the Jasuta / Schulman report

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eMail: officemanager@texindbar.org Texas Independent Bar Association Web Page: www.texindbar.org
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Tel. 512-474-4747

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TIBA's Case of the Week

Houston (1st) Court of Appeals

[Case Name]: ***Marcio Javier Cardona Avila v. The State of Texas***

- **OFFENSE**: Unlawful Carrying of a Handgun by a Person under Twenty-one Years of Age
- **COUNTY**: Harris
- **C/A CASE No**. 01-25-00022-CR
- **DATE OF OPINION**: November 13, 2026 **OPINION**: Justice Andrew Johnson
- **DISPOSITION**: Trial Court Affirmed
- **TRIAL COURT**: CCrCL 10; Hon. Juanita Jackson
- **LAWYERS**: Douglas Gladden (Defense); Andrew Fletcher (State)

[§§ 62 Challenges to Prosecution / Constitutionality of the Statue]: Section 46.02(a) of the Penal Code establishes the offense of unlawful carrying of a handgun by a person under twenty-one years of age, which is a Class A misdemeanor. It provides that "[a] person commits an offense if the person: (1) intentionally, knowingly, or recklessly carries on or about his or her person a handgun; (2) at the time of the offense . . . is younger than 21 years of age . . . and (3) is not: (A) on the person's own premises or premises under the person's control; or (B) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control." The instant information charged Appellant with unlawfully carrying a handgun because he was 19 years old on the date when he was found to be carrying the gun. Prior to trial, Appellant filed a motion to set aside the information, arguing that section 46.02(a) criminalizes the act of otherwise legally possessing a handgun by a person under the age of twenty-one in violation of the Second Amendment to the United States Constitution and Article I, section 23 of the Texas Constitution. The State filed a response noting that to establish a statute is facially unconstitutional, a party must show that no set of circumstances exists under which the statute would be valid. After hearing oral argument, the trial court denied Appellant's motion. The State and Appellant then entered a plea bargain which permits him to appeal the trial court's decision.

[Holding / "As Applied" Challenge]: In the trial court, Appellant did not specify whether he was making an as applied challenge to section 46.02(a)'s constitutionality, a facial challenge, or both. Appellant does not specify the challenge he is making in his opening brief. *** To the extent Appellant's motion and opening brief may be construed as asserting an as-applied challenge, we conclude he is prevented from so doing. *** In an as-applied challenge, the claimant asserts that the statute is unconstitutional as applied to his particular facts and circumstances. ***Irsan v. State***, 708 S.W.3d 584 (Tex.Cr.App. 2025)[see ☙, Vol. 33, No. 8; 03/03/2025]. Because this assertion requires recourse to evidence, it cannot be properly raised by a pre-trial motion to quash or set aside the charging instrument. Thus, if Appellant asserted an as-applied challenge, the trial court did not err in denying the motion because Appellant may not use a pre-trial motion to raise an as-applied challenge. ***Sheldon v. State***, 100 S.W.3d 497 (Tex.App. - Amarillo 2003)[see ☙, Vol. 11, No. 5; 03/10/2003].

Sidebars

[David A. Schulman] This holding is wrong. The defendant in ***Sheldon*** could not raise his "as applied" challenge on appeal because he failed to raise in the claim in the trial court, and the Court of Appeals found that the claim was waived. Second, this Court did not consider ***Ex parte Boetscher***, 812 S.W.2d 600 (Tex.Cr.App. 1991), in which the Court granted *habeas corpus* relief on an pre-trial "as applied" challenge. See ***Ex parte Perry***, 483 S.W.3d 884, 920 (Tex.Cr.App. 2016)[see ☙, Vol. 24, No. 9; 02/29/2016]("this Court held in ***Ex parte Boetscher*** that pretrial *habeas* relief was appropriate in an as-applied constitutional challenge")(Alcala, J., concurring). IMHO, the Court of Appeals could have and should have addressed the merits of the "as applied" challenge, and, because of its similarity to ***Boetscher***, explained in detail why a 21 year old adult is permitted to carry a handgun but a younger adult may not.

[Michael F. Stauffacher] David is right that this holding is incorrect regarding the as-applied challenge. While the CCA has vacillated somewhat on the issue of pre-trial *habeas* cognizability, it is not a dead letter issue as opined by the appellate court. In ***Ex parte Perry***, 483 S.W.3d 884, 920 (Tex.Cr.App. 2016)[see ☙, Vol. 24, No. 9; 02/29/2016], the Court stated the following regarding available cognizable claims: "Pretrial *habeas*, followed by an interlocutory appeal, is an extraordinary remedy. This remedy is reserved "*for situations in which the protection of the applicant's substantive rights or the conservation of judicial resources would be better served by interlocutory review*." Except when double jeopardy is involved, pretrial *habeas* is not available when the question presented, even if resolved in the defendant's favor would not result in his immediate release." *** *We have permitted double jeopardy and bail claims to be raised on pretrial habeas, but we have disallowed its use to assert a claim involving a right to a speedy trial, a challenge to the denial of a motion to suppress, or a collateral estoppel claim that does not allege a double-jeopardy violation. We have also said that pretrial habeas is generally not available to test the sufficiency of the charging instrument or to construe the meaning and application of the statute defining*

the offense charged. We have also held a pretrial habeas to be an appropriate vehicle to assert a facial constitutional challenge to the validity of a statute and, conversely, we have stated that pretrial habeas cannot be used to advance an as-applied constitutional challenge to a statute [citing to ***Ex parte Ellis***, 309 S.W.3d 71 (Tex.Cr.App. 2010)(see ¶¶, Vol. 18, No. 17; 05/03/2010)]. *And we have said that pretrial habeas is unavailable "when the resolution of a claim may be aided by the development of a record at trial."* *** However, the Court has also held that as-applied challenges are kosher. See ***Ex parte Boetscher***, 812 S.W.2d 600 (Tex.Cr.App. 1991); see also ***Ex parte Aparicio***, 707 S.W.3d 189 (Tex.Cr.App. 2024)[see ¶¶, Vol. 32, No. 38; 10/14/2024], where "at least under these circumstances" the CCA found the as-applied challenge to be cognizable. So, the appellate court should have addressed the merits of the as-applied issue.

[Holding / "Facial" Challenge]: The State filed a response noting that to establish a statute is facially unconstitutional, a party must show that no set of circumstances exists under which the statute would be valid. Therefore, the State asserted that Appellant had to show that no circumstances exist under which section 46.02(a)3 is constitutional. *** Appellant's facial challenges do not fall within an exception for certain First Amendment challenges; therefore, Appellant's challenges are the most difficult to mount successfully, because he must establish that no set of circumstances exists under which section 46.02(a) would be valid. ***McGruder v. State***, 483 S.W.3d 880 [see ¶¶, Vol. 24, No. 9; 02/29/2016]. To prevail, he must establish that section 46.02(a) always operates unconstitutionally in all possible circumstances. ***State v. Rosseau***, 396 S.W.3d 550 (Tex.Cr.App. 2013)[see ¶¶, Vol. 21, No. 16; 04/22/2013]. *** Appellant argues he need not establish that section 46.02(a) operates unconstitutionally as to a defendant who is under eighteen years of age at the time of the alleged offense because this burden shifted to the State under the Supreme Court of the United States opinion in ***New York State Rifle & Pistol Association v. Bruen***, 597 U.S. 1 (2022). *** ***Bruen*** addressed claims by two law-abiding adults that their Second Amendment rights were violated by the denial of their applications for a license to carry a handgun for self-defense. The ***Bruen*** parties did not dispute that the two adults were "part of 'the people' whom the Second Amendment protects." In the present case, Appellant -- who must establish section 46.02(a) always operates unconstitutionally in all possible circumstances -- does not argue that the plain text of the Second Amendment covers the conduct of an individual under eighteen years of age who commits an offense under section 46.02(a), or that individuals under eighteen years of age at the time of the alleged defense are "part of 'the people' whom the Second Amendment protects." Because Appellant has not established that the Second Amendment's plain text covers the conduct of an individual under eighteen years of age who commits an offense under section 46.02(a), the burden of justifying section 46.02(a) as to these individuals has not shifted to the State, and Appellant has not carried his burden of showing that section 46.02(a) operates unconstitutionally in all circumstances. *** Appellant also relies on ***United States v. Rahimi***, 602 U.S. 680 (2024)[see ¶¶, Vol. 32, No. 25; 07/02/2024], in which the Supreme Court addressed a facial challenge to a federal statute prohibiting a person subject

to a domestic-violence restraining order from possessing a firearm under certain circumstances. *** ***Rahimi*** does not relieve Appellant of his burden in this facial challenge of establishing that the plain text of the Second Amendment covers the conduct of an individual under eighteen years of age who commits an offense under section 46.02(a).

Sidebars

[Stanley Schneider] I think that the statute is unconstitutional - there is no legitimate basis for the exclusion. The right to keep and bear arms is among the "fundamental rights necessary to our system of ordered liberty." ***McDonald v. City of Chicago***, 561 U. S. 742 (2010); ***United States v. Rahimi***, 602 U.S. 680 (2024)[see ꝟ&ꝟ, Vol. 32, No. 25; 07/02/2024]. I think that SCOTUS will eventually have to decide whether there is a legitimate basis for the exclusion.

[Joseph Varela]: I'd analogize this to a first amendment case. When the .gov restricts speech, the burden is on the .gov to justify the restriction. If, under ***District of Columbia v. Heller***, 554 U. S. 570, 626 (2008) and ***McDonald v. City of Chicago***, 561 U. S. 742 (2010), the Second Amendment guarantee is equal in dignity to those of the other Amendment, then the right to bear arms must be treated like the right to speak, or any other bill of rights guarantees.

[John G. Jasuta] My opinion, for whatever it is worth after the comments by my colleagues above, is that this opinion has no chance in hell to survive. It could bounce around for awhile, though.

[David A. Schulman] Although I own several firearms, both long guns and pistols (and have done so for many years), I am not a Second Amendment scholar. Nevertheless, I believe there is some validity to Appellant's theory that the federal courts always put the burden on the State/Government to prove that a limit on one's Second Amendment rights is constitutional. While I believe defense counsel will be seeking rehearing or reconsideration by the Court of Appeals, I think we'll have to wait to see what the Court of Criminal Appeals says on the subject.

[Ed. Note]: The Court of Appeals also rejected Appellant's claims under the Texas Constitution.