Touro Law Review

Volume 11 | Number 3 Article 68

1995

Search & Seizure

retroactivity test adopted in *Pepper* for determining whether a rule is to be applied retroactively. Federal law takes a rigid approach and inquires only to whether the new rule is grounded in federal principles and according to federal law. If the new rule is based on federal constitutional concerns, then it is applied retroactively without exception. However, New York's rule on retroactivity takes a more practical approach and inquires not only to what the purpose of the new rule is, but also as to its practical effects upon the judicial system and the individuals who may have relied upon the old rule.

It may be stated, and rightly so, that the factors articulated in *Pepper* present the possibility that a rule which should be applied retroactively will not be so applied because of its practical effect on the administration of justice and the reliance upon it by the defendants. This is perhaps a weakness, however, it provides a degree of judicial discretion that is sometimes needed when the rights of individuals are involved. The functional difference in the two rules is that the state rule provides a means for determining the degree of protection a defendant is entitled, whereas the federal bright-line test relies on the constitutional guarantees inherent in the Constitution and its amendments.

People v. Saurini[295]
(decided February 4, 1994)

Defendant appealed the denial of his motion to suppress evidence on the grounds that the warrantless entry onto his property by deputy sheriffs violated his constitutional protection against unreasonable searches and seizures pursuant to both the New York State Constitution[296] and the United States

295. 201 A.D.2d 869, 607 N.Y.S.2d 518 (4th Dep't 1994).

296. N.Y. CONST. art. I, § 12. This provision provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, . . . but upon probable cause . . . ." *Id.*

Constitution.[297] The People argued that the entry and seizure were either justified under the plain view doctrine,[298] or the open fields doctrine.[299] The Appellate Division, Fourth Department, held that the motion to suppress should have been granted because neither doctrine was applicable.[300]

In *Saurini*, two deputy sheriffs entered the defendant's neighbor's property with the neighbor's permission, and from there viewed marijuana plants growing in defendant's backyard.[301] The deputy sheriffs then entered defendant's property and seized eighteen marijuana plants.[302] The plants had been growing in a flower bed behind the defendant's home at a distance ranging from eight inches to three feet from the house

297. U.S. CONST. amend. IV. The Fourth Amendment provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, . . . but upon probable cause . . . ." *Id.*

298. *See, e.g.*, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993); People v. Diaz, 81 N.Y.2d 106, 612 N.E.2d 298, 595 N.Y.S.2d 940 (1993). Essentially, the plain view doctrine, as described in both of these cases, permits the warrantless seizure of objects viewed in plain sight when the incriminating character of the object is immediately apparent and the authorities are lawfully situated to both make the viewing and access the object. *Dickerson*, 113 S. Ct. at 2136-37; *Diaz*, 81 N.Y.2d at 110, 612 N.E.2d at 301, 595 N.Y.S.2d at 943.

299. *See, e.g.*, Oliver v. United States, 466 U.S. 170 (1984) (holding that government entrance upon open fields is not an unreasonable search despite the fact the owner has erected fences indicating an expectation of privacy). *But see* People v. Scott, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992). The New York Court of Appeals expressly rejected the holding in *Oliver* to the extent that the *Oliver* court refused to distinguish between fields that the owner sought to enclose and those that had no such enclosure. *Id.* at 478, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922. In *Scott*, the court of appeals held that "where landowners fence or post 'No Trespassing' signs on their private property or, by some other means, indicate unmistakably that entry is not permitted, the expectation that their privacy rights will be respected and that they will be free from unwarranted intrusions is reasonable." *Id.* at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.

300. *Saurini*, 201 A.D.2d at 870, 607 N.Y.S.2d at 519.

301. *Id.* at 869, 607 N.Y.S.2d at 519.

302. *Id.*

and were enclosed in a flower bed with a rope attached to the house.[303]

The *Saurini* court rejected the People's argument that the seizure was justified under the plain view doctrine.[304] Regarding this claim, the New York Court of Appeals has stated that "[i]t is fundamental that warrantless searches and seizures are per se unreasonable unless they fall within one of the acknowledged exceptions to the Fourth Amendment's warrant requirement."[305] The plain view doctrine is an exception that permits the warrantless seizure of an object that is viewed in plain sight when three conditions are met: 1) the person doing the viewing must be lawfully positioned to view the object; 2) the person must lawfully have access to the object; and 3) the incriminating nature of the object must be immediately apparent.[306]

In *Saurini*, although the deputies satisfied the first and third requirements by being lawfully positioned to view the plants and because their incriminating nature was immediately apparent, they did not have lawful access to the plants when they seized them.[307] What the deputies needed was a lawful means of gaining access to the defendant's property and, as noted, the plain view doctrine presupposes this factor, rather than supplying it. It has been held that the plain view doctrine is an exception to the warrant requirement for seizures, not searches,[308] it nevertheless requires that the person conducting the seizure have prior justification for being in a position from which he can seize the

303. *Id.*

304. *Id.* at 870, 607 N.Y.S.2d at 519.

305. *Diaz*, 81 N.Y.2d at 109, 612 N.E.2d at 300, 595 N.Y.S.2d at 943. *See* Katz v. United States, 389 U.S. 347 (1967) (holding that the Fourth Amendment's protection against unreasonable searches and seizures includes conversations over public telephones).

306. *See* Minnesota v. Dickerson, 113 S. Ct. 2130, 2136-37 (1993); *Diaz*, 81 N.Y.2d at 110, 612 N.E.2d at 301, 595 N.Y.S.2d at 943.

307. *Saurini*, 201 A.D.2d at 870, 607 N.Y.S.2d at 519.

308. *See* Horton v. California, 496 U.S. 128, 134 (1990) (stating that "[i]f 'plain view' justifies an exception from an otherwise applicable warrant requirement . . . it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches").

object.[309] In this case, the problem lay in the entering onto the defendant's property to seize the evidence. Thus, the plain view doctrine was inapplicable because the deputies did not have lawful access to the objects they seized.[310]

The *Saurini* court then turned to the People's claim that the entry and seizure was justified under the open fields doctrine.[311] The open fields doctrine asserts that "the government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment."[312] There are two significant aspects to this doctrine. First, where does the curtilage end and the open field begin?[313] Second, once an area has been defined as an open field rather than part of the curtilage, what constitutes an unreasonable search in violation of the Fourth Amendment?[314] In *Saurini*, the court relied on cases that have defined curtilage boundaries, finding the marijuana in question was being grown within the curtilage because of its proximity to the house and the rope enclosing it.[315] However, had the court

309. *See Dickerson*, 113 S. Ct. at 2136-37; *Diaz*, 81 N.Y.2d at 110, 612 N.E.2d at 301, 595 N.Y.S.2d at 943.

310. *Saurini*, 201 A.D.2d at 870, 607 N.Y.S.2d at 519.

311. *Id.*

312. Oliver v. United States, 466 U.S. 170, 177 (1984).

313. *See* Florida v. Riley, 488 U.S. 445 (1989) (stating that a greenhouse located ten to twenty feet behind a mobile home was within the curtilage); California v. Ciraolo, 476 U.S. 207 (1986) (holding that marijuana growing in a fifteen by twenty-five foot plot in respondent's backyard was within the curtilage); United States v. Depew, 8 F.3d 1424 (9th Cir. 1993) (stating that an area six feet from a garage and fifty to sixty feet from the house was within the curtilage); Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968) (holding that a stockpile of Christmas trees twenty to thirty-five feet from a lodge and about five feet from a parking area of the lodge was within the curtilage of the lodge).

314. *See Oliver*, 466 U.S. at 177 (holding government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment). *But see* People v. Scott, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992) (holding that the expectation of privacy, if overtly manifested and reasonable by objective societal standards, can defeat the open fields exception to the warrant requirement with regard to searches and seizures).

315. *Saurini*, 201 A.D.2d at 870, 607 N.Y.S.2d at 519.

found that the marijuana was growing outside the curtilage, it is likely that it would have held the warrantless entry onto defendant's property to be in violation of his constitutional right to privacy pursuant to the second of the two open fields doctrine aspects, in light of the *People v. Scott* decision.[316]

With regard to the second aspect, the United States Supreme Court has held that "the term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech."[317] Thus, the erection of a fence does not necessarily defeat the open fields doctrine.[318] The New York Court of Appeals, on the other hand, has expressly declined to adopt this position. Rather, in *People v. Scott*,[319] the court relied on the expectation of privacy test formulated in *Katz v. United States*[320] and held that "where landowners fence or post 'No Trespassing' signs on their private property or, by some other means, indicate unmistakably that entry is not permitted, the

316. 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992). In deciding not to follow the Supreme Court's holding in *Oliver*, the court of appeals stated:

> We believe that under the law of this State the citizens are entitled to more protection. A constitutional rule which permits State agents to invade private lands for no reason at all -- without permission and in outright disregard of the owner's efforts to maintain privacy by fencing or posting signs -- is one that we cannot accept as adequately preserving fundamental rights of New York citizens.

Id. at 486, 593 N.E.2d at 1335, 583 N.Y.S.2d at 927.

317. *Oliver*, 466 U.S. at 180 n.11.

318. *Id.* at 177.

319. 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

320. 389 U.S. 347 (1967). In Justice Harlan's concurrence in *Katz*, he suggested that the expectation of privacy factor should be analyzed in two steps: 1) whether the individual manifested a subjective expectation of privacy, and 2) whether such expectation would be viewed as objectively reasonable by society. *Id.* at 361 (Harlan, J., concurring). The significance of this case, is that in defining "expectation of privacy," it laid the foundation for viewing the Fourth Amendment as essentially protecting "people, not places." *Id.* at 351. *See* California v. Ciraolo, 476 U.S. 207, 211 (1986) ("The touchstone of the Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" (quoting *Katz*, 389 U.S. at 360)).

expectation that their privacy rights will be respected and that they will be free from unwanted intrusions is reasonable."[321] Thus, under New York State law, even property outside the curtilage may be subject to the "unreasonable search" proscription of article I, section 12 of the New York State Constitution.[322]

In summary, neither the plain view doctrine nor the open fields doctrine could justify the warrantless seizure of the defendant's marijuana plants. The plain view doctrine essentially augments an existing justification, permitting the seizure of an object where a search was originally justified. A plain view seizure will be justified if the seized object is viewed in plain sight from a lawful vantage point, its incriminating nature is immediately apparent, and the law enforcement official has some other lawful basis for being in a position from which it can be seized.[323]

The open fields doctrine defines an area of law in which law enforcement officials may enter, without a warrant; an area that is essentially outside the boundaries of the Fourth Amendment proscription against unreasonable searches and seizures.[324] The state and federal case law differ as to whether efforts indicative of an expectation of privacy impact the identification of an open field. In this case, however, the plants were reasonably within the curtilage[325] and, therefore, not subject to either jurisdiction's application of the open fields doctrine.

---

321. People v. Scott, 79 N.Y.2d 474, 491, 593 N.E.2d 1328, 1338, 583 N.Y.S.2d 920, 930 (1992).

322. *Id.* at 478, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922 ("[W]e hold that the Oliver ruling does not adequately protect fundamental constitutional rights . . . and we decline to follow it.").

323. *See* Minnesota v. Dickerson, 113 S. Ct. 2130, 2136-37 (1993); People v. Diaz, 81 N.Y.2d 106, 110, 612 N.E.2d 298, 301, 595 N.Y.S.2d 940, 943 (1993).

324. Hester v. United States, 265 U.S. 57, 59 (1924) ("[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields.").

325. *Saurini*, 201 A.D.2d at 870, 607 N.Y.S.2d at 519.