[Cite as *In re Wilson*, 2005-Ohio-2648.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

IN RE: ALFONZO T. WILSON	:	Case No. V2004-60997
ALFONZO T. WILSON	:	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 a November 14, 2003 shooting incident. On June 15, 2004, the Attorney General denied the applicant's claim pursuant to R.C. 2743.60(E)(1)(e) and In re Dawson (1993), 63 Ohio Misc.2d 79 contending that the applicant engaged in felonious drug use at the time of the criminally injurious conduct, since he tested positive for PCP on a hospital toxicology screening. On July 7, 2004, the applicant filed a request for reconsideration. On September 2, 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 asserting that the hospital tested the wrong urine sample to conduct the toxicology screening. Hence, this matter came to be heard before this three commissioner panel on December 16, 2004 at 9:55 A.M.

{¶ 2} The applicant, applicant's counsel, and an Assistant Attorney General attended the hearing and presented testimony, exhibits, and oral argument for the panel's consideration. Alfonzo Wilson testified that he is a 67 year old United States Postal Service employee who was

shot in the hand after returning home from a union meeting. Mr. Wilson explained that he was transported to Huron Hospital for treatment. The applicant stated that Huron Hospital's medical staff engaged in an unsanitary and in an unprofessional manner during his visit. The applicant explained that over the years he has provided numerous urine samples to his physician due to reoccurring kidney issues. However, Mr. Wilson stated that Huron Hospital's medical staff provided him a specimen cup without a name tag, which was eventually lost by the staff. Mr. Wilson testified that he was asked to submit another urine sample, which he refused, signed himself out of Huron Hospital against medical advice, and sought treatment at Lutheran hospital, where no urine sample was requested of him. Mr. Wilson also testified that after learning his claim was denied due to a positive toxicology report for PCP, he asked his family physician to administer another drug screening, which he successfully passed. Lastly, Mr. Wilson stated that he does not use drugs, that he has been employed with the United States Postal Service for 30 years without incident, and that he missed approximately three months of work as a result of the criminally injurious conduct.

{¶ 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 prove that the applicant engaged in felonious drug use. Counsel asserted that the Dawson, supra, decision relies solely upon a toxicology report in order to disqualify an individual for felonious drug use. However, counsel argued that Huron Hospital's medical records, upon which the Attorney General relies, are vague and incomplete evidence of actual felonious drug use by the applicant, since the medical report indicates that the detection of any drug is only presumptive. Counsel also argued that the Dawson presumption of felonious drug use is rebuttable once contrary evidence has been

introduced. Lastly, counsel noted that Mr. Wilson testified that Huron Hospital's medical staff acted in an unprofessional manner during his visit, which was evidenced by the loss of his urine sample, and hence Mr. Wilson signed himself out of the hospital against medical advice and sought adequate treatment at a different hospital.

{¶ 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) and Dawson, since hospital laboratory reports 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 decision toxicology reports and hospital laboratory results are one in the same and therefore Huron Hospital's medical records 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, has failed to sufficiently rebut the felonious drug use presumption of Dawson 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 of 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, the Dawson decision was affirmed by Judge Bettis in In re Howard (2004), 127 Ohio Misc.2d 61.

[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 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;

{¶ 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. In short, we do not believe that felonious conduct should be adjudged to the exclusion of defenses that a criminal defendant could viably raise. Thus, again, we believe that Dawson creates a rebuttable rather than conclusive presumption in favor of felonious conduct. 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 the elements of the offense itself, nor do we believe that Dawson stands for that proposition. In essence, we do not believe the proof of felonious conduct can be "short circuited." Therefore, once the Attorney 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, then 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 are equivalent to a toxicology report for the purposes of determining felonious drug use.

{¶ 11} In this case, we find that the applicant has sufficiently rebutted the Dawson presumption that he engaged in felonious drug use. We find Mr. Wilson's testimony concerning: 1) Huron Hospital's unsanitary and unprofessional urine collection procedures, 2) his spotless

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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.

history with the United States Postal Service, and 3) his submission to another drug screen in order to resolve the dispute, to be credible and reliable. Moreover, we also find the disclaimer listed at the bottom of Huron Hospital's medical report that the detection of any drug is only presumptive to be compelling of the applicant's lack of felonious drug use. Therefore, the September 2, 2004 decision of the Attorney General shall be reversed and the claim shall be remanded to the Attorney General for economic loss calculations and decision.

IT IS THEREFORE ORDERED THAT

{¶ 12} The September 2, 2004 decision of the Attorney General is hereby REVERSED and judgment is rendered in favor of the applicant;

{¶ 13} This claim shall be referred to the Attorney General's office for economic loss calculations and decision;

{¶ 14} 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;

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

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JAMES H. HEWITT III
Commissioner

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KARL H. SCHNEIDER
Commissioner

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GREGORY P. BARWELL

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Commissioner

ID #\7-dld-tad-011805

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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