

[Cite as *In re Martin*, 2007-Ohio-3494.]

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

www.cco.state.oh.us

IN RE: GEORGE R. MARTIN : Case No. V2006-21158

ANNABELLE M. GIVENS : Commissioners:

: Gregory P. Barwell, Presiding

: Randi Ostry LeHoty

: Lloyd Pierre-Louis

:

Applicant : OPINION OF A THREE-

_____ : COMMISSIONER PANEL

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{¶1} The applicant filed a reparations application seeking reimbursement of expenses incurred with respect to the November 20, 2005 murder of George Martin ("victim" or "Mr. Martin") by Anthony Collins ("offender" or "Collins"). On May 3, 2006, the Attorney General denied the claim pursuant to R.C. 2743.60(F) contending that the victim had been engaged in substantial contributory misconduct when he was shot and killed at his home. The Assistant Attorney General asserted that the victim regularly sold alcohol and drugs at his home and that he allowed individuals to use drugs and to have sexual intercourse at his apartment for a fee. On June 19, 2006, the applicant filed a request for reconsideration. On November 1, 2006, the Attorney General denied the claim once again. On December 1, 2006, the applicant filed a notice of appeal to

the Attorney General's November 1, 2006 Final Decision. On February 22, 2007 at 10:15 A.M., this matter was heard before this panel of three commissioners.

{¶2} Detective David Landesberg ("Det. Landesberg") of the Cincinnati Police Department was the lead homicide detective on the victim's murder case. He testified that he learned from witnesses that Mr. Martin was generally known in the neighborhood, and specifically known in the community to operate a "house joint" out of his first floor apartment. Mr. Martin was known as a "sugar daddy," sold alcohol and prescription drugs at his apartment and allowed individuals, specifically troubled woman, to stay there and smoke crack cocaine in exchange for sex. He further testified that Mr. Martin ran at least one other "house joint" in the past at another location.

{¶3} Det. Landesberg stated that on November 20, 2005, the victim invited some friends over to watch a football game. He indicated that the witnesses reported that when the game concluded at approximately 9:30 P.M. only the victim and his two female friends remained. At approximately 12:30 A.M., someone knocked on Mr. Martin's apartment door. The male identified himself as Darrel, although he was later determined to be Anthony Collins. Upon entry into the apartment, Collins struck one of the women and instructed the other woman to get on the floor and not to report having seen anything. A witness noted that Collins repeatedly inquired about money. Mr. Martin, in his bedroom, was overheard warning Collins not to proceed, and if he did so, he would shoot him. Collins left the apartment, immediately returned, fired a shot, and

fled the apartment. Mr. Martin died from a single gunshot wound. Collins was convicted of voluntary manslaughter and felonious assault.

{¶4} Angela Mills ("Ms. Mills") was present at the time of the murder. Det. Landesberg testified that Ms. Mills knew Collins. Collins, a street level drug dealer in Mr. Martin's neighborhood and well-known to police, had been to Mr. Martin's apartment in the past. Det. Landesberg explained that his drug territory included Mr. Martin's neighborhood and in the detective's opinion, the robbery was not a "random event" because of the prospect of drugs and money at Mr. Martin's apartment.

{¶5} Revised Code 2743.51(M) states:

(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.

{¶6} Revised Code 2743.60(F) states in part:

(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.

{¶7} These facts present all the elements necessary to deny a claim under R.C. 2743.60(F). These elements are: 1) any specific, unlawful or intentionally tortious conduct of the victim/applicant;¹ 2) a causal relationship between the conduct and the criminally injurious conduct; 3) foreseeability of the criminally injurious conduct in light of the victim/applicant's conduct;² and 4) a showing of substantial misconduct. Generally, the Attorney General bears the burden of proof by a preponderance of the evidence under the exclusionary criteria of R.C. 2743.60. See *In re Williams*, V77-0739jud (3-26-79); and *In re Brown*, V78-3638jud (12-13-79).

{¶8} In the instant case, the victim engaged in specific unlawful conduct when he operated an illegal "house joint" from his apartment, whereby he: (1) sold prescription drugs and alcohol, (2) permitted individuals to engage in the illegal conduct of smoking crack cocaine, and (3) charged individuals a fee to engage in sexual intercourse. Second, Mr. Martin's unlawful misconduct was a direct and proximate cause of the criminally injurious conduct and but for his illegal misconduct he would not have been robbed. Mr. Martin's "house joint" was well-known in the neighborhood and this was not a "random event" because of the prospect of drugs and money present. Hence, we find a causal connection is indeed established in that operating the "house joint" - a dangerous enterprise - was causally connected to his murder. Third, the robbery at Mr. Martin's apartment was a foreseeable event, because the victim knew or should have known that operating an illegal "house joint" (involving money and drugs) it

¹See *In re McGary II*, V91-83761jud (11-16-94).

was highly likely that he could and would be robbed. Det. Landesberg testified that the victim had been robbed in the past and likely maintained a gun in his home to help prevent any future robberies. Mr. Martin was most likely a robbery target because: (1) he maintained cash and a variety of drugs at his illegal establishment; (2) he was 69 years old and quite frankly an easier target to overpower, and (3) he would not have involved law enforcement in order to avoid any repercussions resulting from his own unlawful misconduct. Quite simply the criminal enterprise he ran out of his apartment exposed him to dangerous elements. And fourth, Mr. Martin's unlawful conduct is substantial and thus, denial of this claim is squarely in line with this court's precedent.

{¶9} *In re Durham*, V87-72831sc (5-20-88) is on point with the facts and circumstances of this case. In *Durham*, the victim was denied a reparations award under R.C. 2743.60(F) because he was shot in his apartment where he illegally operated a known after-hours establishment. In *Durham*, witnesses stated that they went to the victim's apartment and patronized his establishment with knowledge that his place was actually an after-hours establishment. Accordingly, *Durham* exposed himself to the criminally injurious conduct. Similarly, because of Mr. Martin's unlawful conduct, he exposed himself to, if not invited, the criminally injurious conduct that resulted in his death.

{¶10} "[T]he victim, more likely than not, was an active participant in the illegal drug activity. Since illegal drug activity is inherently risky business, it is reasonable that

²See *In re Ewing* (1987), 33 Ohio Misc. 2d 48.

the [victim] could have foreseen [he] was creating a dangerous situation." *In re Taylor*, V91-88381sc (5-21-92). Therefore, the victim engaged in unlawful activity with a causal relationship to the shooting. *In re Morrow*, V96-34092 tc (12-5-97), presents an analogous situation. In *Morrow*, the decedent's operation of a gambling house was illegal, causally related to the foreseeable act of robbery, and constituted contributory misconduct. The applicant argued that the decedent's operation of a gambling house was not a foreseeable cause of the offender's actions. However, the *Morrow* court found that gambling houses, like crack houses, are magnets for other forms of criminal, even violent activity. Crack houses are frequently robbed because of the large amount of illegally obtained cash kept therein and persons conducting illegal activity at crack houses are frequently subjected to acts of violence during robberies.

{¶11} The same is true in this case. Mr. Martin's long standing operation of a "house joint" attracted people accustomed to illegal activity. Because of the nature of the victim's business it was a prime target for a robbery. The parties were from the same neighborhood and the offender had been to the victim's apartment previously. Mr. Martin's well-known illegal establishment more than likely motivated the offender, a known drug dealer who hailed from the same neighborhood, to target Mr. Martin for a robbery. Further, Mr. Martin had a lengthy criminal history involving both felonies and misdemeanors. Ergo, the victim's prior activities and his reputation in the neighborhood made him a likely target for criminal conduct.

{¶12} The testimony of Det. Landesberg established that the "house joint" was open any hour of the day. At the time of the robbery two "guests" were at the residence. No evidence was presented that either of the "guests" resided at the residence. Also, the products of the victim's trade were present in the residence and as a matter of fact this was the reason for the robbery. The victim knew the risks inherent in his illegal operation since he was armed and ready to protect his business.

{¶13} In sum, considering the variety of illegal activities that took place at Mr. Martin's residence, his house was a "magnet" for criminal activity. The facts reveal that the offender had prior knowledge of the house and of cash, drugs, and money inside. Hence, it made it a tempting target for a robbery.

{¶14} For an award of reparations to be denied, rather than reduced, as a result of contributory misconduct on behalf of the victim or applicant pursuant to R.C. 2743.60(F), there must be a showing of substantial contributory misconduct. *In re Spaulding* (1991), 63 Ohio Misc. 2d 39. Illegal gambling activity constitutes substantial contributory misconduct. *In re Toth*, V94-64547sc (8-8-95) and *In re McClain*, V94-48517sc (12-12-95). If a decedent engaged in substantial contributory misconduct, the claim is denied. See also *In re Johnson*, V96-53577tc (3-12-98). We find that in this case, Mr. Martin engaged in substantial contributory misconduct by operating a "house joint" and therefore, we deny the claim.

{¶15} While we recognize the applicant's kindness in paying for Mr. Martin's cremation and her ensuing financial hardship, these facts applied to the law preclude us

from reaching any other result. In as much as Mr. Martin engaged in substantial contributory misconduct, the claim shall be denied. Therefore, the November 1, 2006 decision of the Attorney General shall be affirmed.

GREGORY P. BARWELL
Presiding Commissioner

RANDI OSTRY LE HOTY
Commissioner

Lloyd Pierre-Louis, Commissioner, Dissenting Opinion:

I respectfully dissent from the majority's analysis of fact and law in this case. Today, the majority has held that a victim of a homicide was more culpable for his demise than the criminal himself, a street-level drug dealer who robbed and shot the victim.

I agree with the majority's determination that Mr. Martin is a victim and that he engaged in contributory misconduct pursuant to R.C. 2743.51(M). However, I do not find that his conduct was the direct and proximate cause of his murder, or that his misconduct was substantial. I find that the victim's conduct did bear some relation to the crime, but was certainly not the primary cause of his death. Accordingly, I would reduce the applicant's award by 10 percent.

Even though the goal of this program is remedial in nature and is designed to return victims/applicants to their status prior to the occurrence of the criminally injurious conduct, I realize the program's goal is curtailed by certain restrictions. The Ohio General Assembly created the Victims of Crime Act as a class gift for certain persons to have a right to participate in the reparations fund under specific conditions. That right to participate in the fund is controlled via compliance with special criteria and restrictions contained within the statute. In this case, I believe the victim/applicant has met the criteria to participate in the fund.

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In 1988, the single commissioner noted that it is unlawful for a person, without a permit, to keep a place where alcoholic beverages are sold, furnished, or given away pursuant to R.C. 4399.09 and R.C. 4301.58(B). *In re Durham*, V87-72831tc (5-20-88). In *Durham*, the victim's claim was denied pursuant to R.C. 2743.60(F) because the victim was operating an illegal "after-hours" establishment when he was shot and killed. The present case is distinguishable from *Durham* because Mr. Martin was not actually operating an "after-hours" establishment.

According to R.C. 2743.51(M) and current case law, there are three elements that must be proven before a prima facie case of contributory misconduct can be established pursuant to R.C. 2743.60(F), which the majority accurately cites. However before an award of reparations can be denied as a result of contributory misconduct pursuant to R.C. 2743.60(F), there must be a showing of substantial contributory misconduct. *In re Spaulding* (1991), 63 Ohio Misc.2d 39.

Since the panel's decision in *In re Terry*, V91-96073tc (9-30-94), which held that any contributory misconduct that approaches the fifty percent mark is substantial and is a complete bar to recovery, most claims involving drug deals, prostitution, solicitation, etc. have been completely denied. However, I note the holding in *In re McKendry*, V91-26415jud (1-26-94) and *In re Simpson*, V93-36752jud (2-14-96). In *Simpson*, a judge upheld the panel's 60 percent reduction in an award despite finding that the applicant engaged in substantial contributory misconduct. In *Simpson*, the judge stated that the panel of commissioners has the authority to deny or reduce an award pursuant to R.C. 2743.60(F) and that the panel's decision will be supported by the court unless the

decision is determined to be unreasonable or arbitrary. The court in *Simpson* referencing *McKendry* further stated that it recognized the difficulty of these particular cases and stated that it is impossible to specifically define "substantial." In *Simpson*, the court further related that the court will evaluate these claims on a case-by-case basis and specifically stated that R.C. 2315.19 (contributory negligence or implied assumption of the risk) is not the applicable standard to apply to victims of crime cases. The holding in *Simpson* essentially overturned the holding in *Terry*, because the court allowed the 60 percent reduction in an award even though the victim's misconduct was found to have surpassed the 50 percent mark. Pursuant to *Simpson*, a substantial contributory misconduct finding, regardless of the type of misconduct, does not warrant an automatic denial of an award.

In evaluating the existence and level of contributory misconduct under R.C. 2743.60(F) for this case, I consider the following nonexclusive list of considerations:³

1. Age and corresponding mental capacity of the victim/applicant;
2. The victim/applicant's familiarity/relationship with the offender;
3. The victim/applicant's mens rea;
4. Whether the victim/applicant suffered from diminished capacity due to intoxication or other mitigating factor;
5. Whether the victim/applicant suffered a disproportionate level of harm compared to the victim/applicant's level of misconduct;

6. Whether the victim/applicant' s degree of misconduct was a de minimus or substantial violation of the law; and

7. Whether granting an award of reparations violates the public policy of the Victims of Crime Act. See *In Kempton*, V06-20640tc (4-2-07), 2007-Ohio-2929.

In this case, there was no evidence that the assailant and the victim knew one another. Prior to the incident, Mr. Martin had some friends over to his apartment to watch a football game. After the game ended at approximately 9:30 P.M., only Mr. Martin and his two friends remained in the apartment. Mr. Martin had retired to his bedroom when suddenly at approximately 12:30 A.M. the offender knocked on the victim's door. Collins, acting out of his own greed, gained entry into the residence by deceit, then, as accurately described in the majority opinion, ultimately forced two women to the floor, attempted to rob Mr. Martin, then shot and killed him.

Det. Landesburg opined that the robbery was not a random event because of the prospect of drugs and money being present in Mr. Martin's home. But there was no evidence presented regarding the offender's motivation and recollection of the incident. Further, there was no evidence that Mr. Collins would not have robbed anyone else in the neighborhood notwithstanding the means by which any prospective victim obtained his/her money.

³We note that review of the above listed consideration is not required for every R.C. 2743.60(F) case. The list is merely a guide when reviewing contributory misconduct cases.

I recognize that Det. Landesberg's testimony was used to support finding the elements of R.C. 2743.51(M); however, I am not convinced that it was or should have been foreseeable to Mr. Martin that after watching a football game with his friends he would be

murdered by a drug dealer merely because he operated a so-called "house joint." The criminal act of Mr. Collins was the direct and proximate cause of Mr. Martin's demise and not Mr. Martin's minor misconduct by comparison.

Mr. Martin was 69 years old when he was robbed and killed by the offender (now age 23). According to information obtained from the police, the victim and the offender were from the same neighborhood and the offender had been to the victim's apartment previously. Beyond the one visit to the victim's apartment, there is no other evidence to indicate the offender and victim had an established relationship.

Due to the offender's illegal and excessive use of force, Mr. Martin suffered a disproportionate level of harm compared to the level of his misconduct. Mr. Martin's degree of misconduct was minor, while the offender's conduct was significant and felonious in nature. Furthermore, to grant an award to the applicant would not violate the program's public policy, because by reducing the award I acknowledge Mr. Martin's limited participation in the matter.

Therefore based upon the goal of the program, the facts and analysis of this case, and relevant case precedent, I find that the victim did not engage in substantial contributory misconduct and hence an award granted should be reduced by 10 percent.

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LLOYD PIERRE-LOUIS
Commissioner

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ANNABELLE M. GIVENS	:	Commissioners:
	:	Gregory P. Barwell, Presiding
	:	Randi Ostry LeHoty
Applicant	:	<u>ORDER OF A THREE-</u>
_____	:	<u>COMMISSIONER PANEL</u>
_____	:	
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IT IS THEREFORE ORDERED THAT

- 1) The November 1, 2006 decision of the Attorney General is AFFIRMED;
- 2) This claim is DENIED and judgment rendered for the state of Ohio;
- 3) Costs are assumed by the court of claims victims of crime fund.

GREGORY P. BARWELL
Presiding Commissioner

RANDI OSTRY LE HOTY
Commissioner

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ID #\3-dld-tad-041707

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

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