IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-0228-17

THE STATE OF TEXAS

v.

JOSE LUIS CORTEZ, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE SEVENTH COURT OF APPEALS POTTER COUNTY

YEARY, J., filed a dissenting opinion.

DISSENTING OPINION

Today the Court affirms the judgment of the court of appeals without even reviewing the actual legal basis for that court's ruling. It does so in the name of "judicial economy." Majority Opinion at 3 & n.4. But, in doing so, the Court fails to adhere to our narrow precedents that allow for the discretionary review of issues *not* decided by the court of appeals. Because "the record supports the conclusion reached by the trial court[,]" the Court today "affirm[s] the judgment of the court of appeals." Majority Opinion at 4. Thus, the Court bypasses the intermediate appellate process entirely, essentially deciding issues *de*

novo, without reviewing the actual basis for the court of appeals' judgment at all. *See id*. at 13 ("[I]t is not necessary that we establish a definitive rule regarding whether every fog line painted on a roadway is part of the roadway or part of the shoulder . . . .").[1]

A discretionary review court culls through the many and sundry opinions of the lower appellate courts, granting review of only a select few appropriate cases with the aim to optimize its ability to isolate important legal issues and write cogent judicial opinions that will set clear jurisprudential precedents for the lower courts. Today the Court, instead, essentially remakes itself and assumes the role of a super-appellate court, as though our proper function was to ensure that *all* individual cases are rightly and expeditiously decided, regardless of the proper roles assigned to the various courts in our hierarchical judicial

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[1] I agree with Presiding Judge Keller's conclusion that "the fog line must be part of the shoulder." Dissenting Opinion at 4. I disagree with her, however, to the extent that she apparently believes that the court of appeals addressed the question of whether driving momentarily on the fog line would constitute an offense. *See* Dissenting Opinion at 3 ("We can also ask whether touching the fog line constitutes 'driving' on it [because this issue was among those that] were addressed by the court of appeals."). Thus, when the Court today holds that, even if the fog line itself constitutes the shoulder, a mere "momentary touch" of the fog line would not constitute an offense, it is resolving an issue that the court of appeals had also resolved. Majority Opinion at 14. To the extent that the court of appeals did so, however, it only did so in the context of its treatment of the issue we ordered it to address on remand, namely, whether the trooper made a reasonable mistake of law in believing that Appellee violated the traffic code, under *Heien v. North Carolina*, 574 U.S. ___, 135 S.Ct. 530 (2014). *See State v. Cortez*, 512 S.W.3d 915, 926 (Tex. App.—Amarillo 2017) (trooper did not claim to be aware of any law holding that a "momentary touch of some fraction of a 'fog line' or boundary hardly connotes driving upon either the boundary or the area on the other side of the boundary"). But the State did not raise the *Heien* issue in its petition for discretionary review, nor did it otherwise argue the "momentary touch" issue, and we did not grant review of the either issue on our own motion.

system.[2] In my view, that is an untenable model for discretionary review. *See Arcila v. State*, 834 S.W.2d 357, 360 (Tex. Crim. App. 1992), *overruled on other grounds by Guzman v. State*, 955 S.W.2d 85 (Tex. Crim. App. 1997) ("Our principal role as a court of last resort is the caretaker of Texas law, not the arbiter of individual applications.").

If the issue were properly before us, I might well agree with the Court's ultimate conclusion that the State failed (at least) to establish, as was its burden, that the trooper had at least some reason to believe that Appellee was not justified in driving on the shoulder, in contemplation of the statute. Majority Opinion at 11 & n.23 (citing *Lothrop v. State*, 372 S.W.3d 187, 191 (Tex. Crim. App. 2012)); *id*. at 15-18. After all, an argument could be made that an officer may not himself conjure the circumstances to cause a citizen to appear to violate some traffic law and then rely upon the apparent violation to justify a traffic stop.[3] The court of appeals might well reach the same conclusion, were we to remand the cause to

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[2] Acting in this same capacity as a super-appellate court, we could have issued the opinion the Court hands down today at least a year-and-a-half ago, instead of remanding the cause at that time for the court of appeals to address a separate issue the Court does not even mention in its opinion today. *See State v. Cortez*, 501 S.W.3d 606, 610 (Tex. Crim. App. 2016) (remanding this cause to the court of appeals to address the State's argument predicated on *Heien*).

[3] Surely police officers may not be permitted to make their own probable cause by essentially provoking citizens into committing suspicious conduct. *Cf*. *Brown v. State*, 481 S.W.2d 106, 111 (Tex. Crim. App. 1972) (quoting *Wong Sun v. United States*, 371 U.S. 471, 484 (1963), for the proposition that "a vague suspicion cannot be transformed into probable cause to arrest by reason of ambiguous conduct which the arresting officers themselves provoked") (internal quotation marks omitted); *Faulk v. State*, 574 S.W.2d 764, 766 (Tex. Crim. App. 1978) (same); *Parker v. State*, 206 S.W.3d 593, 598 n.21 (Tex. Crim. App. 2006) (noting that exigent circumstances will not satisfy Fourth Amendment concerns "if the government deliberately creates them") (quoting *United States v. Coles*, 437 F.3d 361, 366 (3d Cir. 2006)).

that court (as we should). But that issue is not currently before us in our discretionary review capacity. In that capacity, as we have said on countless occasions, we typically review only "decisions" of the courts of appeals. *See, e.g.*, *Stringer v. State*, 241 S.W.3d 52, 59 (Tex. Crim. App. 2007) ("In our discretionary review capacity we review 'decisions' of the courts of appeals. Thus, the State's alternative arguments are not ripe for our review. Because we reverse the judgment of the court of appeals, the court shall consider these arguments on remand.") (some internal quotation marks omitted).

It is true, as the Court frankly admits, that we have sometimes reached an issue *in addition to* the issue upon which we granted discretionary review, even when that issue was not expressly decided below—but only when the proper resolution of the additional issue has been deemed "clear." Majority Opinion at 3 n.4. But even while it acknowledges this to be the state of the law, the Court does not claim, much less attempt to demonstrate, that the proper resolution of the issues upon which it disposes of the case are so manifestly self-evident that it is appropriate, for the sake of judicial economy, to suspend our ordinary procedure, bypass the usual intermediate appellate resolution, and resolve them *de novo*. Inclined though I may be to agree with the Court's resolution of at least some of the issues the Court reaches today, they do not seem so indisputably clear to me.

In any event, I am unaware of any case in which we have ever deliberately resolved a case based upon issues that are *different from* the issue we granted discretionary review to address—*and for the express purpose of avoiding resolution of the issue we actually granted*

review of. What sense does it make to ignore the issue that we ordered the parties to brief, having deemed it important enough to the jurisprudence of the State to implement our own judicial resources in the first place?[4] I do not see how, in the broader scheme of things, this serves the cause of judicial economy. Yet that is what the Court does today.

I object to the misapplication of scarce judicial resources in this case. The Court should address the issue we granted review to resolve and then, if need be, remand the cause (once again) to the court of appeals to address any remaining, as-yet-unaddressed issues necessary to the ultimate resolution of the case. Because the Court does not, I respectfully dissent.

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[4] We have sometimes resolved petitions for discretionary review on a basis that was *broader* than the grounds presented in the petition itself. *See Blanco v. State*, 962 S.W.2d 46, 47 (Tex. Crim. App. 1998). But I am unaware of a case in which we simply ignored the issue raised in the petition for discretionary review and resolved the case on different issues altogether.