RESTRAINTS ON PLAIN VIEW DOCTRINE: *Arizona v. Hicks**

I. INTRODUCTION

Before criticizing President Reagan's recent nominations of conservative judges to the Supreme Court, one should note a recent Supreme Court decision[1] authored by Justice Scalia, a Reagan appointee. Those who fear that a conservative shift in the Court will lead to the erosion of individual liberties gained under the Warren Court may well find their fears unfounded. In *Arizona v. Hicks*,[2] Justice Scalia proves that once a nominee joins the Supreme Court, there is no way to predict with certainty how he or she will vote on a given issue.

In *Arizona v. Hicks*, the Supreme Court held that probable cause is required to invoke the "plain view" doctrine for even cursory inspections.[3] This decision, which hinders law enforcement and breaks with accepted practice, was authored by Justice Scalia. This Note criticizes Justice Scalia's failure to exempt cursory inspections from the probable cause requirement.

II. HISTORY OF THE PLAIN VIEW DOCTRINE

The "plain view" doctrine permits the warrantless seizure of evidence inadvertently discovered by police who are lawfully in a position to view the item.[4] This exception to the warrant requirement is based on the notion that once police are lawfully in a position to observe an item, its owner no longer has a reasonable expectation of privacy.[5]

Prior to *Arizona v. Hicks*, the Supreme Court had not directly addressed the issue of whether probable cause is required to invoke the "plain view" doctrine. However, decisions rendered by the Court lead lower courts to develop the "plain view" doctrine in two distinct directions: full-blown searches requiring probable cause, and cursory inspections requiring only reasonable suspicion.[6]

The evolution of this dual standard began with Justice Stewart's

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[1] Arizona v. Hicks, 107 S. Ct. 1149 (1987).

[2] *Id.*

[3] *Id.* at 1153-54.

[4] Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971).

[5] Illinois v. Andreas, 463 U.S. 765, 771 (1983).

[6] *See generally*, 2 W. LAFAVE, SEARCH AND SEIZURE § 6.7(b), at 717 (2d ed. 1987).

concurring opinion in *Stanley v. Georgia*.[7] His opinion makes a distinction between a full-blown search and "mere inspection" when applying the "plain view" doctrine, implying that mere inspection should be held to a lower standard. Justice Stewart's rationale for the distinction is that a mere inspection is not prone to the same abuses as a full-blown search.[8]

The distinction further evolved in *Coolidge v. New Hampshire*.[9] The *Coolidge* plurality stated that the "plain view" justification is not applicable unless it is immediately apparent that the object is contraband or evidence of a crime.[10] The Court, however, offered no guidance, leaving the interpretation of "immediately apparent" to the lower courts.[11]

Because *Stanley* hinted that a mere inspection should be held to a lower standard than a full-blown search, and the Supreme Court did not address the issue in *Coolidge*, an overwhelming majority of both state and federal courts have held that a standard less than probable cause can justify a cursory inspection.[12] The following passage is typical of the position adopted by most lower courts:

> "the minimal additional intrusion which results from an inspection or examination of an object in plain view is reasonable if the officer was first aware of some facts and circumstances which justify a reasonable suspicion (not probable cause, in the traditional sense) that the object is or contains a fruit, instrumentality, or evidence of a crime."[13]

Two Supreme Court cases furthered the distinction between a full-blown search and a cursory inspection. The first, *Texas v. Brown*,[14] reasoned that a full-blown search of an item in plain view must be based on probable cause, but the mere observation of such an item generally does not involve a fourth amendment search.[15] The second case, *United States v. Place*,[16] extended "stop and frisk"[17] principles to items of personal property, permitting a brief search and seizure of those items based on a reasonable suspicion that an item contains contraband or evidence of a crime.[18]

Thus, case law leading up to *Arizona v. Hicks* generally recognized that under the "plain view" doctrine police could conduct a full-blown search of items found in plain view if based on probable

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[7] 394 U.S. 557, 571 (1969) (Stewart, J., concurring).
[8] *Id.* at 571.
[9] 403 U.S. 443 (1971) (plurality opinion).
[10] *Id.* at 466.
[11] 2 W. LAFAVE, SEARCH AND SEIZURE § 6.7(b), at 717 (2d ed. 1987). Interpreted strictly, the "immediately apparent" standard would bar any examination of an article that would extend beyond the reason for the officer's presence on the premises. But as Professor LaFave points out, most courts have not taken such a narrow view. *Id.*
[12] *Id.*
[13] *Id. See, e.g.*, People v. Eddington, 23 Mich. App. 210, 178 N.W.2d 686 (Mich. 1970). *See also*, State v. Noll, 116 Wis. 2d 443, 343 N.W.2d 391 (Wis. 1984).
[14] 460 U.S. 730 (1983).
[15] *See generally id.* at 736-44.
[16] 462 U.S. 692 (1983).
[17] Terry v. Ohio, 392 U.S. 1, 30-31 (1968).
[18] *Place*, 462 U.S. at 702.

cause. Further, police could conduct a cursory inspection of such items on less than probable cause. In *Hicks*, the Supreme Court squarely addressed whether probable cause is required to invoke the "plain view" doctrine and whether there are different standards for full-blown searches and cursory inspections.

III. *Arizona v. Hicks*

A. Facts and Case History

The defendant fired a gun through the floor of his apartment injuring a man below. Based on the exigency of the circumstances, police officers made a warrantless search of the defendant's apartment to look for the source of the bullet, possible other victims, and weapons.[19]

During the search, one of the officers noticed two sets of expensive stereo components in plain view. The stereo equipment was of a type frequently stolen and seemed out of place in the otherwise ill-furnished apartment. In addition, the apartment was littered with drug paraphernalia, a .45-caliber automatic pistol, a .22-caliber sawed-off rifle, and a stocking mask. Suspecting that the equipment had been stolen, the officer read and recorded the serial numbers. In order to read the numbers, the officer had to move a stereo turntable a few inches. The officer then reported the serial number, and after being advised that the turntable had been stolen in an armed robbery, he immediately seized it.[20]

At the defendant's armed robbery trial, the trial court granted his motion to suppress the stolen equipment. The Arizona Court of Appeals affirmed, concluding that, although the initial intrusion was valid, obtaining the serial number was an additional search, unrelated to the exigency. The United States Supreme Court, in an opinion written by Justice Scalia, affirmed the Arizona Court of Appeals.[21]

B. United States Supreme Court

The Court held that probable cause is required to invoke the "plain view" doctrine and refused to adopt a distinction between a full-blown search and a cursory inspection, stating that "[a] search is a search."[22] However, the Court did note that a truly cursory inspection of an item in plain view is not a fourth amendment search and that the mere recording of serial numbers does not constitute a seizure.[23] In this case, the officer moved the turntable a

[19] *Hicks*, 107 S. Ct. at 1152.
[20] *Id.*
[21] *Id.* at 1152-55.
[22] *Id.* at 1153.
[23] *Id.* at 1152.

few inches and the State conceded the lack of probable cause. Therefore, the Court found that the officer's actions constituted an illegal search and seizure.[24]

The Court reasoned that had the officers known that the stolen stereo equipment was in the defendant's apartment, they would have been required to obtain a warrant based upon probable cause in order to seize the equipment.[25] Under the facts of *Hicks*, the Court found no reason to allow a search or seizure without probable cause since probable cause would have been necessary had the officers known that the equipment was in the apartment.[26]

IV. ANALYSIS

A. The Search Was Reasonable Under the Fourth Amendment

In *Hicks*, the entry into the defendant's apartment was justified by the exigent circumstances. Once lawfully inside, the officers were justified in searching the entire apartment for the source of the bullet, weapons, and possible other victims. Finding the stolen stereo equipment was not the result of a general search, but rather an inadvertent discovery. The equipment was discovered in "plain view" and thus, the search was reasonable under the fourth amendment.

B. The "Bright Line" Approach is Too Rigid

The Court eliminates the distinction between a full-blown search and a cursory inspection, stating that "a search is a search."[27] Thus, probable cause is required for all "plain view" searches, regardless of their intrusiveness. The Court ignores, however, that it has long recognized that searches vary in intrusiveness[28] and that it has adopted standards of reasonableness (less than probable cause) when a careful balancing of governmental and individual interests suggest such a standard is appropriate.[29] Therefore, the Court's "bright line" approach is inappropriate because it does not consider distinctions in the level of intrusiveness. Such an approach does not follow the Court's previous cases, nor the spirit of the fourth amendment.

Probable cause should be required for a full-blown search of an item in plain view in order to prevent a general search. However, by its very nature, a cursory inspection is minimally intrusive and limited in scope. By demanding that cursory inspections also be based

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[24] *Id.* at 1153-54.
[25] *Id.*
[26] *Id.* at 1154.
[27] *Id.* at 1153.
[28] *Id.* at 1159 (O'Connor, J., dissenting).
[29] *Id.* (*citing* New Jersey v. T.L.O., 649 U.S. 325, 341 (1985)).

upon probable cause, the Court has extended the fourth amendment beyond its original purpose. Clearly, a cursory inspection is not a general search and thus, should not require probable cause.

Although a "bright line" approach may be desirable, the facts of *Hicks* demonstrate that such an approach is often too rigid.[30] For example, had the serial number been on the front of the turntable, exposed to the officer, the Court stated that there would not have been an illegal search.[31] But because the serial number happened to be facing the wall and the officer had to move the turntable a few inches, the Court held that the search was illegal.[32] By openly displaying the turntable in his living room, however, the defendant did not have a reasonable expectation of privacy.[33] The defendant did not face the serial number toward the wall to hide or conceal anything. Rather, the manufacturer just happened to stamp the serial number on the back of the turntable. Therefore, the fourth amendment should not have prohibited the cursory inspection of the turntable.

C. The Decision Will Unduly Hamper Law Enforcement

Under the *Hicks* decision, law enforcement officers are not allowed to move an item in plain view without probable cause. Such a limitation will greatly hamper law enforcement efforts and unduly inconvenience the police. For example, under the facts of *Hicks*, the police would need to leave the defendant's apartment and continue a separate investigation until they established probable cause to believe the turntable was contraband or evidence of a crime, and then obtain a warrant.[34] By allowing a brief cursory inspection of the turntable, the follow-up investigation and inconvenience would be eliminated.[35]

Finally, serial numbers are often the only identifying feature on mass produced items. Therefore, from a practical standpoint, a cursory inspection is not only helpful, but often necessary.

V. CONCLUSION

Justice Scalia's opinion in *Hicks* unreasonably restricts the "plain view" doctrine. By refusing to acknowledge a distinction between a full-blown search and a cursory inspection, the Court places serious

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[30] This rigid approach may lead lower courts to relax the probable cause standard in order to permit cursory inspections. For example, had the State not conceded the lack of probable cause in this case, a lower court could easily have found, as Justice O'Connor did, that probable cause existed. *Id.* at 1160.

[31] *Id.* at 1152.

[32] *Id.*

[33] *See*, Katz v. United States, 389 U.S. 347, 351 (1967).

[34] Once the police leave, their subsequent intrusion would no longer be justified by exigent circumstances. Therefore, they would need a warrant.

[35] Furthermore, the investigation delay may result in the destruction of evidence.

roadblocks in the way of effective law enforcement without any significant enhancement of individual privacy interests. Thus, *Hicks* imposes a high cost for a *de minimus* benefit.