[Cite as *In re Smith*, 2004-Ohio-4179.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

IN RE: ROY A. SMITH	:	Case No. V2003-41123
ROY A. SMITH	:	OPINION OF A THREE-COMMISSIONER PANEL
Applicant	:	

: : : : :

{¶1} The applicant filed a reparations application seeking reimbursement of expenses incurred with respect to a January 8, 2003 shooting incident. On August 6, 2003, the Attorney General denied the claim pursuant to former R.C. 2743.60(F) contending that the applicant engaged in substantial contributory misconduct since he tested positive for opiates on a hospital's toxicology report. On August 21, 2003, the applicant filed a request for reconsideration. On October 7, 2003, the Attorney General denied the claim once again. On November 3, 2003, the applicant filed a notice of appeal to the Attorney General's October 7, 2003 Final Decision. Hence, this matter came to be heard before this panel of three commissioners on April 21, 2004 at 11:40 A.M.

{¶2} The applicant, applicant's counsel and an Assistant Attorney General attended the hearing and presented testimony and oral argument for the panel's consideration. Roy Smith testified that on January 8, 2003 he was entertaining approximately four or five guests at his home when the shooting occurred. Mr. Smith testified that he and the offender, Vincent Cross,

were initially playing a game of dominos when Mr. Cross became irate because he lost the game. The applicant stated that, in order to calm Mr. Cross, he suggested they play spades instead of dominos. Mr. Smith explained that Mr. Cross lost again and this time he started cursing and yelling. Mr. Smith stated that he told Mr. Cross that he would not tolerate him disrespecting his home and asked him to leave the premises. The applicant testified that Mr. Cross exited his home, but returned a short while later with a gun. The applicant explained that Mr. Cross shot him in the thigh and then fled the scene. Mr. Smith stated that an ambulance arrived shortly thereafter and transported him to Good Samaritan Hospital. Mr. Smith indicated that he was administered Darvocet at the hospital and later prescribed Vicoden to help relieve his pain. The applicant advised the panel that he had not previously taken any drugs since 1985 and that the only alcoholic beverage served at his party was beer.

{¶3} LaShay Curry, a friend of the victim's and an eye witness to the shooting, briefly testified and essentially corroborated the victim's version of what transpired the night of January 8, 2003. Ms. Curry advised the panel that she has known the victim for approximately five or six years and that she has never known him to consume any drugs.

{¶4} Applicant's counsel asserted that the victim's claim should be allowed based on the testimony presented. Counsel argued that the criminally injurious conduct was caused by Vincent Cross shooting the applicant and not the presence of opiates in Mr. Smith's system. Counsel asserted that In re Dawson (1993), 63 Ohio Misc. 2d 79 and In re Howard, V03-40411jud (2-24-04) do not pertain to opiate related toxicology cases since opium includes a broad field of drugs and that exposure or consumption of such may occur in a variety of ways. Counsel noted that the ingestion of poppy seed bagels or muffins will produce a false positive

result for opiates. Due to the high probability of false positive tests involving opiates, counsel contended that the Attorney General should first be required to identify the specific opiate before denying a victim's claim outright. Counsel asserted, in this case, that the positive result for opium may have been caused by the victim having been administered morphine (a derivative of opium) via an IV given by EMS or at the hospital. Counsel further opined that the victim may have been given morphine at the same time or shortly before a sample for the toxicology screen was collected.

{¶5} Counsel further asserted that the toxicology report may contain inaccuracies since there was a lengthy delay between the time the sample was collected from the applicant and the time the specimen was received by the lab. Counsel also contended that the recorded time of the collection and the receipt time may be in error. Counsel opined that there also may be an error in the recorded collection time and the recorded time the applicant was administered morphine. Counsel noted that the administration of the morphine and the collection sample occurred within 15 minutes of each other.

{¶6} Counsel also argued that former R.C. 2743.60(F)(2) is a rebuttable presumption, which can be overcome by proof that the controlled substance was not ingested illegally or by proof that the toxicology report was rendered in error. Counsel cited, State ex rel Pivk v. Industrial Commission (1935), 130 Ohio State 208, State ex rel Olsen v. Industrial Commission (1967), 9 Ohio St. 2d 47, and State vs. Myers (1971), 26 Ohio St. 2d 190, in his brief to support his position that unless a statute specifically indicates a presumption is conclusive, then the said presumption shall be deemed rebuttable. Lastly, counsel asserted there are three primary issues which need to be addressed and resolved, which are as follows: (1) whether In re Dawson, supra,

and In re Howard, supra, applies to opiate cases; (2) whether the presumption in former R.C. 2743.60(F)(2) is rebuttable or conclusive; and (3) whether the causation element of contributory misconduct, as defined by R.C. 2743.51(M), must be and has been met.

{¶7} The Assistant Attorney General maintained that the applicant's claim must be denied pursuant to former R.C. 2743.60(F)(2), In re Dawson, supra, and In re Howard, supra. The Assistant Attorney General contended that Dawson and Howard apply to all claims involving positive toxicology reports for any controlled substance. The Assistant Attorney General asserted that former R.C. 2743.60(F)(2) creates a mandatory presumption of contributory misconduct since the victim tested positive for a controlled substance. The Assistant Attorney General argued that when she produced the positive toxicology report for a controlled substance she met her burden of proof with respect to former R.C. 2743.60(F)(2) as well as proved a causal connection, as contributory misconduct is defined in R.C. 2743.51(M). The Assistant Attorney General asserted that the toxicology report indicates the applicant's sample for the toxicology screening was collected before the applicant was administered morphine. The Assistant Attorney General further stated that the EMS report and hospital records only indicate that the applicant was administered an IV saline solution by EMS.

{¶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. Even though Dawson was rendered under former R.C. 2743.60(E) it has become the leading authority involving positive toxicology reports. Judge Leach 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. Since then, this panel has been handed the task of determining if the language of Dawson, when faced with positive toxicology reports, was an "end all" determination or whether the controlling tenant of Dawson shifts the burden to the applicant of going forward with evidence on how exposure/ingestion occurred or whether the toxicology result, itself, is in error.

{¶9} Former R.C. 2743.60(F) states in pertinent part:

{¶10} (F) In determining whether to make an award of reparations pursuant to this section, a single commissioner or panel of commissioners shall consider whether there was contributory misconduct by the victim or the claimant. A single commissioner or a panel of commissioners shall reduce an award of reparations or deny a claim for an award of reparations to the extent it is determined to be reasonable because of the contributory misconduct of the claimant or the victim . . .

{¶11} For purposes of this section, if it is proven by a preponderance of the evidence that the victim engaged in conduct at the time of the criminally injurious conduct that was a felony violation of section 2925.11 of the Revised Code, the conduct shall be presumed to have contributed to the criminally injurious conduct and shall result in a complete denial of the claim.

{¶12} R.C. 2743.51(M) states:

{¶13} (M) "Contributory misconduct" means any conduct of the claimant or of the victim through whom the claimant claims an award of reparations that is unlawful or intentionally tortious and that, without regard to the conduct's proximity in time or space to the criminally injurious conduct, has a causal relationship to the criminally injurious conduct that is the basis of the claim.

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

{¶15} No person shall knowingly obtain, possess, or use a controlled substance.

{¶16} * * *

{¶17} Whoever violates division (A) of this section is guilty of one of the following:

{¶18} 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.)

{¶19} It is our opinion that Dawson was not intended to create a conclusive presumption in all cases involving positive toxicology reports. Rather, we believe, that Dawson held that a positive toxicology report shall bar a claim for an award of reparations, where no testimony or evidence had been offered by an applicant to indicate the manner in which the controlled substance was consumed or where no evidence was presented to indicate a faulty toxicology result. 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 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 that Dawson nor Howard stands for that proposition.

{¶20} With respect to the exclusionary criteria of R.C. 2743.60, 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 screening, then the burden shifts to the applicant to rebut the presumption that felonious conduct had occurred. In this case, the Attorney General has successfully proven that the victim tested positive for opiates, a controlled substance. However, now the burden lies with the applicant to prove that he did not illegally ingest the banned substance or that the toxicology evaluation was rendered in error. We believe this assessment of Dawson squares itself with other holdings of the panel and this court. According to 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, the holding in In re Wallace, V98-38869tc (5-26-99), stated that 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 or the validity and accuracy of a positive toxicology result.[1]

[1]In re Treadwell, Sr., V97-32891tc (10-20-98), 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 and reversed 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

{¶21} We further believe that former R.C. 2743.60(F) is a rebuttable presumption since the statute does not expressly indicate that the presumption is conclusive. In In re Green, V03-40836jud (5-13-04), Judge Shoemaker held that "the Attorney General must prove that the victim's alleged contributory misconduct had a causal relationship to the criminally injurious conduct. Although evidence of felony drug use is presumed to have contributed to the criminally injurious conduct, that presumption may be rebutted with additional evidence."

{¶22} We find it was the General Assembly's intent, with respect to former R.C. 2743.60(F), to exclude only those victims or applicants from participating in the fund whose conduct *actually* caused or aided the criminally injurious conduct. Amended S.B. 153 never altered the definition of contributory misconduct as defined in R.C. 2743.51(M). Since its inception R.C. 2743.51(M) has always required that a victim's or applicant's conduct have a causal connection to the criminally injurious conduct. According to R.C. 2743.51(M), there are three elements that must be established before a *prima facie* case of contributory misconduct can be met: (1) conduct by the victim or the claimant; (2) conduct that is unlawful or intentionally tortious; and (3) that conduct must have a causal relationship to the criminally injurious conduct.

---

confirming that the applicant was administered narcotics while at the hospital; In re Starr, V02-50935tc (10-17-02), the panel allowed an applicant's claim despite the positive toxicology report for barbiturates and opiates; In re Parrish, V02-51915tc (8-1-03), the panel allowed a claim involving a decedent who tested positive for ecstasy on a coroner's toxicology report; In re Bealer, V03-40321tc (12-3-03), the panel allowed an applicant's claim who tested positive for opiates on a hospital toxicology report; and In re Green , V03-40836jud (5-13-04), Judge Shoemaker affirmed the panel's decision to allow a claim based on the coroner's opinion that the controlled substance was not ingested by the decedent on the day of the criminally injurious conduct, which established that the decedent had not engaged in contributory misconduct.

We fail to see how the presence of opiates in this victim's system has a causal relationship to him being shot by Vincent Cross on January 8, 2003.

{¶23} Moreover we further find, by a preponderance of the evidence, that the applicant did not engage in substantial contributory misconduct. Although the applicant tested positive for a controlled substance, we do not believe Mr. Smith illegally ingested opiates and we find no evidence that impeaches the credibility of the applicant's testimony. According to the Good Samaritan Hospital Triage/Nurse Notes, the applicant was initially seen at 4:50 A.M., the applicant was administered an IV containing morphine at 5:15 A.M., a blood sample was sent to the lab at 6:30 A.M., and the urine specimen was not sent to the lab until 10:00 A.M. This information contradicts the Good Samaritan toxicology report, upon which the Attorney General relies. Based on the above medical records, we find the applicant was administered morphine before the toxicology sample was collected and before the toxicology screen was performed. Hence, the Attorney General's argument that this claim must be denied pursuant to former R.C. 2743.60(F) is not well-taken. Therefore, the October 7, 2003 decision of the Attorney General shall be reversed and the claim shall be remanded to the Attorney General for economic loss calculations and decision.

{¶24} IT IS THEREFORE ORDERED THAT

{¶25} The October 7, 2003 decision of the Attorney General is REVERSED to render judgment in favor of the applicant;

{¶26} This claim is remanded to the Attorney General for economic loss calculations and decision based upon the panel's findings;

{¶27} This order is entered without prejudice to the applicant's right to file a supplemental compensation application, within five years of this order, pursuant to R.C. 2743.68;

{¶28} Costs are assumed by the court of claims victims of crime fund.

_____
KARL H. SCHNEIDER
Commissioner

_____
LEO P. MORLEY
Commissioner

_____
ROBERT B. BELZ
Commissioner

_____
KARL H. SCHNEIDER
Commissioner

_____
LEO P. MORLEY
Commissioner

_____
ROBERT B. BELZ
Commissioner

ID #\3-dld-tad-051304

A copy of the foregoing was personally served upon the Attorney General and sent by regular mail to Montgomery County Prosecuting Attorney and to:

Filed 6-16-2004
Jr. Vol. 2253, Pgs. 200-201
To S.C. Reporter 8-10-2004