

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

State of Georgia,	:	
	:	Accusation No. _____
v.	:	
	:	
_____ ,	:	
	:	
Defendant.	:	

PLEA IN BAR

Comes Now, the Defendant in the above-styled case, by and through his counsel of record, and respectfully moves that the Court enter an Order absolutely discharging and acquitting him of the charges of driving under the combined influence of alcohol and drug and driving under the influence of alcohol - less safe. In furtherance of the Defendant's plea in bar, the Defendant respectfully shows this Honorable Court the following:

On or about June 23, 2007, the Defendant was arrested by Officer Gladkowski of the Sandy Springs Police Department for DUI, speeding, and failure to obey a traffic control device. On or about April 29, 2009, the Fulton County Solicitor General filed in the Fulton County State Court Clerk's office an accusation against the Defendant. The accusation included four separate counts. Among the four counts were charges of driving under the influence of marijuana - per se and driving under the influence of a drug - less safe. On February 18, 2011, the state filed an accusation purporting to amend the charge of driving under the influence of marijuana to driving under the combined influence of alcohol and drug. On February 22, 2011, the state also filed an accusation purporting to amend the charge of driving under the influence of drug - less safe to driving

under the influence of alcohol - less safe. Both of these attempted amendments are made approximately 44 months after the date of the Defendant's arrest.

Pursuant to OCGA § 17-3-1(d), "[p]rosecution for misdemeanors must be commenced within two years after the commission of the crime." "The two-year period runs from the date the offense was committed until the date the original accusation is filed." *Prindle v. State*, 240 Ga.App. 461, 523 S.E.2d 44 (1999). In the instant case, the original accusations were filed within the statute of limitation, but the amended accusations were not.

OCGA § 17-7-71(f) governs the amendment of accusations and provides, in pertinent part:

[P]rior to trial, the prosecuting attorney may amend the accusation, summons, or any citation to allege or to change the allegations regarding any offense arising out of the same conduct of the defendant which gave rise to any offense alleged or attempted to be alleged in the original accusation, summons, or citation.

The question presented to the Court by the State's purported amendments to the accusations in this case is whether the amended accusations were valid since they were filed after the expiration of the applicable two-year statute of limitation.

"[A]n amended accusation is valid as long as the original accusation was still pending, was timely, and did not broaden or substantially amend the original charges." *Lee v. State*, 304 Ga.App. 681, 697 S.E.2d 221, 223 (2010)(emphasis added), citing *Wooten v. State*, 240 Ga. App. 725, 524 S.E.2d 776 (1999). The State's attempt to amend the DUI charges in this case broaden and substantially

amend the original charges. As recognized in *State v. Rustin*, 208 Ga. App. 431, 433, 430 S.E.2d 765 (1993), these purported amendments are the addition of a new offense requiring different evidence and methods of proof.

1. Amendment of the accusation of driving under the influence of marijuana to driving under the combined influence of alcohol and drug.

As originally filed on April 29, 2009, the charge of driving under the influence of marijuana alleged:

I, Carmen D. Smith, Solicitor General for the County of Fulton, State of Georgia, on the name and on behalf of the citizens of Georgia do hereby charge and accuse _____ LEE_____ with the offense of DRIVING UUNDER THE INFLUENCE OF MARIJUANA (MHAN), a misdemeanor of a high and aggravated nature, for that said accused in the County of Fulton, State of Georgia on JUNE 23, 2007 did DRIVE A MOVING VEHICLE with marijuana present in HIS URINE, in violation of O.C.G.A. §40-6-391, contrary to the laws of this state, the good, order, peace and dignity thereof.

The State has attempted to amend this charge on February 18, 2011 to the following:

I, Carmen D. Smith, Solicitor General for the County of Fulton, State of Georgia, in the name and on behalf of the citizens of Georgia do hereby charge and accuse _____ LEE_____ with the offense of DRIVING UNDER THE COMBINED INFLUENCE OF ALCOHOL AND DRUG, a misdemeanor, for that said accused in the County of Fulton, State of Georgia on June 23, 2007 did drive a moving vehicle on U.S. Interstate 285 West while under the combined influence of alcohol and drug to the extent that it was less safe for the defendant to drive, in violation of O.C.G.A § 40-6-391, contrary to the laws of this state, the good, order, peace and dignity thereof.

The purported amendment broadens and substantially alters the original charge in, at least, two material ways:

- (1) The original charge alleged that the Defendant was under the influence of marijuana (O.C.G.A. § 40-6-391(a)(6)), and the purported amendment alleges that the Defendant was under the influence of alcohol and a drug (O.C.G.A. § 40-6-391(a)(4)). The proof which must be adduced at trial upon these two charges is, by definition, substantially different because the State cannot simply rely upon proof that the Defendant had marijuana in his urine at the time of driving.
- (2) The original charge alleged that the Defendant committed a per se violation of O.C.G.A. § 40-6-391(a)(6), and the purported amendment alleges that the Defendant committed a less safe violation of O.C.G.A. § 40-6-391(a)(4). Under the purported amendment, the State must show impaired driving ability; whereas, the original charge required no showing of impaired driving ability.

Accordingly, the purported amendment of this charge does not meet with the requirements of *Lee v. State* and *Wooten v. State* in that the amendment broadens and substantially alters the charge.

2. Amendment of the accusation of driving under the influence of drug - less safe to driving under the influence of alcohol - less safe.

As originally filed on April 29, 2009, the charge of driving under the influence of drug - less safe alleged:

I, Carmen D. Smith, Solicitor General for the County of Fulton, State of Georgia, on the name and on behalf of the citizens of Georgia do hereby charge and accuse _____ LEE _____ with the offense of DRIVING UNDER THE INFLUENCE OF DRUG, LESS SAFE, a misdemeanor, for that said accused in the County of Fulton, state of Georgia on JUNE 23, 2007 did DRIVE A MOVING VEHICLE on U.S. INTERSTATE 285 WEST while under the influence of a drug to the extent that it was less safe for the defendant to drive, in violation of O.C.G.A § 40-6-391, contrary to the laws of this state, the good, order, peace and dignity thereof.

The State has attempted to amend this charge on February 22, 2011 to the following:

I, Carmen D. Smith, Solicitor General for the County of Fulton, State of Georgia, in the name and on behalf of the citizens of Georgia do hereby charge and accuse _____ LEE _____ with the offense of DRIVING UNDER THE INFLUENCE OF ALCOHOL, LESS SAFE, a misdemeanor, for that said accused in the County of Fulton, State of Georgia on June 23, 2007 did drive a moving vehicle on U.S. Interstate 285 West while under the influence of alcohol to the extent that it was less safe for the defendant to drive, in violation of O.C.G.A § 40-6-391, , contrary to the laws of this state, the good, order, peace and dignity thereof.

The purported amendment broadens and substantially alters the original charge by alleging that the Defendant was under the influence of alcohol in violation of O.C.G.A. § 40-6-391(a)(1) as opposed to a drug (O.C.G.A. § 40-6-391(a)(2)), which was the basis for the original timely filed charge. The proof which must be adduced at trial upon these two charges is, by definition, substantially different and a material allegation to this charge.

Accordingly, the purported amendment of this charge does not meet with the requirements of Lee v. State and Wooten v. State in that the amendment broadens and substantially alters the charge.

WHEREFORE, the Defendant respectfully requests that this Honorable Court grant his plea in bar and dismiss the purported amendments to the DUI charges in this case.

Respectfully submitted, this __ day of February, 2011.

D. BENJAMIN SESSIONS
State Bar #141280
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served by _____ delivery copies of the foregoing Plea in Bar in the above-reference case to the Fulton County Solicitor General or a duly appointed representative by personal service.

Respectfully submitted, this __ day of February, 2011.

D. BENJAMIN SESSIONS
State Bar #141280
Attorney for Defendant