the Jasuta / Schulman report

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TIBA's Case of the Week

San Antonio Criminal Appeals

Case Name: ***Clay A. Roberts v. The State of Texas***

- **OFFENSE**: 2x Smuggling of Persons
- **COUNTY**: Val Verde
- **C/A CASE No**. 04-24-00485-CR
- **DATE OF OPINION**: February 4, 2026 **OPINION**: Chief Justice Rebecca Martinez
- **DISPOSITION**: Conviction Affirmed / Judgment Modified
- **TRIAL COURT**: 63rd D/C; Hon. Roland Andrade
- **LAWYERS**: Doug Keller (Defense); Suzanne West (State)

(**Background Facts**): While on patrol in Val Verde County in the early morning, Department of Public Safety Trooper Jordan Garner observed a car with a defective taillamp traveling along a public road. The vehicle had tinted windows and was traveling from a Border Patrol checkpoint on a road known by law enforcement to be one used for smuggling. Trooper Garner ran the license plate of the car and noted that the vehicle was registered out of Kerr County. Trooper Garner engaged his lights, and Appellant, who was driving the car, pulled over. After the car came to a stop, four passengers immediately exited the vehicle, while Appellant remained inside. One passenger fled the scene, and the other three passengers waited outside the vehicle. The passengers were in dirty clothes, covered with brush and sticks. Trooper Garner gave Appellant commands to exit the vehicle, but Appellant refused to comply. After approximately ten minutes, U.S. Border Patrol agents arrived to the scene and assisted Trooper Garner in extracting Appellant from the vehicle. Once accomplished, Trooper Garner arrested Appellant.

[G&S 62 **Challenges to Prosecution / Overbreadth (Punishment for Thoughts)**]: Appellant argues that section 20.05(a)(1)(A) facially violates the First Amendment to the United States Constitution. He argues that the statute is a legislative attempt to regulate thought. He claims that, because the statute "focuses on regulating thought" and because it applies a content-based restriction that distinguishes between favored and disfavored thought, strict scrutiny applies.

Holding: The first step in a First Amendment facial analysis is to assess the challenged law's scope. ***Moody v. NetChoice, LLC***, 603 U.S. 707 (2024). Scope entails, "[w]hat activities, by what actors, do[es] the law prohibit or otherwise regulate?" Id. Section 20.05(a)(1)(A) prohibits using a means of conveyance to transport an individual if done with a specific intent -- to conceal that individual from a peace officer or special investigator. On its face, the law regulates an action -- the use of a means of conveyance to transport an individual. For simplicity, we refer to this action as "transport." That action, or actus reus, if done with the stated specific intent, is a crime. *** The next step "is to decide which of the laws' applications violate the First Amendment, and to measure them against the rest." [Appellant] focuses only on applications in which a person transports with a "conscious objective" to conceal that is not manifested through any action. [Appellant] contends that section 20.05(a)(1)(A) reaches an "innocuous, common act -- driving with a passenger --" if done "with the wrong thought." *** However, section 20.05(a)(1)(A) also applies to transport during which a person is actually concealing another. In such cases, section 20.05(a)(1)(A) does not punish mere "preparation, thought or fantasy." See ***United States v. Tykarsky***, 446 F.3d 458 (3d Cir. 2006). *** Moreover, in such cases, the relationship between a defendant's "intent to conceal" and transport is neither incidental nor tangential because concealment occurs during transport. *** . In fact, we have affirmed convictions under section 20.05(a)(1)(A) where there has been actual concealment. See ***Elsik v. State***, 678 S.W.3d 360 (Tex.App. - San Antonio 2023)(see &&, Vol. 32, No. 45; 12/02/2024)(holding evidence sufficient for jury's finding of intent to conceal a front-seat passenger, where defendant drove a U-Haul truck, evaded detention by speeding up when an officer activated his siren, and thirteen passengers were found under blankets covering the bed of the truck after it was stopped) . . .. *** [Appellant] also argues that an "unusual aspect" of section 20.05(a)(1)(A) is that "it criminalizes an innocent act with the thought to commit an act that is also not criminal." However, [Appellant] has not tied his "unusual aspect" argument to the balancing of constitutional and unconstitutional applications that we must perform. Moreover, even under [Appellant]'s framing, section 20.05(a)(1)(A) is not "unusual" in applications in which the statute reaches intended concealment that is unlawful -- for example, concealment made unlawful by Texas Penal Code section 38.05, which creates an offense for concealment with an intent to hinder the arrest of another. *** Thus, the scope of section 20.05(a)(1)(A) covers transport with an intent to conceal that is demonstrated through actual concealment and where concealment is itself unlawful. This sweep is "plainly legitimate." The First Amendment protects the "freedom to think as you will and to speak as you think," ***303 Creative LLC v. Elenis***, 600 U.S. 570 (2023), but its protections extend "only to conduct that is inherently expressive." *** In contrast, [Appellant] has not identified a single instance of prosecution under section 20.05(a)(1)(A) for thoughts to conceal without action in furtherance of concealment. *** Assuming without deciding that section 20.05(a)(1)(A) could reach as far as [Appellant] posits, and further assuming that application of the statute to thoughts to conceal without action in furtherance would violate the First Amendment, we cannot say that such applications are "substantial" compared to the statute's constitutional applications. *** It is doubtful that the State would prosecute if intent to conceal was alleged to be a mental impression

only because the State would face a daunting challenge to prove its case beyond a reasonable doubt. See ***United States v. Williams***, 553 U.S. 285 (2008). *** Therefore, having considered the scope of section 20.05(a)(1)(A) and explored its full set of applications, and having concluded that any unconstitutional applications are not substantial in comparison to constitutional ones, we overrule [Appellant]'s First Amendment facial challenge.

Sidebars

(**David A. Schulman**) This "being punished for my thoughts" argument has been made over and over during the last five years. As this opinion makes clear, the *actus reus* involved is not "thinking" about doing something --- it is actually doing something --- such as using a motor vehicle to conceal somebody from the police. That the evidence is often circumstantial is of not important.

[**62 Challenges to Prosecution / Federal Preemption**]: Appellant argues that section 20.05(a)(1)(A) is preempted by federal law as applied to his prosecution.

Holding: "If federal law imposes restrictions or confers rights on private actors and a state law confers rights or imposes restrictions that conflict with the federal law, the federal law takes precedence and the state law is preempted." ***Kansas v. Garcia***, 589 U.S. 191 (2020). *** Preemption will generally fall into three categories: express preemption, implicit field preemption, or implicit conflict preemption. See ***Horton v. Kan. City S. Ry. Co.***, 692 S.W.3d 112 (Tex. 2024). "There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." "State law must also give way to federal law in at least two other circumstances." "State law must also give way to federal law in at least two other circumstances." "First, the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance." Id. "Second, state laws are preempted when they conflict with federal law." ***Arizona v. United States***, 567 U.S. 387 (2012).

Holding (**As-Applied Preemption**): For as-applied constitutional challenges, we must determine whether there was a constitutional violation in the application of the statute to the defendant. ***Lykos v. Fine***, 330 S.W.3d 904 (Tex.Cr.App. 2011)(see , Vol. 19, No. 2; 01/17/2011). "A litigant raising only an 'as applied' challenge concedes the general constitutionality of the statute, but asserts that the statute is unconstitutional as applied to his particular facts and circumstances." In ***State v. Flores***, 679 S.W.3d 232 (Tex.App. - San Antonio 2023)(see , Vol. 31, No. 30; 09/04/2023), we held that section 20.05(a)(1)(A) was not facially preempted, but we did not address whether the statute was preempted as applied to the Appellants in that case because, unlike [Appellant], the Appellants had not briefed the issue. *** [Appellant] does not argue that section 20.05(a)(1)(A) was expressly preempted. Instead, he argues the statute was implicitly preempted, as applied to his prosecution, because Congress completely ousted the States from regulating in the "field of noncitizen smuggling," and because [Appellant]'s prosecution conflicts with federal immigration laws and prosecutorial prerogatives. *** [Appellant] does not argue that

section 20.05(a)(1)(A) was expressly preempted. Instead, he argues the statute was implicitly preempted, as applied to his prosecution, because Congress completely ousted the States from regulating in the "field of noncitizen smuggling," and because [Appellant]'s prosecution conflicts with federal immigration laws and prosecutorial prerogatives.

Holding (**Field Preemption**): [Appellant] identifies the relevant field as "noncitizen smuggling" or "the smuggling of noncitizens." *** However, unlike the instances where courts have found state statutes to be field preempted, section 20.05(a)(1)(A) does not require prosecutors to prove a noncitizen's illegal presence in the United States. In fact, Agent Price testified at [Appellant]'s trial that Border Patrol agents are regularly called to assist state and local law enforcement agencies because these agencies lack the authority to make immigration determinations. *** More to the point for [Appellant]'s as-applied challenge, his conviction did not turn on immigration status. Prosecutors alleged only his intent to conceal individuals from law enforcement, and the trial evidence indicated that [Appellant] wished to conceal his passengers from all law enforcement. [Appellant] had been driving in the early morning in a vehicle with tinted windows along a corridor known by law enforcement to be one used by smugglers. [Appellant]'s passengers were covered in dirt, which, in conjunction with the route chosen, could suggest that his passengers had been hiding in the brush. *** Nothing required the State to prove the passengers' unlawful status or that [Appellant] knew his passengers' actual immigration status. *** As we noted in ***Flores***: "Federal law specifically allows for state laws that target traffickers of noncitizens[, and] Congress did not intend to preempt neutral state smuggling statutes like section 20.05(a)(1)(A)." *** [Appellant] was prosecuted under this neutral statute, and his conduct was criminal regardless of his passengers' immigration status. We hold, on this record, that [Appellant]'s prosecution was not field preempted.

Holding (**Conflict Preemption**) With an as applied conflict preemption challenge, the application of the law must conflict with federal law's comprehensive immigration scheme or with the federal government's discretion over immigration related prosecutions. *** Evidence from [Appellant]'s trial, however, does not show that his prosecution interfered with federal law or federal discretion over immigration-related prosecutions. Instead, the evidence shows that Trooper Garner, a Texas law enforcement officer, arrested [Appellant] with assistance from Border Patrol agents. According to trial evidence, state officers did not determine immigration status or enforce federal immigration laws; these tasks were left to the Border Patrol agents who arrived on the scene to assist. The record does not suggest that federal prosecutors wished to pursue federal charges against [Appellant], and, as described above, [Appellant]'s conviction did not turn on the immigration status of his passengers. On this record, we hold that [Appellant]'s prosecution under section 20.05(a)(1)(A) was not preempted through conflict with federal law.

Sidebars

(**David A. Schulman**) There is one section of the law which *might* be preempted - Penal Code section 20.05 (a)(2), which applies when a person "encourages or induces a person to enter or remain in this country in violation of federal law by concealing, harboring, or

shielding that person from detection." To date, however, we have seen no prosecutions under that statute.

Ed Note: The Court of Appeals reformed the judgment to show a conviction under section 20.05(a)(1)(A) rather "Sec. 20.05(b) Penal Code."