

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

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| IN RE: SAKAIYA Q. GREEN | : | Case No. V2003-40836 |
| SHELBY D. GREEN | : | <u>OPINION OF A THREE-</u> |
| Applicant | : | <u>COMMISSIONER PANEL</u> |
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{¶1} The applicant filed a reparations application seeking reimbursement of expenses incurred with respect to the January 20, 2003 murder of Sakaiya Green. On May 22, 2003, the Attorney General denied the applicant's claim pursuant to R.C. 2743.60(F) and *In re Dawson* (1993), 63 Ohio Misc. 2d 79, contending that the victim engaged in substantial contributory misconduct since the victim tested positive for phencyclidine (PCP) on the coroner's toxicology report. On June 23, 2003, the applicant filed a request for reconsideration. On July 31, 2003, the Attorney General denied the claim once again. On August 29, 2003, the applicant filed an appeal of the Attorney General's Final Decision contending that there was no causal link between the victim's murder and PCP being found in the victim's system. Hence, this matter came to be heard before this panel of three commissioners on December 4, 2003 at 11:10 A.M.

{¶2} The applicant, applicant's counsel, and an Assistant Attorney General attended the hearing and presented testimony and oral argument for this panel's consideration.

{¶3} Shelby Green testified that the decedent resided with her and her other five children. The applicant stated that Sakaiya was a special needs student who functioned at the level of a 10 or 11 year old. The school, recognizing Sakaiya's limitations, assigned a personal aid to him. The aid attended class with Sakaiya and assisted him with all daily school activities. The applicant further stated that Sakaiya was administered medication which was suppose to help him distinguish between right and wrong. However, the results of the medication were questionable since Sakaiya continued to have trouble distinguishing right from wrong. The applicant stated that due to Sakaiya's condition, he received Supplemental Social Security benefits.

{¶4} Counsel for the applicant referred to an October 15, 2003 letter from Cuyahoga County Coroner Elizabeth K. Balraj, M.D. The letter stated in pertinent part: "The toxicology reports, . . . show the phencyclidine (PCP) was not found in Sakaiya Green's blood. A trace amount of PCP was found in his urine. This toxicology evidence establishes that Sakaiya Green was not using PCP at the time of his death. The absence of PCP in his blood with only a trace amount in his urine is evidence of past use of this drug probably days before his death on January 20, 2003." Counsel for the applicant argued that the decedent did not have the capacity, due to his diminished mental state, to knowingly commit a felony by consuming PCP, nor did the decedent's ingestion of PCP a few days prior to his death constitute contributory misconduct since there was no causal connection between the consumption of the PCP and Sakaiya's subsequent murder.

{¶5} Assistant Attorney General, Ethan Sprang, cross examined the applicant and elicited testimony from Ms. Green concerning whether Sakaiya had actually taken his

medication on January 20, 2003. The Assistant Attorney General also asserted that there had been no determination that the decedent had ever been adjudged medically incompetent or that a legal guardian had ever been appointed for him. The Assistant Attorney General argued that the claim should be denied pursuant to Ohio Revised Code Section 2743.60(F)(2) since it has been established that an illegal controlled substance, namely PCP, was found in the decedent's system at the time of his death; that the applicant has failed to establish that the decedent was mentally incompetent and did not know right from wrong; and that the statute presumes the decedent's contributory misconduct, based upon the fact that an illegal substance was found in the decedent's system at the time of his death. Accordingly, the Assistant Attorney General argued that the Final Decision of the Attorney General should be affirmed.

{¶6} From review of the file and with full and careful consideration given to all the evidence presented at the hearing, we make the following determination. We find that the decedent was a victim of criminally injurious conduct at the time of his death and that he did not engage in contributory misconduct pursuant to Ohio Revised Code Section 2743.60(F)(2).

{¶7} Ohio Revised Code Section 2743.60(F)(2) in pertinent part states:

“(F) In determining whether to make an award of reparations pursuant to this section, the attorney general or panel of commissioners shall consider whether there was contributory misconduct by the victim or the claimant. The attorney general, a panel of commissioners, or a judge of the court of claims 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.

“* * * * *

“(2) 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.” Emphasis added.

{¶8} Ohio Revised Code Section 2925.11(A) states that “no person shall knowingly obtain, possess or use a controlled substance.” The use of PCP would constitute a felony under this statute.

{¶9} The Attorney General believes this case falls under the purview of In re Dawson, supra. However, Dawson interpreted the law under former Ohio Revised Code Section 2743.60(E) and, accordingly, it has no precedented value when interpreting claims under Section 2743.60(F). Therefore, the Attorney General’s reliance on Dawson is misplaced.

{¶10} Under Amended Substitute Senate Bill 153, effective July 1, 2000, possession or use of a controlled substance was not considered a disqualifying factor under Ohio Revised Code Section 2743.60(E), the felony exclusion. The amended statute required claims, involving applicants who use or possess illegally controlled substances, to be determined by a two step process under Ohio Revised Code Section 2743.60(F)(2). First, the Attorney General has the burden to prove 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.” If and when that fact is established, then the victim’s conduct is “presumed to have contributed to the criminally injurious conduct” which in turn would result in a complete denial of the claim.

{¶11} Applicant’s counsel has presented testimony from the applicant that Sakaiya functioned at the level of a 10-11 year old and, consequently, did not possess the required *mens rea* to commit a violation of Ohio Revised Code Section 2925.11. While the mental competence

of a deceased individual is difficult to assess, based solely on the testimony of the victim's mother, it is clear that Sakaiya did not function at an adult level. However, in our view, the strongest evidence was presented by the Coroner of Cuyahoga County. The Coroner's letter clearly establishes that the decedent did not illegally use PCP at the time of the criminally injurious conduct, but a few days prior to the criminally injurious conduct. The Coroner's expert opinion concludes, due to the slight traces of PCP in the decedent's urine and not his blood, that the "toxicology evidence establishes that Sakaiya Green was not using PCP at the time of his death."

{¶12} Moreover, since the medical evidence establishes that the decedent was not using PCP at the time of the criminally injurious conduct, accordingly it would be factually impossible to assert that the presence of PCP in Sakaiya's system contributed to the criminally injurious conduct.

{¶13} Accordingly, the Attorney General has failed to meet his burden of proof under Revised Code Section 2743.60(F)(2). Consequently, the July 31, 2003 Final Decision of the Attorney General is reversed and judgment is rendered in favor of the applicant. This claim shall be remanded to the Attorney General in accordance with this panel's order for economic loss calculations and decision.

{¶14} IT IS THEREFORE ORDERED THAT

{¶15} 1) The July 31, 2003 decision of the Attorney General is REVERSED to render judgment in favor of the applicant;

{¶16} 2) This claim is remanded to the Attorney General for economic loss calculations and decision;

{¶17} 3) 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;

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

CLARK B. WEAVER, SR.
Commissioner

DALE A. THOMPSON
Commissioner

THOMAS H. BAINBRIDGE
Commissioner

ID #\2-drb-tad-011404

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

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