[Cite as *In re Higgins*, 2003-Ohio-2247.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

IN RE: DWAIN A. HIGGINS	:	Case No. V2002-51311
DWAIN A. HIGGINS	:	OPINION OF A THREE-COMMISSIONER PANEL
Applicant	:	

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{¶1} This appeal came to be heard before this panel of three commissioners on February 20, 2003 at 11:00 A.M. upon the applicant's July 10, 2002 appeal from the June 21, 2002 Final Decision of the Attorney General.

{¶2} The Attorney General denied the applicant's claim pursuant to R.C. 2743.60(E) contending that the applicant engaged in felonious conduct within ten years of the criminally injurious conduct. The Attorney General stated that the applicant unlawfully entered the dwelling of another thereby engaging in felony burglary on September 23, 1991. On reconsideration, the Attorney General determined that no modification of the previous decision was warranted based on the above information. The applicant appealed the Attorney General's Final Decision.

{¶3} The applicant, applicant's counsel and an Assistant Attorney General appeared at the hearing and presented testimony, exhibits and oral argument for this panel's consideration. Dwain Higgins testified that on September 17, 2000 he was involved in a motor vehicle accident.

Mr. Higgins explained to the panel that his vehicle was struck three times by an offender just prior to the assault. After the last impact, the applicant stated that he exited his vehicle in order to assess the damage to his vehicle. While at the rear of his vehicle, the applicant stated that the offenders exited their vehicle and proceeded his way. Upon their approach, Mr. Higgins indicated that he retrieved a tire iron from the trunk of his automobile solely for protection purposes. However, Mr. Higgins explained that before he could turn around he was struck by one of the offenders. The applicant insisted that he never had the opportunity to use the tire iron or defend himself since he was repeatedly struck, kicked, punched, and spat upon by several offenders. Mr. Higgins noted for the panel that he may have loss consciousness at some point during the incident. Mr. Higgins further stated that when the police arrived he gave them a statement and was then transported to the hospital via ambulance.

{¶4} Mr. Higgins further testified that during the September 1991 incident he resided at the premises of Robert Blepp along with Karen Bagg, Robert's girlfriend. Mr. Higgins explained that on the day in question he returned home only to have Ms. Bagg refuse him access to the dwelling. Shortly after Ms. Bagg's refusal, the applicant stated that he forced his way into the house. After gaining entry into the home, the applicant stated that Ms. Bagg contacted the police and he was later arrested. Mr. Higgins stated that subsequent to the incident, he pled guilty to simple assault.

{¶5} Applicant's counsel argued that based on the testimony and evidence presented the applicant's claim for an award of reparations should be allowed. With respect to the criminally injurious conduct, counsel asserted that the Attorney General failed to prove that the applicant contributed to the incident in any way. Counsel stated that the applicant testified that

he merely exited his vehicle to access the damage to his vehicle when he was approached from behind and assaulted. Counsel argued that the applicant only retrieved his tire iron as a form of self-defense and not as an attempt to provoke further conflict. Moreover, counsel opined that the Attorney General relied on untrustworthy evidence to deny the applicant's claim.

{¶6} With respect to the September 1991 incident, counsel argued that the applicant did not engage in felony burglary since he resided at the premise. Counsel stated that the applicant testified that he lived at the residence with the owner and his live-in girlfriend. Counsel asserted that based upon the applicant's testimony and the owner's statement, Exhibit A-14, the applicant resided at the premises therefore the applicant's claim should be allowed.

{¶7} However, the Assistant Attorney General continued to maintain that the applicant's claim should be denied. The Assistant Attorney General stated that the applicant engaged in substantial contributory misconduct when he exited his vehicle and grabbed the tire iron prior to him being struck. The Assistant Attorney General asserted that the offenders' conduct toward the applicant was a foreseeable result of the applicant's act of retrieving the tire iron. In terms of the September 1991 incident, the Assistant Attorney General argued that the claim must also be denied pursuant to R.C. 2743.60(E) since the applicant engaged in felony burglary. The Assistant Attorney General contended the applicant's behavior of breaking into the premises, after being denied access by a co-tenant, and thereafter assaulting the co-tenant is sufficient proof that the applicant engaged in felony burglary. The Assistant Attorney General cited State vs. Lilly (1999), 87 Ohio St. 3d 97, as relevant case law.

{¶8} From review of the file and with full and careful consideration given to all the information presented at the hearing, this panel makes the following determination. We fail to

find that the applicant engaged in contributory misconduct or felonious conduct. Based upon the testimony and evidence presented, we find that the applicant's claim should be allowed. The applicant testified that he merely seized the tire iron from the open trunk of his vehicle (after being reared three times by the offender) as a form of protection when he was approached from behind and brutally attacked by several individuals. We do not find the applicant's behavior, in this case, to have been provocative since we believe the applicant's testimony that he felt threatened by the offenders. Furthermore, we also believe that the applicant did not engage in felony burglary since the applicant's testimony and Exhibit A-14 indicates that the applicant resided at the said property on the day in question. We also find State vs. Lilly, supra, to be of no value to the Attorney General's case since the facts are clearly distinguishable. Therefore, the June 21, 2002 decision of the Attorney General shall be reversed and the case shall be remanded to the Attorney General for economic loss calculations and decision based on the above findings.

{¶9} IT IS THEREFORE ORDERED THAT

{¶10} "1) The June 21, 2002 decision of the Attorney General is REVERSED and judgment is rendered in favor of the applicant;

{¶11} 2) This claim is remanded to the Attorney General for economic loss calculations and decision based on the above findings;

{¶12} 3) This order is entered without prejudice to the applicant's right to file a supplemental compensation application pursuant to R.C. 2743.68;

{¶13} 4) Costs are assumed by the court of claims victims of crime fund.

JAMES H. HEWITT III
Commissioner

KARL H. SCHNEIDER
Commissioner

ROBERT B. BELZ
Commissioner

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