#466.

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
BRCR2013-00983

BRISTOL, SS SUPERIOR COURT
FILED
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MARC J. SANTOS, ESQ.
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COMMONWEALTH

vs.

AARON HERNANDEZ

MEMORANDUM OF DECISION AND ORDER ON MOTION TO ABATE PROSECUTION

On April 15, 2015, a jury convicted Hernandez of the first degree murder of Odin Lloyd and two firearms offenses. He filed a notice of appeal on April 21, 2015.[1] On April 19, 2017, Hernandez died at the Souza-Baranowski Correctional Center. His death certificate lists the cause of death as asphyxia by hanging and the manner of death as suicide. His appellate counsel now moves to abate the prosecution. The motion seeks that the appeal from the convictions be dismissed, that the convictions be vacated, and that the underlying indictments be dismissed. The Commonwealth opposes the motion to abate the convictions and dismiss the indictments; it does not object to dismissal of the appeal. For the reasons discussed below, the motion to abate is **ALLOWED**.

DISCUSSION

The long-standing practice in Massachusetts is that if a defendant dies while his conviction is on direct appeal, the conviction is vacated and the indictment dismissed, thus abating the entire prosecution as if it never happened. Commonwealth v. Squires, 476 Mass. 703, 707 (2017); Commonwealth v. Harris, 379 Mass. 917, 917 (1980); Commonwealth v. Eisen, 368 Mass. 813, 813 (1975). See also Commonwealth v. De La Zerda, 416 Mass. 247, 248 (1993) (citing the many states

[1] The record has not yet been fully assembled and, accordingly, the appeal has not been docketed in the Supreme Judicial Court.

and federal courts that follow this practice).

The Commonwealth first argues that the abatement doctrine "lacks any identifiable historical or public policy basis." To the contrary, abatement has been practiced in federal and state courts for more than a century. See, e.g., List v. Pennsylvania, 131 U.S. 396, 396 (1888) (criminal cause abates upon the death of the accused); March v. State, 5 Tex. App. 450, 456 (1879) (when defendant dies while appeal is pending, prosecution abates in toto).

Moreover, the Supreme Judicial Court has explained that the primary policy served by abatement is the recognition that, because an appeal is an integral part of the system for fairly adjudicating guilt or innocence, the interests of justice do not permit a defendant to stand convicted without resolution of the merits of his appeal. De La Zerda, 416 Mass. at 251.[2] The direct appeal is moot because neither the asserted importance of the legal issues nor any personal interest in the defendant's vindication by counsel or the defendant's family is sufficient to warrant deciding the appeal of a dead person. Harris, 379 Mass. at 917; Eisen, 368 Mass. at 814. The policies supporting abatement apply in full force in this case, where Hernandez availed himself of the statutory right to appeal his convictions but died before his appeal was resolved. Cf. De La Zerda, 416 Mass. at 251 (allowing conviction to stand where, at time of his death, defendant had served his sentence and received direct appellate review of denial of his new trial motion, but Supreme Judicial Court had accepted his application for further discretionary review).

The Commonwealth is incorrect that the United States Supreme Court has rejected the practice of abatement. In *Durham* v. *United States*, the Supreme Court opined that the lower courts

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[2] In addition, abatement acknowledges the reality that post-conviction relief has become impossible because the defendant neither can be punished if the conviction stands nor retried if the conviction is reversed. De La Zerda, 416 Mass. at 250.

had adopted the "correct rule" that death pending direct review abates not only the appeal but the prosecution from its inception; the court then granted the defendant's pending petition for certiorari, vacated the judgment and remanded the case with an order to dismiss the indictment. 401 U.S. 481, 483 (1971). Five years later, the Supreme Court reversed *Durham* with respect to the disposition of an underlying judgment when a discretionary writ of certiorari is pending at the time of death. See Dove v. United States, 423 U.S. 325, 325 (1976) (where defendant dies while certiorari review is pending, Supreme Court will simply dismiss the petition for certiorari, allowing conviction to stand). Nothing in the two-sentence *per curiam* decision in *Dove* suggests that the Supreme Court has rejected the policy of abatement when a defendant dies during his direct appeal. See United States v. Pogue, 19 F.3d 663, 665 (D.C. Cir. 1994) (recognizing that Supreme Court has adopted abatement policy abating not only appeal but prosecution from its inception in cases of death pending direct review as have the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits).[3] See, e.g., United States v. Pauline, 625 F.2d 684, 685 (5th Cir. 1980) (interpreting *Dove* as applying only to certiorari petitions, not appeals as of right); United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977) (*Dove* does not change longstanding abatement practice as applied to appeal as of right); United States v. Bechtel, 547 F.2d 1379, 1380 (9th Cir. 1977) (*Dove* controls only disposition of certiorari petitions, not direct review of conviction). See also De La Zerda, 416 Mass. at 249 (citing *Dove* for proposition that, when a defendant dies after filing a certiorari petition, the Supreme Court dismisses the petition but leaves underlying judgment untouched). Even though

[3] Each of the Circuit Court decisions cited in *Pogue* were decided after *Dove*. Moreover, after *Pogue* was decided, the Third Circuit also adopted the abatement practice. See United States v. Christopher, 273 F.3d 294, 297 (3d Cir. 2001). In addition, the First Circuit follows this practice. See United States v. Sheehan, 874 F.Supp. 31, 33 (D. Mass. 1994).

the Commonwealth is mistaken about the import of *Dove*, the point is not critical because *Dove* does not control how Massachusetts handles cases pending on direct appeal after the death of the defendant.

The Commonwealth further argues that this Court should follow an emerging trend in other states to reject abatement based on the need to respect jury verdicts and protect the rights of victims and their families. See, e.g., State v. Korsen, 111 P.3d 130, 134-135 (Idaho 2005) (rejecting abatement on public policy grounds because it denies victims fairness, respect, dignity and closure by preventing finality of the conviction); Surland v. State, 895 A.2d 1034, 1039-1044 (Md. 2006) (rejecting abatement because conviction erases presumption of innocence, state has interest in preserving presumptively valid conviction, and abatement has collateral consequences for defendant's estate and victims, but allowing estate to elect whether to pursue appeal); State v. Devin, 142 P.3d 599, 605-606 (Wash. 2006) (rejecting abatement because it deprives victims of compensation required by law and has collateral consequences such as emotional distress, lessened ability to recover civil judgment, and potential impacts on family court proceedings, but courts not precluded from deciding a criminal appeal on the merits post-death if "doing so is warranted"). In support of its argument, the Commonwealth invokes G.L. c. 258B, § 3, "Rights of Victims and Witnesses of Crime," and 18 U.S.C. § 3771, "Crime Victims' Rights." While this Court recognizes the harsh emotional and legal effects of abatement on victims and their families, it is constrained to conclude that victims' rights statutes do not alter the longstanding and controlling practice of abatement of criminal proceedings. See People v. Robinson, 719 N.E.2d 662, 663-664 (Ill. 1999) (reversing lower court ruling that abatement does not apply in cases of violent crime based on need to protect victims).

Notably, the Supreme Judicial Court considered and explicitly rejected identical public policy arguments less than one year ago. In Commonwealth v. Keith Luke, the Commonwealth also argued that the abatement doctrine lacks a cogent rationale and urged the Supreme Judicial Court to follow the trend in other states of rejecting abatement in order to vindicate the rights of victims. See Commonwealth v. Keith Luke, SJC-11629, "Motion to Dismiss Appeal as Moot and Motion to Prevent or Forestall Abatement *Ab Initio* of the Underlying Convictions" (May 29, 2014).[4] In its brief in the *Luke* case, the Commonwealth relied on much of the same case law and statutes cited by the Commonwealth in this matter. In an order dated July 21, 2016, the Supreme Judicial Court vacated Luke's murder, rape, kidnaping, home invasion, armed assault, and firearms convictions and remanded the case for entry of an order dismissing the indictments, stating: "[n]othing in the Commonwealth's submission persuades us to change our longstanding practice in these circumstances." Commonwealth v. Keith Luke, SJC-11629 (July 21, 2016). Thus, the Supreme Judicial Court rejected the precise argument made to this court that public policy concerns warrant abandonment of the traditional abatement practice. See also Squires, 476 Mass. at 707 (recently affirming vitality of general practice of abatement). Abatement remains the law in this Commonwealth, and this Court is compelled to follow binding precedent. See Commonwealth v. Vasquez, 456 Mass. 350, 356 (2010) (decisions of Supreme Judicial Court on all questions of law are conclusive on trial courts).

Notwithstanding the general practice of abatement, the Supreme Judicial Court has noted that, in a particular case, "the interests of justice" may merit a departure from abatement *ab initio*. See Squires, 476 Mass. at 707 (fairness dictated that decedent should have same outcome as co-

[4] The Commonwealth did not bring the *Luke* appeal to the attention of this Court.

defendant where co-defendant had incorporated by reference arguments made by decedent, thus requiring SJC to address decedent's arguments on the merits despite his death). The Commonwealth argues that waiver and forfeiture principles warrant an exception to abatement when the defendant commits suicide.[5]

Waiver is the intentional and voluntary relinquishment of a known statutory or constitutional right, which can be inferred from a person's words and conduct under all the circumstances. Merrimack Mut. Fire Ins. Co. v. Nonaka, 414 Mass. 187, 189-190 (1993); Commonwealth v. Scionti, 81 Mass App. Ct. 266, 278, rev. den., 461 Mass. 1111 (2012).[6]

The doctrine of forfeiture by wrongdoing is based on the principle that a defendant should not be permitted to gain a tactical advantage from his own wrong. Commonwealth v. Szerlong, 457 Mass. 858, 861 (2010), cert. den., 562 U.S. 1230 (2011); Commonwealth v. Sousa, 2016 WL 4006250 at *1 (Mass. App. Ct. Rule 1:28), rev. den., 475 Mass. 1105 (2016). For example, a defendant forfeits his right to cross-examine a witness if the defendant is involved in or responsible

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[5] In contrast to the argument that the abatement practice should be abandoned, this Court does have authority to consider the Commonwealth's alternative arguments that suicide or lack of probability of success on the merits warrant departures from the abatement doctrine in the "interests of justice." The Court disagrees with the argument of defense counsel that the values that inform the "interests of justice" calculus have already been "categorically settled" by the SJC. There is no indication in the case law or reason to assume that, given a sufficiently persuasive reason, an additional ground or grounds to depart from the general practice could not be found to be in the interests of justice. See also Eisen, 368 Mass. at 313 (when a defendant dies pending his appeal, "normally" the judgment should be vacated and the indictment dismissed). The arguments made by the Commonwealth here, other than with respect to outright abrogation of the abatement *ab initio* practice, do not appear ever to have been made to the SJC.

[6] See also Commonwealth v. Means, 454 Mass. 81, 89 (2009) (waiver of right to counsel must be voluntary and informed); Commonwealth v. Tavares, 385 Mass. 140, 144-145 (1982) (waiver of *Miranda* rights must be knowing and voluntary); Ciummei v. Commonwealth, 378 Mass. 504, 507 (1979) (waiver of right to jury trial must be freely and knowingly given).

for procuring the unavailability of the witness and acted with the intent to make the witness unavailable. Szerlong, 457 Mass. at 861. Forfeiture by wrongdoing requires a specific intent by the defendant to interfere with the course of justice. See Commonwealth v. Edwards, 444 Mass. 526, 536, 542, 549 (2005); Scionti, 81 Mass App. Ct. at 278.

The Commonwealth maintains that Hernandez's deliberate, voluntary, and affirmative act of ending his own life manifests an intention to abandon his appeal and thus amounts to a waiver of his right to review or a forfeiture of any claim for abatement of his convictions. See United States v. Dwyer, 654 F. Supp. 1254, 1255 (M.D. Pa. 1987) (suicide presents exception to general practice of abatement, at least where defendant committed suicide before sentencing, it was possible that defendant would have chosen not to appeal given his suicide statement that he had no faith in the judicial system and his statement that he did not believe he could succeed in reversing the verdict upon appeal, it was highly unlikely he would have succeeded on appeal, and "it defies common sense to allow [defendant] to be absolved of criminal liability so carefully arrived at by a jury because he intentionally took his own life before the appeal process could run"), vacated by United States v. Dwyer, 855 F.2d 144 (3d Cir. 1988) (dismissing case on standing grounds).[7]

This Court cannot know why Hernandez may have chosen to end his life and declines to infer an intent by Hernandez to relinquish his appellate rights or an intent to interfere with the course of justice from his reported suicide, a tragic act that may have complex and myriad causes. See

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[7] Although the Commonwealth also cites State v. McDonald, 405 N.W.2d 771,772 (Wis. App. Ct. 1987) for the proposition that suicide justifies an exception to abatement, that case was overruled by the Wisconsin Supreme Court. See State v. McDonald, 424 N.W.2d 411, 414 (Wis. 1988) (holding that all appeals continue after death and declining to distinguish between suicide and natural causes because the court should not have to inquire in each case into the circumstances of defendant's death).

People v. Robinson, 699 N.E.2d 1086, 1095 (Ill. App. Ct. 1998) (Greiman, J., dissenting in part) ("the notion of whether the act of suicide changes the effect of [abatement] because it is a 'waiver' or an escape is too metaphysical to address . . . "), rev'd, People v. Robinson, 719 N.E.2d 662 (Ill. 1999). The Commonwealth's supplemental filing, based in large part upon statements from unnamed inmates, suggests several possible motives for suicide that are unrelated to the defendant's appeal. Particularly telling is the fact that, according to the Department of Correction's investigatory report, inmates were aware of, and some viewed as disrespectful, a radio broadcast that "brought up that Hernandez was gay. " The report also states that, according to other inmates, Hernandez had become increasingly spiritual while in prison, and they viewed his suicide as some sort of religious message. One inmate stated that Hernandez frequently talked with a religious tone and expressed his belief that, when you die, your soul gets reincarnated. A religious motive and possibly mental disturbance is reflected in the note Hernandez allegedly left for his fiancee, in which he wrote, "This was the Supremes, the almightys plan, not mine!" The report states that an inmate, who claimed to be one of Hernandez's best friends, said that, after the verdict in the other case, Hernandez had been talking about the NFL and going back to play "even if it wasn't with the Pats," statements that do not reflect the mind-set of a defendant who intended to waive his right of appeal. While the report does state that Hernandez had recently mentioned to one inmate a rumor that if an inmate has an open appeal and dies in prison, he is acquitted of the charge and deemed not guilty, there is no indication that he had been so advised by any attorney. The defendant's arguable awareness of such a rumor hardly is sufficient to warrant the inferences the Commonwealth seeks to draw with respect to the defendant's specific intent.

The case of United States v. Chin, 633 F. Supp. 624, 627-628 (E.D. Va.1986), rev'd on other

grounds, 848 F.2d 55 (4th Cir. 1988), is not, in fact, based on "all of the same factors" that are present here, as the Commonwealth asserts. The District Court in *Chin* did not rely merely on the defendant's suicide in carving out an exception to abatement. Rather, there was nothing in the record of that case that supported a conclusion that counsel for the defendant had either been requested or authorized to take an appeal. The defendant committed suicide before judgment entered. Further, the record justified a conclusion that the defendant did not intend to appeal because he wrote to his wife that he had decided not to appeal and that his decision had made him feel "extremely tranquil." 633 F. Supp. at 627-628.

Given the mental health implications of the act of suicide, where, as here, a defendant has filed a Notice of Appeal, it would not be in the interests of justice to depart from the practice of abatement because the death may have been by suicide. A defendant may lack the capacity to make a voluntary choice whether or not to live. In many cases, circumstances such as mental illness, drug or alcohol use, or other impairment may negate an intentional and voluntary waiver of the right to appeal or an intent to frustrate justice. Cf. Commonwealth v. Bishop, 461 Mas. 586, 599-600 (2012) (mental illness, mental impairment, intoxication and consumption of drugs each may affect capacity to form specific intent); Commonwealth v. Gassett, 30 Mass. App. Ct. 57, 60 n. 1, rev. den., 409 Mass. 1104 (1991) (drugs, intoxication or mental impairment may negate defendant's ability to appreciate meaning and consequences of his own conduct). Therefore, an evidentiary inquiry would have to be held into the circumstances surrounding each defendant's purported suicide to attempt to determine if it actually was a suicide should that be contested,[8] if the defendant had the mental

[8] The death certificate, at best, is prima facie evidence of the cause of death. G.L. 46, § 19.

capacity to make a voluntary choice whether or not to live, and the factors or factor that motivated the suicide. If the decision "whether to abate a conviction *ab initio* [depends] upon whether the defendant died involuntarily or took his or her own life, we necessarily open the door to an exhaustive examination of the circumstances of death in most cases." State v. McDonald, 405 N.W.2d at 773-774 (Sundby, J. concurring). Neither public policy nor common sense supports such an evidentiary inquiry.

In the view of this Court, the waiver and forfeiture doctrines simply have no application to the issue of the abatement of a conviction. See People v. Matteson, 75 N.Y.2d 745, 747 (N.Y. 1989) (rejecting contention that suicide should be deemed a waiver or forfeiture of right to appeal); United States v. Oberlin, 718 F.2d 894, 896 (9th Cir. 1983) (rejecting argument that suicide is the "ultimate waiver"). The interests of justice do not warrant a departure from the doctrine of abatement because Hernandez may have committed suicide under the theory that suicide constitutes waiver of the right to appeal or the theory that suicide constitutes forfeiture by wrongdoing.

Finally, the Commonwealth argues that the interests of justice warrant not abating Hernandez's convictions because he had a negligible probability of success on appeal. See United States v. Dwyer, 654 F. Supp. at 1255 (declining to abate conviction of defendant who committed suicide, in part based on conclusion that there were no grounds whatsoever on which defendant could hope to succeed on appeal, and defendant stated he did not believe his conviction would be reversed); United States v. Chin, 633 F. Supp. at 628 (declining to abate conviction of defendant who committed suicide, in part based on court's determination that the record in the case did not reflect likely success on appeal where defendant took stand and completely confessed and, after consulting

with attorneys, decided that his appellate arguments were not strong).[9] None of the Massachusetts cases discussing abatement hint that the merits of the appeal might be a relevant factor. See De La Zerda, 416 Mass. at 251. In any event, the defendant in this case had not yet filed a motion for a new trial or appellate briefs before his death, and this Court cannot speculate as to the potential grounds he may have raised to challenge his convictions.

Our long-standing abatement doctrine requires that where, as here, the defendant is deprived of his statutory right of appeal due to death, whether by his own hand or otherwise, the interests of justice do not permit him to stand convicted because an appeal is integral to a fair adjudication of guilt or innocence. Accordingly, there being no reason to recognize an exception in this case in the interests of justice, this Court has no choice but to abate the proceedings in this case *ab initio* by vacating Hernandez's convictions and dismissing the charges against him and his appeal.

ORDER

For the foregoing reasons, it is **ORDERED** that the Motion To Abate Prosecution be and hereby is **ALLOWED**. It is further **ORDERED** that the murder, unlawful possession of a firearm, and unlawful possession of ammunition convictions be **VACATED**, that Indictments Nos. 2013-00983-1, 2, and 6 be **DISMISSED**, and that the Notice of Appeal be **DISMISSED**.

E. Susan Garsh
Justice of the Superior Court

DATED: May 9, 2017

[9]As noted supra, *Dwyer* was vacated and *Chin* was reversed on appeal.