

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JANUARY 4, 2013

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## THIS WEEK:

### • **Aggravated Assault on a Police Officer; Intent**

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### **Aggravated Assault on a Police Officer; Intent**

*Touchstone v. State, A12A1826 (12/19/12)*

Appellant was convicted of aggravated assault on a police officer, obstruction of a law enforcement officer, and possession of a weapon during the commission of a crime. He argued that the trial court gave an inadequate response to a question from the jury and that the evidence was insufficient to convict him of aggravated assault and possession of a weapon during the commission of a crime. The Court agreed with appellant that the evidence was insufficient, and that his convictions of those crimes must be reversed.

The record showed that police received a report of an apparent burglary in progress and were given a description of the car the alleged perpetrators were driving. An officer saw a car matching the description provided and started following the car. Another officer heard a call go out and fell in behind the first officer. One of the officers initiated a stop of the vehicle and the vehicle pulled into a gas station. Appellant jumped out of the car and “immediately” began running away. One of the officers detained the driver while the other officer pursued appellant. The officer identified herself as a police officer and commanded appellant to stop but he continued to run toward a nearby wood-line. The officer lost sight of him when she slipped and fell and testified that

when she started to pull herself up from the ground, she heard what sounded like a gunshot and immediately dropped back to the ground because she was in an open area and could not see appellant. Officers who had arrived at the scene of the stop had spread out around the perimeter, and one of those officers observed appellant come out of the “creek wood-line area.” The officer pursued appellant, who gave up when it became apparent that the officer had the advantage. The officer located a gun in the area, although it was not where appellant told the officers he had thrown it. The officer identified the gun as a Smith and Wesson revolver, and a subsequent examination of the gun revealed it had been fired once. The State also introduced evidence that appellant was out on bond on another crime, and that he made statements that he intended to run from police. Appellant also told police that he knew he was going to get caught and go to jail, and that the gun fired accidentally when he was taking it out of his pants pocket to dispose of it. But an officer testified that revolvers require a lot of “trigger pull” to discharge, and that it would be difficult to accidentally fire the gun while pulling it out of your pocket since you would be pulling the gun in the opposite direction of the trigger pull. Appellant was indicted for “knowingly mak[ing] an assault upon the person of Tunisha Billups, a peace officer engaged in the performance of her official duties, with a deadly weapon, to wit: a .357 caliber revolver,” and thus on its face the indictment was broad enough to authorize appellant’s conviction of aggravated assault based on either O.C.G.A. § 16-5-20(a)(1) or (a)(2), provided it was shown that he committed the assault with a gun.

However, the Court found, the trial court’s charge included an instruction only on attempt to commit a violent injury; nowhere

in its instructions did the court charge that appellant could be found guilty of assault by placing the officer in reasonable apprehension of receiving a violent injury. Thus, although the indictment and governing law may have authorized the jury to convict appellant based on either O.C.G.A. § 16-5-20(a)(1) or O.C.G.A. § 16-5-20(a)(2), the Court agreed with appellant that, pursuant to the trial court's instructions, the jury was authorized to convict him of aggravated assault only if it was established beyond a reasonable doubt that he attempted to commit a violent injury to the officer. Further, the Court agreed with appellant that the circumstantial evidence, which primarily consisted of the officers' testimony that she lost sight of appellant, heard a gunshot and fell to the ground because she feared for her life, was insufficient to establish that the shot was fired with the intent to cause her actual physical injury. Appellant was out of the officer's view when he fired the gun, no other officer or witness saw him fire the gun, no witness saw where he aimed the gun when he fired it, and no forensic or other evidence was introduced which suggested that he fired the gun in the officer's direction.

Further, the Court noted that there were clear indications that the jury may have been confused by other parts of the charge and that the unsupportable verdict in this case may have stemmed in part from that confusion. Thus, the Court held, the evidence was insufficient to convict appellant of the offense of aggravated assault and his conviction for that offense must be reversed. Moreover, the Court held, appellant's conviction for possession of a firearm in the commission of a felony based on the underlying felony of aggravated assault must also be reversed.