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Fixel v. State, 256 So. 2d 27 (Fla. 3d Dist. Ct. App. 1971), cert. denied, 262 So. 2d 443 (Fla. 1972)

is based on the best information available to the creditor, and is not used for the purpose of circumventing or evading the disclosure requirements . . . ."[23] As the *Bissette* court said, "[p]laintiffs do not seek, nor does the Act require, full and complete disclosure of each and every detail of the entire credit transaction."[24] All that is required is a forthright indication of the cost of borrowing, allowing the consumer to decide for himself if the rate is reasonable and the best available.

Criminal Law — SEARCH WARRANT — HEROIN SEIZED IN BACKYARD INCIDENT TO ARREST OF DEFENDANT IN HIS APARTMENT HELD ADMISSIBLE IN EVIDENCE.—*Fixel v. State,* 256 So. 2d 27 (Fla. 3d Dist. Ct. App. 1971), *cert. denied,* 262 So. 2d 443 (Fla. 1972).

During a surveillance of defendant Robert Fixel's apartment and backyard, an officer of the Key West police saw a number of persons—later characterized by the appeal court as "known pushers"—enter defendant's apartment. Another officer observed that several times defendant went to a pile of debris in his backyard, removed something from a black zipper bag, and took it into his apartment. A warrant to search the apartment was secured. One officer then went to the front door and arrested Fixel while another picked up the bag from the debris pile in the fenced-in backyard. The bag was found to contain heroin. The police were unable to find any narcotics in the apartment itself. The heroin seized in the backyard was admitted at trial, and defendant was convicted of possession of heroin. On appeal, the district court affirmed the conviction, stating that "Coolidge v. New Hampshire . . . does not require a reversal in this case inasmuch as that opinion recognizes that not every seizure of evidence which is not supported by a warrant is unconstitutional."[1] The Florida Supreme Court denied certiorari.[2]

The *Fixel* decision arguably misconstrues the import of *Coolidge v. New Hampshire.*[3] The law has long recognized that not all searches and seizures need be authorized by a warrant. The significance of *Coolidge* was not in its recognition of this principle but rather in its discussion of the situations in which the warrant requirement

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23. *Id.*
24. 340 F. Supp. at 1194.

1. 256 So. 2d at 28.
2. 262 So. 2d 443 (Fla. 1972).
3. 403 U.S. 443 (1971).

would be excused. The central issue in *Fixel* was whether the warrantless seizure of the heroin qualified under any of the exceptions to the warrant requirement; not whether such exceptions exist.

The court in *Fixel* was clearly of the opinion that the evidence was admissible under some exception to the warrant requirement. It is not immediately apparent, however, which exception was relied upon. After observing that the police lawfully entered Fixel's apartment to make a warrantless arrest on probable cause,[4] the court stated, as to the heroin seized in the backyard, that:[5]

> [A] search was not necessary because the police observed the replacement of the heroin . . . . [H]eroin is contraband and is a dangerous substance. It is important to note that we are not dealing with an unlawful entry into a dwelling in order to procure evidence of a crime but with an alleged trespass on to land in order to recover contraband. The seizure was, we think, incident to the lawful arrest.

The final conclusion of the court appears to be that the heroin was lawfully seized incident to a lawful arrest. Yet this would directly conflict with the Supreme Court's decision in *Chimel v. California,*[6] which limited searches incident to lawful arrest to "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."[7] Since Fixel was arrested in his apartment, the seizure in the backyard was not within the limited scope recognized by *Chimel.*[8] Indeed, a seizure of evidence located outside a dwelling could not have been sustained as incident to an arrest inside the dwelling even under the much more liberal scope of searches incident to arrest permitted prior to the *Chimel* decision. In *Coolidge v. New Hampshire,*[9] for example, the

4. The court said that observation of a crime—that is, sale of heroin to known pushers—constituted sufficient probable cause for the arrest. The trial record reveals that there was no testimony that the visitors were known pushers. The officer conducting the surveillance testified, "I can't tell what was in his hand . . . . I couldn't tell what it was or what it was for." Record, p. 46. It is at least questionable that this evidence constituted probable cause for an arrest.

5. 256 So. 2d at 29 (footnote omitted).

6. 395 U.S. 752 (1969).

7. *Id.* at 763.

8. *Cf.* Giacalone v. Lucas, 445 F.2d 1238, 1259 (6th Cir. 1971) (*Coolidge* cited by dissenting judge as authority for finding that search and seizure in a house cannot be extended to another floor of the house); United States v. Taggart, 334 F. Supp. 206, 208 (D. Del. 1971) (*Coolidge* cited as authority that search incident to arrest must be substantially contemporaneous and confined to immediate vicinity of the arrest).

9. 403 U.S. 443 (1971). Since *Chimel,* the case currently controlling the application

Court struck down the warrantless seizure of an automobile parked in the defendant's driveway, where the defendant was arrested in his house.

The *Fixel* court may also have relied on the plain view exception to the warrant requirement. The court stated that "a search was not necessary because the police observed the replacement of the heroin."[10] Assuming the evidence was in fact plainly observable by the police,[11] it is questionable whether the discovery satisfied the restrictions placed on plain view seizures by *Coolidge*.

Coolidge was suspected of the murder of a young girl. On information that his car might be connected with the crime, the state attorney general (who later acted as investigator and prosecutor of the case) issued a warrant authorizing a search of Coolidge's car. Coolidge was then arrested, and the car was taken from his driveway to the police station where it was searched two days after the arrest and on two other occasions. Vacuum sweepings from the car, including particles of gun powder, were introduced as evidence at the trial. After denial of pretrial motions to suppress, the evidence was admitted at trial and Coolidge was convicted.

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of this exception, was decided after the search in *Coolidge* and was considered prospective in its effect, the Court was forced to look to United States v. Rabinowitz, 339 U.S. 56 (1950), as authority. *Rabinowitz*, while not as restrictive as *Chimel*, still rendered the exception inapplicable on the theory, according to the *Coolidge* Court, that a warrantless search may extend only to an " 'area that is considered to be in the "possession" or under the "control" of the person arrested.' " 403 U.S. at 456, quoting from Chimel v. California, 395 U.S. at 760. The Court then stated that "a lawful pre-*Chimel* arrest of a suspect outside his house could never by itself justify a warrantless search inside the house. There is nothing in search-incident doctrine . . . that suggests a different result where the arrest is made inside the house and the search outside and at some distance away." *Id.* at 456-57 (footnote omitted).

10. 256 So. 2d at 29. The black zipper bag was probably not in plain view at the time of seizure, since it was hidden in the pile of debris. However, it has been held that an earlier observance of evidence in plain view will legitimate its seizure under the plain view exception at a later time if its location is known. *See* United States v. Wright, 449 F.2d 1355 (D.C. Cir. 1971); United States v. Welsch, 446 F.2d 220 (10th Cir. 1971). A more serious problem is that the heroin itself was never in plain view at any time since it was inside the black bag. With reference to police seizures of evidence without a warrant, the Supreme Court has said: "There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction." Warden v. Hayden, 387 U.S. 294, 307 (1967).

11. The Florida Supreme Court has ruled that a police officer may assume any position necessary to see evidence in open view as long as he has a legal right to be where he is. Even looking through a crack in a garage door is seeing evidence in plain view. But any slight intrusion, such as lifting a raincoat, constitutes a search and is no longer a matter of plain view. *See* State v. Ashby, 245 So. 2d 225 (1971).

The Supreme Court first determined that the warrant used in the search and seizure was invalid because it had not been issued by an impartial magistrate.[12] The Court then discussed whether the seizure and search of the car was nevertheless permissible within one of the exceptions to the warrant requirement. The Court began its analysis by accepting as "the most basic constitutional rule in this area"[13] the statement in *Katz v. United States* that " 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' "[14] The rationale for this rule is that any intrusion into a constitutionally protected area, such as a residence,[15] is an evil to be avoided. The warrant requirement minimizes the intrusive evils of police searches in two ways: "First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. . . . The second, distinct objective is that those searches deemed necessary should be as limited as possible. . . . The warrant accomplishes this second objective by requiring a particular description of the things to be seized."[16]

In plain view seizures, however, if the police are lawfully present (because of a valid search warrant, hot pursuit, search incident to lawful arrest, or some other reason) and inadvertently discover evidence which is "immediately apparent to the police"[17] as evidence of crime, neither of the protective functions of the warrant requirement is relevant. The police are by definition lawfully present; a magisterial determination of probable cause would be redundant. Since the evidence is in plain view, the protective function of the warrant served by a particular description of the things to be seized is also inoperative; there is no exploratory search by definition.

Using this rationale, Justice Stewart, writing for four Justices,[18]

12. 403 U.S. at 453.

13. *Id.* at 454.

14. *Id.* at 454-55, quoting from Katz v. United States, 389 U.S. 347, 357 (1967). The Court in *Coolidge* also expressed its opinion as to how these exceptions might be applied: "The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." *Id.* at 455 quoting from 335 U.S. 451, 456 (1948) (footnotes omitted).

15. Warrants are only required for constitutionally protected areas, which were defined in Katz v. United States, 389 U.S. 347, 351-52 (1967): "For the Fourth Amendment protects people, not places. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

16. 403 U.S. at 467.

17. *Id.* at 466.

18. Justices Douglas, Brennan, and Marshall joined in the Stewart opinion. Justice Harlan pointedly did not concur in Part-II-C dealing with plain view, but did concur in Part D which is a general defense of Parts II-B and II-C, and in the judgment.

placed two important limitations on the plain view doctrine. First, the initial intrusion by the police must have some lawful justification other than plain view. "[P]lain view *alone* is never enough to justify the warrantless seizure of evidence."[19] Secondly, "the discovery of evidence in plain view must be inadvertent."[20] Since the state planned in advance of Coolidge's arrest to seize his automobile, the seizure was clearly not inadvertent. Hence, although the automobile was parked in Coolidge's driveway and was obviously within the eyesight of the police when Coolidge was arrested, the seizure could not be justified under the plain view exception.[21]

The first important determination in *Fixel* is whether the police had a lawful justification for their initial intrusion other than plain view of the evidence. The Court said in *Coolidge* that:[22]

> Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.

Applying this language to *Fixel,* it is clear that the police could not rely on their observation of defendant's movements around the debris pile to provide a basis for the warrantless seizure of the bag. Assuming the observation constituted "incontrovertible testimony of the senses" that heroin was in, or likely to be in, the bag, the police could rely on no other exception to the general warrant requirement to justify their intrusion. In other words, they would be relying on "plain view alone" to justify the warrantless invasion and this was specifically prohibited by *Coolidge.*[23] Additionally, the police could not rely on the arrest of Fixel to justify their warrantless intrusion since the debris

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Justice Harlan has therefore been counted by lower courts as a fifth concurring vote, making Justice Stewart's plain view doctrine a majority view. *See, e.g.,* United States v. Drew, 451 F.2d 230 (5th Cir. 1971); United States v. Welsch, 446 F.2d 220 (10th Cir. 1971); Leavett v. Howard, 332 F. Supp. 845 (D.R.I. 1971); Brown v. State, 15 Md. App. 584, 292 A.2d 762 (Ct. Sp. App. 1972). *But see* United States v. Hill, 447 F.2d 817 (7th Cir. 1971); People v. George, 49 Ill. 2d 372, 274 N.E.2d 26 (1971).

19. 403 U.S. at 468.

20. *Id.* at 469.

21. *Id.* at 472-73.

22. *Id.* at 468.

23. "Plain view *alone* is never enough to justify the warrantless seizure of evidence." *Id.* There must be a lawful justification for the initial intrustion and the discovery must be inadvertent. *Id.* at 468-69. These considerations would apply only if the debris pile was a constitutionally protected area under the fourth amendment. *See* note 36 and accompanying text *infra.*

pile was not within their eyesight when Fixel was arrested. Put another way, the arrest justified a warrantless intrusion into Fixel's apartment, but that was not the area into which the police intruded to seize the heroin.

Even if there was a lawful intrusion in *Fixel,* it would also be necessary under *Coolidge* that the finding be inadvertent.[24] Although the *Fixel* court did not explicitly say so, it apparently considered the inadvertency requirement inapplicable since the evidence seized in *Fixel* was contraband. The court quoted without further comment the following language from Justice Stewart's opinion in *Coolidge*:[25]

> "The initial intrusion may, of course, be legitimated not by a warrant but by one of the exceptions to the warrant requirement, such as hot pursuit or search incident to lawful arrest. But to extend the scope of such an intrusion to the seizure of objects—*not contraband nor stolen nor dangerous in themselves*—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure."

Although the above passage can be read as exempting dangerous, stolen or contraband objects from the inadvertency requirement applicable to plain view seizures,[26] there is another interpretation which is more consistent with the primacy of the warrant requirement, a principle vigorously maintained by Justice Stewart in *Coolidge.* If a plain view seizure is legitimate "only where it is immediately apparent

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24. At some time within thirty days of the arrest, the police sent an informer into Fixel's apartment where he made a purchase of marijuana. On the basis of this evidence the police, on the day of the arrest, obtained a search warrant that only authorized a search of the apartment. The affidavit was attacked for staleness at the first trial, which ended in a mistrial. The affidavit was not used by the prosecution at the subsequent trial; however, the affidavit does indicate that the police did have prior knowledge of the probability of finding narcotics.

25. 256 So. 2d at 29, quoting from 403 U.S. at 471. (Emphasis added by the *Fixel* court.)

26. *See* 403 U.S. at 507 n.4 (Black, J., dissenting) ("The majority correctly notes . . . that this Court . . . flatly rejected the distinction for purposes of the Fourth Amendment between 'mere evidence' and contraband, a distinction which the majority appears to me to reinstate at another point in its opinion, *ante,* at 471 and 472."); *id.* at 519 (White, J., dissenting) ("Apparently, contraband, stolen, or dangerous materials may be seized when discovered in the course of an otherwise authorized search even if the discovery is fully anticipated and a warrant could have been obtained. The distinction the Court draws between contraband and mere evidence of crime is reminiscent of the confusing and unworkable approach that I thought *Warden v. Hayden, supra,* had firmly put aside."); State v. Richards, 489 P.2d 422, 426 (Utah 1971) (concurring opinion) (stating that in *Coolidge* the Supreme Court had at last seen the error of its ways in turning criminals free); Kuipers, *Suspicious Objects, Probable Cause and the Law of Search and Seizure,* 21 DRAKE L. REV. 252, 263 (1972).

to the police that they have evidence before them,"[27] then plain view seizure cannot be extended to objects that are not contraband, stolen or dangerous because those objects are generally innocuous on their face.[28] The automobile in *Coolidge* would have had no significance to an officer who inadvertently discovered it in another location. Prior knowledge of the relationship of the automobile to the suspected murder and of the location of the automobile in Coolidge's driveway was necessary to give it significance. At the same time, this prior knowledge made inadvertent discovery impossible since the police knew the location of the evidence and intended to seize it. Only evidence which on its face bears a relationship to criminal activity *regardless of location* is subject to plain view seizure, since only that evidence can be inadvertently discovered.[29]

Justice Stewart's comment in *Coolidge* about contraband and dangerous and stolen objects is very similar to a statement made in *Warden v. Hayden*.[30] That decision abolished the prior doctrine that only the fruits and instrumentalities of crime were seizable and that "mere evidence" was not. But to make it clear that the police could not randomly seize every item that might at some future time and in some unknown way become relevant to a criminal prosecution, the Court added that "[t]here must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior."[31] The *Coolidge* statement appears to be a reiteration of the observation that the nexus with criminal activity is automatically provided in the case of contraband, stolen or dangerous objects, thus making inadvertent discovery not certain but possible.[32]

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27. 403 U.S. at 466.

28. There will be a few limited situations in which the police have a detailed description of a criminal object that is not contraband, stolen or dangerous but in which discovery of the object could be inadvertent if the police did not know or suspect its location.

29. Although only contraband, stolen or dangerous objects can be discovered inadvertently, this does not mean that there is a presumption that a plain view seizure of those classes of objects is actually inadvertent. That remains to be proved by the introduction of other evidence.

30. 387 U.S. 294 (1967).

31. *Id.* at 307.

32. Justice Stewart recognized in *Coolidge* that there are some exigent circumstances in which the exigency itself can provide proof of inadvertency even though the police expect to find evidence and the evidence is not fruits, instrumentalities or contraband. This was the case in the seizure of clothing worn by a robber in Warden v. Hayden, 387 U.S. 294 (1967). This is the one aspect in which Justice Stewart felt that the requirement in Trupiano v. United States, 334 U.S. 699 (1948), that police obtain a warrant whenever they expect to find evidence is too broad. He specifically mentions the *Chimel* search incident to an arrest and the automobile on the open highway as instances where, al-

Even if the seizure in *Fixel* did not comply with federal standards for a search incident to an arrest or a plain view seizure, it is still possible that there was no "search" or "seizure" on the theory that the backyard was not a constitutionally protected area. The court suggested this theory when it stated that "[i]t is important to note that we are not dealing with an unlawful entry into a dwelling in order to procure evidence of a crime but with an alleged trespass on to land in order to recover contraband."[33] The court was apparently referring to the consideration that the police do not need a warrant to seize evidence in an open field.[34] For many years the determination of which areas are constitutionally protected centered around whether the area was part of the curtilage.[35] *Katz* shifted emphasis from the curtilage concept to the idea that the fourth amendment protects people from unreasonable invasion into areas which they justifiably expect to be private. Justifiable expectations of privacy, and hence fourth amendment protection, can extend to areas which are ordinarily open to public use.[36] In *Katz*, a public telephone booth was held to be a place where a person could reasonably expect not to be overheard once the door was closed. In other cases, courts have allowed the police to use a public area in a way in which an individual would expect it to be used. It was permissible for a policeman to walk down a side alley used by other tenants and see lottery tickets through an open door because it was reasonable to expect the public to use the entryway and look in through the door.[37] On the other hand, it was held impermissible to use a fire escape to look in a

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though the police may expect to find evidence and have the opportunity to obtain a warrant, they are not required to do so. 403 U.S. at 482.

33. 256 So. 2d at 29.

34. *See* Hester v. United States, 265 U.S. 57 (1924) (liquor seized in an open field); United States v. Wright, 449 F.2d 1355, 1360 (D.C. Cir. 1971) (buildings, fields and automobiles not as protected as a residence); *cf.* United States v. Lee, 274 U.S. 559 (1927) (boat seized on public waters).

35. *See, e.g.*, Taylor v. United States, 286 U.S. 1 (1932); Walker v. United States, 225 F.2d 447 (5th Cir. 1955); Roberson v. United States, 165 F.2d 752 (6th Cir. 1948).

36. *See* Wattenburg v. United States, 388 F.2d 853, 858 (9th Cir. 1968):

> If the determination of such questions is made to turn upon the degree of privacy a resident is seeking to preserve as shown by the facts of the particular case, rather than upon a resort to the ancient concept of curtilage, attention will be more effectively focused on the basic interest which the Fourth Amendment was designed to protect.

The court cited *Katz* in finding a search and seizure of a stockpile of Christmas trees about thirty feet from a motel and five feet from a parking area to be unconstitutional.

37. Harris v. State, 203 Md. 165, 99 A.2d 725 (1953).

window when an individual could reasonably expect it to be used only under emergency conditions.[38]

The seizure of Fixel's black zipper bag from a pile of debris can be usefully compared to cases dealing with search and seizure of trash from trash receptacles. In a recent California case[39] the defendant's trash receptacles were placed near the street where they were picked up and dumped into a garbage truck. The police immediately inspected the trash, which required the dumping of paper bags, and found marijuana debris. The California Supreme Court found the seizure to be unconstitutional because the defendant's "reasonable expectation of privacy . . . [had] . . . been violated by unreasonable governmental intrusion."[40] The United States Supreme Court has granted certiorari.[41]

Since the *Fixel* court referred to the issue of constitutionally protected areas in only one sentence, without supporting citations or rationale, the court arguably could have proceeded on the basic assumption that the yard or the rubbish pile where the heroin was hidden was a constitutionally protected area. If the court did intend to raise the issue, the critical question would then be whether Fixel's expectation of privacy in the rubbish pile was reasonable, which would depend on a careful examination of the facts.

The *Fixel* court dismissed the application of *Coolidge* to the case by quoting a short, obscure passage without further comment or analysis. Whatever one's views are on the wisdom of recent developments in search and seizure law, it is undeniable that matters of considerable complexity must now be confronted in deciding particular issues in this area. Although the decision in *Fixel* may have been sustainable under existing precedent, the decision itself is unilluminating as an application or interpretation of constitutional principles.

38. Cohen v. Superior Court, 5 Cal. App. 3d 429, 85 Cal. Rptr. 354 (2d Dist. Ct. App. 1970).

39. People v. Krivda, 5 Cal. 3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971).

40. *Id.* at 365, 96 Cal. Rptr. at 67, 486 P.2d at 1267. *But cf.* United States v. Long, 449 F.2d 288 (8th Cir. 1971) (search warrant for the premises was held to cover a trash barrel just outside the house).

41. California v. Krivda, 92 S. Ct. 1307 (1972).