

**FILED**

AUG 15 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 29363-7-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER DEVLIN,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

---

APPELLANT'S ANSWER TO BRIEF OF *AMICUS CURIAE*  
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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A. ARGUMENT IN RESPONSE TO BRIEF OF AMICUS  
CURIAE WASHINGTON ASSOCIATION OF  
PROSECUTING ATTORNEYS

This Court invited the Washington Office of Public Defense and the Washington Association of Prosecuting Attorneys (WAPA) to submit amicus briefs. Pursuant to RAP 10.1(e), counsel submits the following answer the brief submitted by WAPA.

1. THIS COURT SHOULD STRIKE THOSE PORTIONS OF THE BRIEF THAT ARE BASED ON FACTS OUTSIDE THE RECORD.

In its brief WAPA asserts that Mr. Devlin waived his right to appeal by committing suicide. WAPA brief at 7. Thus, WAPA contends this Court must dismiss the appeal rather than permit substitution of a party.

First, WAPA provides no citation to the record to support its claim that Mr. Devlin committed suicide. See, Brief of WAPA at 3. WAPA's failing in this regard is easily explained by the fact that the record is devoid of any finding as to the cause of Mr. Devlin's death. Nonetheless, this Court cannot consider matters outside the record. State v. Tolias, 135 Wn.2d 133, 140-41, 954 P.2d 907 (1998). Thus, the Court should strike and disregard that portion of WAPA's brief which references the cause of death as well as that

portion of WAPA's brief contending the cause of death is determinative of the estate's ability to substitute in this matter.

Second, the commissioner's ruling permitting substitution of the personal representative of Mr. Devlin's estate, his sister Leslee Devlin, was entered on January 19, 2011. The State did not move to modify that ruling. The question of whether substitution is appropriate is not presently before this Court.

Further, WAPA's proposed new rule is even more cumbersome than the procedure adopted by the Supreme Court in State v. Webb, 167 Wn.2d 470, 219 P.3d 695 (2009). If the cause of death is to be determinative of whether substitution will be permitted or whether the appeal is simply dismissed, in the absence of appointed counsel there will be no advocate for the deceased in that litigation. Instead, the State alone will be allowed to litigate the cause of death unopposed. Nor would it be a proper rule to simply defer to the finding of cause of death of a medical examiner or coroner, as that finding is often subject to dispute. Thus, some judicial finding of the cause of death will be required.

Assuming for sake of argument that WAPA is interested in maintaining the truth-seeking function of an adversarial process, counsel must at least be provisionally appointed to litigate the

threshold question of cause of death. Presumably either party would be permitted to appeal an adverse ruling on that threshold question. Depending upon the outcome of that threshold litigation a third party may or not be permitted to substitute. Thus, even under its proposed new rule, WAPA must concede that some provisional appointment is necessary.

2. WEBB HAS ALREADY REJECTED WAPA'S ARGUMENT THAT AN APPEAL SHOULD BE DISMISSED AS MOOT AND THE CONVICTION AFFIRMED WHEN AN APPELLANT DIES.

Again ignoring the fact that whether the estate should be permitted to substitute in this case is not at issue, WAPA invites this Court to dismiss the appeal as moot and simply affirm the conviction. WAPA brief at 12-13. Webb does not permit the Court to accept WAPA's invitation.

The two cases upon which Webb principally relied in adopting the substitution rule expressly rejected the notion that the appeal could be dismissed as was moot. State v. McGettrick, 31 Ohio St.3d 138, 140-41, 509 N.E.2d 378 (1987); State v. Surland, 392 Md. 17, 34-35, 895 A.2d 1034 (2006). In each case, as in Webb, the courts recognized that even following the appellant's death there remained the possibility that the conviction was invalid

and could be reversed. Webb, 167 Wn.2d at 698-99; Surland, 392 Md. at 34-35; McGettrick, 31 Ohio St.3d at 140-41; see also, Gollot v State, 646 So.2d 1297, 1303-04 (Miss. 1994). Webb noted that dismissing the appeal as moot “fails to accommodate the possibility that a conviction is subject to reversal, vacation or modification.” 167 Wn.2d at 698-99. Thus, Webb recognized two basis supporting the substitution rule in a criminal appeals.

First, an heir may substitute to show that criminal financial penalties imposed on the decedent “would result in an unfair burden on the heirs.” Id. at 477. Second, “the existence of a warranted appeal” permits substitution of a party simply because the conviction itself may be improper. 167 Wn.2d. at 478. Webb concluded “when the substitution rule is invoked, the appeal is warranted.” Id. WAPA’s brief ignores this second scenario entirely, suggesting instead that the estate may only challenge the financial penalties imposed. WAPA Brief at 12. As is clear from Webb, WAPA’s limited view of the scope of appeal is simply wrong.

B. CONCLUSION

Following Webb, this Court cannot simply dismiss the appeal and affirm the conviction. This, Court must reject WAPA's proposed outcome in favor of the procedures outlined in Webb.

Respectfully submitted this 11<sup>TH</sup> day of August 2011.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 29363-7-III
v.	)	
	)	
CHRISTOPHER DEVLIN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **APPELLANT'S ANSWER TO BRIEF OF AMICUS CURIAE** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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