

IN THE COURT OF APPEALS
STATE OF GEORGIA

ERIC SUNG KIM
Appellant,

v.

STATE OF GEORGIA,
Appellee.

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Docket No. A26A2067

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

COMES NOW, Appellee, the State of Georgia, and files this brief and shows the Court as follows:

PART 1

SUMMARY OF ARGUMENT

Appellant is asking this Court to vacate his conviction for Speeding and enter an order of acquittal or to otherwise vacate the trial court's order denying Appellant's Motion for New Trial. Appellant's arguments in support of these requests are based on claims that the trial court committed plain error in its instructions to the jury and an allegation of ineffective assistance of counsel.

Appellant first argues that the trial court committed plain error by instructing the jury that "in the prosecution for someone for speeding, the State need not prove the driver was traveling at a precise speed in order to obtain a conviction." However, Appellant fails to satisfy any prong of the plain error standard.

Second, Appellant argues that his trial counsel was ineffective for failing to file a general demurrer as to Count 2 and for failing to except to the trial court's refusal of the Appellant's requested lesser included offense for Too Fast for Conditions. Appellant's trial counsel was not deficient, because there was no legal basis for a general demurrer to be made and an objection to the trial court's refusal

to include Too Fast for Conditions as a lesser included offense would have been meritless.

STATEMENT OF FACTS

Appellant committed the offenses of Speeding and Reckless Driving on June 15, 2024, at approximately 6:45 p.m.

Appellant was operating his motor vehicle, a black 2020 Lamborghini Urus, on Georgia State Route 400 Southbound in Forsyth County, Georgia near Exit 16 where there are clearly marked speed limit signs that indicate that the speed limit is 65 mph. *Trial Transcript Vol 4* (hereafter “*TT Vol [Volume number]*”) at 77-78, 92. Traffic conditions were moderate at that time. *Id.* at 78.

Deputy Sam Roberts with the Forsyth County Sheriff’s Office was also traveling down Georgia State Route 400 Southbound in his marked patrol car when he observed Appellant’s black SUV coming up behind him in his driver’s side mirror “like a rocket.” *Id.* at 78.

Deputy Roberts, who has extensive training in speed detection (having completed the speed detection operator course and received radar and LIDAR certifications) and is assigned to the Forsyth County Sheriff’s Office’s Highway Enforcement of Aggressive Traffic (HEAT) Unit, visually estimated Appellant’s speed to be 110 mph. *TT Vol 4* at 71-85. Deputy Roberts then turned on his radar unit which showed that Appellant was traveling at 107 mph. *TT Vol 4* at 78.

When Appellant realized that he was approaching Deputy Roberts's marked police car, Appellant slammed on his brakes. *TT Vol 4* at 79. Deputy Roberts slowed down in order to get behind Appellant, but Appellant continued to reduce his speed to prevent Deputy Roberts from getting behind him. *Id.* at 79. At one point, Deputy Roberts was traveling at 39 mph on State Route Georgia 400, but Appellant was still refusing to pass Deputy Roberts. *Id.* at 79. Deputy Roberts then pulled over to the side of the roadway and waited for Appellant to pass him in order to get behind Appellant and initiate a traffic stop. *Id.* at 79.

When Deputy Roberts made contact with Appellant and informed him of the reason for the stop (that Appellant was speeding at 107 mph in a 65-mph zone), Appellant replied, "Yeah." *TT Vol 4* at 93. When asked why he was going so fast, Appellant stated that traffic was going slow. *Id.* at 93. Deputy Roberts offered Appellant an accuracy check for the radar unit. *Id.* at 93. Appellant acknowledged that he was going 107 mph and indicated that he did not need an accuracy check. *Id.* at 93.

PROCEDURAL HISTORY

The Forsyth County Solicitor-General's Office filed an accusation against Appellant on July 3, 2024, which charged Appellant in Count 1 with Reckless Driving, and in Count 2 with Speeding. *Record Vol 2*. (hereafter "*R Vol [Volume number]*") at 13-14.

Appellant was tried in front of a jury of his peers from September 22 through September 23, 2025. See *TT Vol. 4 and 5*. The jury found Appellant guilty beyond a reasonable doubt of Speeding (Count 2) and not guilty of Reckless Driving (Count 1). *R Vol 2* at 66. During the sentencing hearing, the State pointed out that the Defendant had 35 traffic citations on his driver's history, including 26 for Speeding. *TT Vol 6* at 278. The trial court subsequently sentenced Appellant to serve 12 months on probation with the first 96 hours to be spent in confinement, a \$1,000 fine, 42 hours of community service, and a Defensive Driving class. *R Vol 2* at 67-69. Appellant immediately made an oral motion for supersedeas bond which the trial court granted. *TT Vol 6* at 282-283. Appellant filed a Motion for a New Trial on September 23, 2025. *R Vol 2* at 72-73. Appellant subsequently amended that Motion for New Trial. *R Vol 2* at 89-93.

The trial court conducted a hearing on Appellant's Motion for New Trial on March 2nd, 2026. *TT Vol 7* at 286-314. The trial court issued an order denying said motion on March 5th, 2026. *R Vol 2* at 4-12.

Appellant timely filed a Notice of Appeal on March 6th, 2026. *R Vol 2*. at 1-3. This appeal now follows.

PART 2

ARGUMENT AND CITATION OF AUTHORITY

1. The trial court did not commit plain error in its instruction to the jury.

Appellant argues that the trial court committed plain error under *Alleyne v. United States*, 570 U.S. 99 (2013) when it instructed the jury that, in a speeding prosecution where precise speed is alleged, the State need not prove a precise speed to convict.

The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an “element” of the charged offense. *United States v. O’Brien*, 560 U.S. 218, 224 (2010). It is well established Georgia law that in a Speeding case actual speed is not a material averment of an indictment that need be proven at trial. *Porter v. State*, 290 Ga. App. 113, 114 (2008).

However, Appellant argues that in *Alleyne*, the Supreme Court of the United States held that the Sixth Amendment requires any fact capable of increasing the minimum sentence for the charged offense to be found by a jury beyond a reasonable doubt. Appellant reasons that the precise speed for which someone is convicted may change the mandatory punishment for the offense of Speeding, because it may increase the amount of points assessed against the convicted

person's Driver's License by the Georgia Department of Driver Services (DDS) and because it may impose a super speeder fee administered and collected by the DDS. However, no Georgia case has ever applied *Alleyne* to collateral civil consequences, making Appellant's theory legally unprecedented and incompatible with controlling authority.

In order to show plain error, the Defendant must satisfy a four-prong test.

"First, there must be an error or defect—some sort of deviation from a legal rule—that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the [trial] court proceedings. Fourth and finally, if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." See *State v. Kelly*, 290 Ga. 29, 33 (2011).

"Satisfying all four prongs is difficult, as it should be." *Id.* at 33. Here, the Appellant cannot satisfy any of the four prongs.

First, there is no legal defect. Under Georgia law, there is no minimum sentence for the offense of Speeding, and the sentencing range is not affected by the precise speed for which an offender is convicted. Facts that only influence a judge's choice within a standard range, without raising the "floor" of the sentence, are still considered "sentencing factors" rather than elements of the crime and do not require a jury finding. *Alleyne v. United States*, 570 U.S. 99, 116-117 (2013).

Additionally, points and fees assessed for the offense of Speeding are assessed by a

separate entity, namely the Georgia DDS, and are a collateral consequence and not part of the sentencing the trial court can impose.

Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *United States v. Ward*, 448 U.S. 242, 248 (1980).

In regard to *O.C.G.A. § 40-6-189* (Classification as Super Speeder), the legislature has indicated an intent to establish a civil penalty by using the words "administer" and "fee" instead of "assess" and "fine." Additionally, the fact that the authority to administer and collect such fee is conferred upon an administrative agency, the DDS, is prima facie evidence that the Georgia legislature intended to provide for a civil, not criminal sanction. See *O.C.G.A. § 40-6-189*. Finally, *O.C.G.A. § 40-6-189*, specifically states that "all fees collected under the provisions of this Code section shall be deposited in the general fund of this state with the intent that these moneys be used to fund a trauma care system in Georgia and the direct and indirect costs associated with the administration of this Code section. For that reason, it is evident that the imposition of the Super Speeder fee was not intended to be a criminal sanction.

Likewise, the DDS has the authority to assess points for moving violations. *See O.C.G.A. § 40-5-57*. Additionally, this Court has specifically held that a mandatory suspension of license imposed under violation point system cannot be classified as criminal punishment resulting from a criminal prosecution. *Williams v. State*, 138 Ga. App. 662, 663 (1976)¹. It is accomplished administratively by a designated public officer, and there is a complete absence of any judicial action and no attribute of a criminal case. *Id.* Thus, the application of points by an administrative agency such as the DDS – points which have a sole purpose of building to an administrative license suspension – can also not be considered punishment in the criminal context.

Finally, in support of his argument that license points are in fact a punishment, Appellant erroneously relies on *Hudson v. United States*, 522 U.S. 93 (1997). In *Hudson*, the United States Supreme Court analyzed if the defendants' Fifth Amendment rights were violated under the Double Jeopardy clause when the Government administratively imposed monetary penalties and occupational debarment on the defendants for violation of federal banking statutes, and later criminally indicted them for essentially the same conduct. *Id. at 95*. Appellant's

¹ See also *Nolen v. State*, 218 Ga. App. 819 (1995) (administrative license suspensions triggered by a refusal under the Implied Consent Statute not a criminal punishment); *McGraw v. State*, 230 Ga. App. 843 (1998) (license to drive is a privilege, and suspension of said privilege is not a criminal punishment); *Thompson v. State*, 229 Ga. App. 526 (1997) (requiring administrative fees for the reinstatement of a license is not a punishment); *Simile v. State*, 259 Ga. App. 106 (2003) (remedial sanctions by other State bodies, such as educational probation, are not punishment).

case before this Court does not require an analysis under the Double Jeopardy clause; even assuming that the civil point assessment and fee collection could be considered criminal punishment, Appellant was never the subject of civil administrative proceedings or consequences prior to being criminally charged or convicted for the offenses of Reckless Driving and Speeding. Finally, as stated above, points and fees assessed after sentencing for the offense of Speeding are a collateral consequence and not part of the sentencing the trial court can impose.

Assuming *arguendo* that a Double Jeopardy analysis under *Hudson* is proper, applying the seven “guideposts” for determining whether administrative sanctions are merely civil or a form of punishment to this case leads to the conclusion that the points assessed are merely civil.

The seven guideposts are: (1) "whether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of scienter"; (4) "whether its operation will promote the traditional aims of punishment -- retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned." *Id.* at 99-100.

- (1) Here, the assessment of points does not involve an affirmative disability or restraint. At most, assessed points can lead to one’s temporary suspension of one’s driving privileges, and as discussed *supra* this Court has held that

the suspension of driving privileges is not a criminal punishment. *O.C.G.A. § 40-5-57*.

- (2) The assessments of points has not historically been regarded as a punishment. The statute even states under subsection (a) that the reason that the DDS is authorized to suspend the license of a driver based on points is not to punish the driver, but because “the State of Georgia considers dangerous and negligent drivers to be a direct and immediate threat to the welfare and safety of the general public, and it is in the best interests of the citizens of Georgia immediately to remove such drivers from the highways of this state.” *Id.* See *Quiller v. Bowman*, 262 Ga. 769 (1993) (holding that an administrative license suspension due to a conviction for drug possession is not a punishment and has the specific purpose of combating “a direct and immediate threat to the welfare of the immediate public.”)
- (3) A finding of scienter is not required for a Speeding conviction; while general intent is required in any criminal prosecution, speeding is a crime of strict liability that does not require specific intent, mental fault, guilty knowledge, or a purposeful violation of the law. *State v. Oglivie*, 292 Ga. 6, 8 (2012). See also *Smith v. State*, 319 Ga. App. 164, 172 (2012).
- (4) While courts have recognized that all civil penalties have some deterrent effect, the reason for point assessments and license suspensions is not to

promote the traditional aims of punishment, retribution and deterrence, but as stated *supra* is to protect the general public from dangerous and negligent drivers. *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 777 (1994); *United States v. Ursery*, 518 U.S. 267 (1996).

- (5) The behavior to which the point assessment applies, Speeding, is already a crime under *OCGA § 40-6-181*, and *OCGA § 40-6-1* separately defines the offense as a misdemeanor and provides its range of punishment with no mention of points or administrative consequences being part of that.
- (6) The alternative purpose to which the point assessment is rationally connected to is again the protection of the general public from dangerous and negligent drivers. *Supra*.
- (7) Finally, the assessment of points does not appear excessive in relation to the alternative, nonpunitive purpose (protection of the general public from dangerous and negligent drivers).

For all of these reasons, it is evident that the assessment of points by the DDS or any collection of a super speeder fee are merely civil and not punitive.

Appellant also cannot satisfy the second prong of the plain error test. Even assuming that there was some legal error or defect in the Court's charge regarding the State not needing to prove the exact speed under a Sixth Amendment analysis pursuant to *Alleyne*, there is Georgia authority that postdates *Alleyne* on point

contrary to Defendant's position. *See Lafavor v. State*², 334 Ga. App. 125, 126-127 (2015). Thus, it can hardly be said that Appellant's position is not subject to reasonable dispute.

Further, Appellant fails to meet the third prong of the plain error test. In this particular case, the State adduced evidence that supported the allegation that Appellant was traveling at 107 miles per hour. *Supra*. Therefore, even if the jury had been instructed that it was required to find that Appellant was travelling at a speed of 107 mph in order to convict, the evidence was so overwhelming that they would not have reached any other conclusion.³ Not only did the State present evidence regarding the detection of a precise speed by a properly calibrated radar device, but Appellant never disputed the alleged speed at which he was traveling. Instead, Appellant expressed agreement with Deputy Roberts when confronted with the speed of 107 mph by stating, "Yeah." Appellant therefore cannot show that the supposed plain error affected the outcome of the proceeding.

For these reasons, the alleged plain error did not substantially affect the fairness, integrity, or public reputation of the proceedings.

² "In order to be guilty of speeding, one need only exceed the designated speed limit. And, in prosecuting someone for speeding, the State need not prove that a driver was traveling at a precise rate of speed in order to obtain a conviction for speeding."

³ The fact that the jury specifically asked whether exact speed was required for a conviction for Speeding does not indicate that the jury was confused about the law, but mere showed their desire to follow the court's instructions. *TT Vol 6* at 259.

2. Trial counsel did not render ineffective assistance.

Finally, Appellant argues that trial counsel provided ineffective assistance of counsel by failing to generally demur to Count 2, Speeding, after jeopardy attached and failing to except to the trial court's refusal of the requested lesser-included offense of Too Fast for Conditions.

In order to show ineffective assistance of counsel, Appellant must show (1) that his trial counsel's performance was professionally deficient, and (2) that but for that deficiency, there is a reasonable probability that the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Here, Appellant has failed to satisfy either of the two *Strickland* prongs.

In Appellant's first enumeration of ineffective assistance of counsel, Appellant alleged that trial counsel should have made a general demurrer to Count 2, Speeding, based on the fact that the language of that count on the accusation did not include any reference to the speed limit being "posted", or otherwise noticed to the public by the designated, appropriate sign.

However, the State is not required to quote the exact language of a statute for an accusation to properly survive a general demurrer. *Carter v. State*, 252 Ga. 502, 504 (1984). Moreover, "[e]very [accusation] which states the offense in the terms of the language of this Code or so plainly that the nature of the offense charged

may be easily understood by the jury shall be deemed to be technically sufficient and correct.” *State v. Wyatt*, 295 Ga. 257, 260 (2014). *See also O.C.G.A. § 17-7-71 (c)*.

In this particular case, the count in question read that the Appellant did “unlawfully operate a motor vehicle at a speed of 107 miles per hour on GA 400 SB, a highway in the State of Georgia, when the speed limit there was 65 miles per hour.” The State properly alleged that the speed limit where Appellant committed the offense was 65 miles per hour, and the only way a speed limit is set is by a properly posted sign.

Counsel cannot be deficient for failing to make a meritless motion. *Fleming v. State*, 306 Ga. 240, 250 (2019). Because there was no legal basis for a general demurrer to be made or sustained, Appellant cannot show that trial counsel was deficient in this regard, nor can he show that he was prejudiced by any supposed deficiency.

Appellant’s second enumeration of ineffective assistance is that trial counsel was deficient for failing to except to the trial court’s refusal to include Too Fast for Conditions as a lesser included offense for Speeding. A crime is considered a lesser included offense of another crime when it is established by proof of the same or less than all of the facts or a less culpable mental state is required to establish

the commission of the crime charged, or that the lesser included offense differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission. *O.C.G.A. § 16-1-6*.

The offense of Too Fast for Conditions is defined by *O.C.G.A. § 40-6-180*, which reads:

“No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing. Consistently with the foregoing, every person shall drive at a reasonable and prudent speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching and traversing a hill crest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.”

To prove a violation of that statute, the State would need to prove beyond a reasonable doubt that the offender was driving above a reasonable and prudent speed when approaching and crossing an intersection or railroad grade crossing; approaching and going around a curve; approaching and traversing a hill crest, traveling upon any narrow or winding roadway; or the existence of special hazards with respect to pedestrians, other traffic, or because of weather or highway conditions. None of those are elements of a violation of *O.C.G.A. § 40-6-181*, for which Appellant was convicted, and therefore Too Fast for Conditions is not a

lesser included offense of speeding. Under the required evidence test, the offenses of Speeding and Too Fast for Conditions each have independent elements that are required to prove the two offenses and, as a result, Speeding and Too Fast for Conditions do not merge. See *Jones v. State*, A26A0321 (decided June 18, 2026).

Trial counsel cannot be deficient for failing to raise a meritless motion or objection, and thus Appellant cannot show deficiency or prejudice from trial counsel's failure to renew his exception to the trial court's refusal to include Too Fast for Conditions as a lesser included offense of Speeding.

CONCLUSION

Based on the law and arguments presented above, this Court should deny Appellant's appeal and uphold Appellant's conviction.

WORD COUNT CERTIFICATION

Appellee certifies that this submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this the 29th day of June 2026.

/s/ William A. Finch
William A. Finch
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Georgia Bar. No. 260283

/s/ Randa Hafez
Randa Hafez
Assistant Solicitor-General
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CERTIFICATE OF SERVICE

This is to certify that I have this day served Appellant in the foregoing matter with a copy of this BRIEF OF APPELLEE via electronic mail, to the following address:

Matthew K. Winchester
Garland Law Building
3151 Maple Drive, NE
Atlanta, Georgia 30305
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I certify that there is a prior agreement with Matthew K. Winchester to allow documents in a .pdf format sent via email to suffice for service pursuant to Ga. Ct. App. R. 6.

Respectfully submitted this 29th day of June 2026.

/s/ Randa Hafez
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