



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 27, 2024

VIA EMAIL AND FIRST CLASS MAIL

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Re: **Robert Vincent Reilly vs. David Comiske et al.**
Case No: CL-2023-0000968

Dear Counsel:

This matter came before the Court on October 11, 2023 for trial on Petitioner Robert Vincent Reilly's Motion for Aid and Direction to determine whether Respondent David Comiske is a "slayer" as defined in Virginia Code § 64.2-2500. At the conclusion of the trial, the Court took the matter under advisement. Since that time, the Court has had the opportunity to thoroughly review the pleadings in this case, the parties' written closing arguments, applicable Virginia law, and the trial transcript. During the trial, the Court observed witnesses and their demeanors and made determinations as to their credibility.

OPINION LETTER

The below recitation of the facts shall constitute the Court's findings of fact in this case. After considering the evidence and the applicable law, the Court is now prepared to rule.

I. Background

Respondent David Comiske is the only child of Christine Reilly. Mr. Comiske is purported to have been found not guilty by reason of insanity of his mother's murder.¹ Mr. Comiske has schizophrenia and experiences hallucinations. He is currently a residential patient of Northern Virginia Mental Health Institute.

Prior to her death, Ms. Reilly suffered a cognitive decline. She was no longer able to take care of her home or help Mr. Comiske refill his prescription medication. By the time of her death, the house was filled with garbage, cat urine and feces, and the utilities had been shut off. On or about April 3, 2021, Mr. Comiske believed he heard noises coming from inside the house and saw an intruder, "J.S." Mr. Comiske believed J.S. threatened to kill him and stated he hit and kicked J.S. Mr. Comiske then left the home and returned sometime later. Days later, Mr. Comiske found his mother lying on the ground, realizing he may have hurt her rather than J.S. After some time, Mr. Comiske threw Ms. Reilly's body and their cat out of a second-story window. Mr. Comiske left the house again and encountered a Virginia State Trooper. Based upon Mr. Comiske's statements to the State Trooper, law enforcement was sent to the Reilly home to investigate. Christine Reilly's body was found in the backyard. Mr. Comiske was escorted back to the residence and spoke with Senior Trooper Korson who testified to her interaction with Mr. Comiske at the scene.

Petitioner Robert Reilly is the administrator of Ms. Reilly's estate and is allegedly Ms. Reilly's estranged brother.² Mr. Reilly filed a Complaint for Aid and Direction on January 20, 2023. A one-day trial followed to determine whether Mr. Comiske can inherit his mother's estate or if he is barred from inheritance by Virginia's slayer statute.

Aside from the testimony of Mr. Comiske and Senior Trooper Korson, no other evidence was admitted at trial.

Whether a person who kills another can inherit from the decedent's estate is governed by Virginia Code § 64.2-2500 et seq. In the instant case, Mr. Comiske pleaded not guilty by reason of insanity. Virginia has not excluded insanity cases from the application of the Slayer statute. *Osman v. Osman*, 737 S.E.2d 876, 880-81 (Va. 2013).³

¹ Conclusive evidence of Mr. Comiske's conviction was not presented.

² Petitioner did not testify and there was no testimony about Petitioner's relationship with Ms. Reilly.

³ It is also notable, though not binding or pertinent to this Court's decision, that "[n]umerous courts have held that an insane person would *not* be precluded by a slayer statute from inheriting from his or her victim[.]" See *Armstrong v. Armstrong (In re Estate of Armstrong)*, 170 So. 3d 510, 515 (Miss. 2015). (citing cases from California, Florida, Indiana, Maryland, New Jersey, New York, North Carolina, Pennsylvania, South Dakota, Texas, and Vermont).

Here, the Court finds that the evidence was insufficient to show that Mr. Comiske is a slayer.

II. Summary of the Arguments

Through counsel, Mr. Reilly argued that there was substantial circumstantial evidence that Mr. Comiske committed second-degree murder. He argued there was no question that Mr. Comiske intended to kill the person in front of him and that a hallucination does not prevent Mr. Comiske from being a Slayer. Mr. Reilly's view was that Mr. Comiske's contradictory statements to police implied that Mr. Comiske may have known before the fact that he killed his mother and not just after the fact. Mr. Reilly argued that Mr. Comiske likely would have been found guilty of killing his mother except for his insanity defense, and as such it can be assumed that criminal intent was established. If there is criminal intent, there is certainly civil intent. Mr. Reilly asserted that once the requirements of § 64.2-2500 have been met, the burden shifts to the alleged slayer to show that the statute does not apply.

Through his counsel, Mr. Comiske argued that *Osman* is distinguishable. In *Osman*, the individual who killed his mother did so because of delusions, but he nonetheless believed he was killing his mother. Mr. Comiske distinguished another case where the court found intent where a mentally ill insured believed God commanded him to shoot his friend. *Johnson v. Insurance Co. of North America*, 232 Va. 340, 343 (1986) (analyzing the implications of a not guilty by reason of insanity verdict in another context). Mr. Comiske argued that *Osman* and *Johnson* are distinct from the facts here because Mr. Comiske intended to attack J.S. rather than his mother.⁴

The Court was tasked with contending with the arguments of counsel, the applicable law, and the evidence presented to determine whether Mr. Comiske is a slayer.

III. Legal Analysis

A. Virginia Code § 64.2-2500 as applied in *Osman*.

Osman v. Osman lays the framework for the application of Virginia's slayer statute to a defendant who is found not guilty by reason of insanity. 737 S.E.2d at 877. Though the *Osman* defendant was not guilty by reason of insanity, the court still found him to be a slayer because he intended to kill his mother by strangling her and hitting her head on the ground until she died. *Id.* at 878; 880. In *Osman*, the facts were not in dispute. *Id.*

Virginia Code § 64.2-2500 defines a slayer as:

"[A]ny person (i) who is convicted of the murder or voluntary manslaughter of the decedent or, (ii) in the absence of such conviction, who is determined,

⁴ The Court did not find this argument persuasive because of transferred intent. See generally *Watson-Scott v. Commonwealth*, 298 Va. 251, 255-258 (2019) (affirming a second-degree murder conviction where the defendant's malice was not directed towards a particular person).

whether before or after his death, by a court of appropriate jurisdiction by a preponderance of the evidence to have committed one of the offenses listed in clause (i) resulting in the death of the decedent.”

Since part (i) does not apply here, the Court will analyze the facts under part (ii). The party seeking to establish that the defendant is a slayer bears the burden of proof. *Id.*

“Manslaughter . . . is the unlawful killing of another *without* malice.”⁵ Murder is the unlawful killing of another *with* malice.⁶ Malice means that a defendant committed a wrongful act willfully or purposefully.⁷ Murder requires mens rea, or criminal intent.⁸ A finding of not guilty by reason of insanity does not negate mens rea even though it excuses criminal sanctions.⁹ Civil intent “requires [only] that a person intended his actions; *there is no requirement that the person have knowledge that his actions were wrongful.*” *Osman*, 737 S.E.2d at 880 (emphasis added). As such, the distinction between murder and manslaughter becomes irrelevant as applied though *Osman*. The purported slayer need not have intended to kill. *Id.* at 880. To be a slayer under *Osman*, a defendant must have committed 1) an unlawful killing of another 2) while *intending the actions* that caused death. *Id.*

In the present case, the Court is faced with a unique challenge. On its face, Virginia Code § 64.2-2500 is ostensibly inconsistent with the reasoning in *Osman*. Under Virginia Code § 64.2-2500 et seq., a defendant found by a preponderance of the evidence to have committed murder or voluntary manslaughter is a slayer and cannot inherit from the decedent’s estate. *Id.* A plain reading of Virginia Code § 64.2-2500 changes nothing from the criminal to civil context except the evidentiary standard – from beyond a reasonable doubt to a preponderance of the evidence.¹⁰ The elements of murder and voluntary manslaughter remain the same. However, the *Osman* Court required only a civil intent, an intent to act, for Virginia’s Slayer statute to apply. 737 S.E.2d at 880. As such, the Court will analyze the facts here through *Osman*’s lens and must contend with a two-part question: 1) whether the petitioner met his evidentiary burden, and if so, 2) whether the defendant intended wrongful actions.

i. Evidence Presented

During the trial, Mr. Comiske testified that he has schizophrenia and that his cognitive decline coincided with his mother’s decline. (Tr. 20:2-6; 20:13-20). He reported that his mother was a heavy drinker. (Tr. 20:16-17). Mr. Comiske stopped bathing about nine months prior to his mother’s death. (Tr. 21:9-10). The home was filthy and filled with

⁵ *E.g.*, *Dandridge v. Commonwealth*, 72 Va. App. 669, 681 (2021) (citing *Canipe v. Commonwealth*, 25 Va. App. 629, 642 (1997)) (emphasis added).

⁶ *E.g.*, *Wood v. Commonwealth*, 140 Va. 491, 494 (1924) (emphasis added).

⁷ *See Avent v. Commonwealth*, 279 Va. 175, 202 (2010).

⁸ *Osman*, 737 S.E.2d at 879-80.

⁹ *See Johnson*, 232 Va. at 348.

¹⁰ *See Osman*, 737 S.E.2d at 883 (Powell, J. concurring).

trash, cat feces, cat urine, and the utilities were cut off. (Tr. 21:15-22; 42:4-10; 43:13-16). Mr. Comiske had not taken his medication for about a year and a half before his mother's death. (Tr. 41:17-20). Mr. Comiske's mother did not help him refill his medication despite him asking, and he did not know how to on his own. (Tr. 44:10-16; 46:5-6).

Mr. Comiske met J.S. at a school in Leesburg. (Tr. 34:18-22). They started out as friends and "drinking buddies." (Tr. 36:4-6). Their relationship started changing when Mr. Comiske and J.S. hit each other during a fight and J.S. threatened Mr. Comiske. (Tr. 37:1-2; 37:10-22). Mr. Comiske also witnessed J.S. being physically aggressive with J.S.'s grandmother. (Tr. 39:12-17).

Shortly before her death, Ms. Reilly sent Mr. Comiske out for wine. She was angry when Mr. Comiske dropped and broke the bottles. (Tr. 22:17-22; 23:1-14). Mr. Comiske said he was hallucinating when he dropped the wine. (Tr. 60:17-22). He testified that he saw "a guy from 'Charmed' [who] had a whole city inside of him. [The hallucination] was boiling in front of [him and] talking to [him while he] was getting pizza and wine at the 7-Eleven." (Tr. 61:3-6). When not on medication, Mr. Comiske had up to *fifteen* hallucinations per day. (Tr. 28:9-15). Mr. Comiske would see "evil clowns trying to [kill him,] witchcraft, [and other] random things." (Tr. 28:17-22). Mr. Comiske would sometimes try to hit his hallucinations. (Tr. 29:15-22).

Mr. Comiske testified that he heard noises in the house. (Tr. 49:4-6). He testified that when he went to investigate, he saw J.S., J.S. threatened him, and he kicked and hit J.S. (Tr. 24:4-9; 49:4-20). When counsel for Mr. Reilly's counsel questioned him, Mr. Comiske said he realized it was his mother, rather than J.S., a couple of hours later. (Tr. 24:10-12). But when questioned by his own counsel, Mr. Comiske said he did not see his mother for two days after the incident. (Tr. 50:12-14). Mr. Comiske dropped his mother and their cat out of the second story window two days later. (Tr. 24:16-21). Mr. Comiske believed his mother and cat were connected to witchcraft. (Tr. 53:14-17). Mr. Comiske denied telling the police that he did not remember killing his mother, and he denied telling the police that if he did kill her, he was glad she was gone. (Tr. 25:21-22, 26:1-9). Mr. Comiske testified that he thought "it might be real," so he wanted to plead insanity since he believed he would die in prison. (Tr. 56:9-12).

Senior Trooper Korson testified to her interaction with Mr. Comiske at the scene of the Reilly home. She said that during her homicide investigation, Mr. Comiske made several contradictory statements. He told her that he killed his mother and wanted to plead insanity, he said he did *not* kill his mother, and he stated that he killed her because she was gifted like he was. (Tr. 67:1-6).¹¹ Senior Trooper Korson recalled Mr. Comiske saying that he didn't kill his mother, but if he did, he is glad she is gone. (Tr. 68:3-8). In addition, Trooper Korsen advised that Mr. Comiske also made statements to the trooper

¹¹ Mr. Comiske explained that by gifted, he meant his mother was telepathic. (Tr. 83:15-17).

that he would say he did it if the trooper wanted him to. (Tr. 75:2-6). Mr. Comiske's inconsistency reflects his instability. No other witnesses testified.

ii. Mr. Comiske's Actions

Even if the Court found that Mr. Comiske hit his mother, the facts still would not demonstrate an intentional, unlawful act that caused death. Mr. Reilly asserted in his closing that Mr. Comiske physically assaulted his mother, "left her for dead," and later threw her out of the second story window. Assuming that is true, many questions are left unanswered. For instance, no evidence was presented as to the cause of death or time of death. Based on the evidence presented, the Court cannot conclude whether it was the actions inside the bedroom, the fall from the window, or something else that caused Ms. Reilly's death.

After being asked about the investigation, Senior Trooper Lara Korson testified that the *manner* of death was homicide. (Tr. 63:11-12). Trooper Korson testified that she attended the autopsy with medical examiner Dr. Posthumus. (Tr. 64:2). An objection was raised to counsel for Mr. Reilly's question about Dr. Posthumus' conclusions, and counsel for Mr. Reilly moved on from the question. (Tr. 64:3-20). Trooper Korson stated she only saw Ms. Reilly's body from a distance. (Tr. 65:7-11). Trooper Korson noted that she saw blood on the carpet inside the house and hair fibers on the windowsill and brick wall where Ms. Reilly fell. (Tr. 66:2-6). She did *not* testify as to the time of death or cause of death.

Mr. Comiske was asked if he thought J.S. was threatening him and he said yes. He was then asked if he hit and kicked "J.S.," to which he also responded "yes." Mr. Comiske testified that he later realized it was his mother, and he believed she was dead. (Tr. 51:16-22). He felt horrible; she was all he had. (Tr. 52:3-9). Mr. Comiske testified that he could not have financially survived without his mother's help. (Tr. 89:8-20).

Two days later, he dropped her from their second story window. (Tr. 24:4-21). Mr. Comiske first said he believed she was dead when he threw her out the window. (Tr. 51:21-22; 52:1-2). However, Mr. Comiske's beliefs are not reliable. Mr. Comiske also believed he was telepathic, that he saw a "boiling city" inside a character from the show Charmed, and that his mother's body and cat were connected to witchcraft necessitating that he throw them out the window. (Tr. 53:14-17; 61:3-6; 83:15-17). Moments after stating that he believed his mother was dead when he threw her, Mr. Comiske said he did not know whether his mother or his cat were alive. (Tr. 54:19-22).

The only evidence the Court has as to the cause of death is testimony from a defendant who experienced hallucinations and gave contradictory testimony,¹² and from

¹²See, e.g., Tr. 23:19-22; 24:1-3. Mr. Comiske said he was mad and then said he was not mad. See also Tr. 24:10-12; Tr. 50:12-14. During his examination by counsel for Mr. Reilly, Mr. Comiske said he realized he must have hit his mother, and not J.S., a couple of hours later. During examination by his own attorney, Mr. Comiske said he did not see his mother for two days after the incident.

a law enforcement officer who was not an expert and who only saw the body from a distance. The Court has no other evidence showing when or how Ms. Reilly died.

In addition, no evidence was introduced as to any sanity evaluation of Mr. Comiske at the time of the underlying prosecution and what, if any, statements Mr. Comiske made to the evaluator. No evidence was introduced as to what offense with which Mr. Comiske was charged, what offense to which he entered a plea of not guilty by reason of insanity, nor what, if any, plea colloquy the court engaged in with Mr. Comiske nor what findings the court made relative to any plea colloquy.

B. Osman v. Osman Facts are Distinct.

Osman does not bind this Court to find that Mr. Comiske is a slayer as defined in Virginia Code § 64.2-2500. The *Osman* majority analyzed the evidence and concluded defendant Osman intended to kill his mother because he repeatedly struck her head on the ground while strangling her. 737 S.E.2d at 879-880. In *Osman*, the facts were stipulated. *Id.* at 878-880. The defendant believed that his mother wanted to harm him. *Id.* Defendant Osman was mistaken, but he intended to attack his mother. *Id.* The *Osman* majority concluded that a person who has committed a justifiable homicide is not someone who committed a “wrong” as anticipated by Virginia’s slayer statute. *Id.* at 880-81. The question of whether a person who kills in self-defense is a slayer was left open. *Id.* at 881.

While Defendant Osman beat his mother’s head on the ground and strangled her, Mr. Comiske only remembers hitting “J.S.” on the head and then punching “J.S.” in the stomach a few times. In *Osman*, the facts were stipulated, whereas here, the evidence was primarily presented through a mentally ill man’s contradictory testimony. While defendant Osman incorrectly believed his mother wanted to harm him, Mr. Comiske thought he faced an *immediate* threat and was fighting an intruder who was not his mother and who had threatened to kill him. Mr. Comiske appears to have been acting, at least in part, in self-defense or in defense of his mother. The *Osman* Court expressly left open the question of justifiable homicide. *Id.* at 881. Mr. Comiske’s perceived threat by J.S. *could* make his homicide justifiable, though mistaken.¹³ The Court does not need to reach that conclusion, however, for the reasons explained below.¹⁴

¹³ See generally *Riddick v. Commonwealth*, 226 Va. 244, 249-250 (1983) (affirming a jury instruction and explaining that a defendant would not be legally responsible in the death of a bystander if acting in self-defense); *McGhee v. Commonwealth*, 219 Va. 560, 562 (1978) (explaining that self-defense is the law of necessity and that “[i]t is not essential to the right of self-defense that the danger [] exist.”).

¹⁴ The Legislature’s intent should also be noted. Virginia Code § 64.2-2511 which states: “[t]his chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of the Commonwealth that no person shall be allowed to profit by his own wrong, wherever committed.” Mr. Comiske’s world was a mix of reality and hallucinations, and the line between the two was not clear. Mr. Comiske lived in a home inundated with garbage and cat urine and feces, leaky pipes, and no utilities. (Tr. 21:15-22). Mr. Comiske’s troubles culminated when he perceived a physical threat from his perceived

IV. Conclusion

Mr. Reilly did not meet his evidentiary burden. He relied almost entirely on Mr. Comiske's testimony. Mr. Comiske's testimony, while not uncredible, included a lot of "I don't know" and inconsistencies. Mr. Comiske's memory of the attack is tainted by his hallucinations. Mr. Comiske testified to seeing J.S. standing over his mother and then threatening to kill him. He believes he hit J.S. in the face and the stomach. He later threw his mother's body out of the window along with the cat because of "witchcraft." Mr. Comiske described his mother as being upset with him over dropping her wine shortly before she died, thinking she might be telepathic like him, and seeing a "city boiling" inside of a character from Charmed. Mr. Comiske also described how he would sometimes try to hit hallucinations because he wanted to get them out of his face. The police officer who testified said that Mr. Comiske made inconsistent statements as to whether he "did it."

Mr. Reilly bears the burden of proof. The evidence presented is insufficient for the Court to find that Mr. Comiske is a slayer as defined by Virginia Code § 64.2-2500. The Court lacks evidence as to when and how Ms. Reilly died. Mr. Comiske explained what he thinks he did, but his testimony was contradictory and riddled with mentions of portals, witchcraft, and telepathy. As such, the Court is hesitant to accept Mr. Comiske's testimony of what he did or did not do because it is inherently unreliable. If other evidence exists which would corroborate the Petitioner's theory of the case and resolve the inconsistencies of Mr. Comiske's testimony, such evidence was not presented. There was no plea form, no plea colloquy, no body camera footage, no photos, no explanation of Mr. Comiske's contradictory statements, no psychological evaluation, no autopsy which would show the mechanism of death, and no expert testimony offered. Further, there was no request for the Court to take judicial notice of the fact that Mr. Comiske was found not guilty by reason of insanity of any offense. The evidence is therefore insufficient, and Mr. Reilly's burden was not met.

For the reasons stated above, the Court disagrees with both parties' reasoning. The Court does not find Mr. Comiske to be a slayer.

Sincerely,


The Honorable Christie A. Leary
Judge, 19th Judicial Circuit

Enclosure

enemy in his own home. A person who has committed a justifiable homicide is not someone who committed a "wrong" as anticipated by Virginia's slayer statute. *Osman*, 737 S.E.2d at 880-81.

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Robert Vincent Reilly)
Plaintiff,)
v.) Case No. CL-2023-0000968
David Comiske et al.)
Defendants.)

ORDER

THIS MATTER came before the Court on October 11, 2023 for a hearing to rule on Petitioner Robert Reilly's Complaint for Aid and Direction filed on January 20, 2023. At the hearing's conclusion, this Court took the matter under advisement. And, for the reasons set forth in the Court's March 27, 2024 Opinion Letter, incorporated herein by reference, it is hereby

ORDERED that the request to find that Defendant David Comiske is a slayer pursuant to Virginia Code § 64.2-2500 et seq. is DENIED.

ENTERED this 27 Day of March, 2024.


The Honorable Christie A Leary

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA