



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

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**NO. PD-0072-15**

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**JAMES EDWARD LEMING, Appellant**

**v.**

**THE STATE OF TEXAS**

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**ON STATE'S PETITION FOR DISCRETIONARY REVIEW  
FROM THE SIXTH COURT OF APPEALS  
GREGG COUNTY**

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**NEWELL, J., filed a dissenting opinion.**

I join Judge Keasler's dissenting opinion on the issue of the statutory construction of Section 545.060(a) of the Transportation Code because I, too, do not read "and" to mean "or." But on the issue of whether there was reasonable suspicion to stop Appellant for suspicion of DWI, it is, as Judge Keasler acknowledges, a close call. Though the State, as the prevailing party in the trial court, is permitted to raise a theory upholding the trial court's ruling in a petition for discretionary review, the court of appeals nevertheless did not have

the opportunity to address that theory. *Leming v. State*, 454 S.W.3d 78 (Tex. App.–Texarkana 2014) (holding that facts did not support reasonable suspicion to believe a traffic violation occurred and that traffic stop was not justified under the community caretaking function). Given that this issue is not clear cut, I would remand the case so that the court of appeals can consider in the first instance whether that theory supports the trial court’s ruling. *McClintock v. State*, 444 S.W.3d 15, 20 (Tex. Crim. App. 2014) (“[T]he proper disposition of a petition for discretionary review that correctly asserts that the lower court has failed to consider a complaint as to the propriety of its ultimate disposition is for this Court, in the exercise of its supervisory authority, to remand the cause to the court of appeals to reach a “decision” on that question in the first instance.”) (quoting *Sotelo v. State*, 913 S.W.2d 507, 510 (Tex. Crim. App. 1995)). The parties make a number of arguments in support of their respective positions in this Court, and “our resolution of the issue (if any should even be necessary after a remand) would benefit from a carefully wrought decision from the court of appeals.” *McClintock*, 444 S.W.3d at 21. I respectfully dissent.

Filed: April 13, 2016

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