

## **APPENDIX**

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SUPREME COURT OF GEORGIA  
Case No. S20C0882

August 24, 2020

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

BRIAN ZELLNER v. THE STATE.

The Supreme Court today denied the petition for certiorari in this case.

*All the Justices concur.*

Court of Appeals Case No. A19A2369

SUPREME COURT OF THE STATE OF GEORGIA  
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

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

*Theresa A. Barnes*, Clerk

**SECOND DIVISION**  
**MILLER, P. J.,**  
**RICKMAN and REESE, JJ.**

**NOTICE: Motions for reconsideration must be physically received in our clerk's office within ten days of the date of decision to be deemed timely filed.**  
**<http://www.gaappeals.us/rules>**

**February 7, 2020**

**In the Court of Appeals of Georgia**

**A19A2369. ZELLNER v. THE STATE.**

RICKMAN, Judge.

In 2016, Brian Zellner pled guilty to aggravated stalking of his ex-wife and was on probation as a first offender when he was indicted in 2017 on several new offenses, including kidnapping his ex-wife at gunpoint. After the new charges were used as a basis to revoke his first offender status and adjudicate him guilty in the stalking case, Zellner filed a plea of former jeopardy in the new action on the ground that he could not be prosecuted on the new charges because they had already been used in the stalking action in support of his adjudication of guilt. We disagree and affirm the denial of his plea of former jeopardy in the kidnapping case.

At the hearing on the plea of former jeopardy, Zellner introduced the documents related to the 2016 stalking case, including the indictment for aggravated

stalking, the final disposition showing that he was sentenced as a first offender, the transcript of the guilty plea and sentencing hearing, the State's petition for and adjudication of guilt, and the court's sentence for aggravated stalking.

These documents show that at the guilty plea hearing, Zellner pled guilty as a first offender with the understanding that if he violated the terms of his probation, he could be adjudicated guilty and sentenced to the maximum sentence available for aggravated stalking, i.e., ten years. See OCGA § 16-5-91 (b). The final disposition shows that Zellner was sentenced to five years probation and given first offender treatment under OCGA § 42-8-60. As a general condition of probation, Zellner was directed not to violate the criminal laws of any governmental unit, and as a special condition, he was ordered to have no contact of any kind with the victim. The first offender conditions further specified that Zellner could be sentenced to the maximum allowed by law in the event of a violation of probation:

Upon violation of the terms of probation, upon conviction for another crime during the period of probation, or upon the Court's determination that the Defendant is or was not eligible for sentencing under the First Offender Act or for Conditional Discharge, the Court may enter an adjudication of guilt and proceed to sentence the Defendant to the maximum sentence as provided by law.

The State's petition for adjudication of guilt states that Zellner violated the terms and condition of probation by violating the criminal laws in that he committed several new offenses in 2017, including kidnapping (the same charges for which he was indicted in the present action). The court's adjudication shows that the court conducted a hearing and that “[t]he State proved by a preponderance of the evidence that [Zellner] committed kidnapping [and the other crimes charged] on 4/17/17.” Accordingly, the court adjudicated Zellner guilty of aggravated stalking and sentenced him to ten years confinement with credit for time served.

In the present case, Zellner was indicted on counts of kidnapping, aggravated assault, aggravated stalking, possession of a firearm during commission of a felony, and possession of a firearm by a first offender probationer. After the trial court denied Zellner's plea of former jeopardy, Zellner appealed.

Zellner contends that the State's use of the new kidnapping and related charges to adjudicate him guilty and impose a sentence of aggravated stalking in the 2016 matter bars his prosecution in the present case. He argues that he is being placed in jeopardy a second time for the same offense because the state “used” the kidnapping and related charges when seeking to have him adjudicated guilty of aggravated stalking in the 2016 case. This argument has no merit.

First, “[t]he constitutional prohibition against ‘double jeopardy’ was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.” (Citation and punctuation omitted.) *United States v. DiFrancesco*, 449 U.S. 117, 127 (III) (101 SCt 426, 66 LE2d 328) (1980). In the 2016 case, following his adjudication of guilt, Zellner was convicted of aggravated stalking. In the present case, he is charged with crimes relating to an entirely separate event. Thus, he is not in jeopardy of being convicted more than once for the same offense.

Second, the use of the 2017 kidnapping and related crimes as a basis for adjudicating him guilty in the 2016 case is expressly allowed by the first offender statute:

The court may enter an adjudication of guilt and proceed to sentence the defendant as otherwise provided by law when the . . . Defendant violates the terms of his or her first offender probation[.]

OCGA § 42-8-60 (d) (1). Zellner was accused of violating his first offender probation by violating the criminal laws. Whether such a violation occurred is determined by a preponderance of the evidence. See OCGA § 42-8-34.1 (b); *Young v. State*, 265 Ga. App. 425, 426 (594 SE2d 667) (2004). Thus, in deciding whether to revoke Zellner’s first offender status in the 2016 case and adjudicate him guilty of aggravated stalking,

the trial court only determined by a preponderance of the evidence that he had committed the 2017 crimes. He was not convicted of those crimes when they were used in that manner, and he was not sentenced for those crimes at the time. Thus, the present action does not subject Zellner to a possible second conviction on the 2017 kidnapping and related charges. See generally *Morgan v. State*, 308 Ga. App. 69, 71 (706 SE2d 588) (2011) (“The general and accepted rule in the state and federal courts is that a proceeding to revoke a probated sentence of one convicted of a criminal offense is not a criminal proceeding.”) (citation and punctuation omitted).

Finally, there is no merit to Zellner’s suggestion that OCGA § 16-1-8 (b) (1) somehow bars his prosecution for the 2017 crimes. Zellner focuses on this portion of the statute:

A prosecution is barred if the accused was formerly prosecuted for a different crime . . . if such former prosecution . . . [r]esulted in . . . a conviction . . . and the subsequent prosecution . . . is for a crime which involves the same conduct.

Obviously, the 2017 crimes involve different conduct than the aggravating stalking that occurred a year earlier.

In sum, the trial court did not err by denying Zellner’s plea of former jeopardy.

*Judgment affirmed. Miller, P. J., and Reese, J., concur.*

*5*  
**COPY**

IN THE SUPERIOR COURT OF ATHENS-CLARKE COUNTY  
STATE OF GEORGIA

STATE OF GEORGIA

vs.

BRIAN CHARLES ZELLNER,  
Defendant.

\*

\*

\* Case No. SU-17-CR-0674-S

\*

\*

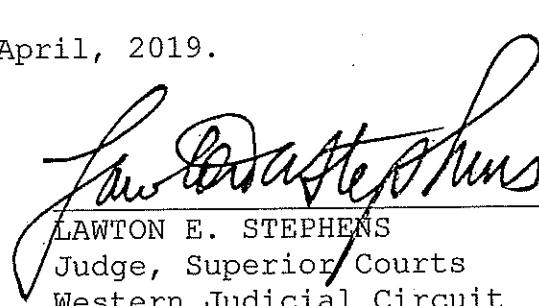
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O R D E R

Upon consideration of the evidence and argument of counsel  
presented at the hearing on April 10, 2019, the Court **Denies**  
Defendant's Motion in Limine, and **Denies** Defendant's Plea of  
Former Jeopardy and Motion to Dismiss.

Let a copy of this Order be served upon Mr. Kris Bolden,  
Assistant District Attorney and Mr. John Donnelly, attorney for  
Defendant, as provided by law.

This 11th day of April, 2019.

  
LAWTON E. STEPHENS

Judge, Superior Courts  
Western Judicial Circuit

4-11-19  
Copies mailed  
dr

CLERK SUPERIOR COURT  
CLARKE COUNTY, GEORGIA

2019 APR 11 PM 2:48

IN THE SUPERIOR COURT OF ATHENS CLARKE COUNTY, GEORGIA

STATE OF GEORGIA .....

CASE NO. SU-17-CR-0674-S

VS.

BRIAN ZELLNER,

Defendant

CLARKE COUNTY, GEORGIA  
CB 37519

PLEA OF FORMER JEOPARDY AND  
MOTION TO DISMISS

Comes now Defendant, through counsel, to file this Plea of  
Former Jeopardy in the above styled case.

Defendant asserts the following:

1

On August 3, 2016, Defendant entered a guilty plea to Aggravated Stalking in Superior Court case SU-16-CR-0594-S. The Court did not enter a judgment or conviction but instead ordered a conditional discharge in that case, at that time, and sentenced Defendant as a First Offender under O.C.G.A. 42-8-60.

2

On August 23, 2017, the State presented evidence to the Court for purposes of adjudicating Defendant's case in 0594. The evidence presented concerned the allegations of kidnapping and associated crimes that are set out in the present (0674) indictment.

3.

After hearing testimony and evidence regarding the facts of the kidnapping incident, the Court made findings in favor of the State and entered a final adjudication of guilt and conviction in the 0594 case. Pursuant to that ruling the Court imposed a new sentence against Defendant, ordering him to serve ten years confinement.

4.

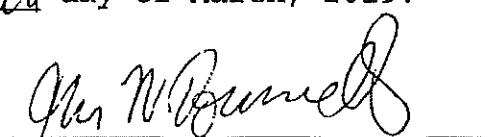
The Defendant, through the 2017 criminal proceedings adjudicating him guilty of case 0594 and entering a sentence thereon, was prosecuted for the acts alleged in the 0674 case.

5.

Any further prosecution based on these facts violates Defendant's right against double jeopardy. United States Constitution Amendments V, XIV; Georgia Constitution Article I, Section I, paragraph 18; O.C.G.A. 16-1-7, 16-1-8.

**THEREFORE**, Defendant prays the Court grant relief by granting the plea of former jeopardy.

Respectfully submitted this 21 day of March, 2019.

  
\_\_\_\_\_  
JOHN W. DONNELLY  
Attorney for Defendant

WESTERN CIRCUIT PUBLIC DEFENDER OFFICE  
440 COLLEGE AVENUE SUITE 220  
P.O. BOX 1644  
ATHENS, GEORGIA 30603

(706) 369-6440

IN THE SUPERIOR COURT OF CLARKE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA

vs.

BRIAN CHARLES ZELLNER,  
Defendant

Case No: SU-17-CR-01674-S

July Term, 2017

Charges:

Ct. 1: Kidnapping  
Ct. 2: Aggravated Assault  
Ct. 3: Aggravated Stalking  
Ct. 4: Possession of Firearm During Commission of a Felony  
Ct. 5: Possession of Firearm by First Offender Probationer

INDICTMENT

True

Bill

Returned in Open Court,

*This the 4th day of August, 2017 at the Cassus* att'd Cassus Foreperson  
*Brian Zellner, Clerk 8/23/17* Fredrick Dearing, Prosecutor  
KENNETH W. MAULDIN, District Attorney

ARRAIGNMENT

The Defendant, BRIAN CHARLES ZELLNER

hereby waives formal arraignment and pleads \_\_\_\_\_

This \_\_\_\_\_ day of \_\_\_\_\_, 2017.

Defendant

Attorney for Defendant

KENNETH W. MAULDIN, District Attorney

VERDICT

We, the jury, find the Defendant \_\_\_\_\_

This \_\_\_\_\_ day of \_\_\_\_\_, 2017.

Foreperson

GEORGIA, CLARKE COUNTY

IN THE SUPERIOR COURT OF CLARKE COUNTY

The Grand Jurors selected, chosen and Sworn for the County of CLARKE, to wit:

I, Willie G. Casseus, FOREPERSON

2. Susanne E. Alford  
3. Carolyn L. Andradski  
4. Henry H. Cobb, III  
5. Cedric W. Cooper  
6. Daniel R. Cottar  
7. Robert A. Covington  
8. Elizabeth G. Harnden  
9. Matthew Z. Head  
10. Stacy H. Inoko  
11. Paulette J. Johnson  
12. Juliette G. Kennedy  
13. Philip J. Kieffer

14. Edwin E. Maddox  
15. Sandra Metts  
16. Jemeka J. Moon  
17. Jan M. Neubauer  
18. Juanita Page  
19. Russell R. Parham  
20. Terrell D. Piotrowski  
21. Richard J. Scheall  
22. Mark S. Warren  
23. Ashley M. Welbourn  
24. Kurt W. Wood  
25. Timothy A. Wright

**COUNT 1:** In the name and on behalf of the citizens of the State of Georgia, do hereby charge and accuse **BRIAN CHARLES ZELLNER** with the offense of **KIDNAPPING** for that the said **BRIAN CHARLES ZELLNER** on the 7th day of April, 2017, in the County aforesaid, did unlawfully abduct Richelle Zellner without lawful authority or warrant and held such person against her will, said act resulting in bodily injury to said victim, to wit: bruising to her arms; in violation of O.C.G.A § 16-5-40, Contrary to the laws of said State.

**COUNT 2:** In the name and on behalf of the citizens of the State of Georgia, do hereby charge and accuse **BRIAN CHARLES ZELLNER** with the offense of **AGGRAVATED ASSAULT** for that the said **BRIAN CHARLES ZELLNER** on the 7th day of April, 2017, in the County aforesaid, did make an assault upon the person of Richelle Zellner with a deadly weapon, to wit: a handgun, by brandishing said handgun in a threatening manner towards the person of Richelle Zellner; in violation of O.C.G.A § 16-5-21, Contrary to the laws of said State.

**COUNT 3:** In the name and on behalf of the citizens of the State of Georgia, do hereby charge and accuse **BRIAN CHARLES ZELLNER** with the offense of **AGGRAVATED STALKING** for that the said **BRIAN CHARLES ZELLNER** on the 7th day of April, 2017, in the County aforesaid, in violation of a condition of probation, did unlawfully contact Richelle Zellner at or about 289 Janice Drive, without the consent of said victim, for the purpose of harassing and intimidating said victim; in violation of O.C.G.A § 16-5-91, Contrary to the laws of said State.

**COUNT 4:** In the name and on behalf of the citizens of the State of Georgia, do hereby charge and accuse **BRIAN CHARLES ZELLNER** with the offense of **POSSESSION OF FIREARM DURING COMMISSION OF A FELONY** for that the said **BRIAN CHARLES ZELLNER** on the 7th day of April, 2017, in the County aforesaid, did unlawfully have on his person a handgun, a firearm, during the commission of at least one of the offenses alleged in Count one, Count two, and Count three of this Indictment, crimes involving the person of Richelle Zellner; in violation of O.C.G.A § 16-11-106, Contrary to the laws of said State.

**COUNT 5:** In the name and on behalf of the citizens of the State of Georgia, do hereby charge and accuse **BRIAN CHARLES ZELLNER** with the offense of **POSSESSION OF FIREARM BY FIRST OFFENDER PROBATIONER** for that the said **BRIAN CHARLES ZELLNER** on the 7th day of April, 2017, in the County aforesaid, did, knowingly and without lawful authority, possess a firearm, to wit: a handgun, while on probation as a felony first offender on Indictment number SU-16-CR-0594, in the Superior Court of Athens-Clarke County on August 3, 2016 for the offense of Aggravated Stalking; in violation of O.C.G.A § 16-11-131(b),

Contrary to the laws of said State, the good order, peace and dignity thereof.

PETITION FOR THE ADJUDICATION OF GUILT AND IMPOSITION OF SENTENCE

THE STATE OF GEORGIA

VS

Brian Charles Zellner

SID #: 2439929P

DOCKET NUMBER: SU16CR0594 R1-S

Original Docket Number: SU16CR0594

July TERM 2016

SUPERIOR COURT OF CLARKE COUNTY

Now comes Amela Newson, DCS Officer, Western Judicial Circuit, in the name of and on behalf of the State of Georgia, and bring this action against Brian Charles Zellner, hereinafter called the Defendant, and shows:

I

That the Defendant entered a plea of guilty to or was convicted of the offense(s) of Aggravated Stalking at the July Term, 2016.

II

That this Court, on August 3, 2016 did sentence the Defendant under the provisions of First Offender Act (O.C.G.A. 42-8-60 et. seq.) without and adjudication of guilt to serve a period of time on probation as follows:

5 years, serve the first 53 days in confinement, the balance to be served on Probation.

Toll Time Began/Ended Dates: N/A

III

That this Court, by proper order, and with the consent of the Defendant, did permit said Defendant to serve said sentence on probation pursuant to O.C.G.A. 42-8-60 and/or O.C.G.A. 16-13-2, probation for First Offenders, under the terms and conditions of said sentence which are fully set forth in the copy of said sentence which is attached hereto, and marked as Exhibit "A", and specifically incorporated herein.

IV

That the Defendant has violated the terms and conditions of probation in the following particulars:

1. Violation of Condition #1: "Do not violate the criminal laws of any government unit." In that, the Defendant committed the offenses of Aggravated Assault, Aggravated Stalking, Kidnapping, Possession of a Firearm by a Convicted Felon or First Offender, Possession of a Firearm During the Commission of a Felony, and Battery on or about 4/7/17 in Clarke County, GA.

V

WHEREFORE, the State of Georgia prays that the citation for adjudication of guilt and imposition of sentence be served on the Defendant and that the Defendant be directed to appear before this Court on a day to be fixed by the Court and at that time to show cause why adjudication of guilt and imposition of sentence should not be ordered.

This

July 18, 2017

*Amela Newson*  
Amela Newson  
DCS Officer, Western Judicial Circuit

ORDER

Having considered the foregoing petition, it is hereby ordered that the Defendant be served with a copy of same and that the Defendant show cause before me the 23rd day of August, 2017 at 1:00 am/pm at the courthouse in Athens/Watkinsville, Georgia why adjudication of guilt and imposition of sentence should not be ordered. Let a copy of this petition be filed in the office of the Clerk of Superior Court of said county.

So ordered, this 18th day of

July 17

*Lawton E. Stephens*  
Honorable Lawton Stephens  
Superior Court Judge  
Western Judicial Circuit

*Atty-  
Markus Boenig*

**LAWTON E. STEPHENS**  
**SUPERIOR COURT JUDGE**  
**WESTERN JUDICIAL CIRCUIT**  
**Athens-Clarke and Oconee Counties**

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing petition upon the Defendant in person (by registered mail)

This 18 day of July, 20 17.

J. White

ACKNOWLEDGEMENT

I hereby acknowledge service of the foregoing petition and that I am aware that I may employ legal representation at said hearing and that if I am indigent, I have the right to representation at the hearing by the Circuit Public Defender or to be represented otherwise as the Court may direct.

This 18 day of July, 20 17.

B. Zellner

Defendant, Brian Charles Zellner

ORDER OF ADJUDICATION OF GUILT AND IMPOSITION OF SENTENCE

WHEREAS, pursuant to notice given to the Defendant, a full hearing was conducted by this Court on the date aforesaid in accordance with O.C.G.A. 42-8-38, and the Court has adjudged that the terms and conditions of probation have been violated as set forth in the following particulars: The State proved by a preponderance of the evidence that Probationee committed Kidnapping, Aggravated Assault, Aggravated Stalking, possession of firearm during commission of felony, possession of firearm by first offender, Battery on 4/7/17.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED (check one)

The Defendant is HEREBY ADJUDICATED GUILTY of said offense for which he or she received First Offender Probation, and it is further ordered that the Clerk of Court file this Order in said case and make proper entry in the records of a guilty conviction and imposition of sentence, and that the Georgia Crime Information Center be notified of the adjudication of guilt and imposition of sentence so as to proceed as provided by law. The Defendant is hereby resentenced and is required to serve Ten (10) years confinement in the Clayton County Jail, County Correctional Institution, State Penal System, or other such place as the Commissioner of Corrections may direct, subject, however,

CETS 6/10/16

245

IT IS FURTHER ORDERED AND DIRECTED that the Clerk of Court file this order in said case and make proper entry in the records of guilty conviction and imposition of sentence, and that the Georgia Crime Information Center be notified of the adjudication of guilt and imposition of sentence so as to proceed as provided by law.

The Defendant is CONTINUED ON PROBATION subject to the added further provisions that:

1. You shall produce from time to time and at your own expense, upon oral or written request by a Probation Officer, law enforcement officer, or alcohol or drug treatment facility personnel, a breath, spittle, urine and/or blood specimen for analysis for the presence of drugs and/or alcohol.
2. You shall, at your own expense, submit to any alcohol, drug, or mental health evaluation as directed by the Probation Officer; if treatment is indicated, you shall at your own expense, actively participate in and complete said treatment program as approved by the Probation Officer, you shall comply with all treatment program rules and regulations while enrolled therein and make the records thereof a
3. You shall submit to a search of your person, residence, papers, and/or effects as these terms of the fourth amendment of the United States Constitution are defined by the courts, at any time of the day or night without a search warrant, whenever requested to do so by a Probation Officer or other law enforcement officer upon reasonable cause to believe that you are in violation of probation or otherwise acting in violation of the law, and you shall specifically consent to the use of anything seized as evidence in any judicial proceedings or trial; you shall not own, possess, purchase, or attempt to purchase any firearm or ammunition, and you shall abide by any curfew established by the Probation Officer.
4. Further,

The defendant is hereby advised that violation of any of the conditions of probation may result in revocation of the BALANCE of this sentence.

So ordered, this 20<sup>TH</sup> day of September, 20 17.

Lawton E. Stephens

Honorable Lawton Stephens,  
Superior Court Judge  
Western Judicial Circuit

(OTN:88408849981)

Original Offense OTN:88404457131