visitation shall be exercised, and the same shall be scheduled to avoid conflicting with the vacation schedule of mother and stepfather.

Father or the paternal grandparents shall pick up at and return Jason to the home of mother and stepfather on the dates and at the times above set forth.

Exceptions are granted all parties.

COMMONWEALTH v. SHORT, C.P. Franklin County Branch, No. 79 of 1979

Criminal Law - Aggravated Assault - Points for Charge

1. In order to convict of an assault where no injury is sustained, an attempt msut be shown and this requires the showing of an intent to cause bodily harm.

2. An inference of an intent to inflict serious bodily injury can be made where a person caused a car to accelerate with a police officer standing in front of it.

3. The Court need not read defendant's points for charge verbatim, so long as the issues raised are adequately, accurately and clearly presented to the jury for their consideration.

John F. Nelson, Esq., Assistant District Attorney, Attorney for the Commonwealth

Richard L. Shoap, Esq., Attorney for Defendant

OPINION AND ORDER

EPPINGER, P.J., September 18, 1979:

The defendant, Alan Ray Short, was a fugitive. He was being actively pursued by the Pennsylvania State Police who learned that he might be in the Barclay Village area of Chambersburg. Cpl. Farrell and Tpr. Lingenfelter in going to that area noticed a car approaching them and Tpr. Lingenfelter identified one of the occupants as Short. Farrell got out of the police car, stood in the center of the lane in which the car was travelling and signaled the car to stop by extending his arm palm outward.

The vehicle was operated by another, but Short was an occupant. When Short saw Cpl. Farrell, whom he knew was a State Police officer, he slouched down in the front seat and when the vehicle was coming to a stop in front of Farrell, Short reached the accelerator with his left foot and the car

sped up. When this happened Farrell was forced to dive from the path of the vehicle, which narrowly missed him. Short and his companion left the scene. Short got out of the car later and continued his flight on foot. He was apprehended later.

The defendant was convicted by the jury of Aggravated Assault on a Police Officer, Simple Assault and Recklessly Endangering another person. He filed timely motions for a new trial and in arrest of judgment. Though five reasons were stated in support of the motion, they can be consolidated into two questions: (1) Was the evidence sufficient to convict the defendant of Aggravated Assault Upon a Police Officer, Simple Assault and Recklessly Endangering Another, and (2) Did the court err in refusing certain instructions to the jury?

SUFFICIENCY OF THE EVIDENCE - In testing its sufficiency, the court must review the evidence in the light most favorable to the Commonwealth. *Commonwealth v. Williams*, 476 Pa. 557, 383 A.2d 503 (1978). In this connection, a reviewing court accepts as true all of the Commonwealth's evidence and all reasonable inferences arising therefrom which would sustain the jury's verdict. *Commonwealth v. Mawson*, 247 Pa. Super 88, 371 A.2d 1340 (1977). A jury is free to believe all, part of none of the evidence in a case. *Commonwealth v. Eckert*, 244 Pa. 424, 368 A.2d 794 (1976).

In order to convict of an assault where no injury is sustained, an attempt must be shown and this requires the showing of an intent to cause bodily harm. *Commonwealth v. Goosby*, 251 Pa. Super 326, 380 A.2d 802 (1977). Such intent may be shown by direct or circumstantial evidence. *Goosby*, supra.

Seldom does a person who is about to commit a crime announce his intentions to the general public. In *Commonwealth v. White*, 229 Pa. Super 280, 323 A.2d 757 (1974), the court quoted from an 18th century New Jersey decision, saying:

> The designs of the heart can rarely be proved in a direct manner by the testimony of witnesses. When a man designs to perpetrate a scheme of wickedness, he seldom communicates his intentions unless to an accomplice; hence the intent must, in most cases, be collected from the circumstances.

One such circumstance in a homicide case is the use of a deadly weapon on a vital part of the body. This gives rise to the inference of an intent to kill. *Commonwealth v. Boyd*,

461 Pa. 17, 334 A.2d 610 (1975). An automobile "aimed" at a person is no less a deadly weapon. Only "Superman" can dodge a speeding bullet. Cpl. Farrell was fortunate the automobile aimed at him did not accelerate to the speed of a bullet. Only because he was attentive and was fortuitously located near the edge of the travelled portion of the road was he able to avoid the intended run down and serious bodily injury.

In a sort of distorted logic the defendant contends that the most the Commonwealth showed in establishing that he slouched down and stepped on the gas was that Short intended to avoid apprehension. Rather than exonerate the defendant, we think the fact that he was no intent on avoiding capture established beyond peradventure that he would run Cpl. Farrell down to do it. We conclude therefore that the evidence established that the defendant knowingly attempted to cause bodily injury to Cpl. Farrell. See the Crimes Code, Act of 1972, Dec. 6, P. L. , 18 C.P.S.A. Sections 2701, 2702(a)(3).

The remainder of Short's reasons supporting his post trial motions deal with purported errors committed by the court. He contends that the District Attorney, in his opening statement, defined aggravated assault without mentioning the required intent. We do not recall that we were asked for a curative instruction as stated by the defendant, but only that our attention was called to the statements of the District Attorney. Nevertheless, the jury was bound to follow the instructions of the court on the law and those instructions included a reference to the required intent.

The defendant presented 10 points for charge. The first two were points for binding instructions which the court properly refused. Points 3 and 4 dealt with the burden of proof, and these like the remaining points which dealt with the definitions of the crimes the defendant was alleged to have committed, and the interest of Earl Lehman in the case were covered fully in the charge. The Court did not read Short's points verbatim because they were redundant and were, as we said, covered elsewhere in the charge. The court need not read defendant's points verbatim, so long as the issues raised are adequately, accurately and clearly presented to the jury for their consideration. *Commonwealth v. McComb,* 462 Pa. 504, 341 A.2d 496 (1975).

ORDER OF COURT

September 18, 1979, the motions for new trial and in arrest of judgment are refused. It is directed that the Probation Department prepare a presentence investigation report and that sentencing in this matter be scheduled for October 10, 1979, at 9:30 o'clock a.m.

COMMONWEALTH v. BEELER, C.P. Fulton County Branch, No. 6 of 1975

Criminal Law - Ineffective Counsel - PCHA Petition - Failure to Appeal

1. Where a defendant was tried with a co-defendant and both parties' convictions were sustained by the Superior Court, the fact that the co-defendant's petition for allocatur was denied by the Supreme Court and defendant's grounds for appeal would be the same as co-defendant's, is insufficient reason for counsel to refuse appeal.

2. Failure to appeal, even though an appeal appeared frivolous, precludes defendant from entering the Federal Courts on a Petition for a Writ of Habeas Corpus in that he has not exhausted his state remedies.

Gary D. Wilt, Esq., District Attorney, Counsel for the Commonwealth

James M. Schall, Esq., Public Defender, Post Conviction Proceeding Counsel for Defendant

Douglas W. Herman, Esq., Post Conviction Proceeding Counsel for Defendant

OPINION AND ORDER

EPPINGER, P.J., September 25, 1979:

It is the contention of Ray R. Beeler in these Post Conviction Hearing Act proceedings that he was denied the right to effective assistance by counsel.

Beeler was tried with a co-defendant and after being found guilty and sentenced, both convictions were sustained by the Superior Court, Pa. Super , 389 A.2d 165 (1978). Then the co-defendant petitioned for an allowance of an appeal to the Supreme Court. That petition for allowance of an appeal was denied. *Commonwealth v. Duffy*, No. 362 Allocature Docket. Beeler's trial attorney took no such action and the Public Defender was appointed to represent him in post conviction matters. A Petition for Leave to File a Petition for Allowance of an Appeal Nunc Pro Tunc was granted and the next step would have been to file a Petition for Allowance of Appeal.