[Cite as *In re Prince*, 2005-Ohio-2647.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

IN RE: MICHAEL A. PRINCE	:	Case No. V2004-60989
MICHAEL A. PRINCE	:	ORDER OF A THREE-COMMISSIONER PANEL
Applicant	:	

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{¶ 1} The applicant filed a reparations application seeking reimbursement of expenses incurred with respect to an August 5, 2003 assault incident. On April 29, 2004, the Attorney General denied the applicant's claim pursuant to R.C. 2743.60(E)(1)(e), In re Dawson (1993), 63 Ohio Misc.2d 79, and In re Howard (2004), 127 Ohio Misc.2d 61 contending that the applicant engaged in felonious drug use at the time of the criminally injurious conduct. On May 11, 2004, the applicant filed a request for reconsideration. On September 27, 2004, the Attorney General denied the claim once again. On October 7, 2004, the applicant filed a notice of appeal to the Attorney General's Final Decision. Hence, this matter came to be heard before this three commissioner panel on December 15, 2004 at 10:30 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. Michael Prince testified that he sustained a clavicle fracture, multiple contusions and lacerations to his right hand and elbow as the result of an assault in a nightclub in August of 2003. The applicant explained that he was assaulted after a friend had contacted him at approximately 11:15 P.M. to pick him up from a bar, since he was too inebriated to drive himself home. The applicant explained that

he was rendered unconscious as a result of the assault and hence is unable to fully recall all the details surrounding the incident. However, the applicant testified that he did not ingest cocaine on the night of the incident as the Attorney General contends. Mr. Prince stated that at the time of the assault he was employed by Anderson Concrete as a concrete mixer. The applicant explained that due to the nature of his job, he regularly underwent drug testing and that he had never failed a drug test administered by his employer.

{¶ 3} Applicant's counsel argued that the claim should be allowed based upon the applicant's testimony and the Attorney General's lack of evidence to sufficiently prove that the applicant engaged in felonious drug use. Counsel asserted that the Dawson, supra, and Howard, supra, decisions rely solely upon a toxicology report in order to disqualify an individual for felonious drug use. However, counsel noted that no toxicology report exists in this case, but merely hospital laboratory results, and hence counsel argued that the applicant's claim cannot be denied pursuant to R.C. 2743.60(E), Dawson, or Howard. Counsel further argued that the hospital laboratory results upon which the Attorney General relies are vague and incomplete evidence of actual felonious drug use by the applicant. Counsel also noted that no documentation has been submitted to certify whether the results of the hospital laboratory results are true and accurate.

{¶ 4} The Assistant Attorney General continued to maintain that the applicant is ineligible to participate in the fund pursuant to R.C. 2743.60(E)(1)(e), Dawson, and Howard, since hospital laboratory results exist which indicate that the applicant tested positive for a controlled substance at the time of the criminally injurious conduct. The Assistant Attorney General argued that under the Dawson and Howard decisions toxicology reports and hospital laboratory results are

one in the same and therefore the laboratory results received from the hospital are credible and reliable evidence that the applicant engaged in felonious drug use at the time of the criminally injurious conduct. The Assistant Attorney General stated that the applicant, based upon his testimony alone, failed to sufficiently rebut the felonious drug use presumption of Dawson and Howard in order to receive an award of reparations.

{¶ 5} From review of the file and with full and careful consideration of all the evidence presented, this panel makes the following determination.

{¶ 6} R.C. 2743.60(E)(1)(e) states:

{¶ 7} Except as otherwise provided in division (E)(2) of this section, the Attorney General, a panel of commissioners, or a judge of the court of claims shall not make an award to a claimant if any of the following applies:

{¶ 8} "(e) It is proved by a preponderance of the evidence that the victim at the time of the criminally injurious conduct that gave rise to the claim engaged in conduct that was a felony violation of section 2925.11 of the Revised Code or engaged in any substantially similar conduct that would constitute a felony under the laws of this state, another state, or the United States.

{¶ 9} The Attorney General bears the burden of proof by a preponderance of the evidence with respect to the exclusionary criteria of R.C. 2743.60(E). In re Williams, V77-0739jud (3-26-79); and In re Brown, V78-3638jud (12-13-79). The standard for reviewing felonious drug use cases has typically been determined by In re Dawson (1993), 63 Ohio Misc.2d 79, which held that a positive toxicology report for a controlled substance is sufficient evidence that a victim or applicant engaged in felonious drug use. However since Dawson, supra, was rendered various cases have emerged over the years concerning the issue of felonious drug use.[1] More recently,

[1] 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

the Dawson decision was affirmed by Judge Bettis in In re Howard (2004), 127 Ohio Misc.2d 61.

{¶ 10} We find that Dawson was not intended to create a conclusive presumption of felonious drug use in all cases involving positive toxicology reports, since 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 that the General Assembly intended to relax or dispense with the elements of the offense itself, nor do we believe that Dawson stands for that proposition. Therefore, once the Attorney

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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 France, V01-31201tc (10-15-01) affirmed jud (1-10-02), the panel held that absent a showing of substantial evidence concerning a defect in the collection process or the maintenance of records which would demonstrate a defect in the report or the result, or which would otherwise challenge or impugn the scientific integrity of the testing methodology or its conclusions, Dawson should be followed; In re Ware, V01-31091tc (12-28-01) affirmed jud (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; 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; and In re Parrish, V02-51915tc (8-1-03), the panel determined that Dawson did not establish a conclusive presumption, but rather a rebuttable presumption.

General has met his burden of establishing that a victim or applicant has in fact tested positive for an illegal drug via a toxicology screening or hospital laboratory results, our view is that the burden shifts to the applicant to rebut the presumption that felonious drug use has occurred. In re Green, V03-40836jud (5-13-04). We further find that, even though no toxicology report exists in this case, hospital laboratory results have evidentiary and probative value of the issue for the purposes of determining felonious drug use.

{¶ 11} In this case, the Attorney General has successfully proven, via the hospital laboratory results, that the applicant tested positive for cocaine. However, now the burden lies with the applicant to prove that he did not illegally ingest the controlled substance or that the hospital laboratory results were rendered in error. After review of the file and hearing the applicant's testimony, we find that the applicant has failed to sufficiently rebut the presumption of felonious conduct. We, therefore, find that the Attorney General has proven, by a preponderance of the evidence, that the applicant engaged in felonious drug use at the time of the criminally injurious conduct. We do not believe that the applicant presented sufficient evidence to overcome the Dawson presumption. Therefore, the September 27, 2004 decision of the Attorney General shall be affirmed.

IT IS THEREFORE ORDERED THAT

{¶ 12} 1) The September 27, 2004 decision of the Attorney General is hereby AFFIRMED;

{¶ 13} 2) This claim is DENIED and judgment is rendered in favor of the state of Ohio;

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

JAMES H. HEWITT III
Commissioner

KARL H. SCHNEIDER
Commissioner

GREGORY P. BARWELL
Commissioner

ID #\3-dld-tad-011805

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

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