

81314-1

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

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COURT OF APPEALS
STATE OF WASHINGTON
PM 4:55

STATE OF WASHINGTON,)	No. 596 26-8-1
Respondent,)	
)	
)	REPLY TO STATE'S
v.)	RESPONSE RE:
)	MOTION TO ABATE
MICHAEL WEBB,)	APPEAL
Appellant.)	
)	
)	

I. STATEMENT OF FACTS

Although the prosecution does not take issue with the fact that Michael Webb met a brutal death after filing a notice of appeal, a copy of Mr. Webb's death certificate as evidence of his death is attached herein as Appendix A.

II. ARGUMENT

ABATEMENT OF THE APPEAL AND CONVICTION ARE REQUIRED TO SERVE THE INTEREST OF JUSTICE AND UNDER THE AUTHORITY OF PREVAILING CONSTITUTIONAL AND COMMON LAW

A: The right to appeal in all cases is required by the Washington Constitution. Article I, section 22 of the Washington Constitution guarantees a person convicted of a crime, "the right to

appeal in all cases.” See State v. French, 157 Wn.2d 593, 602, 141 P.3d 54 (2006) (rejecting application of common law fugitive flight doctrine to Washington because unsentenced defendant has not waived constitutional right to appeal despite flight from jurisdiction). While the federal constitution does not contain a similar provision, the due process and equal protections clauses of the federal constitution guarantee the right to a meaningful appeal for all people whenever a state offers its citizens the right to appeal a conviction. Griffen v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585 100 L.Ed. 891 (1956); U.S. Const. amend. 14. In a criminal appeal of right, knowing waiver is required to dismiss the appeal. State v Tomal, 133 Wn.2d 985, 989, 948 P.2d 833 (1997). The prosecution’s suggestion that this Court abate the appeal but leave the conviction standing is contrary to these state and federal constitutional guarantees.

B. An appeal is a critical stage in a criminal proceeding in ensuring a fair and lawfully obtained conviction. An appeal of right is a fundamental component of the criminal process, and without the right to appeal, a conviction is not final. See United States v. Logal, 106 F.3d 1547, 1552 (11th Cir. 1997) (“[a] fundamental principle of our jurisprudence from which the abatement principle is

derived is that a criminal conviction is not final until resolution of the defendant's appeal as a matter of right.") (citing Griffen v. Illinois, 351 U.S. 12, 18, 76 S.Ct. 585 100 L.Ed. 891 (1956)); see also State v. Carter, 299 A.2d 891, 892-93 (Me. 1973) (based on principles of "widespread acceptance," "the death of the defendant occurring while an appeal from the judgment of conviction is in process requires dismissal of the appeal.").

As the court ruled recently in United States v. Lay, 456 F.Supp.2d 869 (S.D. Tex. 2006),

[W]hen an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the *interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal*, which is an "integral part of [our] system for finally adjudicating [his] guilt or innocence."

(emphasis in original) (quoting United States v. Pauline, 625 F.2d 684, 685 (5th Cir.1980)); see also United States v. Moehlenkamp, 557 F.2 126, 128 (7th Cir. 1977) (interest of justice rationale favors dismissal of conviction unless appeal fully adjudicated). Even though a conviction is presumptive evidence of a person's guilt, our system of justice depends upon the right to appeal to secure a final determination that the conviction was fairly entered.

Moreover, whether or not a conviction should be regarded as non-final once an appeal is filed, a case being appealed “certainly is subject to reversal, vacation, or modification if the appellate court finds merit in any of the challenges made by the appellant, and, despite the low rate of actual success on direct appeal, the court should not dismiss that possibility out of hand.” Surland v. State, 895 A.2d 1035, 1044 (Md. 2006). Mr. Webb filed a notice of appeal before he died, did not waive his right to appeal, and no court has determined whether the conviction and sentence were fairly and properly entered.

C. Unlike Devin, Mr. Webb filed a timely notice to appeal his conviction and sentence. In State v. Devin, 158 Wn.2d 157, 142 P.3d 599 (2006), Mr. Devin did not file a timely notice of appeal. Although there is a strictly enforced 30-day deadline for filing a notice of appeal and Mr. Devin was properly informed of this deadline, he did not file a notice of appeal until six months had elapsed after his sentencing. Id. at 160; RAP 5.2(a) (setting deadline for filing notice of appeal); RAP 18.8(b) (extraordinary circumstances and gross miscarriage of justice required to extend time to file notice of appeal).

Moreover, Mr. Devin's untimely notice of appeal stated only that he wished to challenge the sentence imposed. 158 Wn.2d at 160 n.2. It did not contain any indication that he contested the underlying conviction. Id.

Because Mr. Devin had neither filed a timely notice of appeal nor indicated in his untimely notice of appeal that he wished to challenge the conviction itself, the Devin Court refused to apply the doctrine of abatement *ab initio* to Mr. Devin. Id. at 166.

D. The portion of *Devin* discussing the application of the doctrine of abating a conviction based on the appellant's death is entirely *dicta*. The court in Devin dismissed the appeal based on Devin's untimely notice of appeal and his failure to appeal his conviction. 158 Wn.2d at 166-67. The court then noted that it "need not reach the question" of the general application of the principle of abatement of a conviction upon the death of an appellant. Id. at 167. The court decided "to take this opportunity to address" abatement even though Mr. Devin's failure to file a notice of appeal disposed of his case. Id. However, despite discussing abatement in some detail, the court ultimately refused to set forth a new rule regarding abatement upon an appellant's death for future cases. Id. at 172.

The net effect of this court-acknowledged *dicta* is somewhat puzzling. See State v. Fontaga, 148 Wn.2d 350, 364, 60 P.3d 1192 (2003) (when court goes “beyond what is necessary to decide case,” resulting discussion is not mandatory authority). Courts in Washington do not issue advisory opinions. Walker v. Munro, 124 Wn.2d 402, 414, 879 P.2d 920 (1994) (“Although courts in some states do render advisory opinions, we do not do so in this jurisdiction.”). Despite casting doubt on principles requiring automatic abatement *ab initio* in all cases, the court in Devin also indicated that in future cases, a court could abate a conviction *ab initio*, abate a conviction while leaving intact outstanding financial obligations, or rule on the merits of the appeal, based on the facts of the case. 158 Wn.2d at 172.¹

Consequently, while Devin clearly rejects abatement of a conviction when a person has neither filed a timely appeal nor explicitly indicated a desire to appeal the conviction, Devin does not preclude abatement of a conviction in a future case based on

1. In terms of advising courts in the future, Devin provides:
... we do not preclude courts from abating financial penalties still owed to the county or State, as opposed to restitution owed to victims, where the death of a defendant pending an appeal creates a risk of unfairly burdening the defendant's heirs. We also do not preclude courts from deciding a criminal appeal on the merits after the appellant has died, if doing so is warranted. We decline, though, to fashion a new doctrine in place of the Furth "ab initio" rule, as suggested by the State and amicus.

different facts. See Burkhart v. Harrod, 110 Wn.2d 381, 391, 755 P.2d 759 (1988). Indeed, the court declined, even in its *dicta*, to abandon the notion that a court may abate *ab initio* an appeal when an appellant files a timely notice of appeal. Accordingly, Devin stands for the proposition that it is appropriate to abate a conviction depending on the circumstances of the case. This Court retains the authority to act in the interest of justice and abate a conviction upon the unfortunate death of an appellant who has demonstrated his or her desire to appeal and when there are no principled reason to proceed with the merits of the appeal.

E. The *Devin dicta* either misunderstands or misconstrues the cases on which it relies. In its *dicta* discussion of the principle of vacating a conviction when the appellant dies, Devin relies on Herrera v. Collins, 506 U.S. 390, 399, 113 S.Ct. 853, 122 L.Ed.2d 203 (1997), for the principle that the presumption of innocence no longer applies after a person has been convicted of a crime after a jury trial. 158 Wn.2d at 169. But in Herrera, the appellant had already pursued and exhausted several state and federal appeals, including a prior petition for certiorari. 506 U.S. at 395-96. The issue before the court in Herrera was whether the appellant could

158 Wn.2d at 172.

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file a second federal habeas petition based on new evidence of his innocence. Id. at 396, 398. The Herrera Court expressly qualified the statement quoted in Devin by noting that there was no dispute that Mr. Herrera had a fair trial at which the prosecution met its burden of proof. Id. at 399.

Unlike Herrera, Mr. Webb has not been afforded his right to appeal. No courts have examined the fairness of the proceedings or the validity of the conviction. Accordingly, unlike Herrera, the fairness of this conviction has not been determined.

Devin also noted that courts have allowed a defendant to be impeached on a prior conviction that is later overturned on appeal, citing State v. Murray, 86 Wn.2d 165, 166, 543 P.2d 332 (1975). 157 Wn.2d at 169. Yet this synopsis of the holding in Murray is misleading. The court in Murray ruled that while it is not automatic reversible error to impeach a defendant with a conviction that was overturned on Fourth Amendment grounds, it is reversible error to impeach a defendant if the conviction was overturned on Sixth Amendment grounds. 86 Wn.2d at 168.

The issues of judicial economy that permit a court to rely on the presumptive validity of a conviction that is still pending on appeal are not present in the case at bar, when there is no

opportunity to litigate and finally determine the fairness of the conviction. In fact, issues of judicial economy favor the vacation of the appeal and conviction, as pursuing the appeal is a waste of judicial resources and is contrary to the interest of judicial economy.

F. The outstanding crime victim's penalty assessment or DNA collection fee do not undermine the rationale for abatement of the conviction on appeal. The State urges this Court to deny the request to abate the conviction on the grounds that Mr. Webb, or his estate, still owe \$600 in fees: \$500 for the crime victim's penalty assessment and \$100 for the DNA collection fee.²

As an initial matter, the records department of the Clerk's office has informed the undersigned counsel that before Mr. Webb died, he made three monthly payments as he was required, of \$25 each, and thus paid \$75 of the outstanding fees. Those funds are not reimbursable or returned upon abatement. United States v. Zizzo, 120 F.3d 1338, 1346-47 (7th Cir. 1997) (approximately \$60,000 in fines paid by defendant who died pending appeal

² The prosecution does not mention the \$443.90 in court costs imposed at sentencing. See Judgment and Sentence, attached as App. A to Appellant's Motion to Abate. Presumably, because these funds do not serve the needs of crime victims, and fall within the "financial penalties owed to the county or State" that Devin indicated would be appropriate to vacate upon an appellant's death,

analogous to time served and not returned even when conviction abated).

The policy interests on which the State relies to demand that Mr. Webb pay the remainder of the court fees are undermined by the particular facts in the case at bar. The purported purposes of the DNA data bank are to deter future crimes and identify the perpetrators of crimes. See State v. Surge, 160 Wn.2d 65, 77, 80, 156 P.3d 208 (2007). Mr. Webb cannot be deterred from committing future crimes nor prosecuted for committing a past crime. His human remains no longer need to be identified. Surge, 160 Wn.2d at 77-78. Preserving Mr. Webb's DNA in a data bank when he is dead does not serve the purposes of the DNA collection.

The crime victim's penalty assessment is just that, a penalty imposed for all persons convicted of crimes that is immediately refunded in the event a person's conviction is overturned. RCW 7.68.035; RCW 7.68.230. Although the money collected from the penalty assessment funds programs that help crime victims, it is a punitive measure, as evidenced by its name: the "penalty assessment." RCW 7.68.035.

the State does not seek to recover these costs. See Devin, 158 Wn.2d at 172.

Even if this penalty assessment is partially compensatory in nature, Devin suggests that the court may craft fair remedies based on the facts of the case itself, including imposing outstanding financial obligations along with abating the conviction. Devin, 158 Wn.2d at 171-72; see Surland v. State, 895 A.2d 1035, 1035-36 (Md. 2006) (federal courts and majority states follow abate doctrine but some permit courts to collect financial fees or restitution).

The specific legislative purpose of the crime victim's penalty assessment is to compensate the family members of people killed due to a criminal act. See State's Response, p. 5-6 n.2 (quoting legislative intent for penalty assessment, as "Specifically, the increased funds from offender penalty assessments will allow more appropriate compensation for families of victims who are killed as a result of the criminal act, including reasonable burial benefits.").

Mr. Webb was the victim of a vicious crime, having been killed by an ax and his dismembered body left for months in crawl space in his own home. See Appellant's Motion to Abate, App. E (newspaper article detailing circumstances of death). The \$500 Mr. Webb purportedly owes to the penalty assessment fund could be deducted from the amount his family is entitled by virtue of his horrific and brutal death by bludgeoning, since this fund was

created precisely to help the families of people who are the victims of such deaths.

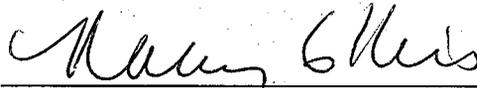
H. Abatement of the appeal and vacation of the conviction is appropriate. The prosecution's willingness to dismiss the appeal without dismissing the underlying conviction, despite the particular facts of this case, is contrary to the strict guarantee of a right to appeal in all cases in the Washington Constitution as well as principles of fundamental fairness. The interest of justice favors the abatement of the conviction here, where Mr. Webb, who lacked any criminal history prior to this case, timely filed a notice of appeal, and suffered a horrible and undignified death that was most certainly not intended as a way to escape punishment for this crime. Alternatively, this Court should order the resolution of the appeal on its merits.

III. CONCLUSION

For the reasons stated above and in Appellant's Motion to Abate, counsel for Mr. Webb respectfully requests that the Court terminate this appeal and vacate the underlying conviction.

DATED this 11th day of September 2007.

Respectfully submitted,



NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX A

STATE OF WASHINGTON
DEPARTMENT OF HEALTH

CERTIFIED COPY OF DEATH CERTIFICATE

6334

Local File Number				Washington State Certificate of Death				State File Number			
1. Legal Name (Include AKA's if any) First Middle LAST Suffix Michael Kenneth WEBB								2. Death Date Found 06/28/07			
3. Sex (M/F) Male		4a. Age - Last Birthday 51		4b. Under 1 Year Months		4c. Under 1 Day Hours		5. Social Security Number 572-98-7092		6. County of Death King	
7. Birthdate 9/4/1955		8a. Birthplace (City, Town, or County) San Francisco		8b. (State or Foreign Country) CA		9. Decedent's Education HS Graduate or GED					
10. Was Decedent of Hispanic Origin? (Yes or No) If yes, specify. No				11. Decedent's Race(s) White				12. Was Decedent ever in U.S. Armed Forces? No			
13a. Residence: Number and Street (e.g., 624 SE 5 th St.) (Include Apt. No.) 2505 3rd Ave W.								13b. City or Town Seattle			
13c. Residence: County King		13d. Tribal Reservation Name (if applicable)		13e. State or Foreign Country WA		13f. Zip Code + 4 98119		13g. Inside City Limits? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Unknown			
14. Estimated length of time at residence. 15 years		15. Marital Status at Time of Death Never Married		16. Surviving Spouse's Name (Give name prior to first marriage)							
17. Usual Occupation (Indicate type of work done during most of working life. Do not use retirement) Talk Radio Host								18. Kind of Business/Industry (Do not use Company Name) Communications			
19. Father's Name (First, Middle, Last, Suffix) Robert Webb						20. Mother's Name Before First Marriage (First, Middle, Last) Verna Wright					
21. Informant's Name Marian Boggi		22. Relationship to Decedent Sister		23. Mailing Address: (Number and Street or RFD No. City or Town State Zip 2730 Mayfair Ave, Concord, CA 94520							
24. Place of Death, if Death Occurred in a Hospital: Residence								25. Facility Name (If not a facility, give number & street or location) 2505 3rd Avenue West			
26a. City, Town, or Location of Death Seattle		26b. State WA		27. Zip Code 98119							
28. Method of Disposition Cremation		29. Place of Final Disposition (Name of cemetery, crematory, other place) Bayside Crematory				30. Location: City/Town, and State Seattle, Washington					
31. Name and Complete Address of Funeral Facility Bonney-Watson, 1732 Broadway, Seattle, WA 98122								32. Date of Disposition 7/3/2007			
33. Funeral Director Signature X <i>[Signature]</i>											
34. Enter the chain of events - diseases, injuries, or complications - that directly caused the death. DO NOT enter terminal events such as cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. DO NOT ABBREVIATE. Add additional lines if necessary. Cause of Death (See Instructions and examples) IMMEDIATE CAUSE (Final disease or condition resulting in death) → a. Multiple sharp force injuries Due to (or as a consequence of): Interval between Onset & Death Sequitently (but conditions, if any, leading to the cause listed on line a. Enter the UNDERLYING CAUSE (disease or injury that initiated the events resulting in death). LAST Due to (or as a consequence of): Interval between Onset & Death Due to (or as a consequence of): Interval between Onset & Death Due to (or as a consequence of): Interval between Onset & Death											
35. Other significant conditions contributing to death but not resulting in the underlying cause given above								36. Autopsy? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		37. Were autopsy findings available to complete the Cause of Death? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
38. Manner of Death <input type="checkbox"/> Natural <input checked="" type="checkbox"/> Homicide <input type="checkbox"/> Accident <input type="checkbox"/> Undetermined <input type="checkbox"/> Suicide <input type="checkbox"/> Pending		39. If female <input type="checkbox"/> Not pregnant within past year <input type="checkbox"/> Pregnant at time of death		<input type="checkbox"/> Not pregnant, but pregnant within 42 days before death <input type="checkbox"/> Not pregnant, but pregnant 43 days to 1 year before death <input type="checkbox"/> Unknown if pregnant within the past year		40. Did tobacco use contribute to death? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> Probably <input type="checkbox"/> No <input type="checkbox"/> Unknown					
41. Date of Injury (mm/dd/yyyy) Unknown		42. Hour of Injury (24hrs) Unknown		43. Place of Injury (e.g., Decedent's home, construction site, restaurant, wooded area) Residence		44. Injury at Work? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <input type="checkbox"/> Unknown					
45. Location of injury: (Number & Street: 2505 3rd Avenue West City or Town: Seattle County: King State: WA Zip Code + 4: 98119								46. Describe how injury occurred Inflicted injuries by other			
47. If transportation injury, specify: <input type="checkbox"/> Driver/Operator <input type="checkbox"/> Pedestrian <input type="checkbox"/> Passenger <input type="checkbox"/> Other (Specify)											
48a. Certifying Physician (If any, include any known cause, death certificate number, date, and place and date of the death or end-stage condition) X								48b. Medical Examiner/Coroner (If the medical examiner or coroner is designated, it may apply to all deaths or to the deaths of persons who died in the state or in the territory of the state)			
49. Name and Address of Certifier - Physician, Medical Examiner or Coroner (Type or Print) Richard C. Harruff, M.D., P.O. Box 325, 9th AVE Seattle WA 98104								50. Hour of Death (24hrs) Unknown			
51. Name and Title of Attending Physician (If other than Certifier (Type or Print))								52. Date Signed (mm/dd/yyyy) 06/29/07			
53. Title of Certifier Chief Medical Examiner		54. License Number		55. ME/Coroner File Number 07-1069		56. Was case referred to ME/Coroner? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No					
57. Registrar Signature <i>[Signature]</i>								58. Date Received (mm/dd/yyyy) JUL 2 2007			
59. Amendments											

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THIS IS A CERTIFIED COPY OF THE RECORD ON FILE WITH THE CENTER FOR HEALTH AND STATISTICS. CERTIFIED COPIES MUST HAVE THIS OFFICIAL SEAL.

DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the document filed under **Court of Appeals No. 59626-8-I** to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for respondent: **King County Prosecuting Attorney**, appellant and/or other party, at the regular office or residence or drop-off box at the prosecutor's office.


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 11, 2007

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