11. PLAIN VIEW

During the course of their duties, school authorities may come across an item that they immediately recognize to be evidence of a school rule infraction or of a crime. This may occur during the course of a suspicionless inspection (see Chapter 4), a suspicion-based search (see Chapter 3), or during the course of routine interactions with students or while patrolling the hallways or conducting a surveillance. (see Chapter 9). School officials are permitted under the Fourth Amendment to seize these items, which are said to be in "plain view," provided that (1) at the moment the items come into view, the school officials are legitimately present and have not already violated a student's Fourth Amendment rights, and (2) it is immediately apparent to the school officials that they are, in fact, observing evidence of a crime or infraction.

Note that with respect to the first criterion, if school officials have already violated a student's Fourth Amendment rights, the plain view doctrine does not apply, and any evidence observed or seized following the Fourth Amendment violation will be said to be a "fruit" of the unlawful search or seizure and thus subject to the exclusionary rule. Note further that if the object was observed only after school officials had peeked, poked, or pried (i.e., had to open a closed container or rearrange clothing), then the items subsequently observed can only be lawfully seized if school officials had acted appropriately in conducting the peeking, poking, or prying. In other words, school officials must have reasonable grounds to believe that evidence of a school rule infraction or crime will be found *before* they engage in searching conduct that reveals the object.

Thus, for example, if a school official directs a student to empty his pockets without first having reasonable grounds to believe that the student is carrying evidence of an infraction or offense, any items dutifully revealed by the student would *not* be said to be in "plain view." Rather, those objects would be said to be a "fruit" of a search that, in this example, would have been unlawfully conducted.

On the other hand, if the student voluntarily and on his or her own initiative chooses to empty his pockets, or unwittingly reveals an object that was concealed in a closed container, that object would be said to be in "plain view," and it could be seized lawfully provided that it is immediately apparent to school officials that the object is contraband or is evidence of a school rule infraction or violation of the criminal law.

With respect to the "immediately apparent" criterion, the police officer or school official must be able to recognize the incriminating character of the evidence without conducting any further peeking, poking, or prying (unless, of course, the officer or official is already permitted to conduct a further peeking, poking, or prying under a

separate legal theory). This usually means, in the context of a law enforcement operation, that the police officer has *probable cause* to believe that the items in plain view are evidence or contraband. See Arizona v. Hicks, 480 U.S. 321, 326-328, 107 S.Ct. 1149, 1153-1154, 94 L.Ed.2d 347 (1987). In the context of a discovery by a school officials, it would seem that the school employee need only have *reasonable grounds* to believe that the items in plain view are contraband or evidence of a crime or school rule infraction. (Recall that the United States Supreme Court in T.L.O. held that school officials need not be concerned with the probable cause standard that applies to searches conducted by police.)

Under the plain view doctrine, ordinarily, the seized evidence would have been discovered "inadvertently." It is not uncommon for school officials to initiate a search looking for a particular type of object or item and, during the course of the search, discover evidence of a completely different and previously unsuspected violation. Thus, for example, school officials may conduct a search of a student's purse looking for cigarettes based upon reasonable grounds to believe that the student had been smoking, and subsequently discover evidence of drug-abuse violations, such as drug paraphernalia or illicit substances. In that event, school officials may lawfully seize the drugs and drug paraphernalia. In fact, that is exactly what happened in New Jersey v. T.L.O..

In Horton v. California, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990), the United States Supreme Court noted that "inadvertence" is characteristic of most plain view seizures, although the Court said that inadvertence is not a necessary element or condition. As a general rule, if police officers know in advance that they are going to find a particular item during the course of a search, they are expected to apply for a search warrant that specifically identifies all of the items to be seized. Under federal law, a seizure of an item would nonetheless be lawful under the plain view doctrine even if police could have, but chose not to, describe the object in their warrant application, so long as the police do not expand the scope of their search beyond that authorized by the warrant.

In State v. Damplias, 282 N.J. Super. 471 (App. Div. 1995), a New Jersey court declined to decide whether "inadvertence" is required in New Jersey under the plain view doctrine. In any event, this is not likely to become a significant issue in the context of searches conducted by school officials, since they are not, in any event, required to stop and apply for a search warrant where they have reasonable grounds to believe that a given search would reveal evidence of a school rule infraction or violation of the criminal law.

In a closely-related vein, police officers are not allowed to expand the scope of their search upon the discovery of evidence in plain view, unless the expanded search is authorized by a warrant or some other (i.e., besides "plain view") recognized exception to the warrant requirement. So too, government officials conducting a so-called "administrative search" cannot rely on evidence discovered in plain view during the administrative inspection as the basis upon which to expand the scope of the search "without first making a successful showing of probable cause to an independent judicial officer." Michigan v. Clifford, 464 U.S. 287, 294, 104 S.Ct. 641, 647 (1984). Thus, fire officials who are conducting an administrative inspection into the cause and origin of a fire who discover evidence of arson may seize that evidence, but are not permitted to conduct a more intrusive search (one that goes beyond a cause and origin inspection) without first obtaining a warrant.

Once again, this principle would not seem to apply in the context of searches conducted solely by school officials. Although the New Jersey Supreme Court in T.L.O. referred to these as "administrative" searches (as distinct from traditional criminal searches), the fact remains that school officials are allowed to conduct complete and thorough searches without having to apply for warrants and on the basis of a more flexible and less stringent standard of proof than probable cause. Thus, when a school official lawfully observes an object in plain view that is immediately recognized to be contraband or evidence of a crime or school rule infraction, the school official may not only seize that item, but may also proceed immediately to conduct a further search for additional like evidence, provided that the initial discovery, considered in conjunction with all other known facts, provides reasonable grounds to believe that additional evidence will be found in a particular place or in a particular container that is on school grounds or that is otherwise subject to school supervision.

It is important to note that the "plain view" doctrine applies to any of the human senses, including smell. In State v. Judge, 275 N.J. Super. 194 (App. Div. 1994), Judge (now Justice) Coleman ruled that the smell of burning marijuana coming from a passenger compartment of a lawfully-stopped vehicle constitutes probable cause. So too, in State v. Vanderveer, 285 N.J. Super. 475 (App. Div. 1995), the court held that the smell of burning marijuana on a small porch constituted probable cause to believe that an offense was being committed. (The fact that drugs were *not* found during the course of the search did not mean that the search was unlawful.) Since the recognizable smell of marijuana (or, presumably, burning tobacco products) constitutes probable cause, it is doubtless that school officials who smell burning marijuana (or burning tobacco products) would have "reasonable grounds" to conduct a search, since it is well-settled that the reasonable grounds standard governing school searches requires less proof than

the probable cause standard that applies to searches conducted by police.

The plain view doctrine also applies to the sense of touch. In Minnesota v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), the United States Supreme Court held that police officers may lawfully seize an object discovered during the course of conducting a lawful "frisk" or "patdown" for weapons if it is "*immediately apparent*" to the officers during the course of the protective frisk that the object that they are touching is evidence of a crime. This case has thus established the so-called "plain touch" or "plain feel" doctrine. The Court made clear, however, that it must be immediately apparent to police that they are feeling evidence of a crime *without* squeezing, sliding, or otherwise manipulating the contents of the suspect's pocket. The act by a police officer of squeezing, sliding, or manipulating the suspect's clothing constitutes a full-blown search, which goes well beyond the conduct that is permitted during a limited "patdown" for weapons.

In the context of school search law, however, this limitation on what police can do during the course of a protective frisk for weapons should not pose a particular problem. A school official, after all, would only be permitted to conduct a physical "patdown" of a student if he or she has reasonable grounds to believe that the student is carrying a weapon or other evidence of a school rule infraction or crime. In the event that school officials have such reasonable grounds, they (unlike police officers) would be authorized to conduct a *full-blown search*, subject, of course, to the limitations described in Chapter 10 concerning searches of persons and "strip searches". (Recall that police cannot conduct a full search of a person's clothing unless they have probable cause to arrest — a significantly higher standard of proof than the reasonable suspicion that authorizes police to conduct a limited patdown for weapons, or that authorizes school officials to conduct a full search.) Accordingly, where school officials have reasonable grounds to conduct any search at all, whether or not for weapons, they would be *permitted* to squeeze, slide, or otherwise manipulate the contents of a pocket. (But again, see Chapter 10 for a detailed discussion of the law governing strip searches and searches of the person.)

As noted in Chapter 3, because every search conducted by school officials must be limited to its legitimate objective, a search should ordinarily cease when the particular item being sought has been found and removed, provided that there is no basis for continuing to search for other suspected items. If a search conducted by school officials is based on reasonable grounds to believe that drugs will be found, school officials need not, of course, automatically stop upon the discovery of the first marijuana cigarette or packet of white powdery substance. Rather, the school officials conducting the search may continue to look for other evidence of drugs or drug paraphernalia in any place

where such drugs or items might reasonably be concealed. (Of course, school officials at this point may also elect to discontinue the search and call the police, who can be asked to assume responsibility for conducting any further searches. (See Chapter 14.1.) If school officials choose that option, they must take steps to ensure that the student, or anyone who may be working in concert with the student, does not conceal or destroy evidence before the police can arrive on the scene.)

Note also that the items revealed during the course of a lawful search may provide a factual basis to conduct an entirely new search based on a new suspicion of wrongdoing. Consider the following example: A student is observed carrying a small knife. The student could be brought to the principal's office and could be ordered to empty his pockets. Although the search in that case would be justified by reasonable grounds to believe that the student is carrying a weapon on his person, if the search of the student's pockets were to reveal drugs or drug paraphernalia, school officials could not only lawfully seize that contraband, they could also conduct a separate new search of the student's locker based on a suspicion that additional drugs or drug paraphernalia might be concealed at that location. (Note that a reasonably-grounded suspicion that the student was carrying a knife in his pocket would probably ***not*** justify a search of the student's locker unless there was some articulable reason to believe that the student kept additional weapons in the locker. See Chapter 3.2A for a discussion of the "four step" analysis that school officials should perform before initiating a search, or in this context, before expanding the search.)