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

NEWELL, J., filed a concurring opinion in which KEEL, J., joined.

Today, the Court finally holds that the trial court properly suppressed the evidence flowing from the traffic stop in this case. The Court rightly determines that "touching the line" does not constitute "driving on the improved shoulder." The Court recognizes that there is no need to send the case back a third time for the court of appeals to address whether any encroachment upon the improved shoulder in this

case violated a traffic law. I agree with and join the Court's opinion.

First, the Court decides as a matter of judicial economy to address whether Appellee properly drove upon the improved shoulder to either allow another vehicle to pass or to decelerate before making a right turn. This Court has held in the past that we have the authority to review "decisions" of the court of appeals in our discretionary review capacity.[1] But this rule is not without exception. Recently, for example, in *Salinas v. State*, we decided, without being asked, the legal issue of whether declaring a statute unconstitutional should have a retroactive effect.[2] Yet, that issue was not part of the court of appeals' decision below nor was it one of the issues before us on discretionary review.[3] We addressed the issue without granting a ground of review on our own motion or giving the parties a chance to brief the issue.[4] If that was acceptable in *Salinas*,

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[1] *See, e.g., Holland v. State*, 802 S.W.2d 696, 701 (Tex. Crim. App. 1991) ("In our discretionary review capacity we review 'decisions' of the court of appeals.").

[2] 523 S.W.3d 103, 111 (Tex. Crim. App. 2017).

[3] *Id*. Indeed, in *Salinas*, the issue of retroactivity could not have been part of the lower court's decision because the court of appeals found the statutory court costs constitutional. *See Salinas v. State*, 485 S.W.3d 222, 226-27 (Tex. App—Houston [14th Dist.] 2016).

[4] Notably, in *Salinas* the Appellant sought rehearing specifically to request the opportunity to brief the retroactivity issue. Later, we refused discretionary review in a case in which the retroactivity issue was one of the grounds for review. *Horton v. State*, ___ S.W.3d ___; 2017 WL 4399159 at *2 (Tex. Crim. App. 2017) (Newell, J., dissenting) ("That is why I would grant review in this case so that we can fully address the issue of *Salinas*'s retroactivity in an opinion where the issue has actually been raised.").

it is in this case as well.

Second, the Court sensibly focuses on the reasonableness of the traffic stop rather than trying to decide what part of the road the "fog line" belongs to. As the Court notes, the term "fog line" does not appear in the Transportation Code. Chief Justice Quinn allowed that "arguably, the 'fog line' may be the 'different . . . marking' referred to in § 541.302 (15)."[5] But that's all it is, an argument.

Section 541.302(15) of the Transportation Code defines "shoulder" to mean "that portion of a highway" 1) "adjacent to the roadway," 2) "designated or ordinarily used for parking," 3) "distinguished from the roadway by different design, construction, or marking," and 4) "not intended for normal vehicular travel."[6] One can read "distinguished from the roadway by . . . marking" as meaning that the marking must actually be "on the shoulder," but that additional clarification does not come from the text of the statute. Describing the shoulder itself as "adjacent" to the roadway and "not intended for normal vehicular travel" tells us about the shoulder, not where the roadway ends and the improved shoulder begins. This text tells us nothing about *how* a shoulder may be distinguished from

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[5] *State v. Cortez*, 512 S.W.3d 915, 919 (Tex. App.—Amarillo 2017).

[6] TEX. TRANSP. CODE § 541.302 (15).

the roadway *by* markings. Neither is there any legislative history regarding this portion of the statute. Markings on the roadway indicating the edge of the roadway can distinguish the shoulder from the roadway just as easily as markings on the shoulder could indicate the beginning of the shoulder. At the very least, it's a tie.

In 2015, our Legislature passed House Bill 1396 which added Section 311.035 to the Texas Government Code and codified the rule of lenity for offenses outside the Penal Code.[7] Under the text of this section, a statute that creates or defines a criminal offense shall be construed in favor of the actor where any part of the statute is ambiguous.[8] As late Justice Scalia of the United States Supreme Court put it, "Under a long line of our decisions, the tie must go to the defendant."[9] Here the text, structure, and history of the statute in question provide us no resolution to the inherent ambiguity in the statute itself.[10] If we are required to draw a line in this case, we are required to draw the line in favor of

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[7] TEX. GOV'T. CODE § 311.035.

[8] *Id.*

[9] *United States v. Santos*, 553 U.S. 507, 514 (2008).

[10] *United States v. Granderson*, 511 U.S. 39, 54 (1994) ("In these circumstances--where text, structure, and history fail to establish that the Government's position is unambiguously correct--we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.").

Appellee rather than rely upon our own line-drawing gestalt.

Finally, the Court's resolution of the case is consistent with previous precedent interpreting this statute. In *Lothrop v. State*, we rejected the argument that Section 545.058(a) set up a "shifting-burden, self-defense-style framework" in which driving on an improved shoulder, regardless of the circumstances, is prima facie evidence of an offense.[11] We noted that in this statute, "the legislature *explicitly* made certain behavior legal" so allowing that behavior to serve as the basis of a traffic stop or arrest would violate the Legislature's intent.[12] For police to stop a motorist for driving on an improved shoulder, there must be some showing that the driving was not necessary to effectuate one of the seven approved purposes listed in Section 545.058(a).[13] And yet, allowing the mere touching of the improved shoulder to constitute driving on the improved shoulder would effectively reverse this holding and resurrect

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[11] 372 S.W.3d 187, 189, 191 (Tex. Crim. App. 2012).

[12] *Id.* at 191.

[13] *Id.*, *see also* TEX. TRANSP. CODE § 545.058(a) ("An operator may drive on an improved shoulder to the right of the main traveled portion of a roadway if that operation is necessary and may be done safely, but only: (1) to stop, stand, or park; (2) to accelerate before entering the main traveled lane of traffic; (3) to decelerate before making a right turn; (4) to pass another vehicle that is slowing or stopped on the main traveled portion of the highway, disabled, or preparing to make a left turn; (5) to allow another vehicle traveling faster to pass; (6) as permitted or required by an official traffic-control device; or (7) to avoid a collision.").

the shifting-burden, self-defense-style framework we rejected in *Lothrop*.

Someday, perhaps soon, our cars will drive themselves. When that day comes, determining with molecular-level precision where a roadway ends and an improved shoulder begins may be necessary. But cars are still driven by people, and the Court focuses on what the statute focuses on, whether the driving at issue was necessary and safe. With these thoughts I join the Court's opinion.

Filed: January 24, 2018

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