

**IN THE COURT OF APPEALS
STATE OF GEORGIA**

ERIC SUNG KIM	:	
Appellant - Defendant,	:	DIRECT CRIMINAL APPEAL
	:	
vs.	:	Docket Number: A26A2067
	:	
STATE OF GEORGIA	:	
Appellee - Plaintiff.	:	

**A direct appeal from the State Court of Forsyth County
Accusation 24M-2234-B
The Honorable T. Russell McClelland, III., presiding.**

**REPLY BRIEF FOR APPELLANT
ERIC SUNG KIM**

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ORAL ARGUMENT REQUESTED

ARGUMENT AND CITATIONS TO AUTHORITY

I. The “no actual speed” instruction deviated from *Beckett*, that deviation on these facts violated *Alleyne*, and the State’s harmlessness argument overlooks critical defense facts that prompted the jury’s two questions.

The State first argues “there was no legal defect.” State’s Br. at 8. Not so. At the time of Kim’s trial, *Beckett* unequivocally held that “averments as to the specific manner in which a crime was committed are not mere surplusage, and such averments must be proved as laid, or the failure to prove the same will amount to a fatal variance and a violation of the defendant's right to due process of law.” 372 Ga. App. at 141 (1), n.8. Under *Beckett*, the trial court’s instructions that a finding of exact speed was not required *twice* deviated from this rule because 107mph was alleged in count two. [T. Vol. 2 at 211, 217].

Contrary to the State’s argument, this deviation from *Beckett* also violated *Alleyne* because the trial court found in the disposition that Kim was not only guilty of speeding, but also “107/65.” [R. at 67]. No special verdict form was used, [R. at 66] (verdict form does not reference 107mph allegation), and the jury was instructed *not* to find exact speed, [T. Vol. 2 at 218: 1-10], so this finding was purely judicial—that judicial finding increased Kim’s minimum punishment, violating *Alleyne*.

The State’s dispute over the “punishment” classification of license points and the Super speeder fee is based on a red herring. According to the State, because the statute delegates the “collection” of the fee and “assessment” of points to the

Department of Driver's Services, these direct consequences of the trial judge's finding somehow become collateral and civil, no longer penal.¹ That is wrong. The "fee" and "points" are mandatory under the statute, regardless of which agency keeps track of them—they are logged by DDS, but imposed by Georgia law as a direct and necessary consequence of a conviction for this exact speed.

Contrary to the State's position, the *Hudson* factors favor Kim's argument. The assessment of points to suspend a driver's license results in affirmative restraint, and restraint was imminent given Kim's driving record. [T. Stg. Oct. 9, 2025 at 235]. Factors two, four, and six, concern the same topic: "even remedial sanctions carry the sting of punishment." *Nolen*, 218 Ga. App. at 821. Though related to safety, the stated purpose to protect from dangerous and negligent drivers, *without* a preliminary hearing, accomplishes deterrence and retribution (punishment) to an equal or greater degree than it furthers safety. That fact – mandatory suspension without a preliminary hearing – distinguishes *Nolen*'s analysis.² § 40-5-57 (b).

The State's reliance on *LaFavor* to oppose the second plain error prong fails. Beyond the Opening Brief argument that *LaFavor* merely recycled pre-*Alleyne* case

¹ For this proposition, the State's citation to *Williams v. State*, 138 Ga. App. 662, 663 (2) (1976) is inapposite because division of two *Williams* considered Code Ann s 92A-445, a predecessor version of the habitual violator statute that used distinguishable language.

² The statute analyzed in *Nolen* provided for a license suspension hearing. And contrary to *Nolen*'s analysis, *Quiller* held that "[a] driver's license is a property interest that may not be denied without due process of law." (citing *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589 (1971)).

law, Kim at 16, *LaFavor* is at odds with *Beckett* and the O.C.G.A. § 40-6-187 requirement to “specify speed” in speeding violation accusations.

Finally, the State’s “overwhelming evidence” argument misconstrues the facts at trial. Contrary to the State’s argument, Kim *did* dispute Dep. Robert’s claim that he sped at 107mph. [T. Vol. 2 at 132] (Vera Kim testimony that Eric was “shocked” and told Dep. Roberts that he “didn’t go that fast.”). This case was a credibility determination due to Dep. Roberts’ operational failure—Dep. Roberts did not activate his body camera, [T. Vol. 1 at 74], and did not think to activate his dash camera when he first claimed to see the Urus speeding. [T. Vol. 1 at 125]. When the jury asked to see the complete footage of the “fisheye camera,” the State opposed it. [Court’s Ex. 2]; [T. Vol. 2 at 219]. This footage supported *Kim*.

The deputy’s operational failures, considered together with the fisheye camera and Deputy’s inconsistent statements (i.e., claiming that Kim sped behind him while he traveled 39mph in traffic), explains the jury’s refusal to accept wholesale the deputy’s credibility: despite his specialized training, he failed to take standard investigative steps with equipment necessary to ensure an accurate arrest. Though the State downplays the jury’s questions, the record shows that exact speed was the center of the deliberations. [Court’s Ex. 1]. Contrary to the State’s argument, the deliberation questions and split-verdict show *underwhelming* evidence.

The State argues that a different instruction would not have affected the outcome. It absolutely would have. As framed by the closing arguments, exact speed, as alleged, was the ultimate issue. Because the trial court's instructions misled the jury on this material question, Kim has shown plain error. *See Stanbury*, 299 Ga. at 130 (2) ("when, as here, the instructions the jury receives are infirm, the expected result is not enlightenment, but confusion."). A new trial is required.

II. Section 40-6-181 (b) (4) expressly qualifies liability on "that such speed limit is designated by appropriate signs" and count two alleged no facts to establish that the 65mph limit was appropriately posted.

Conceding that count two did not allege the 65mph speed limit was designated by an appropriate sign, the State does not engage Kim's citation to *Harper v. Brown*, 122 Ga. App. 316, 319 (2) (176 SE2d 621) (1970). Nor does it attempt to reconcile the plain language of O.C.G.A. § 40-6-182.

§ 40-6-182 undermines the State's argument that "the only way a speed limit is set is by a properly posted sign." State's Br. at 16. Not so.

Incorporated in § 40-6-181 (b), Section 40-6-182 provides the speed limit is set by the commissioners of public safety and/or transportation, via determination and declaration, and that such determination "shall be effective when appropriate signs giving notice thereof are erected." *Id.* Thus, contrary to the State's argument, a speed limit may be *set*, but not *effective* to establish liability, where no sign has

been erected to give notice.³ *Id.* (“[s]uch a maximum speed limit may be declared to be effective at all times as are indicated upon such signs[.]”).

For Eric Kim, the collective import of these statutes is that the mere factual allegation of a speed limit did not plead the separate element that the alleged limit was posted (or that he had notice of the same), as required by § 40-6-181 (b) (4). *See* O.C.G.A. § 40-6-187 (a) (requiring “official charging instrument” of a speeding violation shall specify “the maximum speed *applicable* [] at the location”) (emphasis added).

Given the consistent statutory reference to “notice” and “designated sign,” trial counsel’s failure to demur count two for this omission was objectively unreasonable. Because Kim could admit count two as pled and remain not guilty of the crime, trial counsel was ineffective. Count two must therefore be reversed.

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³ Similarly, Section 40-6-183 (c) requires alteration of speed limits to be effective through the erection of appropriate signs.

CONCLUSION

For the foregoing reasons, Eric Sung Kim respectfully requests this Court to **VACATE** his conviction, **REVERSE** the denial of his motion for new trial, and **REMAND** this case to the State Court of Forsyth County with instructions that a **NEW TRIAL** be granted.

Respectfully submitted this 17th day of July, 2026.

/s/ Matthew K. Winchester

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing REPLY BRIEF upon Randa Hafez, Assistant Solicitor General for Forsyth County by filing the foregoing via the Court of Appeals E-Fast service, and by depositing the same in the U.S. Mail with adequate postage affixed to insure delivery, addressed to Forsyth County Solicitor General's Office, 101 E. Courthouse Square, Cumming, Georgia 30040.

Pursuant to Court of Appeals Rule 24 (f), undersigneds hereby certify that this brief does not exceed the criminal case word limit imposed by Rule 24 (a).

This 17th day of July, 2026.

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