

IN THE COURT OF CLAIMS OF OHIO

VICTIMS OF CRIME DIVISION

IN RE: LEVI D. SNOWDEN : Case No. V2004-60628
LEVI D. SNOWDEN : OPINION OF A THREE-
Applicant : COMMISSIONER PANEL

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{¶ 1} The applicant filed a supplemental compensation application seeking reimbursement of expenses incurred with respect to an April 4, 2002 assault. The applicant contends he was assaulted by James Fisher while vacationing on Spring Break at the Ocean Villa Motel in Panama City, Florida. On April 12, 2004, the Attorney General denied the applicant's claim pursuant to R.C. 2743.60(F) contending that the victim engaged in substantial contributory misconduct since he initiated the assault on James Fisher. The Attorney General also denied the claim pursuant to R.C. 2743.60(C) alleging that the victim failed to cooperate with law enforcement officials during the investigation of the incident. On April 19, 2004, the applicant filed a request for reconsideration. On June 17, 2004, the Attorney General denied the applicant's claim once again. On June 22, 2004, the applicant filed a notice of appeal to the Attorney General's June 17, 2004 Final Decision.

Hence, this matter came to be heard before this panel of three commissioners on November 4, 2004 at 11:00 A.M.

{¶ 2} The applicant, applicant's counsel, and an Assistant Attorney General attended the hearing and presented testimony, an exhibit, and oral argument for this panel's consideration. Steven Michael Asher, a friend of the victim, testified that he and a group of his friends had been vacationing at their motel approximately 4-5 days, without incident, prior to the assault on the victim. Mr. Asher stated that on the night in question, he and the applicant, after having a few alcoholic beverages, decided to return to their motel and engage in one of their customary forms of entertainment (wrestling) on the beach, since they were unable to find any wrestling programs on television that evening. Mr. Asher contended that shortly thereafter motel security appeared and separated them. Mr. Asher asserted that he and Levi attempted to explain to the guard that they were friends, despite the scratch above the applicant's eye, and had been merely horseplaying. Mr. Asher indicated that eventually he was sent to his room (#122) by the security guard and was told to pack his belongings because he and his friends were being evicted from the motel. While packing, Mr. Asher stated that he heard screams and looked over the balcony to see a man strike Levi with an asp, while motel security watched. Mr. Asher acknowledged that he did not see what occurred prior

to the assault on Levi. Mr. Asher also testified that the assailant then fled, while Levi lay in a pool of blood. Mr. Asher stated that the police and an ambulance were contacted and that Levi was transported to the hospital.

{¶ 3} James Derrick Bolen, a friend of the victim, testified that he and his friends had been at their motel approximately 5-6 days, without incident, prior to the assault. Mr. Bolen stated that on the evening of the incident he was in his motel room (#122) when he heard a commotion and looked over the balcony to see a man strike Levi three times. Mr. Bolen testified that Levi was on the ground while the assailant was on his knees hovering over Levi striking him. Mr. Bolen stated that there was a lot of blood and that he had run downstairs to assist his friend, while the security guard just stood there watching Levi being beaten.

{¶ 4} Levi Snowden testified that prior to the assault he and his friends had been staying at the motel without incident. Mr. Snowden advised the panel that he had been drinking earlier that evening and had decided along with Mr. Asher to entertain themselves by wrestling on the beach. Mr. Snowden indicated that he remembered being beaten, however he was unable to recall all of the details of the assault due to the severe injuries he sustained. Mr. Snowden testified that he had sustained a concussion and bruises and that the emergency room physician had informed him that if he had been struck once more he would have died.

{¶ 5} Applicant's counsel stated that the applicant's claim should be allowed based upon the testimony presented. Counsel stated that Mr. Bolen testified that he saw the assailant hovering over and striking the applicant while the security guard watched. Counsel asserted that this incident should not have escalated to the level it did had Ricky Sewell and James Fisher collaboratively subdued the applicant, if such restraint was indeed needed. Counsel argued that the severity of the applicant's injuries clearly indicates that James Fisher exercised excessive force against the applicant. Counsel also noted that the incident smells of foul play based upon Mr. Fisher's return to the scene wearing different clothing.

{¶ 6} Furthermore, counsel argued that the applicant did not fail to cooperate with law enforcement in the investigation and prosecution of James Fisher. Counsel contended the problem between the applicant and the police was purely a matter of poor communication. Counsel noted that the applicant had provided a statement to the police and had return to Ohio the next day, but was never contacted any further by the Panama City Beach Police Department with respect to the incident. Lastly, counsel moved to introduce applicant's Exhibit 1, which are photographs of the applicant's injuries.

{¶ 7} The Assistant Attorney General maintained that the applicant's claim should be denied pursuant to R.C. 2743.60(F) since the applicant engaged in

substantial contributory misconduct. The Assistant Attorney General stated that none of the applicant's witnesses could testify concerning what had transpired prior to them witnessing James Fisher strike the applicant. The Assistant Attorney General argued that there is ample evidence, which is contained in the police statements, that Levi Snowden engaged in substantial contributory misconduct. The Assistant Attorney General asserted that the applicant's misconduct of: 1) underage drinking, 2) fighting with Mr. Asher, and 3) aggressive behavior toward James Fisher contributed to his injuries. The Attorney General also asserted that the applicant had failed to fully cooperate with law enforcement officials during the investigation of the assault, since the victim never returned any of the detectives telephone calls nor did Mr. Snowden pursue any charges against James Fisher.

{¶ 8} According to Officer Land's police report, when he arrived at the scene he was told by Ricky Sewell, Ocean Villa Motel security, that someone had reported that two individuals were Case No. fighting on the property.¹ Officer Land indicated that he observed the handcuffed victim bleeding from his head and face. Officer Land stated that Ricky Sewell informed him that the victim was not

¹ The case file contains sworn (although not signed) typed statements from various witnesses to the assault, which are summarized and contained within this decision.

under arrest, but was in custody for his safety. Officer Land also noted that he spoke with Mr. Black, also a tenant of room #122, who informed him that he saw James Fisher strike the applicant several times with a night stick while Ricky Sewell watched.

{¶ 9} On April 5, 2002, Ryan Black made a sworn typed interview statement with police concerning the incident. Mr. Black stated that he was in his room (#122) when Mike Asher announced that he and Levi had been in a fight and that they (their group) were being evicted from the motel. Mr. Black indicated that he then heard a commotion outside and ran to the balcony where he saw a man beating Levi with a baton. Mr. Black stated that he ran downstairs to Levi and the assailant walked off, but returned wearing a different shirt when the police arrived at the scene. Mr. Black indicated that James Fisher stated that Levi punched him in the face and, therefore he had to hit him. Mr. Black noted that Levi was pretty inebriated.

{¶ 10} On April 5, 2002, Erin Hounshell provided a sworn typed interview statement to the police in relation to the incident. Ms. Hounshell stated that she was in her room (#122) when Mike Asher arrived and informed the group that he and Levi had gotten into it on the beach and now they were being evicted from the room. Ms. Hounshell indicated that she had just begun to cry when she heard

screams. Ms. Hounshell stated that she looked over the balcony and saw Levi being struck by a man with a baton pole. Ms. Hounshell indicated that she yelled for the security officer to intervene, however no one did anything to stop the assault. Ms. Hounshell stated that the assailant stopped and fled when her friends ran downstairs, however the assailant returned when the police arrived.

{¶ 11} On April 5, 2002, Derrick James Bolen made a sworn typed interview statement with the police with respect to the incident. Mr. Bolen stated that he was in the room (#122) watching television when he heard a commotion outside. Mr. Bolen indicated that he went downstairs and saw Levi being beaten by a man with a big metal rod, but shortly thereafter the assailant fled. Mr. Bolen stated that he was not sure what caused the assault, but he was told by Mr. Asher that he and Levi had been playing around on the beach wrestling prior to the incident.

{¶ 12} On April 5, 2002, Ricky Sewell submitted a sworn typed interview statement to the police in relation to the incident. Mr. Sewell stated that he was working security the night of April 4, 2002 when someone reported a fight on the beach. Mr. Sewell indicated that he saw the victim and Mr. Asher fighting and that the applicant was covered in blood. Mr. Sewell stated that he separated the two individuals and asked James Fisher, who had just stepped outside, to watch the applicant while he consulted with Mike Alvis, the motel owner, about evicting the

tenants of room #122. Mr. Sewell mentioned that the two individuals were part of a group that had been fighting the prior night. Mr. Sewell stated that he also went to room #122 to tell the other tenants about the eviction when someone yelled about a fight. Mr. Sewell indicated that he looked over the railing and saw James Fisher and the applicant fighting against an automobile, while Mr. Fisher held his asp. However, Mr. Sewell noted that he at no time witnessed Mr. Fisher strike the victim. Mr. Sewell stated that he ran downstairs, separated the two individuals, took the asp from Mr. Fisher, handcuffed the belligerent applicant, and contacted the police. Mr. Sewell noted that the victim was unable to stand up because he was so intoxicated.

{¶ 13} On April 5, 2002, Steven Michael Asher made a sworn typed interview statement to the police in relation to the incident. Mr. Asher stated that he and Levi were horseplaying when hotel security intervened. Mr. Asher indicated that the security guard did not believe they had been playing and separated them. Mr. Asher noted that Levi had only sustained a small scratch above his eye when they were wrestling. Mr. Asher stated that a man in a grey sweatshirt was also present with the security guard and had sat with them while they talked about the incident. Mr. Asher indicated that he was permitted to return to his room to pack his belongings because they were being evicted from the hotel.

Mr. Asher stated that he heard but did not witness the assault on Levi, since he was told by the security guard to continue packing his belongings. Mr. Asher indicated that he was later informed about the assault from his friends.

{¶ 14} On April 5, 2002, James Fisher provided a sworn typed interview statement to the police concerning the incident. Mr. Fisher stated that he saw Ricky Sewell with two clients that had been in a fight. Mr. Fisher noted that Levi was bleeding from his head, eye, mouth, and hands. Mr. Fisher stated that Mr. Sewell had asked him to watch Levi while he consulted with the motel owner about evicting the tenants. Mr. Fisher indicated that while Mr. Sewell was away with Mr. Asher, the applicant proceeded to assault him. Mr. Fisher stated that he was struck in the left eye and had sustained a broken rib as a result of the applicant's conduct. Mr. Fisher indicated, that in self defense, he struck the applicant with the baton on the leg and across the head. Mr. Fisher stated that he screamed for help and that Mr. Sewell arrived, separated them, handcuffed Levi, and contacted the police. Mr. Fisher noted that Levi was very, very intoxicated.

{¶ 15} On April 5, 2002, Levi Snowden made a sworn typed interview statement to the police about the incident. Mr. Snowden stated that he and Mr. Asher were horseplaying when they were separated by security. Mr. Snowden

stated that he knows that he was assaulted, even though he can not recall all the details of the assault, due to the injuries he sustained.

{¶ 16} R.C. 2743.51(M) states:

{¶ 17} "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.

{¶ 18} Former R.C. 2743.60(F) states:

{¶ 19} 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.

{¶ 20} From review of the file and with full and careful consideration given to all the evidence presented at the hearing, this panel makes the following determination. Clearly, 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(F). See In re Williams, V77-0739jud (3-26-79); and In re Brown, V78-3638jud (12-13-79). According to the definition of contributory misconduct there

are three elements that must be established before a *prima facie* case of contributory misconduct can be met: (1) conduct by the victim or the claimant; (2) conduct that is unlawful or intentionally tortious; and (3) that conduct must have a causal relationship to the criminally injurious conduct.

{¶ 21} We find that the Attorney General has failed to prove, by a preponderance of the evidence, that Levi Snowden engaged in contributory misconduct on April 4, 2002. This panel does not believe the applicant's underage drinking or horseplay with Mr. Asher contributed to the assault.

{¶ 22} We also do not believe that the applicant acted physically aggressive toward James Fisher to have contributed to the assault. Even after hearing testimony and the Assistant Attorney General's argument, we are still unable to determine what specific conduct the applicant may have engaged in that was unlawful or intentionally tortious that contributed to the assault.

{¶ 23} We also note that there is no evidence, outside of James Fisher's police statement, that the applicant assaulted Mr. Fisher.² Mr. Snowden was never arrested or charged with assault against Mr. Fisher nor is there any information that Mr. Fisher pursued charges against the applicant. More likely than not, we believe

² We note the probative value of testimony, since the Attorney General, counsel, and the panel is able to examine witnesses concerning their knowledge of the incident.

that James Fisher and Ricky Sewell attempted to cover-up their own misconduct in order to avoid criminal prosecution or civil liability.

{¶ 24} Moreover, we also find that the Attorney General has failed to prove, by a preponderance of the evidence, that the applicant did not fully cooperate with law enforcement authorities in the investigation and prosecution of James Fisher. Mr. Snowden testified that he was willing to pursue criminal charges against Mr. Fisher, however stated that he was never contacted by the police with respect to the case. In fact, it appears the Panama City Beach Police Department is slack about even contacting the Ohio Attorney General's Office. In the Attorney General's Supplemental Field Report dated April 7, 2004; it was noted that Detective Lindsey of the Panama City Beach Police Department never returned any of the Attorney General's telephone calls concerning the failure to cooperate issue, despite several left messages. Based upon the above facts and analysis, we therefore find the June 17, 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 consistent with the panel's findings.

CLARK B. WEAVER, SR.
Commissioner

KARL H. SCHNEIDER
Commissioner

THOMAS H. BAINBRIDGE
Commissioner

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IT IS THEREFORE ORDERED THAT

- 1) The June 17, 2004 decision of the Attorney General is REVERSED and judgment is rendered in favor of the applicant;
- 2) This claim is remanded to the Attorney General for economic loss calculations and decision consistent with the panel's findings;

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;

4) Costs are assumed by the court of claims victims of crime fund.

CLARK B. WEAVER, SR.
Commissioner

KARL H. SCHNEIDER
Commissioner

THOMAS H. BAINBRIDGE
Commissioner

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

Filed 12-29-2004

Jr. Vol. 2255, Pgs.185-186

To S.C. Reporter 1-31-2005