent happening upon evidence. The examination of the bottle can be analogized to the opening of a drawer or of a box to ascertain what they contain. Neither opening a box, nor opening a drawer, nor inspecting a bottle innocuous on its face fall within the ambit of the plain view exception.

The search of and subsequent seizure of the bottle and its contents, which was subsequently determined to be the heroin which forms the basis of the charge in the instant case, cannot be justified under the plain view seizure as constitutionally justified.

CONCLUSION

Whenever, the State seeks entry into one's home for the seizure of the fruits, instrumentalities, evidence of a crime or other contraband it must do so within the ambit of a judicially secured and valid search warrant or one of the exceptions to the warrant requirement. Searches and seizures, particularly of one's abode, conducted outside of the warrant requirement bear a stigma of

illegality which can be justified as reasonable only when the State bears its burden of bringing it within the time tested exceptions to the warrant requirement of both Federal and State Constitutions. No such reasonable exception to the warrant requirement exists in the instant case, the initial intrusion into the privacy of the defendant's home was unjustified and not based upon articulable probable cause offerred for the scrutiny of a magistrate. Hence, the fruits of such an intrusive observation must be suppressed as evidence for use at trial. Importantly, the intrusion in the instant case was unreasonable not only in the initial abrogation of the appellant's reasonable expectation of privacy, but also in its intrusive scope after the appellant's arrest, in his own home. The search of the entire home after appellant's arrest and detention in one room, and the seizure of unknown items, which by happenstance turned out to be heroin capsules, smack of the baseless exploratory searches which were at one time justified by overbroad writs of assistance. The search of the appellant's home and the contents of that home in the instant case was unreasonable as that term is used in the Fourth Amendment to the United States Constitution and Article One, Section Fourteen of the Constitution of the State of Utah, and hence evidence seized pursuant to that search should have been excluded at appellant's trial. Failure to exclude such evidence constituted reversible error on the part of the Court below.

For the reasons stated, it is requested that the judgment of the trial court be reversed and the appellant granted a new trial.

DATED this ____ day of January, 1977.

Respectfully submitted,

JACK W. KUNKLER
Attorney for Appellant

RONALD J. YENGICH
Attorney for Appellant