[Cite as *In re H.D.*, 2009-Ohio-7209.]

Court of Claims of Ohio
Victims of Crime Division

The Ohio Judicial Center

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IN RE: H. D.

JEFFERY DUNN

and

MELINDA DUNN

Applicants

Case No. V2008-30383

Commissioners:
Karl C. Kerschner, Presiding
Thomas H. Bainbridge
Lloyd Pierre-Louis

OPINION OF A THREE COMMISSIONER PANEL

{¶1}The appeal before this panel involves the alleged sexual imposition upon H.D. by her teacher. We compliment counsel for a superb presentation in a case which involved difficult and arduous issues. We also wish to emphasize to the parties that the decision we have rendered was made with thoughtful deliberation, carefully weighing each piece of evidence whether it be documentary or testimonial before reaching a conclusion which fairly and justly applies R.C. 2743.51(C)(1) to the facts of this case. Ultimately, this panel has determined that the applicants have failed to prove by a preponderance of the evidence that criminally injurious conduct occurred. For this reason we affirm the May 19, 2008 decision of the Attorney General.

{¶2}While we are cognizant that two issues were raised on appeal, since we have determined criminally injurious conduct was not proven, the issue concerning tuition reimbursement for the Columbus School for Girls will not be addressed. This opinion will deal with only the issues surrounding the alleged criminally injurious

conduct. Finally, while both Claim Nos. V2008-30073 and V2008-30383 were litigated at this hearing, this opinion will only address Claim No. V2008-30383. Claim No. V2008-30073 has been addressed by a separate order of this panel.

I. Procedural History

{¶3}On August 13, 2007, the applicants, Jeffery and Melinda Dunn filed a compensation application on behalf of their daughter, H.D., as a result of an alleged sexual assault by a teacher at Reynoldsburg High School. On April 9, 2008, the Attorney General issued a finding of fact and decision denying the applicants' claim based upon the finding that the applicants failed to prove by a preponderance of the evidence that criminally injurious conduct occurred. On April 21, 2008, the applicants submitted a request for reconsideration. On May 19, 2008, the Attorney General rendered a Final Decision determining that there was no reason to modify the initial decision. On April 23, 2008, the applicants filed a notice of appeal from the Final Decision of the Attorney General. A hearing was held before this panel of three commissioners on October 8, 2008 at 11:15 A.M.

II. Hearing

{¶4}The applicants, Jeffery and Melinda Dunn, the alleged victim, H.D., and their attorneys, Kimberley Wells and Megan Hanke, attended the hearing, while the Attorney General's office was represented by Assistant Attorneys General Amy O'Grady and Heidi James. Initially, Attorney Wells moved that the hearing be closed to the public. It is the long-standing policy of this panel to conduct open and public hearings unless specific circumstances or authority dictate a contrary result. Since no persuasive authority was introduced, the applicants' motion was denied. Accordingly, the hearing proceeded on its merits.

III. Applicants' Position

{¶5}The applicants assert that their daughter H.D. was a victim of criminally injurious conduct and during the hearing specifically characterized the incident at issue as follows: "the offender was standing behind H.D.'s chair, reached with his right hand and arm underneath her right arm and toward the paper in front of her and put his hand on both of her breasts. The offender then took his hand away and placed it on the paper on her desk and pointed to a problem asking her if it was correct." The applicants relayed that the offender, a high school teacher, had previously been friendly with H.D. and expressed his preference for her to wear a "tight fitting shirt." The applicants contend that H.D.'s description of the events has been "consistent" and "credible." The applicants allege that the touching incident was corroborated by a fellow classmate. Finally, applicants claim H.D.'s heightened anxiety was consistent with that of a victim of sexual abuse. Applicants assert the conduct in question, an improper touching, violates R.C. 2907.06, which conduct is punishable by fine and imprisonment. Therefore, the applicants argue that they have established by a preponderance of the evidence that H.D. was a victim of criminally injurious conduct.

IV. Attorney General's Position

{¶6}The Attorney General maintains that the applicants have failed to establish by a preponderance of the evidence that H.D. was a victim of criminally injurious conduct. The Attorney General's investigation revealed that the Reynoldsburg Police Department examined the allegations and concluded that there was no probable cause to arrest or prosecute the teacher. Furthermore, the Attorney General argues that the facts of this incident do not establish a violation as defined by R.C. 2907.01(B) and further assert that an individual cannot be convicted of sexual imposition solely on the testimony of the victim without other supporting evidence. R.C. 2907.06(B).

V. Witness Testimony and Argument

{¶7}Attorney Wells called the applicant, Melinda Dunn, to testify. Ms. Dunn relayed that she learned about the inappropriate touching incident at school when a church youth counselor had contacted the family in approximately the third week of November, 2005, on a Sunday evening. Ms. Dunn stated the next day she and her husband, Jeffery, made an appointment with the principal of Reynoldsburg High School to discuss the issue. The following day the Reynoldsburg Police Department was contacted and an investigation was commenced. Ms. Dunn related that no criminal charges were pressed as a result of the incident. To the best of her knowledge the only outcome of the incident was the teacher involved was required to take professional development classes. Subsequently, H.D. started having problems in school, along with anxiety and panic attacks which led to periods of absenteeism. To help resolve these problems, H.D. began seeing Jean Decker for counseling. After an apparent period of recovery in the summer, H.D. developed serious problems with cutting herself and suicidal ideation which resulted in inpatient treatment at the Ohio State University Hospital. After release from the hospital, H.D. started Eye Movement Desensitization and Reprocessing ("EMDR") with Marcy Essig. Ms. Dunn contended that all of H.D.'s emotional problems stemmed from the sexual contact with the teacher which in turn triggered memories of sexual abuse perpetrated by H.D.'s biological father.

{¶8}Attorney O'Grady cross-examined Ms. Dunn, however no questions were directed toward the issue of criminally injurious conduct. Commissioner Kerschner clarified with Ms. Dunn that only one alleged touching incident occurred between H.D. and the teacher, in a math class during the school day with upwards of twenty students present. Whereupon the testimony of the applicant Melinda Dunn was concluded.

{¶9}Attorney Wells next called H.D. to the witness stand. H.D. relayed prior to the incident she had had conversations with the teacher concerning Disney character t-shirts that she wore, and the teacher commented that he enjoyed when she wore tight

fitting t-shirts. H.D. testified concerning the specific details of the incident. The school was informed about the incident when H.D.'s friend told her mother who in turn contacted the school. After the school found out about the incident, H.D. was called into the assistant principal's office, where the incident was discussed and reenacted a number of times. The next day, H.D. relayed that the assistant principal directed her to go to her math classroom where she met her math teacher. She stated that the teacher conveyed that he had no recollection of any inappropriate touching. Finally, H.D. concluded her testimony with extensive testimony concerning her emotional problems resulting in hospitalizations, counseling, and transfer to different education facilities culminating with her enrollment in Columbus School for Girls.

{¶10}The Assistant Attorney General did not cross-examine this witness. Whereupon the testimony of H.D. was concluded.

{¶11}Attorney Wells then called Chris Nemeth to testify. Mr. Nemeth relayed that he was H.D.'s therapist in July 2007. He treated her for post traumatic stress disorder in conjunction with the sexual abuse suffered from her biological father and the school incident.

{¶12}While Assistant Attorney General Amy O'Grady cross-examined Mr. Nemeth her questions did not touch on the issue of criminally injurious conduct. Commissioner Pierre-Louis asked whether any independent investigation was done to determine if the underlying incident in the case, the inappropriate touching by a teacher, actually happened, and in response Mr. Nemeth related it was not a therapist's job or responsibility to be a fact finder but merely treat the condition as it was presented to him and be supportive.

{¶13}At the commencement of the state's case Attorney James called Marcy Essig to testify. Ms. Essig testified that she was H.D.'s therapist for approximately four months. She treated H.D. for crisis stabilization, suicidal ideation and acting out. Ms. Essig stated 75 percent of her treatment involved the sexual abuse committed by H.D.'s biological father.

{¶14}Attorney Wells cross-examined Ms. Essig. Ms. Essig related she was told about the school incident but it was not discussed during therapy sessions. While she was in contact with a Carol Jacob at Reynoldsburg High School concerning the incident, the incident was not discussed in relation to the therapy she provided. The major impetus causing H.D.'s emotional problems was the sexual abuse perpetrated by her biological father. Whereupon the testimony of Marcy Essig was concluded.

{¶15}Attorney O'Grady next called Cheryl Maimona, an attorney who was retained by Reynoldsburg High School to do an investigation concerning the incident with H.D. and the teacher. Ms. Maimona conducted an investigation which included interviews of H.D., the teacher, and approximately 17-20 individuals. Ms. Maimona recalled that one student conveyed that she saw some touching but the student's observation of the incident was not consistent with H.D.'s description. The student witness expressed the impression that the touch was accidental and the teacher did not intentionally touch H.D. Ms. Maimona was aware that the Reynoldsburg Police Department conducted an independent investigation but presented no criminal charges. The investigation conduct by Ms. Maimona did not result in any teacher discipline.

{¶16}Attorney Wells cross-examined the witness. Ms. Maimona stated that her investigation commenced on approximately November 15. Ms. Maimona confirmed that H.D. described to her how the teacher expressed his approval of H.D. wearing tight fitting t-shirts. Ms. Maimona related that when she interviewed the teacher he denied anything had occurred. Ms. Maimona conceded that her investigation revealed that it was possible or probable that touching occurred but that if a touching did occur, the investigation did not reveal any evidence that the touching was intentional.

{¶17}Commissioner Pierre-Louis had Ms. Maimona clarify that she was general counsel for Reynoldsburg Public Schools and her role was to determine if a disciplinary situation existed concerning an employee of the Reynoldsburg Public Schools.

Furthermore, if a civil suit would be filed against the Reynoldsburg Public Schools, her law firm in conjunction with an insurance carrier would represent the school district. Whereupon the testimony of Cheryl Maimona was concluded.

{¶18}Attorney O'Grady then called Carol Jacob, a social worker with Reynoldsburg High School, to the witness stand. Ms. Jacob testified that she offered support to H.D. after the alleged incident with the teacher. However, Ms. Jacob had no personal knowledge of the incident. Attorney Wells conducted cross-examination but it did not concern the occurrence of the incident. Whereupon the testimony of Carol Jacobs was concluded.

{¶19}Attorney O'Grady called Cathy Bregar, director of student services at Reynoldsburg High School to testify. Ms. Bregar did not testify concerning the occurrence of the alleged incident involving H.D. and the teacher. Attorney Wells conducted cross-examination but it did not concern the alleged occurrence of the inappropriate touching. Whereupon the testimony of Ms. Bregar was concluded and the hearing was adjourned.

{¶20}On October 9, 2008, the hearing was reconvened at 10:40 A.M. The applicant, Melinda Dunn and H.D. appeared at the hearing represented by Attorneys Wells and Hanke, while Attorneys O'Grady and James appeared on behalf of the Attorney General's office. The hearing was held for the sole purpose of closing arguments.

{¶21}Ms. Wells concluded that each and every element of R.C. 2907.06 has been established by a preponderance of evidence and accordingly, criminally injurious conduct has been proven.

{¶22}In her closing, Assistant Attorney General O'Grady presented the closing argument for the Attorney General's office. Ms. O'Grady directed the panel's attention to *State v. Cobb* (1991), 81 Ohio App. 3d 179, 610 N.E. 2d 1009, in evaluating the issue of sexual contact. The Ninth District Court of Appeals in *Cobb* stated the trier of fact

should consider the type, nature and circumstances of the contact, along with the personality of the defendant. Ms. O'Grady asserts the evidence reveals that the only witness to the event did not have a good view of the scene, was across the classroom, and believed the touching was unintentional. Ms. O'Grady argues if a touching is unintentional the element of sexual arousal or gratification cannot be satisfied. Furthermore, there is no corroboration that the incident occurred in the way H.D. characterized it. Finally, there was no criminal prosecution or teacher discipline in this case. Consequently the Attorney General's Final Decision should be affirmed and the claim be denied for failure to prove criminally injurious conduct occurred.

VI. Controlling Law and Precedent

{¶23}R.C. 2743.51(C)(1) in pertinent part states:

"(C) 'Criminally injurious conduct' means one of the following:

"(1) For the purposes of any person described in division (A)(1) of this section, any conduct that occurs or is attempted in this state; poses a substantial threat of personal injury or death; and is punishable by fine, imprisonment, or death, or would be so punishable but for the fact that the person engaging in the conduct lacked capacity to commit the crime under the laws of this state."

{¶24}R.C. 2907.01(B) states:

"(B) 'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶25}R.C. 2907.06(A)(4) and (B) state:

"(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

"(4) The other person, or one of the other persons, is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of such person, and the offender is at least eighteen years of age and four or more years older than such other person.

{¶26} "(B) No person shall be convicted of a violation of this section solely upon the victim's testimony unsupported by other evidence."

{¶27}R.C. 2901.21(B) in pertinent part states:

"(B) When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

{¶28}Black's Law Dictionary Sixth Edition (1990) defines preponderance of the evidence as: "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not."

{¶29}Black's Law Dictionary Sixth Edition (1990) defines burden of proof as: "the necessity or duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a cause. The obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court."

{¶30} "[T]he proper method is to permit the trier of fact to infer from the evidence presented at trial whether the purpose of the defendant was sexual arousal or gratification by his contact with those areas of the body described in R.C. 2907.01. In

making its decision the trier of fact may consider the type, nature and circumstances of the contact, along with the personality of the defendant. From these facts the trier of facts may infer what the defendant's motivation was in making the physical contact with the victim. If the trier of fact determines, that the defendant was motivated by desires of sexual arousal or gratification, and that the contact occurred, then the trier of fact may conclude that the object of the defendant's motivation was achieved." *State v. Cobb* (1991), 81 Ohio App. 3d 179, 185, 610 N.E. 2d 1009.

{¶31} "The corroborating evidence necessary to satisfy R.C. 2907.06(B) need not be independently sufficient to convict the accused, and it need not go to every essential element of the crime charged. Slight circumstances or evidence which tends to support the victim's testimony is satisfactory. The corroboration requirement of R.C. 2907.06(B) is a threshold inquiry of legal sufficiency to be determined by the trial judge, not a question of proof, which is the province of the factfinder. See *State v. Robinson*, 83 Ohio St. at 143, 93 N.E. at 625." *State v. Economo*, 76 Ohio St. 3d 56, 60, 1996-Ohio-426, 666 N.E. 2d 225.

{¶32}"[T]he phrase "sexual contact," means any nonconsensual physical touching, even through clothing, of the body of another in an area or of a body part that a reasonable person, or the offender, or the victim, would perceive as sexually stimulating or gratifying to either the offender or the victim, for the purpose of sexually stimulating or gratifying either the offender or the victim." *State v. Ackley* 120 Ohio Misc. 2d 60, 2002-Ohio-6002, 778 N.E. 2d 676 ¶ 23.

VII. Panel's Determination

{¶33}After careful consideration of all the evidence contained in the claim file, weighing the probative value of all the testimony presented at the hearing, and after diligent deliberation we hold the applicants have failed to prove by a preponderance of the evidence that H.D. was a victim of criminally injurious conduct as defined by R.C. 2743.51(C)(1). Here, the evidence quite simply does not support a finding that criminally injurious conduct has been proven. It must be noted that after investigation

by both the Reynoldsburg Police Department and the Reynoldsburg School District no criminal charges or disciplinary action against the teacher. We also do not give much weight to the teacher's prior conversations with H.D., which we find to be inappropriate but not adequate to demonstrate corroboration of an unlawful touching. The student witnesses' statements were not compelling and, when analyzed, raised substantial doubt about H.D.'s assertion that the touching was intentional. Furthermore, H.D. testified that when the teacher was confronted with her allegation, he expressly asserted that nothing inappropriate occurred. This panel determines the applicants have not met their burden in this matter. Therefore, the Final Decision of the Attorney General is affirmed.

KARL C. KERSCHNER
Presiding Commissioner

THOMAS H. BAINBRIDGE
Commissioner

LLOYD PIERRE-LOUIS
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ORDER OF A THREE-COMMISSIONER PANEL

IT IS THEREFORE ORDERED THAT

{¶34}1) The applicants' motion to close the courtroom is DENIED;

{¶35}2) The May 19, 2008 decision of the Attorney General is AFFIRMED;

{¶36}3) This claim is DENIED and judgment is rendered for the state of Ohio;

{¶37}4) Costs are assumed by the court of claims victims of crime fund.

KARL C. KERSCHNER
Presiding Commissioner

THOMAS H. BAINBRIDGE
Commissioner

LLOYD PIERRE-LOUIS
Commissioner

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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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