



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. PD-1076-24

ISAIAH KAIN SALAS-MARTINEZ, Appellant

v.

THE STATE OF TEXAS

**ON APPELLANT'S MOTION FOR REHEARING
AFTER WRITTEN OPINION ON
APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
FROM THE FIRST COURT OF APPEALS
HARRIS COUNTY**

PARKER, J., filed a concurring opinion in which FINLEY J., joined.

CONCURRING OPINION

In his petition, Appellant had raised a seemingly burning issue: whether a Texas statute prohibiting the carrying of a firearm—except in his home or his vehicle or en route to his vehicle—violated the Second Amendment under the

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Supreme Court’s recent decision in *Bruen*.¹ But Appellant did not raise this claim at trial, and under *Karenev*² that means he forfeited it. Appellant seeks to distinguish *Karenev*—relying upon *Smith*³—but there are at least four obstacles to relief under *Smith*, and at least two of those—found in *Bruen* itself and in *Beck*⁴—are indisputably insurmountable in his case.

And in addition to the *Karenev* problem, the firearm statute has been amended to limit its application to narrow classes of people⁵—which do not include Appellant—deflating the jurisprudential value of a decision in Appellant’s case. For these and perhaps other reasons, the Court had ample bases for dismissing Appellant’s petition as improvidently granted.

A. Appellant’s Case

Appellant was charged with, and ultimately convicted of, murder

¹ *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022).

² *Karenev v. State*, 281 S.W.3d 428 (Tex. Crim. App. 2009).

³ *Smith v. State*, 463 S.W.3d 890 (Tex. Crim. App. 2015).

⁴ *Ex parte Beck*, 541 S.W.3d 846 (Tex. Crim. App. 2017).

⁵ See TEX. PENAL CODE § 46.02(a)(2)(A), (B) (West 2026) (2021 amendment) (limiting the scope of the statute to someone who is younger than age 21 or has been convicted of certain offenses within the prior five years).

(committed in December 2017).⁶ Self-defense was submitted in the jury charge. For Appellant to prevail on that defense, the jury had to at least have a reasonable doubt about whether Appellant “reasonably believe[d] [that] deadly force [was] immediately necessary . . . to protect the actor against the [the decedent’s] use or attempted use of unlawful deadly force.”⁷

However, even if the elements of self-defense were otherwise met, the self-defense statute provided that the defense is unavailable “if the actor sought an explanation from or discussion with the other person concerning the actor’s differences with the other person while the actor was . . . carrying a weapon in violation of Section 46.02.”⁸ And at the time of Appellant’s conduct, Section 46.02 provided that a person commits an offense if he:

(1) intentionally, knowingly, or recklessly carries on or about his or her person a handgun or club; and

(2) is not:

(A) on the person’s own premises or premises under the person’s control; or

⁶ *See id.* § 19.02(b).

⁷ *See id.* § 9.32(a)(2) (bracketed material substituted for original for clarity and ease of reading); *see also id.* § 9.31(a).

⁸ *Id.* § 9.31(b)(5)(A).

(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.⁹

As I explained earlier, that statute has since been amended and would no longer apply to Appellant, but a savings clause provides that the law in effect at the time of the offense controls.¹⁰ It is also important to note that Section 46.15 contains a number of exemptions from Section 46.02,¹¹ the significance of which I shall explain later. Appellant did not complain at trial that former Section 46.02 was unconstitutional, nor did he complain about the constitutionality of the self-defense provision that incorporated Section 46.02.

B. *Karenev* and Procedural Default

In *Karenev*, the defendant raised for the first time on appeal a claim that the statute defining his offense was facially unconstitutional.¹² Finding against the defendant, this Court concluded that a facial challenge to the constitutionality of a statute is forfeited if not raised at trial because “[s]tatutes are presumed to be constitutional until it is determined otherwise.”¹³ And the Court also expressed

⁹ *Id.* § 46.02(a) (West 2018) (last amendment effective September 1, 2017).

¹⁰ Acts 2021, 87th Leg., ch. 809 (H.B. 1927), § 28, eff. Sept. 1, 2021.

¹¹ *See* TEX. PENAL CODE § 46.15.

¹² 281 S.W.3d at 429-30 (facial challenge to harassment statute).

¹³ *Id.* at 434.

the concern that, “The State and the trial court should not be required to anticipate that a statute may later be held to be unconstitutional.”¹⁴ Although the lack of objection does not generally forfeit a jury-charge error—merely relegating it to a more onerous standard of harm¹⁵—this Court has determined that, when the issue is whether the statute that supports a jury instruction is facially constitutional, *Karenev*’s rule of preservation applies.¹⁶ As a consequence, absent an objection in that situation, error is forfeited entirely, and there is no occasion for a harm analysis.¹⁷ In essence, the failure to challenge the statute at trial means the presumption of constitutionality remains unrebutted, and, if the instruction conforms to the statute and is otherwise applicable to the case, no error can be shown.

Appellant’s challenge to the firearm statute is a facial constitutional challenge, and he did not raise it at trial. Nor did he raise a trial challenge to the

¹⁴ *Id.*

¹⁵ *Mendez v. State*, 545 S.W.3d 548, 552 (Tex. Crim. App. 2018); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh’g).

¹⁶ *See Estrada v. State*, 313 S.W.3d 274, 305-06 (Tex. Crim. App. 2010) (“[A]ppellant presents what he characterizes as ‘instructional errors at sentencing.’ These points, however, are really facial constitutional challenges to various portions of Article 37.071. The record, however, reflects that appellant did not preserve these claims for appeal.”) (citing *Karenev*).

¹⁷ *See id.*

self-defense provision that incorporated the firearm statute. Consequently, *Karenev* bars review unless he can find a way around that decision.

Appellant did not address *Karenev* in his original briefing; the State brought up the decision as a reason to dismiss Appellant's petition as improvidently granted. In a reply brief, Appellant responded that his situation fell within an exception to *Karenev* that was articulated in *Smith*, and he also claimed that *Beck* provided additional ammunition for his argument. In his current motion, he continues to argue that his claim falls within the *Smith* exception. Notably, Appellant has never argued that we should re-examine *Karenev* but has instead contended that *Karenev* is distinguishable because of the exception in *Smith*.

Smith addressed a claim that the online-solicitation provision under which the defendant had been convicted had been declared facially unconstitutional in *Ex parte Lo*.¹⁸ As in *Karenev*, the defendant in *Smith* failed to raise his facial constitutional challenge at trial.¹⁹ But this Court distinguished *Karenev*, finding that *Lo*'s previous holding of invalidity made all the difference:

¹⁸ *Smith*, 463 S.W.3d at 893-97.

¹⁹ *See id.* at 893 (the defendant contended “that his failure to object to the constitutionality of this statute at the trial-court level is irrelevant because an ‘unconstitutional and void law may be attacked regardless of whether the complaining party objected at the trial or appellate stage.’”).

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But the situation in that case is distinguishable from the present one in appellant's case. In *Karenev*, the defendant was attacking a valid statute that had not yet been declared void. In the present case, appellant is seeking relief for a conviction of a non-crime under a statute that has already been held to be invalid.²⁰

The *Smith* court also said that a defendant could not forfeit—or even waive—a complaint that the statute under which he had been convicted had already been declared unconstitutional and void.²¹

Appellant claims that he falls within the *Smith* exception because the United States Supreme Court invalidated former Section 46.02(a), before his trial even began, in *Bruen*. But at least four obstacles stand in the way of his claim that *Bruen* satisfies the *Smith* exception, and at least two are indisputably insurmountable.

First, *Bruen* did not purport to address Section 46.02; it invalidated a New York law.²² This fact contrasts with what actually happened in *Smith*, where the very statute at issue in the case was explicitly invalidated by *Lo*. For Appellant to prevail, we would have to extend the scope of the *Smith* exception, and there is at least one substantial arguable reason not to do that: without an explicit invalidation, the State and the trial court are not provided the requisite notice that the statute

²⁰ *Id.* at 896.

²¹ *Id.*

²² 597 U.S. at 11-12.

has been voided. Part of *Karenev*'s rationale was that the State and the trial court should not have to anticipate that a statute will be held unconstitutional. No such anticipation is required if the statute has been explicitly invalidated in a court decision. But without such explicit invalidation, the State and the trial court might not even think to look at the case that the defendant later relies upon on appeal.

Second, the statute at issue in *Bruen* differs substantially from Section 46.02. Perhaps if the statutes were virtually identical, one could make an argument that *Bruen*'s invalidation of the New York statute was tantamount to an invalidation of the Texas statute, but such is not the case. The New York statute in *Bruen* was a licensing scheme, and that scheme made it a crime to possess any firearm without a license, whether inside or outside the home.²³ Further, to be authorized to possess a firearm outside the home, the scheme required that the applicant prove that “proper cause exists” to issue a license to do so, and New York courts interpreted the “proper cause” requirement to mean the showing of “a special need for self-protection distinguishable from that of the general community.”²⁴

By contrast, Texas's former Section 46.02 was not a licensing scheme. *No*

²³ *Id.* at 12.

²⁴ *Id.*

license was required to carry a firearm under the conditions that provision specified as permissible—in one’s home or in one’s vehicle or en route to one’s vehicle.²⁵ In his reply brief, Appellant contended that even though New York’s scheme was a licensing scheme, Section 46.02 was worse under the Second Amendment because “the New York regulation did not bar all residents from carrying a handgun at any time outside of the home for self defense, while section 46.02(a) did just that.” This reasoning echoed statements he made in his brief on original submission that “the version of section 46.02 at issue in this case made it unlawful for every person in the State to possess a weapon outside of their home (or vehicle)” and that “section 9.31(b)(5)(A) prevented any defendant who possessed a handgun outside of his house or vehicle from claiming he acted in self-defense if he harmed another while seeking a discussion with that person.” But these statements erroneously view former Section 46.02 in *isolation*, without accounting for exemptions from that provision’s application contained in Section 46.15.²⁶ Section 46.15 provided that Section 46.02 “does not apply” when, among other things, the person has a license to carry a handgun and does so in a concealed

²⁵ See TEX. PENAL CODE § 46.02(a) (West 2018).

²⁶ See *id.* § 46.15 (West 2018) (last amendment effective September 1, 2017).

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manner or in a holster.²⁷ And in *Bruen*, the Supreme Court included Texas as one of 43 “shall issue” jurisdictions, where, unlike New York, “authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability.”²⁸ The Supreme Court’s notation of Texas as a “shall issue” jurisdiction conclusively defeats any claim that *Bruen* even impliedly invalidated any Texas firearm statute.²⁹

A third obstacle to *Smith*’s application is that invalidating Section 46.02 would not eliminate the entire basis for Appellant’s prosecution. As I discussed earlier, *Smith* premised the nonforfeitable and nonwaivable nature of the right at issue in that case on the invalid statute being the one that defined the offense, so that the defendant had the status of being convicted of a “non-crime.” And as I

²⁷ *Id.* § 46.15(b)(6) (West 2018). Exceptions also include “traveling” and engaging in a “lawful hunting, fishing, or other sporting activity.” *Id.* § 46.15(b)(2), (3).

²⁸ *Bruen*, 597 U.S. at 13 & n.1. Texas amended its licensing statute in 2021 to modify notice requirements and provide for expedited issuance. These changes did not effect the fact that Texas was a “shall issue” state under the prior version of the statute, effective in 2016. *See* TEX. GOV’T CODE § 411.177 (LEXIS 2017 and 2021).

²⁹ *See Bruen, supra* at 11 (“In 43 States, the government issues licenses to carry based on objective criteria. But in six States, including New York, the government further conditions issuance of a license to carry on a citizen’s showing of some additional special need. Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that the State’s licensing regime violates the Constitution.”).

have previously discussed, Appellant was prosecuted for murder, not for a firearm offense. Murder is, of course, a crime. At most, Section 46.02 constituted a basis for negating Appellant's claim of self-defense. And Section 46.02's limited role in Appellant's case actually *heightens* the notice concerns articulated by *Karenev*. By failing to object, Appellant deprived the trial court and the State of the opportunity to decide to omit the anti-defensive instruction and for the State to possibly obtain a conviction anyway.

A fourth obstacle to applying *Smith* is that Section 46.02 did not operate as a standalone statute in Appellant's prosecution; it was incorporated into an exclusion in the self-defense statute. The real question under *Karenev* isn't whether former Section 46.02 has been declared facially unconstitutional; it is whether such a declaration has been made of the *incorporating* statute—Section 9.31(b)(5), the self-defense exclusion provision.

The Court recognized this type of situation in *Beck*.³⁰ The offense in *Beck* prohibited an improper relationship between an educational employee and a student.³¹ The subject of the improper relationship was the educational

³⁰ 541 S.W.3d at 857-59.

³¹ *Id.* at 858.

employee’s online interaction with a student in violation of an online-solicitation statute.³² The improper-relationship statute incorporated the online solicitation-statute as a statutory means of having an improper relationship, but the improper-relationship statute had other elements (educational-employee and student status) not required by the online-solicitation statute.³³ The online-solicitation statute had been declared facially unconstitutional (in *Lo*), but the improper-relationship statute hadn’t.³⁴ And because the extra elements in the improper-relationship statute narrowed the scope of conduct affected, this Court’s holding in *Lo* was “not a binding judicial declaration that the improper-relationship statute, which applies much more narrowly to educational settings, is also unconstitutional.”³⁵ The improper-relationship statute was “an entirely different statute that applies in a much narrower context.”³⁶ Consequently, the *Smith* exception to *Karenev* did not apply, and the defendant’s failure to raise a facial constitutional challenge at

³² *Id.* at 857.

³³ *Id.* at 849.

³⁴ *See id.* at 858-59.

³⁵ *Id.* at 859.

³⁶ *Id.* at 860.

trial forfeited his complaint.³⁷

In his reply brief on discretionary review, Appellant contended that *Beck* endorsed “the idea that an opinion issued by a court with authority . . . can render a statute void even without mentioning the specific statute.” He claimed that *Beck* “turned on the degree to which [the] opinion in *Lo* applied to section 21.12” and that *Beck* found “section 21.12 to be sufficiently tailored and therefore not suffering from 33.021’s overbreadth.” Appellant’s reply brief read too much into *Beck*. As my prior discussion shows, *Beck* never held that the improper-relationship statute was sufficiently tailored; the Court never reached the substantive issues in the case. What the Court held was that the improper-relationship statute was distinct from and *narrower* than the online-solicitation statute and that one could not *automatically* conclude that the holding in *Lo* extended to the improper-relationship statute at issue in *Beck*.³⁸

The reasoning in *Beck* applies squarely to facts of the present case. The self-defense exclusion at issue in this case is part of an entirely different statute than the firearm statute it incorporates—being located in an entirely different chapter of the

³⁷ *Id.*

³⁸ *Id.* (“Thus, this Court’s decision in *Lo* that invalidated the online-solicitation provision did not also automatically invalidate the improper-relationship statute.”).

Penal Code within a statute that does not even codify an offense. And the self-defense exclusion does not depend solely on a violation of Section 46.02; it also depends on the defendant having “sought an explanation from or discussion with the other person concerning the actor’s differences with the other person.”³⁹ That additional language makes the self-defense exclusion narrower than the firearm offense. And at least ordinarily, the exclusion would come into play only if self-defense were being asserted in connection with a crime distinct from the offense in Section 46.02—in this case, the crime of murder—which would further narrow the exclusion’s application.⁴⁰ Consequently, under *Beck*, even if it could be shown that *Bruen* had in fact declared Section 46.02 to be facially unconstitutional, that would not automatically make the self-defense exclusion unconstitutional. And while *Beck* involved a claim under the First Amendment, and the present case involves a claim under the Second Amendment, the Supreme Court’s *Bruen* decision itself suggested that both constitutional provisions were analogous in requiring historical

³⁹ See TEX. PENAL CODE § 9.31(b)(5)(A).

⁴⁰ I need not address the possibility of self-defense being asserted as a defense to a Section 46.02 offense, because any unique issues associated with that context would not render the self-defense-exclusion provision facially unconstitutional.

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analyses to determine the scope of the right at issue.⁴¹ In both contexts, the breadth of a restriction on the right at issue is highly relevant to whether it is permissible.⁴² Thus, Appellant’s attempt to invoke the *Smith* exception necessarily fails under *Beck*.

C. Conclusion

Karenev bars Appellant’s claim. To reach his claim, we would have to overrule *Karenev*—something Appellant has not asked us to do. And some of my discussion also shows that Appellant has misunderstood the reach of Section 46.02, which seriously undermines the substance of his claim. And holding Section 46.02 unconstitutional would not even come close to disposing of Appellant’s case—an appellate court would still have to consider whether such a holding made the self-defense-exclusion provision unconstitutional, and if so, whether Appellant was egregiously harmed by the self-defense-exclusion instruction. Also, Section 46.02 has since been amended to significantly narrow

⁴¹ 597 U.S. at 24 (“This Second Amendment standard accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms.”) (pointing out that a historical analysis is used to determine whether a category of speech is unprotected under the First Amendment).

⁴² *See id.* at 22 (pointing to historical analyses under the Second Amendment that consider the severity of the restriction); *Beck*, 541 S.W.3d at 859 (remarking that *Lo* considered the “sweeping breadth” of the restriction on speech).

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the classes of people to which it applies, which would deflate the jurisprudential value of a holding in Appellant's favor regarding the constitutionality of former Section 46.02. Consequently, I concur in the Court's decision to deny Appellant's motion for rehearing.

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Publish