[Cite as *In re Parrish*, 2003-Ohio-4982.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

IN RE: KARA PARRISH	:	Case No. V2002-51915
PEGGY PARRISH	:	OPINION OF A THREE-COMMISSIONER PANEL
Applicant	:	

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{¶1} On May 1, 2002, the applicant filed a reparations application seeking reimbursement of expenses incurred in relation to the May 20, 2000 rape and murder of Kara Parrish. On August 26, 2002, the Attorney General issued a Finding of Fact and Decision denying the applicant's claim for an award of reparations pursuant to former R.C. 2743.60(E) and In re Dawson (1993), 63 Ohio Misc. 2d 79, contending that the decedent engaged in felonious conduct since she tested positive for Methylenedioxymethamphetamine (MDMA), which is more commonly known as ecstasy (a schedule I controlled substance), on a toxicology screening. On September 26, 2002, the applicant filed a request to reconsider. On October 31, 2002, the Attorney General issued a Final Decision denying the applicant's claim pursuant to R.C. 2743.60(F) contending that the decedent engaged in substantial contributory misconduct since she tested positive for ecstasy on a toxicology evaluation. On November 29, 2002, the applicant appealed the Attorney General's Final Decision asserting that there is no proof that MDMA caused Kara's death or that Kara engaged in felonious conduct by voluntarily ingesting

the substance. This matter came to be heard before this three commissioner panel on June 19, 2003 at 11:00 A.M.

{¶2} The hearing was attended by an Assistant Attorney General, the applicant and applicant's counsel. The applicant presented testimony in her case. The Assistant Attorney General cross-examined the witnesses presented in the applicant's case in chief, but did not present testimony in her case. Counsel for the applicant and the Assistant Attorney General provided argument in summation for this panel's consideration. The applicant, who is the decedent's mother, testified. Dr. John Wyman, chief toxicologist for the Franklin County Coroner's Office, also testified.

{¶3} Peggy Parrish testified that Kara, the decedent, was a 20-year-old student attending The Ohio State University at the time of her death. The applicant stated that approximately one year prior to her death, Kara had been diagnosed with a serious heart condition, requiring prescriptions for certain medications associated with that condition. The applicant explained that Kara was careful to maintain a healthy lifestyle consisting of proper diet and exercise in light of her condition and was seen regularly by both her family physician and cardiologist. Ms. Parrish also testified that she was unaware of Kara ever having engaged in any illegal drug use, even though Kara had moved out of her house three weeks prior to her death.

{¶4} Dr. Wyman's qualifications, to offer opinion testimony dealing with toxicology issues, were stipulated by the Assistant Attorney General. However, the Assistant Attorney General did not concede to Dr. Wyman's qualifications pertaining to the subject of "drug-facilitated sexual assault." Dr. Wyman testified that when the autopsy was performed on the decedent, MDMA, ethanol and metoprolol (a drug used to treat high blood pressure and

abnormal heart rhythms and prevent angina and heart attacks) were found in Kara's system. Dr. Wyman testified that the MDMA had not yet metabolized in Karra's system and hence he concluded that exposure to the substance was recent, approximately within only two hours of her death.

{¶5} Dr. Wyman was unable to offer testimony as to exactly how and under what circumstances Kara became exposed to the MDMA. However, he did testify on direct examination and later on cross-examination that the circumstances of this crime are consistent with the profile of a "drug- facilitated sexual assault." Dr. Wyman stated that from his research, approximately 80 percent of the time the victim of a drug facilitated assault knows the offender. Testimony and file evidence revealed that the victim and the offender were both students at the same university and had previously studied together. Dr. Wyman explained that MDMA renders a person incapacitated and without recall ability and has been labeled the "hug drug." Dr. Wyman testified that the toxicology report revealed between 100-150 mg of MDMA in Kara's system at the time of the autopsy, which he testified was within a normal dosage range. Dr. Wyman testified that generally ecstasy is sold in tablet form, resembling an aspirin and can be surreptitiously administered to an individual by slipping the tablet into a person's drink.

{¶6} After the presentation of testimony, the applicant and the Assistant Attorney General rested their cases. Panel then heard oral arguments, which are summarized as follows. Applicant's counsel urged the panel to reverse the Attorney General's Final Decision and allow the claim. Counsel argued that the facts of this case, when viewed cumulatively, demonstrate by a preponderance of the evidence, that it is more likely than not, that Kara did not ingest or become exposed to the MDMA knowingly and voluntarily. Applicant's counsel ascribed this

premise to the fact that exposure to the substance was within two hours of her death. He also argued that, since the amount of the substance was within a normal dosage, the offender was convicted of rape and homicide, the decedent had no history of unlawful drug usage, and since Kara was conscious of her medical condition, this panel should determine that her exposure was involuntary and that she did not therefore engage in felonious conduct. Additionally, applicant's counsel raised the contention that Dawson, supra, is distinguishable from the case at hand. Counsel asserted that Dawson, supra, is not fatal to the applicant's claim because testimony was never adduced in Dawson concerning how the unlawful substance was received by that applicant.

{¶7} The Assistant Attorney General argued that the applicant's claim should be denied on the basis of former R.C. 2743.60(E) and Dawson. The Assistant Attorney General indicated that since the criminally injurious conduct occurred prior to July 1, 2000, the former version of the statute applies. The Assistant Attorney General vigorously maintained that Dawson is good and controlling authority and that this applicant failed to prove involuntary ingestion of the controlled substance. The Assistant Attorney General asserted that, given the regrettable fact that the decedent cannot testify on these issues, the testimony presented by the applicant and the toxicologist is too speculative to overcome the Dawson presumption. Accordingly, the Assistant Attorney General maintained that the claim must be denied and that the Attorney General's Final Decision should be affirmed.

{¶8} From review of the file, together with full and considered view of the testimony adduced, this panel makes the following determination. First, we find that since the criminally

injurious conduct occurred prior to July 1, 2000 that the former Victim of Crime statute applies; hence former R.C. 2743.60(E) applies to this case.

{¶9} Former R.C. 2743.60(E)(3) stated:

"(E) Neither a single commissioner nor a panel of commissioners shall make an award to a claimant if any of the following applies:

"* * *

"(3) It is proved by a preponderance of the evidence presented to the commissioner or the panel that the victim or the claimant engaged, within ten years prior to the criminally injurious conduct that gave rise to the claim or during the pendency of the claim, in conduct that would constitute a felony under the laws of this state, another state, or the United States. (Emphasis added.)

{¶10} Former R.C. 2925.11 provides, in pertinent part, the following:

"(A) No person shall knowingly obtain, possess, or use a controlled substance.

"* * *

"(C) Whoever violates division (A) of this section is guilty of one of the following:

"(1) If the drug involved is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marijuana, cocaine, L.S.D., heroin and hashish, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows: (a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree. (Emphasis added.)

{¶11} The standard for reviewing former R.C. 2743.60(E)(3) cases involving a positive toxicology report has been determined by Dawson. A judge of the Court of Claims took issue with the panel's determination that a positive toxicology report, alone, failed to demonstrate felonious conduct. See In re Dawson, V90-53516tc (8-24-92). On review, Judge Leach

determined that the finding, on those facts, was unreasonable and unlawful and hence overturned the panel's decision. Judge Leach found that " . . . the positive evaluation on the toxicology report for the presence of cocain proves by a preponderance of the evidence that the applicant has committed a felonious act." In re Dawson (1993), 63 Ohio Misc. 2d 79, 81.

{¶12} So, therefore, this panel is confronted with the task of determining if that language of Dawson, supra, universally quoted by the Assistant Attorney General when faced with positive toxicology reports, was an "end all" determination, or whether the controlling tenant of Dawson, supra, is to shift the burden of going forward with the evidence on how the exposure or ingestion occurred. If Dawson is an "end all" analysis, not accounting for occasions of potentially explainable involuntary ingestion, then the claim must be denied and the Attorney General's Final Decision affirmed carte blanch. If however, Judge Leach was intending to burden shift with the obligation of going forward with evidence, in effect establishing a rebuttable presumption of voluntary and hence felonious use, then Dawson is not a rigid straight jacket which would bar all claims.

{¶13} It is our considered opinion that Dawson was not intended to create a conclusive presumption in all cases involving positive toxicology reports. Rather, we believe, that Dawson's holding that the toxicology report, in that case, and without testimony offered by the barred applicant on the circumstances of its use, proved unlawful use of a controlled substance by means of a rebuttable presumption, and that presumption was simply not overcome by the applicant on the facts of that case. We do not believe that Dawson was meant to dispense with the raising of recognized affirmative defenses, that any criminal defendant could raise to defeat one or more elements of the offense levied against him. While the General Assembly has

certainly relaxed the standard of proof to a preponderance of evidence needed by the Attorney General to bar a claim based on felonious conduct, we do not believe the General Assembly intended to relax the elements of the offense itself, and we do not believe Dawson stands for that proposition.

{¶14} This panel's assessment of Dawson seems to square itself with other holdings of the panel and this court. For example, in In re Trice, V92-83781tc (4-26-95), the panel determined that they must presume a knowing and voluntary ingestion when a hospital toxicology report reveals the presence of an illegal substance. However, as stated in In re Wallace, V98-38869tc (5-26-99), the presumption is valid only when no evidence to the contrary is presented. Therefore, there have been occasions when a victim or applicant was successful in challenging an illegal or coerced ingestion and/or the validity and accuracy of a positive toxicology evaluation. See also In re Treadwell, Sr., V97-32891tc (10-20-98), where the panel held that when a drug test is performed for employment, a positive toxicology report may not be used against an applicant where no evidence has been presented concerning the procedures used in collecting a specimen or how such records are maintained; In re Johnson, V98-34260tc (1-31-00), the panel found that the applicant had successfully rebutted the presumption of a knowing and voluntary ingestion of cocaine; In re Ware, V01-31091tc (12-28-01) affirmed (8-20-02), the panel determined that a physician's letter (expert opinion) was sufficient evidence to find that the results of a toxicology report were questionable to reverse the denial of the applicant's claim; and In re Abernathy, V01-32470tc (7-31-02), the panel reversed the Attorney General's Final Decision denying the claim after an Assistant Attorney General revealed to the panel that she

received documentation confirming that the applicant was administered narcotics while at the hospital.

{¶15} With respect to the exclusionary criteria of R.C. 2743.60(E), the Attorney General bears the burden of proof by a preponderance of the evidence. In re Williams, V77-0739jud (3-26-79); and In re Brown, V78-3638jud (12-13-79). Once the Attorney General has met his burden of establishing that the victim or applicant had in fact tested positive for an illegal drug on a toxicology screen, then the burden shifts to the applicant to rebut the presumption that felonious conduct had occurred. In this case, the Attorney General has successfully proved that the decedent tested positive for ecstasy, a schedule I controlled substance. However, now the burden lies with the applicant to prove that the decedent did not illegally ingest the banned substance or that the toxicology evaluation was rendered in error. We note that the parties agree concerning the validity and accuracy of the toxicology evaluation.

{¶16} Ms. Parrish testified that the victim was diagnosed with a serious heart condition the year prior to her death. The applicant explained that the victim was prescribed heart medication and was regularly monitored by her family physician and cardiologist. The applicant indicated that the decedent was careful to maintain a healthy lifestyle of diet and exercise. Even though the victim had moved out of the applicant's home three weeks prior to her death, the applicant stated that she was unaware of the victim ever having engaged in any type of drug related misconduct.

{¶17} We further find Dr. Wyman's testimony to be compelling. Dr. Wyman, the chief toxicologist for the Franklin County Coroner's Office, testified within a reasonable degree of scientific certainty that the ecstasy found in the decedent's body had not been ingested any

longer than two hours before Kara's death. Dr. Wyman further testified that since the drug had not metabolized in Kara's system that he believed the ecstasy was used to facilitate the sexual assault against her. We also find Dr. Wyman's explanation concerning (1) the effects of ecstasy, (2) that ecstasy is commonly used to facilitate rape, (3) that the decedent and offender knew each other prior to the incident, (4) that the amount of ecstasy Kara had in her system equaled a full dosage, and (5) that the victim in this case was in fact sexually assaulted and shortly thereafter murdered at the hands of her rapist, to be reliable evidence that the decedent probably did not knowingly and voluntarily ingest the drug.

{¶18} Clearly, it is not unreasonable to infer, from these facts, that the victim ingested the ecstasy involuntarily. This panel is persuaded by the toxicology report, which indicated the presence of metoprolol, which supports the notion that Kara would not have voluntarily ingested ecstasy in light of her heart condition. Furthermore, we strongly believe that Dr. Wyman's testimony was pivotal in making an accurate determination in this case. Moreover, when examining the facts of this case, this panel believes that Dawson did not envision this type of victim. However, we wish to dissuade those of the notion that the panel reached this decision based upon a causal reliance on the profile of the use of ecstasy in a drug-facilitated sexual assault. Based on the unique facts of this case and the medical testimony presented, we find that the decedent did not engage in felonious conduct. We, however, may not reach the same result in other toxicology related cases. Therefore, the October 31, 2002 decision of the Attorney General shall be reversed and the claim shall be remanded for economic loss calculations and decision.

{¶19} IT IS THEREFORE ORDERED THAT

{¶20} 1) The October 31, 2002 decision of the Attorney General is REVERSED and judgment is rendered in favor of the applicant;

{¶21} 2) This claim shall be remanded to the Attorney General for economic loss calculations and decision;

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

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

JAMES H. HEWITT III
Commissioner

LEO P. MORLEY
Commissioner

KARL H. SCHNEIDER
Commissioner

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