IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-1066-17

THE STATE OF TEXAS

v.

DAI'VONTE E'SHAUN TITUS ROSS, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FOURTH COURT OF APPEALS
BEXAR COUNTY

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

I join all of the Court's opinion today except for Part III-B. I am not inclined to agree with the construction of Section 46.035(a) of the Penal Code that is embodied within that portion of the opinion. *See* TEX. PENAL CODE § 46.035(a) ("A license holder commits an offense if the license holder carries a handgun . . . and intentionally displays the handgun in plain view of another person in a public place."). We are not called upon to definitively interpret this provision in the instant case, and, in any event, I see no need to. I am nevertheless compelled to share an alternative construction of the statute that I am inclined

to regard as more likely.

Part III-B of the Court's opinion contemplates that to carry a handgun in a shoulder or belt holster would constitute a "display" of the weapon, but one that is not actionable under Section 46.035(a) because of the exception. *See id*. ("It is an exception to the application of this subsection that the handgun was partially or wholly visible but was carried in a shoulder or belt holster by the license holder."). This does not seem to me to be the only possible—and is probably not even the preferable—construction of the statute. In my view, there is a palpable difference between carrying a handgun in such a manner that it is partially or wholly visible, on the one hand, and "displaying" it, on the other.[1] The use of the word "display" suggests to me that the statute may more likely contemplate that simply carrying a handgun is never an offense under Subsection (a), while publicly "displaying" it is always an offense unless the exception applies.[2]

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[1] When it was originally enacted in 1995, Section 46.035(a) made it an offense for a license holder to carry a handgun and "intentionally fail to conceal" the handgun. Acts 1995, 74th Leg., ch. 229, § 4, p. 2013, eff. Sept. 1, 1995. It was amended in 2013, however, to add the current language, making it an offense to carry a handgun and "intentionally display[] the handgun in plain view of another person in a public place." Acts 2013, 83rd Leg., ch. 72, § 1, p. 140, eff. Sept. 1, 2013. This change of language—eliminating "fail to conceal" and replacing it with the term "display"—suggests to me that the word "display" should not be understood to mean merely carrying the handgun in a manner that might make it visible to another person. If that is what the Legislature hoped to accomplish, it could have just left the statute alone.

[2] We have said that "we presume that every word in a statute has been used for a purpose and that each word, clause, and sentence should be given effect if reasonably possible." *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016). If the meaning of "displays," as used in Section 46.035(a) is understood so broadly as to apply whenever a person merely "carries a handgun" "in plain view of another person," then the words "and . . . displays the handgun" would be entirely

By this—what strikes me as the more likely—construction of Section 46.035, it seems to me that as long as a licensed holder keeps his handgun holstered, he may carry his handgun with impunity.[3] If he carries it in a shoulder or belt holster, he may even go so far as to "display" it—that is, draw attention to it in some overt way that makes the fact that he is carrying it conspicuous—so long as the manner by which he displays it does not include withdrawing it from the holster. That the exception does not also include, for example, a leg or ankle holster does not inexorably suggest to me that it is an offense for a license holder to carry his handgun in those holsters; it may instead only suggest that, because the exception does not apply, he may neither withdraw it from the leg or ankle holster (subject to the defense embodied by Section 46.035(h), of course), nor draw conspicuous attention to it in

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stricken of any meaning. The Legislature easily could have written this law to establish an offense:

> if the license holder carries a handgun on or about the license holder's person . . . intentionally . . . in plain view of another person in a public place.

Instead, the Legislature established that an offense would only be committed:

> if the license holder carries a handgun on or about the license holder's person . . . *and* intentionally *displays the handgun* in plain view of another person in a public place.

TEX. PENAL CODE § 46.035(a) (emphasis added). We give independent significance to the word "display" in the statute when we interpret it according to its common connotation of conspicuousness or ostentation. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, at 654 (2002) ("**2 . . .b :** to exhibit conspicuously"); WEBSTER'S II NEW COLLEGE DICTIONARY, at 328 ("**3.** To exhibit ostentatiously).

[3] Subject, of course, to other provisions within Section 46.035, such as subsection (d), which prohibits any carrying of a handgun while intoxicated. TEX. PENAL CODE § 46.035(d).

the same way (not including withdrawing it from its holster) that he could permissibly "display" a handgun in a shoulder or belt holster. But, I repeat, if this is how the statute is construed, he may always *carry* it in *any* holster with complete impunity—so long as carry is all he does.[4]

In any event, by this understanding, too, there should be no conflict between Section 46.035 and Section 42.01(a)(8) of the Penal Code, such as Judge Slaughter envisions. TEX. PENAL CODE § 42.01(a)(8). There is nothing intrinsically alarming about carrying a handgun in plain view in public so long as it remains holstered,[5] and I do not think that prosecutors will rush to criminally charge license holders who keep their handguns in their holsters. Because I agree with the Court's construction of Section 42.01(a)(8)—the statute we are called upon to construe in this case—I fully join all other portions of its opinion.

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[4] And again, so long as he does not carry it in one of those places or circumstances prohibited by other portions of Section 46.035, such as a prison or an amusement park, or while intoxicated. TEX. PENAL CODE § 46.035(b) & (d), respectively.

[5] Judge Slaughter asserts that it is "common knowledge" that "the sight of a gun in public" is alarming to "many ordinary people." Dissenting Opinion at 7. For that proposition, she cites what amounts to the naked opinions of a law professor and two note-writers. *Id*. n.4. She cites no empirical data or report of an empirical study to that effect, however, and neither do her sources.

My own intuition tells me that alarm at the sight of a citizen merely carrying a holstered handgun is quite irrational, especially here in the Lone Star State, at least in the absence of any circumstance to suggest that the citizen is doing so in violation of lawful regulations. It should be no more alarming than the sight of a 3000 pound automobile proceeding down a city street at the lawful speed limit and otherwise in compliance with the rules of the road. Both carry the potential for injury, but alarm is unwarranted without some other reason beyond the lawfully sanctioned conduct involved.

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