IN THE COURT OF APPEALS
STATE OF GEORGIA

NORA BEE,
Appellant

v.

STATE OF GEORGIA,
Appellee

Case No. A08A1480

# APPELLEE'S BRIEF

ROBERT D. JAMES, JR.
Solicitor-General DeKalb County
Georgia Bar No. 389148
MATTHEW CICCARELLI
Assistant Solicitor-General DeKalb County
Georgia Bar No. 125665
DeKalb County Courthouse
556 North McDonough Street
Suite 500
Decatur, Georgia, 30030
404.371.2200

**IN THE COURT OF APPEALS**

**STATE OF GEORGIA**

| | | |
|---|---|---|
| **NORA BEE,** | * | |
| **Appellant,** | * | |
| **vs.** | * | **Case Number A08A1480** |
| **STATE OF GEORGIA,** | * | |
| **Appellee** | * | |

# BRIEF OF APPELLEE


Submitted by,

Robert James
Solicitor-General
State Court of DeKalb County
Georgia Bar No.: 389148

Matthew Ciccarelli
Assistant Solicitor-General
State Court of DeKalb County
Georgia Bar No.: 125665

**IN THE COURT OF APPEALS**

**STATE OF GEORGIA**

| | | |
|---|---|---|
| **NORA BEE,** | * | |
| **Appellant,** | * | |
| **vs.** | * | **Case Number A08A1480** |
| **STATE OF GEORGIA,** | * | |
| **Appellee** | * | |

## BRIEF OF APPELLEE

COMES NOW, the State of Georgia by and through the Solicitor-General of DeKalb County, Stone Mountain Judicial Circuit, Robert D. James, Jr., and files the State's Brief. The State respectfully requests that this Honorable Court affirm the Appellants conviction.

## PART ONE

## STATEMENT OF FACTS

On August 4, 2003, prior to filing for divorce, Mrs. Patricia Bostick-Perry applied for a Temporary Protective Order against Nora Bee, her soon-to-be ex-husband. (Trial Transcript, hereinafter "T.T." at 20). The TPO was signed the next day. (T.T. State's Exhibit 4). The applicable language for this appeal provided that the Appellant remain at

least 100 yards away from Mrs. Patricia Bostick-Perry and their daughter. (Id., incorporating the earlier Ex Parte Temporary Protective Order, (T.T. State's Exhibit 1)). This order was to stay in effect for one year. (T.T. State's Exhibit 5). On March 10, 2005, as part of a custody order, the terms of the Temporary Protective Order were made permanent. (T.T. State's Exhibit 3). On October 30, 2005, Appellant drove within 100 yards of Mrs. Patricia Bostick-Perry, violating the Permanent Protective Order. (T.T. at 25-6).

Between July or August 2006, Appellant called Mrs. Patricia Bostick-Perry's parents in an attempt to have a message passed along to her. (T.T. at 61-2, 63). This too was a violation of the PPO no-contact provision.

## STATEMENT OF THE CASE

The original two-count accusation was filed on March 28, 2006. (Record, hereinafter "R.", 16). A subsequent four-count accusation was filed on September 5, 2006. (R. 28). Appellant filled a special demurrer on September 19, 2006 (R-32). Finally, a five-count accusation was filled on October 2, 2006. (R. 34).

A jury trial was held on October 3, 2006. Appellant was found guilty of counts three and four, specifically two counts of Violation of a Temporary Protective Order. (R. 75, 76).

Appellant filled an Amended and Particularized Motion for New Trial on October 10, 2007. On October 17, 2007 a hearing was held on this motion. Following the motion hearing, the Motion was denied. (Motion for New Trial Transcript, hereinafter "N. T." at 48).

## PART TWO

## STANDARD OF REVIEW

## ARGUMENT AND CITATION OF AUTHORITY

The State respectfully requests that this Court affirm the Trial Court's Denial of Appellant's Motion for New Trial.

### I.

### THERE WAS NO ERROR COMMITTED BY THE COURT REGARDING A PRETRIAL HEARING FOR APPELLANT'S SPECIAL DEMURRER

### A.

### THE ISSUE WAS NEVER PROPERLY PRESERVED BY APPELLANT

The record is devoid of any objection regarding the lack of a pre-trial hearing in and of itself. Any mention of the lack of a hearing being error arises from Appellant's

claim that his trial counsel was ineffective for not demanding such a hearing. "The general rule regarding the raising of issues for the first time on appeal is well known. 'An issue not raised during the trial in any form calling for a ruling will not be considered by this court.'" Moore v. State, 141 Ga.App. 245, 246 (1977) *quoting* Jett v. State, 136 Ga. App. 559 (1975). As such, this issue was waived by Appellant.

**B.**

**THERE WAS A HEARING HELD**

When questioned by the Appellant at the Motion for New Trial hearing, trial counsel stated that there was a hearing before the trial. (N.T.T. 24, lines 9-15). However there was no written order of the denial of the Special Demurrer. (N.T.T. 27, lines 5-11). Furthermore, when questioned by the State, trial counsel testified that she had taken notes during the hearing as well as its outcome. (N.T.T. 30-1, lines 19-25, 1-2).

Evidence presented at the Motion for New Trial hearing clearly shows that a hearing was held prior to trial in regard to the Special Demurrer. "There being a presumption in favor of the regularity of proceedings in courts of competent jurisdiction, the Court of Appeals must assume that the trial court's findings are supported by sufficient competent evidence." Smallwood v. Mulkey, 198 Ga. App. 496 (1991). As such Appellant's enumeration must fail since the evidence available shows not only that a

hearing on the matter was held, but also that the Special Demurrer was denied.

Finally, there was no requirement that the hearing be transcribed. "In misdemeanor cases, it is discretionary with the trial court as to whether the proceedings are transcribed." Ward v. State, 188 Ga. App. 372 (1988); O.C.G.A. § 5-6-41 (b).

Wherefore Appellee asks that this enumeration be denied.

## II.

## IN THIS CASE THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL

> The standard of review on the question of trial counsel's effectiveness is whether the conduct of counsel thwarted the adversary process to the point that the result of the trial could not be relied upon as being just. To meet this standard, the defendant must show 'a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different.' Reese v. State, 257 Ga. 624, 626 (1987), *quoting* Strickland v. Washington, 466 U.S. 668 (1984)

### A.

### AS THERE WAS A HEARING FOR THE SPECIAL DEMURRER, THERE CAN BE NO INEFFECTIVE ASSISTANCE CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN NOT DEMANDING A PRETRIAL HEARING

As demonstrated supra, I.B., there is competent evidence showing that a pretrial hearing was held regarding Appellant's Special Demurrer. Moreover, there was a ruling against the special demurrer, albeit an oral ruling. As such there was no ineffective assistance regarding not demanding that a hearing be held for the Special Demurrer.

Wherefore Appellee asks that this enumeration be denied.

**B.**

**APPELLANT'S TRIAL COUNSEL WAS NOT DEFICIENT IN INTERVIEWING WITNESSES PRIOR TO TRIAL**

Appellant's last enumeration rests on the notion that during trial, an Investigator who worked for Trial Counsel's office testified that she had visited the scene of the incident and using a device found the distance between Appellant and victim to be "nine thousand three hundred and seventy-five feet" (T.T. 76, lines 24-5). Furthermore, she was able to walk the distance in "less than two minutes." (T.T. 77, line 21).

This improbable claim encapsulates the entirety or Appellant's third enumeration of error. At the Motion for New Trial Hearing, trial counsel suggested that she thought that perhaps her witness had confused feet and inches on the device. (N.T.T. 29, lines 9-10). Trial counsel also stated that she had spoken with her witness prior to trial and was taken aback by the testimony. (N.T.T. 28, lines 3-5, N.T.T. 29, lines 22-24).

Moreover, Appellant is not able to show how Trial Counsel's deficiency, if any, negatively affected the outcome of his case as required by Poston v. State, 274 Ga. App. 117 (2005). It is not enough to merely allege that there was ineffective assistance, one must also show that such actions affected the outcome of the case. Wafford v. State, 283 Ga. App. 154 (2007), citing Poston.

Wherefore Appellee asks that this enumeration be denied.

## PART THREE

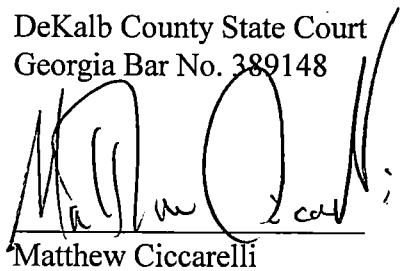
## CONCLUSION

Appellant's appeal must fail for several reasons. First, as there was a hearing for the special demurrer held, the first enumeration should be denied. Second, as there was a hearing for the special demurrer held, any supposed instances of ineffective assistance regarding not demanding said hearing should be denied. Finally, because no harm can be shown regarding the witness's testimony, the third enumeration should be denied.

For the foregoing reasons, the State respectfully requests this Court affirm Appellant's conviction and sentence.

Respectfully Submitted,

Robert James
Solicitor-General
DeKalb County State Court
Georgia Bar No. 389148



Matthew Ciccarelli
Assistant Solicitor-General
DeKalb County State Court
Georgia Bar No. 125665

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

| | | |
|---|---|---|
| **NORA BEE,** | * | |
| **Appellant,** | * | |
| **vs.** | * | **Case Number A08A1480** |
| **STATE OF GEORGIA,** | * | |
| **Appellee.** | * | |

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served Counsel for Appellant with a copy of the foregoing Brief of Appellee by depositing same in the United States Mail with adequate postage attached thereto addressed to:

Tom Csider
P.O. Box 1023
Flowery Branch, GA 30542

This 16th day of May, 2008.

Matthew Ciccarelli
Assistant Solicitor-General
State Court of DeKalb County
Georgia Bar No. 125665

556 North McDonough Street
Suite 500
Decatur, GA 30030
(404) 371-2200

RECE[illegible]

2003 M[illegible]-3 [illegible]:56

[illegible]

CLERK [illegible]

96-057
93
70

**IN THE COURT OF APPEALS**

**STATE OF GEORGIA**



| | | |
|---|---|---|
| NORA ISAAC BEE, | * | |
| Appellant, | * | |
| v. | * | Case No. A08A1480 |
| The STATE OF GEORGIA, | * | |
| Appellee. | * | |

# BRIEF OF APPELLANT

Submitted by

Tom Csider
Counsel for Appellant Nora Isaac Bee
Georgia Bar No. 199752

Nora Isaac Bee, Appellant
1853 Stanton Street
Decatur, Georgia 30032

**IN THE COURT OF APPEALS**

**STATE OF GEORGIA**

| | | |
|---|---|---|
| NORA ISAAC BEE, | * | |
| Appellant, | * | |
| v. | * | Case No. A08A1480 |
| The STATE OF GEORGIA, | * | |
| Appellee. | * | |

## BRIEF OF APPELLEE

## PART ONE

## STATEMENT OF FACTS

On July 23, 2003, the prosecuting witness in this case, Patricia Bostick-Perry, petitioned the Superior Court of DeKalb County for a Family Violence Ex Parte Protective Order against Appellant. (T-19-20; State's Exhibit 1). Appellant was served with a copy of the petition on that same day, July 23. (T23-24; State's Exhibit 2). On August 5, 2003, the court issued an order putting the temporary protective order for a period of six months. (T-72; State's Exhibit 4). On December 13, 2003, the court issued an amended order correcting the first which put the temporary protective order in place for a period of twelve months. (T-72; State's Exhibit 5). The temporary

protective order provided in pertinent part that Appellant was "restrained and enjoined from approaching within 100 yards of [Ms. Bostick-Perry] and/or [her] minor children." (State's Exhibit 1 at p. 3). Appellant was also "ordered not to have any contact, direct, indirect, or through another person with [Ms. Bostick-Perry], by telephone, pager, fax, e-mail or any other means of communication except as specified" in the order. (State's Exhibit 1 at p. 3).

On March 10, 2005, the court issued a custody order regarding Appellant's minor child with Patricia Bostick-Perry. (T-25; State's Exhibit 3). In that order, the Court gave sole custody of the minor child to Ms. Bostick-Perry and incorporated the temporary protective order entered on December 13, 2003 into the custody order as a permanent protective order, to remain in effect until further order of the Court. (State's Exhibit 3). The court did modify the original protective order to allow Appellant to have "one hour of telephone contact" with his daughter "between nine (9:00) o'clock a.m. and ten (10:00) o'clock a.m. on Saturday morning of each week." (State's Exhibit 3).

On October 30, 2005, as Ms. Bostick-Perry and her daughter stood in their front yard, they saw Appellant driving down the street toward their home. (T-25). Ms. Bostick-Perry then called the police. (T-26). When the police officer arrived, he found Appellant down the street at one of the neighbor's homes. (T-55). The officer estimated that the neighbor's house was "three or four houses away" form Ms. Bostick-Perry's home, "five maybe." (T-55). The officer estimated that the location was within one hundred yards of Ms. Bostick-Perry's home, (T-55), but he did not measure the distance between the two locations. (T-58). The officer did not place Appellant under

arrest at that time. (T-56).

Appellant was arrested on December 16, 2005, and charged only with one count of violation of domestic violence orders. (R-11). However, the State ultimately charged Appellant in a five count accusation alleging four (4) counts of Violation of a Permanent Protective Order and one (1) count of stalking. (R-28-29). The first three counts arose out of the events of October 30, when Appellant was visiting his neighbor's home. (R-28). The final two counts arose in whole or in part out of phone calls made by Appellant to Ms. Bostick-Perry's parents, Udelle Perry and Otis Perry. (R-28).

Both Udelle Perry and Otis Perry testified at the trial of the case. (T-64). Though they could recall the general substance of the conversations they had with Appellant, neither was able to recall the exact dates of the conversations. (T-62, 65).

## STATEMENT OF THE CASE

On March 28, 2006, the State filed a two-count accusation against Appellant alleging Violation of a Temporary Protective Order and Stalking. (R-16). The State then filed an amended accusation on September 5, 2006, charging Defendant with five counts including four counts of Violation of a Permanent Protective Order and one count of Stalking. (R-28). Counts Four (Violation of a Permanent Protective Order) and Five (Stalking) of the amended accusation alleged the dates of offenses as "approximately between MARCH 10, 2005 AND AUGUST 25, 2006." (R-28). On September 19, 2006, Appellant's Trial Counsel filed a Special Demurrer in

response to the amended accusation challenging the sufficiency of the dates alleged in Counts 4 and 5. (R-32).

On October 2, 2006, the day before trial, the State responded to Appellant's Special Demurrer by filing yet another amended accusation in which the State changed the dates alleged in Count Four to "approximately between JULY 10, 2006 AND AUGUST 10, 2006." (R-34). The dates alleged in Count Five remained the same as in the earlier amended accusation.

Appellant was tried before a jury on October 3, 2006, and was found guilty as to Counts Three and Four in the accusation. (T-165; R-75, 76). He was given a twenty-four (24) month sentence, the first four months of which were to be served in custody. (T-183; R-76). He was ordered to have no contact with Paticia-Bostick Perry, either directly or indirectly. (T-183; R-76). He was ordered to perform ninety-six (96) hours of community service, and to pay a fine of five hundred dollars ($500.00) as to each count. (T-183; R-76).

On October 30, 2006, Appellant's trial counsel filed a Motion for New Trial, (R-77-78), and a Motion to Modify Sentence. (R-79-81). The following day, October 31, 2006, Appellant filed a pro se Notice of Appeal with the Court along with a number of other documents. (R-1-7).

On December 11, 2006, the trial court issued an order denying Appellant's Motion to Modify Sentence, (R-82), but the court issued no order regarding Appellant's Motion for New Trial, nor did the court schedule the motion for a hearing. One week later, on December 18, 2006, Appellant's trial counsel filed a Motion to Withdraw his previously filed Motion for New

Trial. (R-83).

On April 16, 2007, present counsel for Appellant filed a motion to withdraw Appellant's pro se Notice of Appeal and renewed Appellant's request for a hearing on the Motion for New Trial filed by his trial counsel on October 30, 2006. Present counsel also filed an Amended and Particularized Motion for New Trial on October 10, 2007.

On October 17, 2007, the trial court held a hearing on Appellant's Motion for New Trial. (Transcript of Hearing on Motion for New Trial held on October 17, 2006, hereinafter "T2"). At that hearing, the court signed a consent order permitting Appellant to withdraw his pro se Notice of Appeal filed October 31, 2006 and granting him a hearing on his Motion for New Trial filed on October 30, 2006. (T2-4-5, 13). Following the hearing on the Motion for New Trial, the Court issued an order denying Appellant's Motion for New Trial. (T2-48). It is from this order denying his motion for new trial the Appellant now brings this appeal.

## PART TWO

## ENUMERATION OF ERRORS

I. **THE TRIAL COURT ERRED IN FAILING TO HOLD A HEARING ON THE SPECIAL DEMURRER FILED ON SEPTEMBER 19, 2006**

II. **TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO DEMAND A HEARING ON THE SPECIAL DEMURRER PRIOR TO TRIAL**

III. **TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING ADEQUATELY TO INTERVIEW AND PREPARE DEFENSE WITNESSES**

## PART THREE

## STANDARD OF REVIEW

The grant or denial of motion for new trial is a matter within the sound discretion of the trial court and will not be disturbed if there is "any evidence" to authorize the trial court's ruling. Professional Consulting Svcs. of Ga. v. Ibrahim, 206 Ga. App. 663 (1992).

In reviewing an order on a motion for new trial, appellate courts do not weigh the evidence or give an opinion on where the greater weight of the evidence lies but determine merely whether the record contains sufficient evidence to authorize the trial court's judgment. Milam v. Attaway, 195 Ga. App. 496, 497 (1990).

The standard of post-conviction review of an allegation of a defective charging document is one of harmless error. Bullard v. State, 242 Ga. App. 843 (2000).

The standard of review of a trial court's determination as to the effectiveness of counsel is whether the trial court's findings are "clearly erroneous." Johnson v. State, 266 Ga. 380 (1996).

## ARGUMENT AND CITATION OF AUTHORITIES

### I. THE TRIAL COURT ERRED IN FAILING TO HOLD A HEARING ON THE SPECIAL DEMURRER FILED ON SEPTEMBER 19, 2006

Appellant was charged in an amended accusation filed on September 5, 2006, with five counts, including four counts of Violation of a Permanent Protective Order and one count of Stalking. (R-28). Counts Four (Violation of a Permanent Protective Order) and Five (Stalking) of the amended accusation alleged the dates of offenses as "approximately between MARCH 10, 2005 AND AUGUST 25, 2006." (R-28). On September 19, 2006, Appellant's Trial Counsel filed a Special Demurrer in response to the amended accusation challenging the sufficiency of the dates alleged in Counts 4 and 5. (R-32).

On October 2, 2006, the day before trial, the State amended the accusation yet again, changing the dates alleged in Count Four to "approximately between JULY 10, 2006 AND AUGUST 10, 2006." (R-34). The dates alleged in Count Five remained the same as in the earlier amended accusation. Despite the fact that the special demurrer was filed and had not yet been ruled on, Appellant was tried on October 3, 2006, and convicted on Counts Three and Four in the accusation.

"It has long been the law in this State that demurrers, pleas and answers must be disposed of in that order; and it is error to proceed to trial where demurrers or pleas remain for consideration." Birt v. State, 127 Ga. App. 532, 534 (1972). In the instant case, there is absolutely no evidence in either the trial transcript or the record that the trial court held a hearing on Appellant's special demurrer prior to trial.

Appellant's trial counsel testified at the hearing on the Motion for New Trial that there was "a hearing prior to the beginning of trial, which [ ] took place on October 3rd. It began October 3rd, 2006, and prior to hearing evidence in the case, we did have a hearing on the special [sic] demur." (T2-24). When asked by appellate counsel whether she recalled specifically that the hearing on the special demurrer was held on the day of trial, she replied "It was." (T2-24). A review of the trial transcript reveals that although several matters were taken up prior to the commencement of the trial, there was no hearing on the special demurrer. (T-4-16).

In addition, the record is devoid of any order ruling on the special demurrer. Trial counsel testified at the hearing on the Motion for New Trial that she didn't "believe there was an order ever filed granting or denying the [sic] demur. The Judge made, from what I recall, a ruling prior to trial, but it was never a written order prepared." (T2-27).

Appellant respectfully submits that in the absence of any evidence whatsoever, either in the trial transcript or the record of the case, that the trial court held a hearing and ruled on the special demurrer prior to trial, the sole conclusion that can and must be drawn is that no hearing

ever took place. Pursuant to this Court's decision in Birt, it was error for the case to proceed to trial where the demurrer remained for consideration. 127 Ga. App. at 532. As a result, Appellant respectfully requests that the Court reverse the ruling of the trial court, set aside Appellant's conviction and remand the case back to the trial court for a new trial preceded by a hearing on the special demurrer.

## II TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO DEMAND A HEARING ON THE SPECIAL DEMURRER PRIOR TO TRIAL

Despite having filed the Special Demurrer on September 19, at no time did Appellant's trial counsel demand a hearing on the demurrer on Appellant's behalf. Appellant respectfully submits that had Appellant's trial counsel pressed for a hearing on the Special Demurrer, Appellant stood a significant likelihood of prevailing on the issue raised therein. Appellant respectfully submits that his trial counsel's failure to press for a hearing fell below an objective standard of reasonableness, that there is a reasonable probability that, but for counsel's failure in this regard, the result of the proceeding would have been different. See Strickland v. Washington, 466 U.S. 668 (1984).

Pursuant to State v. Layman, 279 Ga. 340 (2005), "[G]enerally, an indictment which fails to allege a specific date on which the crime was committed is not perfect in form and is subject to a timely special demurrer." 279 Ga. at 341. See also Howard v. State, 281 Ga. App. 797 (2006); Blackmon v. State 272 Ga. App. 854 (2005). There is an exception to this rule where the

evidence does not permit the State to identify a single date on which the offense occurred. Howard, 281 Ga. App. 797 (2006). However, this exception does not apply unless and until "the State first presents evidence to the trial court showing that it cannot more specifically identify the dates of the offenses." Howard, 281 Ga. App. 797 (2006). See also Layman, 279 Ga. at 341("It is only where the State can show that the evidence does not permit it to allege a specific date on which the offense occurred that the State is permitted to allege that the crime occurred between two particular dates.") "Absent some showing by the state that its evidence does not permit it to identify the exact dates of the crimes, [it must be concluded] that the [accusation] counts in question are imperfect and thus subject to the special demurrer." Blackmon v. State, 272 Ga. App. at 855. In this case, the State would not have been able to make such a showing had Appellant's trial counsel pressed for a hearing on the special demurrer, but no hearing was ever held. As this Court pointed out in Blackmon, "While the State may in fact be unable to pinpoint the particular dates of the alleged crimes, we cannot speculate about the matter." Blackmon, 272 Ga. App. at 855. Defense counsel should have demanded, and the trial court should have held, a hearing on the special demurrer.

Count Four in both of the amended accusations was based on phone calls allegedly made by Appellant to the parents of the alleged victim, Patricia Bostick-Perry. (R-34). Count Five was based both on Appellant allegedly coming to the home of Ms. Bostick-Perry and on the phone calls allegedly made by Appellant to Ms. Bostick-Perry's parents. (R-34). In regard to the

phone calls referred to in each count, Appellant's trial counsel easily would have been able to demonstrate at a hearing on the special demurrer that the State could have alleged a specific date for the phone calls had they simply conducted an investigation into the phone records of the Appellant, the victim's parents, or both.

In addition, the State certainly was able to point to a specific date on which Appellant allegedly made contact with the victim in Count One, came to her home in Count Two and came within one hundred yards of her in Count Three. (R-34). Interestingly, however, in Count Five, the State simply alleges a range of dates during which the Appellant is alleged to have come to Ms. Bostick-Perry's home for the purpose of harassing and intimidating her.

Appellant certainly was unfairly prejudiced by trial counsel's failure to demand a hearing on the special demurrer. In allowing this case to proceed to trial without demanding a hearing on the special demurrer, Appellant's trial counsel permitted the case to proceed to trial on an accusation containing two defective counts out of five total charges. Pursuant to Layman v. State, supra, there exists more than a reasonable probability that Counts Four and Five in the amended accusation would have been found to have been defective and would have, at the very least been stricken from the accusation.

Appellant would also argue, that the sustaining of the special demurrer in this case would have resulted in striking from the material allegations of the accusation, making it "equivalent to sustaining a general demurrer and quashing the [accusation]," State v. Mendoza, 190 Ga. App.

831 (1989), thereby preventing the State from trying him on the accusation as amended.

Even if the trial court would have conducted a hearing on the special demurrer and found that the accusation was not void ab initio and that only the defective counts should be stricken, Appellant still was irreparably harmed in this case because he was tried on an accusation containing defective counts. "The mere presence of those counts in the accusation certainly may have had the effect of placing [Appellant's] character in evidence without his consent, providing the jury with information about a separate crime, depriving [Appellant] of the presumption of innocence, lessening the State's burden of proving [Appellant's] guilt beyond a reasonable doubt and depriving [Appellant] of due process of law." Daniel's Georgia Criminal Trial Practice § 14-37, p. 641.

Appellant in this case suffered the ultimate harm in that he was in fact convicted pursuant to one of those defective counts in the accusation. Had Appellant's trial counsel pressed for a hearing on the special demurrer prior to trial, and had the trial court held such a hearing, Appellant respectfully submits that based on applicable case law, the trial court would have had no choice but to strike the defective counts in the accusation and the outcome in this case absolutely would have been different.

## III TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING ADEQUATELY TO INTERVIEW AND PREPARE DEFENSE WITNESSES

During the course of the trial, Appellant's trial counsel called Ms. Gloria Kerry, the Chief

Investigator with the DeKalb County Public Defender's Office to testify as a defense witness. (T-74). Ms. Kerry testified that she measured the distance between the home of the victim, Ms. Bostick-Perry, and the home where Appellant was arrested, and that the distance measured nine thousand three hundred and seventy-five feet, (T-76), or approximately one and three quarter miles. On cross-examination, Ms. Kerry indicated that it took her "less than two minutes" to walk the measured distance. (T-77). She later indicated that the distance she walked and measured was shorter than the distance of a football field. (T-79).

Appellant respectfully submits that the substance of Ms. Kerry's testimony demonstrates that trial counsel was ineffective in that she failed to adequately interview the witness prior to trial to gauge the potential strength or weakness of her testimony. Appellant contends that Ms. Kerry's incredible testimony about walking over a mile and three quarters in two minutes time, and her belief that that distance was less than 100 yards only served to damage his case in the eyes of the jury.

Up to the point in time that Ms. Kerry testified at trial, the State introduced no evidence as to any measurement of distance in the case. They introduced only estimates through the testimony of Ms. Bostick-Perry and Officer Mobley. Rather than serving to aid Appellant's case, Ms. Kerry's testimony simply bolstered that of the State's witnesses, thereby resulting in a conviction on Count Three in the accusation.

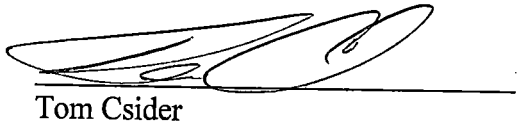
## PART FOUR

## CONCLUSION

In light of the foregoing, Appellant respectfully submits that the trial court erred in proceeding to the trial of his case without holding a hearing on his special demurrer. In addition, Appellant submits that his trial counsel provided him with ineffective assistance in this case, that said ineffective assistance severely prejudiced his case, and that there exists a reasonable probability that, but for counsel's deficient performance, the outcome of Appellant's trial would have been different. See Strickland v. Washington, 466 U.S. 668 (1984); Smith v. Francis, 253 Ga. 782 (1985).

As a result, Appellant respectfully requests that the Court reverse the ruling of the trial court, set aside Appellant's conviction and remand the case back to the trial court for a new trial preceded by a hearing on the special demurrer.

Respectfully submitted,



Tom Csider
Counsel for Appellant Nora Isaac Bee
Georgia Bar No. 199752

P.O. Box 1023
Flowery Branch, Georgia 30542
(404) 408-7115 (phone)
(678) 623-8196 (fax)

**IN THE COURT OF APPEALS**

**STATE OF GEORGIA**

| | | |
|---|---|---|
| NORA ISAAC BEE, | * | |
| Appellant, | * | |
| v. | * | Case No. A08A1480 |
| The STATE OF GEORGIA, | * | |
| Appellee. | * | |

**CERTIFICATE OF SERVICE**

I, the undersigned counsel of record for Appellant NORA ISAAC BEE, do hereby certify that I have this day served a true and correct copy of the foregoing:

1. BRIEF OF APPELLANT; and
2. CERTIFICATE OF COURT APPOINTED COUNSEL

upon the State of Georgia by hand delivery to an authorized representative of:

Robert James, Solicitor-General
DeKalb County Solicitor's Office
Suite 500, DeKalb County Courthouse
556 North McDonough Street
Decatur, Georgia 30030

Respectfully submitted this 21st day of April, 2008.

Tom Csider
Attorney for Appellant Nora Isaac Bee
State Bar No: 199752

P.O. Box 1023
Flowery Branch, Georgia 30542
(404) 408-7115

**SECOND DIVISION**
**BARNES, C. J.,**
**JOHNSON, P. J., PHIPPS, J.**



**October 22, 2008**

# In the Court of Appeals of Georgia

A08A1480. BEE v. THE STATE.

JOHNSON, Presiding Judge.

Following a jury trial, Nora Isaac Bee, Jr. was convicted of two counts of violating a permanent protective order. Bee appeals the trial court's denial of his motion for a new trial, alleging (i) that the trial court erred in failing to hold a hearing on a special demurrer challenging the sufficiency of the indictment and (ii) that his trial counsel was ineffective. We discern no error and affirm.

On appeal from a criminal conviction, we view the evidence in the light most favorable to the verdict, and the defendant no longer enjoys the presumption of innocence.[1] So viewed, the record shows that the trial court issued a temporary protective order prohibiting Bee from approaching within 100 yards of his ex-wife

---

[1] *Dumas v. State*, 239 Ga. App. 210, 210-211 (1) (521 SE2d 108) (1999).

and their minor daughter or to have any direct or indirect contact with his ex-wife. On March 10, 2005, as part of a custody order, the terms of that temporary protective order were made permanent.

Bee's convictions for violating the protective order were based on two separate incidents. First, on October 30, 2006, Bee's ex-wife and daughter were in the front yard of their home when Bee drove by with the car windows rolled down. Bee was honking the horn, hanging out of the car, and yelling. Then, in July or August 2006, Bee called his ex-wife's parents and attempted to have them pass along a message to her.

1. After Bee was charged with violating the protective order, he filed a special demurrer challenging the sufficiency of the dates alleged in the count relating to the phone call to his ex-wife's parents. Bee claims that the trial court erred in failing to hold a hearing on the demurrer. However, Bee's trial counsel testified at the motion for new trial hearing that the trial court conducted such a hearing and that she took notes on its outcome. Based on the evidence provided by Bee's trial counsel and the presumption in favor of the regularity of proceedings in courts of competent jurisdiction, we find that this enumeration of error is without merit.[2]

---

[2] *Smallwood v. Mulkey*, 198 Ga. App. 496 (402 SE2d 99) (1991).

2. Bee also claims that he received ineffective assistance of counsel in that his trial counsel (i) failed to demand a hearing on the special demurrer and (ii) insufficiently interviewed a witness prior to trial.

To prevail on a claim of ineffective assistance of counsel, a defendant "bears the burden of showing both that trial counsel was deficient and that he was prejudiced by the deficiency."[3] Prejudice is shown by demonstrating "that a reasonable probability exists that the outcome of the case would have been different but for the deficient performance of counsel."[4] "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[5]

Pretermitting whether trial counsel was deficient, Bee has failed to establish prejudice. First, as discussed in Division 1, supra, evidence demonstrated that the trial court conducted a hearing on Bee's special demurrer. As a result, Bee was not harmed if his trial counsel failed to demand that hearing.

---

[3] *Welbon v. State*, 278 Ga. 312, 313 (2) (602 SE2d 610) (2004).

[4] (Citations omitted.) *Allen v. State*, 277 Ga. 502, 503 (3) (591 SE2d 784) (2004).

[5] (Citation omitted.) *Strickland v. Washington*, 466 U. S. 668, 691 (III) (B) (104 SC 2052, 80 LE2d 674) (1984).

In addition, the witness that Bee alleges was insufficiently interviewed testified that she had measured the distance between the home of Bee's ex-wife and the house down the street that Bee claimed to have been innocently visiting on the date he allegedly came within 100 yards of his ex-wife and daughter. That witness testified such distance was 9,375 feet, which is the equivalent of almost two miles, and she claimed on cross-examination that she had walked such distance in less than two minutes. At the motion for new trial hearing, trial counsel stated that she had spoken with the witness prior to trial and been present at the time of the measurement. Trial counsel acknowledged that she had not anticipated the witness' response, and she speculated that the witness meant to say that the distance was 9,375 *inches*, which would be approximately 260 yards.

Regardless of any confusion caused by the testimony of that witness regarding the distance between the two houses, however, Bee's wife testified that she and her daughter were in their front yard when Bee drove his car directly in front of their house. Bee's daughter became upset by seeing her father in front of her home and demanded that her mother call 911 immediately. Bee's ex-wife estimated that Bee was within five yards of her and her daughter as he drove by.

Given the testimony of Bee's ex-wife, the jury likely found that calculating the

distance between the ex-wife's house and the house Bee claimed to be visiting was unrelated to its determination that Bee approached within 100 yards of his ex-wife and daughter. As a result, there is no reasonable probability that any failure by trial counsel to adequately interview the witness resulted in the jury's guilty verdict.[6]

3. In a pro se "Addition to . . . Brief . . .[,]" Bee seeks to raise at least six additional enumerations of error. Court of Appeals Rule 22 (a) provides that, pursuant to OCGA § 5-6-40, the enumerations of error shall be filed within 20 days after a case is docketed. An appellant may not raise additional enumerations of error after the expiration of that period. *Turner v. State*, 289 Ga. App. 103, 104 (3) (656 SE2d 235) (2008). Because Bee's "Addition to . . . Brief . . ." was filed over five months after his appeal was docketed, the additional enumerations of error raised therein were untimely and cannot be considered.[7]

*Judgment affirmed. Barnes, C. J., and Phipps, J., concur.*

---

[6] *Allen*, supra, at 503 (3).

[7] In addition, we note that Bee's "Addition to . . . Brief . . ." suggests that the trial court altered the transcript by removing an exchange between Bee's trial counsel and his ex-wife. In the allegedly-removed exchange, Bee contends that his ex-wife was questioned about the warrant that she took out seeking his arrest. That testimony appears at page 51 of the transcript, however, and reads almost verbatim to the way it is recalled by Bee in his pro se filing.

# REMITTITUR

## *Court of Appeals of the State of Georgia*

ATLANTA, OCTOBER 22, 2008

The Court of Appeals having met, the following judgment was rendered:

**COURT OF APPEALS CASE NO. A08A1480**
**NORA ISAAC BEE V. THE STATE**

**This case came before this court on appeal from the STATE Court of DEKALB County; it is considered and adjudged that**

**THE JUDGMENT OF THE COURT BELOW BE AFFIRMED.**

**BARNES, C.J., JOHNSON, P.J., AND PHIPPS, J., CONCUR.**

**LC NUMBERS: 06C73680**

*Court of Appeals of the State of Georgia*
*Clerk's Office, Atlanta,* **NOV 12, 2008**

*I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia*

*Witness my signature and the seal of said court hereto affixed the day and year last above written.*

*Clerk.*

*Court of Appeals Cost $80.00. O.C.G.A. Sec. 5-6-10.*
*No costs are payable to the Court of Appeals.*

COU OF APPEALS OF GEORGI
47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
(404) 656-3450

**APPEAL SUMMARY PAGE**

CLASSIFICATION: STALKING

CASE NUMBER: A08A1480 DATE OF DOCKETING: MARCH 31, 2008

STYLE: NORA ISAAC BEE V. THE STATE

LOWER COURT SUMMARY INFORMATION:

DEKALB County STATE COURT 06C73680

TRIAL JUDGE: HON. EDWARD CARRIERE

| RECORDS | DESCRIPTION: | PARTS: |
|---|---|---|
| 2008-03-31 | LOWERCOURT RECORDS. | 01 |
| 2008-03-31 | TRANSCRIPTS. | 02 |

DATE OF JUDGMENT: 2007-10-17 NOTICE OF APPEAL DATE: 2007-11-16

COURT OF APPEALS CODE: 96-057 C
TERM: Apr. Cal. Mo.: JUL/08

DIVISION 2 PANEL CIR PATH: 96, 93, 70.
DIVISION 2 PANEL CIR PATH: 96, 93, 70, 98, 71, 91, 90.

COURT OF APPEALS OF GEORGIA
47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
(404) 656-3450

**APPEAL SUMMARY PAGE**

CASE NUMBER: A08A1480 DATE OF DOCKETING: MARCH 31, 2008

STYLE: NORA ISAAC BEE V. THE STATE

ATTORNEY REGISTER:

FOR APPELLANT:

Mr. Thomas Edward Csider
ATTORNEYA T LAW
P. O. BOX 1023
FLOWERY BRANCH GA 30542

FOR APPELLEE:

Mr. Robert D. James
SOLICITOR GENERAL
500 DEKALB COUNTY COURTHOUSE
556 N. MCDONOUGH STREET
DECATUR GA 30030

FOR OTHER:

**COURT OF APPEALS OF GEORGIA**
47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
(404) 656-3450

Business Hours: Monday - Friday, 8:30 a.m. to 4:30 p.m.

# NOTICE OF DOCKETING

Mr. Thomas Edward Csider
ATTORNEYA T LAW
P. O. BOX 1023
FLOWERY BRANCH GA 30542

APPEAL CASE NUMBER: A08A1480 DATE OF DOCKETING: MARCH 31, 2008

STYLE: NORA ISAAC BEE V. THE STATE

## IMPORTANT RULE REQUIREMENTS AND INFORMATION

Appellant's brief, including as Part II an Enumeration of Errors, shall be filed within 20 days of docketing. No appellant's brief shall be received for filing without the $80.00 filing fee or sufficient pauper's affidavit.

Appellee's brief shall be filed within 40 days after the docketing date or 20 days after the filing of the appellant's brief, whichever is LATER.

Failure to timely file briefs or to follow any Court rules or orders may cause the appeal to be dismissed or may cause non-consideration of the brief, and may subject the offender to contempt.

The contents of a properly addressed registered or certified mailing shall be deemed filed on the U.S. Postal Service hand stamped, postmark date if it is stamped on the envelope or container. A document received from an overnight delivery service is deemed filed on the date it was delivered to the Post Office or a commercial delivery company as shown by the receipt of the U.S. Postal Service or overnight delivery company.

Motions for reconsideration are deemed filed on the date actually received in the clerk's office.

If oral argument is requested and approved by this Court this case will be scheduled for oral argument on JUL 10, , , ,2008. before the SECOND Division: Johnson,P.J., Barnes, C.J., Phipps, J. A printed calendar showing the exact date of argument will be mailed to counsel of record. If a calendar is not received at least ten days prior to the tentative oral argument date, contact the Clerk's Office.

There shall be no communications relating to pending appeals to any judge or member of the judge's staff.

**FOR MORE INFORMATION CONTACT OUR WEBSITE AT WWW.GAAPPEALS.US.**
**IF YOU HAVE A QUESTION OR PROBLEM, PLEASE CALL THIS OFFICE.**

WILLIAM L. MARTIN, III, CLERK

**COURT OF APPEALS OF GEORGIA**
47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
(404) 656-3450

Business Hours: Monday - Friday, 8:30 a.m. to 4:30 p.m.

# NOTICE OF DOCKETING

Mr. Robert D. James
SOLICITOR GENERAL
500 DEKALB COUNTY COURTHOUSE
556 N. MCDONOUGH STREET
DECATUR GA 30030

APPEAL CASE NUMBER: A08A1480 DATE OF DOCKETING: MARCH 31, 2008

STYLE: NORA ISAAC BEE V. THE STATE

## IMPORTANT RULE REQUIREMENTS AND INFORMATION

Appellant's brief, including as Part II an Enumeration of Errors, shall be filed within 20 days of docketing. No appellant's brief shall be received for filing without the $80.00 filing fee or sufficient pauper's affidavit.

Appellee's brief shall be filed within 40 days after the docketing date or 20 days after the filing of the appellant's brief, whichever is LATER.

Failure to timely file briefs or to follow any Court rules or orders may cause the appeal to be dismissed or may cause non-consideration of the brief, and may subject the offender to contempt.

The contents of a properly addressed registered or certified mailing shall be deemed filed on the U.S. Postal Service hand stamped, postmark date if it is stamped on the envelope or container. A document received from an overnight delivery service is deemed filed on the date it was delivered to the Post Office or a commercial delivery company as shown by the receipt of the U.S. Postal Service or overnight delivery company.

Motions for reconsideration are deemed filed on the date actually received in the clerk's office.

If oral argument is requested and approved by this Court this case will be scheduled for oral argument on JUL 10, , , ,2008. before the SECOND Division: Johnson,P.J., Barnes, C.J., Phipps, J. A printed calendar showing the exact date of argument will be mailed to counsel of record. If a calendar is not received at least ten days prior to the tentative oral argument date, contact the Clerk's Office.

There shall be no communications relating to pending appeals to any judge or member of the judge's staff.

**FOR MORE INFORMATION CONTACT OUR WEBSITE AT WWW.GAAPPEALS.US.**
**IF YOU HAVE A QUESTION OR PROBLEM, PLEASE CALL THIS OFFICE.**

WILLIAM L. MARTIN, III, CLERK