IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. PD-1034-20

TERRY MARTIN, Appellant

v.

THE STATE OF TEXAS

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

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

Under former Section 46.02(a–1)(2)(c) of the Penal Code, a person could be charged with unlawfully carrying a handgun, even in his car, if he was "a member of a criminal street gang, as defined by Section 71.01" of the Penal Code. TEX. PENAL CODE § 46.02(a–1)(2)(c). Section 71.01(d), in turn, defined "criminal street gang" to "mean[] three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." TEX. PENAL CODE § 71.01(d). The State Prosecuting Attorney (SPA) argues that, consistent with these

provisions, an offender need not actually be one of the "persons . . . who continuously or regularly associate in the commission of criminal activities" before he may be prosecuted under Section 46.02(a–1)(2)(c) for carrying a handgun in his car. It is enough that he belongs to—that he is a "member" of—that "criminal street gang" as otherwise defined in Section 71.01(d).

In *Ex parte Flores*, upon which both the court of appeals in this case and this Court today rely, the Fourteenth Court of Appeals expressed the belief that the "plain language" of these two provisions is contrary to the reading for which the SPA advocates today. *See* 483 S.W.3d 632, 644 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) ("[T]hree or more persons meet the definition of a criminal street gang only when they . . . continuously or regularly associate in the commission of criminal activities. * * * [O]ur construction of the statute . . . gives effect to its plain language[.]"); *id*. at 645 ("Read together, these provisions indicate that a gang 'member' must be one of the three or more persons who continuously or regularly associate in the commission of criminal activities.").

I am less sure than the Fourteenth Court that the language of these provisions plainly *precludes* the construction the SPA would have us place upon them. But I am ultimately inclined to believe that the Fourteenth Court's construction of the statutory language is preferable in any event. After all, if "criminal street gang" "*means*" "three or more persons" who otherwise fit the definition, that tends to suggest that, before one can offend under Section 46.02(a–1)(2)(c), then one must actually *be* one of the persons "who [among other things] continuously or regularly associates in the commission of criminal activity" under

Section 71.01(d). TEX. PENAL CODE § 71.01(d) (emphasis added).[1]

I have no definite opinion at this point whether the SPA's proposed construction of these statutory provisions would create any kind of a constitutional dilemma. As I have recently argued, it is indeed an important consideration in construing any statute that the courts avoid unconstitutionality when a plausible alternative construction of the statute exists. *See State v. Brent*, ___ S.W.3d ___, 2021 WL 4891126, at *9–10 (Tex. Crim. App. Oct. 20, 2021) (Yeary, J., concurring) (recognizing that "courts should seek to interpret statutes such that their constitutionality is supported and upheld[,]" citing *Lebo v. State*, 90 S.W.3d 324, 330 (Tex. Crim. App. 2002)). But because I readily favor the Court's construction of the statutory provisions today in any event, I venture no opinion whether

[1] A better way to for the Legislature to have written the definition of "criminal street gang" to accomplish the SPA's proposed construction would have been:

> (d) "Criminal street gang" means **a group of** persons **who have** a common identifying sign or symbol or an identifiable leadership**, and of whom at least three members** continuously or regularly associate in the commission of criminal activities.

Or else, perhaps:

> (d) "Criminal street gang" means **a group of at least** three or more persons having a common identifying sign or symbol or an identifiable leadership**, at least three of whom** continuously or regularly associate in the commission of criminal activities.

Had Section 71.01(d) actually been drafted in one of these ways, it would have plainly enacted the SPA's interpretation of the statute—because one could be a member of the "group" while not necessarily being one of its criminally associated members—and the evidence in this case would have been sufficient to convict. But the statute as it appeared at the time of the purported offense does not plainly *adopt* the SPA's construction, even if it might not plainly *preclude* it. In arguing that the statutes as they read at the time of the offense did not require a defendant to be one of those members of a criminal street gang who actually "associate in the commission of criminal activities[,]" the SPA effectively reads the word "group" into the definition in Section 71.01(d); but that word does not appear in the statute, and without it, the definition does not "plainly" support the SPA's construction.

that construction is necessary to insulate them from constitutional scrutiny.

I respectfully concur in the result.

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