

81314-1

8-27-2007

Appellant wants to reply to the State's response, any reply should be filed by September 7, 2007.

*J.R. Webb*  
*Att. in*

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 59626-8-1
	)	
vs.	)	
	)	RESPONSE TO MOTION TO
MICHAEL WEBB,	)	ABATE APPEAL
	)	
Appellant,	)	
	)	
	)	
	)	

1. IDENTITY OF MOVING PARTY

Respondent, the State of Washington, seeks the relief designated in part 2.

2. STATEMENT OF RELIEF SOUGHT

The State agrees this appeal should be abated but disagrees that the conviction should be vacated.

3. FACTS RELEVANT TO MOTION

The State agrees with the statement of facts made in Webb's motion, with one exception. Counsel is mistaken that "[a] restitution



At the outset of the opinion, the court said, "[W]e overrule *Furth* to the extent that it vacates challenged convictions automatically upon an appellant's death, regardless of whether the unresolved appeal has merit or whether compensation is still owed to victims." 158 Wn.2d at 159. The court explained its decision to overrule *Furth* as follows:

The State and amicus argue that it is incorrect because it is based on the outdated premise that convictions and sentences serve only to punish criminals, and not to compensate their victims. Indeed, since *Furth* was decided, the people amended our state constitution to "ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect" by guaranteeing notice and an opportunity to be heard at relevant proceedings.... Thus, *Furth*'s fundamental principle—"that the object of all criminal punishment is to punish the one who committed the crime or offense"—simply does not reflect the compensation purpose served by restitution and victim penalty assessments. *Furth*, 82 Wash. at 667, 144 P. 907.

....

The State and amicus also argue that the “ab initio” doctrine is incorrect for another reason: it rests on a presumption that convicted criminals are innocent and that their pending appeals ultimately would prevail. The United States Supreme Court said in *Herrera v. Collins*, 506 U.S. 390, 399, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993), “Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.” ... These cases establish that there is no presumption of innocence pending appeal. Accordingly, we conclude that *Furth* is incorrect in light of later decisions cutting off the presumption of innocence after conviction, and in view of modern compensatory statutes.

158 Wn.2d 168-69. Yet, the court expressly declined to set forth a new rule:

[W]e overrule *Furth* to the extent that it automatically abates convictions as well as victim compensation orders upon the death of a defendant during a pending appeal.

In so doing, 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.

158 Wn.2d at 171-72.

In this case, it does not appear that any purpose would be served by deciding this appeal, so the State does not object to abating Webb's appeal.

The conviction, however, should not be abated. The Washington Supreme Court agreed with the argument that convictions are presumptively valid regardless of whether the defendant is alive. It also noted that there are a number of policy justifications, some expressed in legislation or by constitutional amendment, for refusing to abate a conviction after the defendant dies. Many such justifications turn on the recognition that payments made pursuant to a criminal conviction benefit others. For example, payment of restitution is one reason not to abate a conviction. *Devin*, at 168-69, 171-72.<sup>1</sup>

The legislature has also expressed a mandate contrary to abatement of convictions by passing RCW 7.68.035, which established a mandatory victim penalty assessment to be paid to a "fund maintained exclusively for the support of comprehensive programs to encourage and facilitate testimony by the victims of crimes and witnesses to crimes." See RCW 7.68.035(4).<sup>2</sup> Yet,

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<sup>1</sup> Since restitution was never ordered in this case, it is not an issue as to abatement of Webb's conviction.

<sup>2</sup> "The legislature finds that current funding for county victim-witness advocacy programs is inadequate. Also, the state crime victims compensation program should be enhanced to provide for increased benefits to families of victims who are killed as a result of a criminal act. It is the intent of the legislature to provide increased financial support for the county and state crime victim and witness programs by requiring offenders to pay increased penalty assessments upon

counsel for Webb has not acknowledged such debts, nor has counsel explained why the \$500 payment to the victims' fund should be abated in this case.

A similar point can be made about the DNA collection fee, ordered pursuant to RCW 43.43.754. That statute provides that "[e]very sentence imposed under chapter 9.94A RCW, for a felony specified in RCW 43.43.754 ... must include a fee of one hundred dollars for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender." RCW 43.43.7541. The State Treasurer deposits the fee into an account used for "creation, operation, and maintenance of the DNA data base under RCW 43.43.754." RCW 43.43.7532. Thus, this fee serves broader purposes than the mere punishment of the offender, and should not be abated.

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conviction of a gross misdemeanor or felony crime. The increased financial support is intended to allow county victim/witness programs to more fully assist victims and witnesses through the criminal justice processes. On the state level, the increased funds will allow the remedial intent of the crime victims compensation program to be more fully served. Specifically, the increased funds from offender penalty assessments will allow more appropriate compensation for families of victims who are killed as a result of a criminal act, including reasonable burial benefits." Laws of 1996, ch. 122, § 1.

It appears, however, that the \$1000 VUCSA fine was not statutorily authorized in this case because Webb was not convicted of a drug crime. See RCW 69.50.430.<sup>3</sup> That fine should either be abated, or it could be rescinded by agreed order of the parties.

For these reasons, the State agrees that Webb's appeal should be abated, and that the drug fine should be rescinded, but the State respectfully asks the court to otherwise deny the request to abate the criminal conviction.

Submitted this 20th day of August, 2007.

NORM MALENG  
Prosecuting Attorney  
DANIEL T. SATTERBERG  
Interim Prosecuting Attorney



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<sup>3</sup> "(1) Every person convicted of a felony violation of RCW 69.50.401 through 69.50.4013, 69.50.4015, 69.50.402, 69.50.403, 69.50.406, 69.50.407, 69.50.410, or 69.50.415 shall be fined one thousand dollars in addition to any other fine or penalty imposed. Unless the court finds the person to be indigent, this additional fine shall not be suspended or deferred by the court."

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Response to Motion to Abate Appeal, in STATE V. MICHAEL WEBB, Cause No. 59626-8-I-I, in the Court of Appeals, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name Wynne Brame  
Done in Seattle, Washington

8/21/07  
Date

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