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# Court of Criminal Appeals Update
# Significant Decisions from September 2014 to May 2015

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## I. INTRODUCTION

This paper covers the published opinions issued by the Court of Criminal Appeals between September 1, 2014 and May 4, 2015. However, we will continue to update the paper through the rest of the Court's term. If you would like a copy of the updated paper, please feel free to email me though Willette Wallace at willette.wallace@txcourts.gov and we'll do our best to hook you up.

## II. MOTIONS TO SUPPRESS

**A. Search Incident to Arrest—Police could not arrest based upon an uncorroborated and anonymous call about a vehicle chasing a man in a field.** Sherriff's deputies responded to an anonymous call about a vehicle chasing and possibly attempting to run over a man in a field. The deputies found an SUV in the field but no one was inside. They then found James Kuykendall walking nearby and determined that he was the man who was chased. Kimberly Story then arrived and told the officers that she and Kuykendall had been arguing and he got out of the car. She followed him in the car, trying to get him to get back in. Both Story and Kuykendall said nothing had happened and it was "just an argument." A deputy saw what he thought was a marijuana cigarette in plain view inside the SUV. Story was then arrested for assault and the deputies searched her vehicle. Kuykendall admitted the marijuana was his and the officers subsequently arrested him. During the search of the SUV, the officers found several checks that were either made out to Story or blank. The officers seized the checks and Story was indicted for forgery. Story filed a motion to suppress the checks, which the trial court granted.

The Court of Criminal Appeals affirmed. ***State v. Story*, 445 S.W.3d 729 (Tex. Crim. App. Oct. 15, 2014)(6:1:2)**. Writing for the majority, Judge Meyers first explained that the State's argument that the officers were permitted to look into the vehicle pursuant to the open fields doctrine would not be considered because it was not raised below. Similarly, Judge Meyers rejected the State's argument that there is no evidence the officers were trespassing on the field because the State had the burden of proving the officers weren't trespassing and failed to put evidence in the record on that point. Judge Meyers further reasoned that the record supported that the vehicle was searched incident to Story's illegal arrest. No officers testified that the vehicle was searched pursuant to Kuykendall's arrest. The officers did not have probable cause to arrest Story, as an anonymous call about illegal activity must be corroborated and both Story and Kuykendall stated they had only argued. Judge Meyers also briefly discussed the State's argument that the court of appeals failed to address the claim that the search was incident to Kuykendall's arrest and noted the court of appeals had explained that this particular argument was contrary to the evidence.

Presiding Judge Keller dissented, joined by Judge Price, to surmise that the State should have been permitted to present the open fields argument because Story was on notice that she would need to establish a privacy interest with respect to the premises, as she was bringing a Fourth Amendment claim. Judge Keller further noted that even without the open fields argument, Story failed to establish that she had any privacy interest in the field, which was her burden. Judge Keller went on to point out that the officer saw the marijuana cigarette in plain view before he arrested Story and that gave him probable cause to search the vehicle under the automobile exception.

Judge Womack concurred without an opinion.

**B. Search Warrants**

**1. Officer's statement that he smelled marijuana from an ambiguously described "location" outside of building with multiple tenants was insufficient to provide probable cause.** A DPS officer received information that marijuana was being grown inside Bradley McClintock's residence. McClintock lived in a second-floor apartment over a business. An open staircase on the back of the building leads from the parking lot to the second floor apartment. Officers monitored the apartment and witnessed a male individual coming and going from the apartment during non-business hours. The DPS officer

approached "this location" and could smell marijuana. A narcotics canine was brought to the second floor outside of McClintock's apartment and alerted to the presence of drugs. Based on this information, the officer obtained a search warrant for McClintock's apartment and found marijuana. McClintock filed a motion to suppress, which the trial court denied.

On appeal, McClintock argued that the dog sniff was an illegal intrusion. While the appeal was pending, the Supreme Court decided *Florida v. Jardines*, 133 S. Ct. 1409 (2013), which held that an officer bringing a narcotics canine into the curtilage of the home is a search under the Fourth Amendment. Based on *Jardines*, the court of appeals held the information in the affidavit for the search warrant was obtained illegally and the remaining information was insufficient to provide probable cause. The officer failed to specify his exact location to show that the marijuana smell was coming from McClintock's apartment and not the downstairs business.

The Court of Criminal Appeals reversed and remanded to the court of appeals to consider whether the good faith exception applies because *Jardines* was decided after the officer obtained the warrant. ***McClintock v. State*, 444 S.W.3d 15 (Tex. Crim. App. Oct. 1, 2014)(9:0)**. Writing for the unanimous court, Judge Price first noted that without the dog sniff, the warrant lacked probable cause. Judge Price observed that while the officer used "location" in the affidavit mostly to describe the building as a whole, in the sentence immediately before he described the smell of marijuana, the officer described the staircase leading to McClintock's second-floor apartment. But the Court did not give deference to the possibility that the magistrate could have determined the officer meant the staircase by "this location" because the magistrate was relying on more than the smell of marijuana to make the probable cause determination. According to the Court, the officer's statement that he smelled marijuana from "this location" was sufficiently ambiguous that, independently, it did not clearly establish probable cause. Judge Price went on to explain that remanding to the court of appeals to consider the good faith exception was appropriate, even though it was not argued below, because the State was not the appealing party in the court of appeals and the issues are substantial enough to merit a remand rather than disposition by the Court.

**2. Search warrant affidavit established probable cause after illegal dog sniff information was excised when the affidavit as a whole established that officers twice smelled raw marijuana and observed activities consistent with an illegal grow operation.** Sergeant Clark of the Harris County Sheriff's Department responded to a report from a concerned citizen about suspicious activity taking place in a nearby house. The citizen saw young Asian males arriving at the house but never saw anyone move in. The males would arrive in the evening, stay for a while, and then leave. Sergeant Clark, a narcotics investigator, observed the suspected residence and saw that the blinds were drawn on every window. He subpoenaed the utilities records and found that the utilities were in the defendant's name but that the defendant, Cuong Le, lived at a different address. Clark continued to monitor the house and noticed that the air conditioning unit was running continuously on a chilly day. He walked up the sidewalk to the front door and could smell raw marijuana. He continued nighttime surveillance and never saw indoor lights on. He suspected the residence was a marijuana grow house because grow operators usually don't live at the house, keep it cool inside, and check on it daily. Two weeks later, a different officer, Sergeant Roberts, observed Le's car at the house for a few hours, and then Le left in his car, and Roberts stopped him for committing a traffic violation. Roberts could smell raw marijuana. Roberts called for a drug dog, which alerted at the front door of the residence. The officers obtained a warrant and searched the house. They found 358 marijuana plants. Two months after Le was indicted, the Supreme Court decided *Florida v. Jardines*, 133 S. Ct. 1409 (2013), which held that use of a drug dog on the front porch of a home is a search for Fourth Amendment purposes. Le filed a motion to suppress, which the trial court granted. The court of appeals affirmed.

The Court of Criminal Appeals reversed. ***State v. Le*, ___ S.W.3d ___; 2015 WL 1933960 (Tex. Crim. App. April 29, 2015)(7:2).** Writing for the majority, Judge Newell first explained that the Court would not give deference to the magistrate because the search warrant in this case was tainted. Therefore, the Court determines whether the information in the search

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