

[Cite as *In re Polk*, 2007-Ohio-4702.]

Court of Claims of Ohio Victims of Crime Division

The Ohio Judicial Center

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IN RE: CURTIS POLK, JR.

Case No. V2006-20968

CURTIS POLK, SR.

Commissioners:
Karl C. Kerschner, Presiding
Thomas H. Bainbridge
Tim McCormack

Applicant

ORDER OF A THREE-
COMMISSIONER PANEL

{¶1} Curtis Polk, Sr. (“applicant”) filed a reparations application seeking reimbursement of expenses incurred with respect to the January 4, 2005 murder of his son Curtis Polk, Jr. (“victim” or “decedent”). The offender turned himself into the police several days after the incident and was subsequently convicted of voluntary manslaughter and having a weapon under disability. The offender was sentenced to five years in prison. On January 4, 2006, the Attorney General denied the claim pursuant to R.C. 2743.60(F) contending that the victim was engaged in substantial contributory misconduct, an illegal drug transaction, when he was killed. On January 23, 2006, the applicant filed a request for reconsideration. On September 18, 2006, the

Attorney General denied the claim once again. On October 16, 2006, the applicant filed a notice of appeal to the Attorney General's September 18, 2006 Final Decision. At 11:00 A.M. on June 7, 2007, this matter was heard before this panel of three commissioners.

{¶2} The applicant's attorney and an Assistant Attorney General attended the hearing and presented testimony and oral argument for the panel's consideration. Detective Regis Holzworth ("Detective Holzworth") of the Steubenville Police Department testified that he investigated the victim's death. Detective Holzworth explained that during the course of the investigation, he learned from Jermaine Montgomery ("offender") that the offender attempted to purchase marijuana from the victim on January 4, 2005. However, an argument ensued over the price of the drugs and the illegal drug transaction was never consummated as a result. Detective Holzworth stated that, according to the offender, the victim's fellow gang members were present and threatened the offender to provide additional money for the illegal drug transaction. The offender was afraid and he ran home. However, the victim shortly thereafter followed the offender home where the argument concerning the illegal drug transaction continued. The victim (standing on the offender's front porch) brandished his gun at the offender (who was inside his house). The offender, in an attempt to defend himself, shot his gun first and killed the victim. Detective Holzworth stated that he sought additional information and firsthand accounts from other witnesses, to no avail.

{¶3} The applicant's attorney stated that the claim should be allowed based on the facts of this particular case. The applicant's attorney argued that there is

insufficient evidence to prove that the victim engaged in any contributory misconduct, which would warrant denying the claim. Applicant's counsel urged the panel to consider that: 1) no weapon was found on or around the victim's person after the shooting; 2) no illegal drug transaction was ever consummated; and 3) the offender is the state's only real informant as to what transpired.

{¶14} The Assistant Attorney General maintained, however, that the claim should be denied pursuant to R.C. 2743.60(F) based on the evidence and testimony presented and the information and documentation in the claim file. The Assistant Attorney General argued that the victim engaged in a continuing course of substantial contributory misconduct, including involvement in an illegal drug transaction, attempted drug purchase, and threatening the offender with force (by brandishing a gun) just prior to being murdered. The Assistant Attorney General further argued the victim had a long history of illegal conduct, including a lifestyle of gang affiliation and illegal drug activity. The Assistant Attorney General argued that case precedent requires that this claim be denied, based upon the victim's continuing course of unlawful conduct at the time of the criminally injurious conduct.

{¶15} From review of the file and with full and careful consideration given to all the information presented at the hearing, we find by a preponderance of the evidence that the victim had been engaged in substantial contributory misconduct at the time of the criminally injurious conduct.

{¶16} 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.

{¶7} Revised Code 2743.60(F) states in pertinent 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.

{¶8} With respect to the exclusionary criteria of R.C. 2743.60, the Attorney General bears the burden of proof by a preponderance of the evidence. *In re Williams*, V77-0739jud (3-26-79); and *In re Brown*, V78-3638jud (12-13-79). According to R.C. 2743.51(M) and relevant case law, there are three elements that must be established before a *prima facie* case of contributory misconduct can be met: (1) specific, unlawful or intentionally tortious conduct by the victim or applicant;¹ 2) that specific conduct must have a causal relationship to the criminally injurious conduct; and 3) the victim or applicant must have or should have reasonably foreseen the likelihood of the criminally injurious conduct occurring if he engaged in such conduct.²

{¶9} Moreover, in order for an award of reparations to be denied pursuant to R.C. 2743.60(F), the Attorney General must prove by a preponderance of the evidence that the victim's contributory misconduct was substantial in nature. See *In re Spaulding*

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

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

(1991), 63 Ohio Misc. 2d 39. Every allegation of contributory misconduct shall be examined on a case-by-case basis. See *In re McKendry*, V91-26415jud (1-26-94) and *In re Simpson*, V93-36752jud (2-14-96). Based upon the present facts and circumstances of this particular case, we find the victim's contributory misconduct at the time of the criminally injurious conduct was substantial in nature. We believe the victim's murder was the direct and proximate foreseeable result of his continuing course of substantial contributory misconduct, including involvement in an illegal drug transaction and contemporaneous brandishing a gun at the offender just prior to being killed. Based upon the foregoing, the Attorney General established by a preponderance of the evidence that the victim in this matter engaged in substantial contributory misconduct. Indeed, it would be contrary to the public policy underlying the Victims of Crime Act to reward this victim's illegal conduct with compensation from the reparations fund. Accordingly, the September 18, 2006 decision of the Attorney General shall be affirmed.

{¶10} IT IS THEREFORE ORDERED THAT

{¶11} 1) The September 18, 2006 decision of the Attorney General is AFFIRMED;

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

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

KARL C. KERSCHNER
Presiding Commissioner

THOMAS H. BAINBRIDGE
Commissioner

TIM MC CORMACK
Commissioner

ID #\12-dld-tad-061407

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

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