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⚖ Vol. 10, No. 43 - February 6, 2012

Case Name: *[The State of Texas v. Leo Steelman and Ian Steelman](#)*

- OFFENSE: Possession of Marihuana
- COURT OF APPEALS: Eastland 2000
- C/A CITATION: 16 S.W.3d 483
- C/A RESULT: Suppression Order Affirmed
- COUNTY: Taylor
- C.C.A. CASE No. 1022-00
- DATE OF OPINION: October 23, 2002
- JUDGE: Holcomb, J.
- DISPOSITION: Court of Appeals Affirmed
- LAWYERS: Stan Brown (Defense); James Eidson (State)

⚖ 31.024 **Search and Seizure / Probable Cause (Misdemeanor Offense - Perpetrator Uncertain):** Abilene police received an anonymous tip that drug dealing was taking place at the Appellees' residence, and three officers were dispatched to the scene. Upon arrival, the officers peered into the house through a crack in one of the window blinds, but observed no illegal activity, merely seeing four men sitting in a living room. The officers then knocked on the front door. Ian Steelman opened the door, stepped outside, and closed the door. When the door was open, however, the officers smelled the odor of burnt marijuana, and asked Ian for identification. Ian said he would have to get his ID from inside the house. He then opened the door, walked back through it, and attempted to close it behind him. At that point, one of the officers placed his foot in the doorway and prevented Ian the door from closing. The officers then burst through the doorway, handcuffed all of the occupants, including Leo, and placed them all under arrest. At that point, the officers contacted narcotics agent David Varner. Varner arrived at the scene and smelled marijuana inside the residence. After asking for, but not receiving, appellees' consent to search the residence, Varner left to obtain a search warrant. In his search warrant affidavit, Varner asserted that probable cause existed to believe that the occupants of the residence were in possession of marijuana. Approximately two hours after the officers initially entered the residence, Varner obtained a search warrant, searched the residence, and found marijuana. After they were indicted for misdemeanor possession of marijuana, Appellees filed a motion to suppress the marijuana. At the suppression hearing, the State argued that once a police officer smells burning marijuana and determines which house it is coming from, the officer has probable cause to arrest the occupants and search that house. The State, for whatever reason, choose not to rely upon the search warrant. At the conclusion of the suppression hearing, the trial court granted appellees' motion to suppress. The trial court concluded that because the officers did not have probable cause to believe that either Ian or Leo had committed an offense in their presence, the warrantless arrests of Ian and Leo were illegal, and therefore, any evidence seized during the subsequent search of the residence was tainted and should be suppressed. The State appealed the trial court's ruling. The Court of Appeals upheld the trial court's ruling suppressing the marijuana (see [Greenwood & Schulman, Vol. 8, No. 15](#); April 17, 2000). The Court of Appeals reasoned that (1) the

warrantless arrests of appellees were illegal because the officers did not have probable cause to believe that the appellees had committed an offense in their presence and (2)“the issuance of the search warrant did not attenuate the taint from the [initial] illegal search and arrest.”

Holding: An offense is deemed to have occurred within the presence or view of an officer when any of his senses afford him an awareness of its occurrence. However, the information afforded to the officer by his senses must give the officer reason to believe that a particular suspect committed the offense. [Muniz v. State](#), 851 S.W.2d 238 (Tex.Cr.App. 1993). [Having smelled the odor of burnt marihuana in the air] what did the officers have probable cause to believe? Certainly they had probable cause to believe that someone, somewhere, was or had been smoking marihuana. But, did the mere smell of marihuana in the air give the officers probable cause to believe that Ian possessed marijuana? No. First of all, a mere anonymous tip, standing alone, does not constitute probable cause. Second, the mere odor of burning marihuana did not give the officers probable cause to believe that Ian had committed the offense of possession of marijuana in their presence. The officers in this case had no idea who was smoking or possessing marihuana, and they certainly had no particular reason to believe that Ian was smoking or possessing marihuana. Given the evidence before it, the trial court in the instant case could have reasonably concluded that the arrest of Ian was not lawfully made without a warrant because the arresting officers did not have probable cause to believe that Ian had committed an offense in their presence.

Concurring / Dissenting Opinions: (1) Judge Johnson delivered a concurring opinion in which she emphasized the entry into the home and that it was specifically not permitted under Art. 14.05, C.Cr.P. (2) Judge Cochran delivered a separate concurring opinion in which she was joined by Judges Meyers and Johnson, and in which she commented that "This case is about the right of citizens to be left alone in the privacy of their homes." (3) Judge Keller delivered a dissenting opinion in which she was joined by Judge Hervey. She argued that the Court relied on opinions "that are not on point, opinions that are one hundred and eighty degrees contrary to the Court's proposition, and one old, discredited, intermediate court, out-of-state case . . .," and that "The Court also confuses the issue here (probable cause) by including in its discussion the fact that the arrests took place in a residence." (4) Judge Keasler delivered a separate dissenting opinion in which he was joined by Judge Hervey, and in which he suggested that, "Perhaps the majority is confusing probable cause with the quantum of proof needed to convict at trial. It is hard to tell. Regardless, the majority erects barriers to arrest, search, and seizure that go far beyond those required by our Constitutions, statutes or case law." (5) Judge Hervey delivered another dissenting opinion in which she was joined by Judges Keller and Keasler. She pointed out that, because the State had chosen not to rely upon the search warrant at the hearing on the motion to suppress, "the search of appellees' home must be analyzed under the fiction that a warrantless search occurred even though it is undisputed that no warrantless search actually did occur." She argued that "No reasonable person can dispute that the odor of burnt marijuana inside the appellees' home provided the police with probable cause to believe that there was marijuana inside the appellees' home . . .," and "A warrantless search of appellees' home . . . would not have violated the federal constitution."

Comments: ([David A. Schulman](#)) To start with, let me say that this case exemplifies the adage that bad lawyering leads to bad law. In this case, a very talented and experienced defense lawyer was assisted by a prosecutor who wasn't thinking down the road. My analysis would go something like this. "Anonymous tip + smelling burnt marihuana = probable cause." Thus, a warrant to search for marihuana would be valid, and the subsequent search that led to the marihuana would be legal. However, because the DA in this case "for whatever reason, choose not to rely upon the search warrant . . .," and the trial judge ruled against the State, the State can't argue the search warrant on appeal (but they could have if the judge ruled against the suppression motion), and there is no search warrant to rely on. Thus, we're left with old Ian out there on the porch and marihuana reeking from inside the house. Contrary to the majority opinion, I believe that he can be arrested for possession of marihuana (as could probably the other three). However, Art. 14.05, C.Cr.P., clearly prevents the arresting officers from entering the house to make any arrest, and they cannot do a search incident to an arrest inside a house when the probable cause develops and the arrest occurs outside the house (remember - they don't need to go into the house to arrest Ian). Now, the police could have arrested Ian and then gone and obtained a search warrant, which they kinda' did, but the State abandoned the search warrant before the trial court ruled. No matter how I look at it, the juicy issues were not the issues arising out of the application of Art. 14.01, et seq, C.Cr.P., and we're

forced to keep coming back to the search warrant. This then requires, as Judge Hervey noted, that the case "must be analyzed under the fiction that a warrantless search occurred even though it is undisputed that no warrantless search actually did occur." Pretty bizarre. Pretty sad. Maybe the Court should have skipped this case.