

**IN THE SUPERIOR COURT OF MORGAN COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA,

v.,

Defendant.

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Case No. _____ NUMBER

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BRIEF IN SUPPORT OF GENERAL AND SPECIAL DEMURRERS

Comes Now, the Defendant, by and through the undersigned counsel of record, and submits this brief in support of his general and special demurrers to the indictment against him in this case. In furtherance of his general and special demurrers, the Defendant respectfully shows this Honorable Court the following:

Count 1

The Grand Jurors aforesaid, on their oaths aforesaid, in the name and behalf of the citizens of Georgia, charge and accuse BENJAMIN _____ with the offense of Homicide by Vehicle in the First Degree for that the said accused in Thomas County, Georgia, on or about the 8th day of October, 2010, did without malice aforethought, cause the death of Makiah King, a four year old child, while driving a motor vehicle, to wit: 1999 Chevrolet, on US Highway 84 and Eason Crossing Road, through a violation of O.C.G.A. 40-6-391, Driving Under the Influence, in that the accused did drive a moving vehicle while there was an amount of amphetamines and the metabolites and derivatives of marijuana present in the accused's urine, to the extent it was less safe for him to operate a moving motor vehicle, contrary to the laws of said State, the good order, peace and dignity thereof.

1. Count 1 of the indictment pending against the Defendant alleges that he had "an amount of amphetamines and the metabolites and derivatives of marijuana present in the accused's urine." By including reference to "an amount," the State made the alleged amount of amphetamines and metabolites and derivatives of marijuana relevant to this count. In order to adequately prepare for trial, the Defendant must know

what amount of amphetamines and metabolites and derivatives of marijuana the State alleges was present in his urine such that it impaired his ability to drive safely.

2. Count 1 of the indictment pending against the Defendant alleges, in pertinent part, that “the accused did drive a moving vehicle while there was an amount of amphetamines and the metabolites and derivatives of marijuana present in the accused’s urine, to the extent it was less safe for him to operate a moving motor vehicle....” Although this count does not reference a subsection of O.C.G.A. 40-6-391, it can only be presumed that this is an effort to charge the Defendant with a violation of O.C.G.A. 40-6-391(a)(2) because an application of O.C.G.A. 40-6-391(a)(6) to the drugs, at issue, is not permitted under Love v. State, 517 S.E.2d 53 (Ga. 1999) and Sandlin v. State, 707 S.E.2d 378 (Ga. App. 2011). It is not a violation of O.C.G.A. 40-6-391(a)(2) to operate a motor vehicle with metabolites and derivatives of marijuana in one’s urine. Metabolites and derivatives are included within O.C.G.A. 40-6-391(a)(6) but not O.C.G.A. 40-6-391(a)(2). The omission of metabolites and derivatives within O.C.G.A. 40-6-391(a)(2) makes it is clear that the legislature did not intend the metabolites and derivatives to be criminal conduct under O.C.G.A. § 40-6-391(a)(2).

3. Count 1 of the indictment is misleading and not perfect in form because it is an effort to combine O.C.G.A. §§ 40-6-391(a)(2) and 40-6-391(a)(6) in a single count. Count 1 is misleading and confusing because it references “an amount” of amphetamines and the metabolites and derivatives of marijuana. This allegation is misleading in that it suggests that having an amount of amphetamines and the metabolites and derivatives of marijuana while driving is illegal. This suggestion is incorrect under Love v. State, 517 S.E.2d 53 (Ga. 1999) and Sandlin v. State, 707 S.E.2d 378 (Ga. App. 2011).

Count 2

The Grand Jurors aforesaid, on their oaths, aforesaid, in the name and behalf of the citizens of Georgia, charge and accuse BENJAMIN

_____ with the offense of Homicide By Vehicle in the First Degree for that said accused in Thomas County, Georgia, on or about the 8th day of October, 2010, did without malice aforethought, cause the death of Makiah King, a four year old child, while driving a motor vehicle, to with: 1999 Chevrolet, on US Highway 84 and Eason Crossing Road, through a violation of O.C.G.A. 40-6-390, Reckless Driving, in that the accused did accelerate and gun his vehicle through an intersection in the face of oncoming traffic as he crossed Highway 84, striking the vehicle in which Makiah King was a passenger, said accident taking the life of Makiah King, contrary to the laws of said State, the good order, peace and dignity thereof.

(Emphasis supplied in indictment).

1. Count 2 of the indictment against the Defendant is substantively defective in that it fails to allege that the Defendant “drove with reckless disregard for the safety of persons or property.” Ross v. State, 235 Ga. App. 7, 508 S.E.2d 424, 426 (1998)(general demurrer to sufficiency of accusation on reckless driving after close of evidence resulted in reversal of conviction on appeal); see, State v. Black, 149 Ga. App. 389, 254 S.E.2d 506 (1979)(defendant properly raised failure to include critical language of reckless driving statute by special demurrer).

2. Count 2 of the indictment against the Defendant contains a description of the alleged reckless driving that contains terms that are not precise enough to allow the Defendant to prepare his defense against the charge. This count alleges that the Defendant “did accelerate and gun” his vehicle. “It is useful to remember that the purpose of the indictment is to allow defendant to prepare his defense intelligently and to protect him from double jeopardy.” State v. English, 276 Ga. 343, 346(2)(a), 578 S.E.2d 413 (2003). With the filing of a special demurrer, the Defendant is claiming “that the

charge is imperfect as to form or that [he] is entitled to more information.” State v. Delaby, 298 Ga. App. 723, 681 S.E.2d 645, 646 (2009), quoting State v. Jones, 251 Ga.App. 192, 193, 553 S.E.2d 631 (2001). Having filed a special demurrer, the Defendant is entitled to an indictment that is “perfect in form and substance. Delaby, 681 S.E.2d at 647. “An indictment must sufficiently apprise the defendant of what he must be prepared to meet. “The defendant is entitled to know the particular facts constituting the alleged offense to enable him to prepare for trial.” Id., at 648, quoting, State v. Black, 254 S.E.2d 506 (Ga. App. 1979).

Count 3

The Grand Jurors aforesaid, on their oaths aforesaid, in the name and behalf of the citizens of Georgia, charge and accuse BENJAMIN _____ with the offense of Driving Under the Influence (Controlled Substance) for that the said accused in Thomas County, Georgia, on or about the 8th day of October, 2010, then and there did drive a 1999 Chevrolet, a moving vehicle, while there was an amount of a controlled substance as defined in O.C.G.A. Section 16-13-21, to wit: amphetamines and the metabolites and derivatives of marijuana present in his urine, to the extent it was less safe for him to drive, contrary to the laws of said State, the good order, peace and dignity thereof.

(Emphasis supplied in indictment).

As the description of the charge states, Count 3 alleges that the Defendant drove under the influence of controlled substance. This count of the indictment is not perfect in form because when the State sought to specify the alleged controlled substance after “to wit” it stated both amphetamines and metabolites and derivatives of marijuana. The use of the conjunctive “and” in this count after “to wit” is misleading and confusing in that it suggests that the metabolites

and derivatives of marijuana are “controlled substances.” In Asberry v. State, 220 Ga. App. 40, 467 S.E.2d 225 (1996), the Court of Appeals clarified that marijuana is not a “controlled substance” as defined by O.C.G.A. § 16-13-21:

While the possession, manufacture, delivery, distribution, purchase or sale of marijuana does constitute a crime under OCGA § 16-13-30(j), a review of OCGA § 16-13-30 indicates that, within the statute, the legislature distinguishes between controlled substances and marijuana, and OCGA § 16-11-106(b) (4) limits prosecutions to cases involving controlled substances. In particular, the legislature provided separate and distinct paragraphs and punishments for those offenses involving controlled substances and those involving marijuana. Compare OCGA § 16-13-30(c), (d), (e), (f), (g), and (h) with OCGA § 16-13-30(j). The legislature's intent to distinguish controlled substances from marijuana is evident in other respects. The one time the two terms are used within the same subparagraph of the statute, they are used in the disjunctive. See OCGA § 16-13-30(k) (“It shall be unlawful for any person to hire ... an individual under the age of 17 years ... for the purpose of manufacturing, distributing, or dispensing, on behalf of the solicitor, any controlled substance, counterfeit substance, or marijuana”). (Emphasis supplied.)

‘Controlled substance’ means a drug, substance, or immediate precursor in Schedules I through V of Code Sections 16-13-25 through 16-13-29 and Schedules I through V of 21 C.F.R. Part 1308.” OCGA § 16-13-21(4). Marijuana is not listed within any of the schedules contained in this definition.

‘Marijuana’ means all parts of the plant of the genus Cannabis, whether growing or not, the seeds thereof, the resin extracted from any part of such plant, and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include samples as described in subparagraph (P) of paragraph (3) of Code Section 16-13-25 and shall include the completely defoliated mature stalks of such

plant, fiber produced from such stalks, oil, or cake, or the completely sterilized samples of seeds of the plant which are incapable of germination.” OCGA § 16-13-21(16).

Consequently, when the legislature expressly incorporated only those provisions of OCGA § 16-13-30 that concerned “controlled substances,” it excluded those provisions of OCGA § 16-13-30 that concern “marijuana.”

The legislature's limitation of OCGA § 16-11-106(b) to cases involving controlled substances is consistent with their prior determination that crimes involving the possession, manufacture, delivery, distribution, dispensing, administering, selling, or possession with intent to distribute certain controlled substances merit harsher punishment than the same crimes involving marijuana. Compare OCGA § 16-13-30(c), (d), (e), and (f) with OCGA § 16-13-30(j); see also OCGA § 16-11-106(b)(5) (statute expressly provides that possession of a firearm by someone trafficking in marijuana is unlawful). Furthermore, ‘[w]hen a criminal statute fairly and reasonably is subject to two constructions, one which would render an act criminal, the other which would not, the statute must be construed strictly against the State and in favor of the accused.’ (Punctuation omitted.) *State v. Crane*, 247 Ga. 779, 780, 279 S.E.2d 695 (1981).

The trial court erred in charging the jury that marijuana was a controlled substance....

Asberry, 467 S.E.2d 226-27.

Count 3 of the indictment pending against the Defendant is not perfect in form or substance as it incorrectly identifies marijuana as a controlled substance.

Wherefore, the Defendant respectfully prays that this Honorable Court grant his general and special demurrers to the indictment pending against him in this case.

Respectfully Submitted, this ____ day of March, 2012.

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State Bar No. 141280
Attorney for Defendant

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the Thomas County District Attorney's Office with a true and accurate copy of the foregoing pleading by mailing a copy of same via United States Mail, with adequate postage affixed thereon, addressed as follows:

Thomas County District Attorney's Office
Ms. _____ M. Smith
P.O. Box 2596
Thomasville, Georgia 31799

Respectfully Submitted, this ____ day of March, 2012.

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