

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE**

STATE OF TENNESSEE,)	
)	
Appellee,)	Court of Criminal Appeals
)	Case No. M2007-02781-CCA-R3-CD
vs.)	
)	
CHRIST KOULIS)	
)	
Appellant.)	

**NOTICE OF SUGGESTION OF DEATH AND MOTION TO VACATE THE
CONVICTION AND SENTENCE AND DISMISS THE CASE SINCE SAME IS
ABATED *AB INITIO* BY THE DEATH OF APPELLANT.**

Counsel for Koulis suggests their client's death since all available facts are that Dr. Koulis is dead. Counsel also move to remand with instructions to the trial court to vacate the conviction and sentence and dismiss the case since same is abated *ab initio* by the death of appellant. This then renders moot the appeal which should be dismissed as moot; the case, conviction, sentence and case having been abated by death.

Attached to this motion the Court will find the affidavit of David Raybin reciting facts which establish the probable death of his client. See Rule 14 T.R.A.P. Consideration of Post-Judgment Facts in the Appellate Court. ("death"). Should the Court accept the suggestion of death there remains the question of the disposition of this direct appeal which sought not only a new trial but a dismissal of the conviction in light of the insufficiency of the evidence and a double jeopardy claim given that the jury acquitted

Koulis of an offense lesser to that for which he was convicted. Only this Court will ever know the probable outcome of the merits of the direct appeal. Thus, the death of Koulis dictates that the matter be remanded to the trial court with instructions to abate the case, conviction and sentence¹ which effectively moots the appeal.

The majority rule in the United States is that upon the death of the defendant pending appeal, the criminal prosecution, from the indictment forward, abates *ab initio*.

Bagley v. State 122 So.2d 789, at 791(Fla.App.1960):

The obliterative effect of abatement *ab initio* necessarily leaves undetermined the question of the appellant's guilt. For whatever comfort or benefit derivable therefrom, the legal presumption of innocence of the crime with which [deceased] . . . was charged abates now in no less degree than before the criminal proceedings were instituted. Jurisdiction to determine the issue of guilt or innocence is now assumed by the ultimate arbiter of human affairs. The decision we undertook to render is a nullity.

This is the rule in federal court as well: *United State. v. DeMichael*, 461 F.3d 414 (3rd Cir. 2006):

The abatement rule is grounded in procedural due process concerns. When a defendant dies pending an appeal, “ ‘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.’ ” *United States v. Christopher*, 273 F.3d 294, 296- 97 (3d Cir.2001) (quoting *United States v. Moehlenkamp*, 557 F.2d 126, 128 (7th Cir.1977)). The courts of appeals largely agree that abatement *ab initio* is the appropriate rule when a defendant dies while his appeal of right is pending. See *United States v. Pogue*, 19 F.3d 663 (D.C.Cir.1994); *United States v. Schuster*, 778 F.2d 1132 (5th Cir.1985); *United States v. Oberlin*, 718 F.2d 894 (9th Cir.1983); *United States v. Morton*, 635 F.2d 723 (8th Cir.1980); *United States v. Pauline*, 625 F.2d 684, 685 (5th Cir.1980); *Moehlenkamp*, 557 F.2d 126. Our court has followed this well established rule: “[W]here a convicted criminal defendant dies after filing an

¹ In addition to a sentence of imprisonment of two years, the trial court imposed a fine of \$3,000 for Koulis' criminally negligent homicide conviction. (Vol. XXXV, p. 735).

appropriate appeal, the conviction will be abated and the case remanded to the district court with instructions to dismiss the indictment.” Christopher, 273 F.3d at 297. See also United States v. Dwyer, 855 F.2d 144, 145 (3d Cir.1988) (reciting the traditional rule that a criminal conviction abates when the defendant dies prior to the resolution of his or her direct appeal).

See also, *Better Off Dead: Abatement, Innocence, And The Evolving Right Of Appeal*, 73 UCOLR 943 (Summer 2002) and *Abatement of State Criminal Case By Accused's Death Pending Appeal Of Conviction--Modern Cases*, 80 A.L.R.4th 189 (“Numerous reported cases have addressed the issue of abatement of a criminal case where the accused dies pending resolution of his appeal; the most frequently stated rule is that under such circumstances, the prosecution abates from the inception of the case (ab initio).”). Tennessee clearly follows the majority rule as expressed in *Bagley* and the federal cases:

Supreme Court of Tennessee.
Clifford CARVER, Plaintiff in Error,
v.
STATE of Tennessee, Defendant in Error.
Jan. 14, 1966.
21 McCanless 482, 217 Tenn. 482, 398 S.W.2d 719

WHITE, Justice.

The plaintiff in error, Clifford Carver, was convicted of unlawfully possessing intoxicating liquors and was sentenced to serve sixty days in the Macon County Jail, and to pay a fine in the amount of \$250.00. After his motion for a new trial was overruled, he appealed to this Court and assigned four errors, which will not be considered because of the disposition we now make of this case.

At the Bar of the Court, counsel for the plaintiff in error suggested the death of Carver during the pendency of the appeal. If his sentence consisted only of a jail term, any consideration of the merits of this case would be obviously moot. But, with the addition of a fine assessed against him, consideration of the merits is rendered moot only if we find that his estate is not liable for the fine.

Thus, counsel for Carver and the State have agreed that the only matter remaining for the decision of the Court is the question of liability of his estate for the payment of the assessed fine of \$250.00, together with the court costs.

This question has never been dealt with by this Court in detail, although there is a bare statement in *Wiggins et al. v. State*, 154 Tenn. 83, 289 S.W. 498 (1926):

All the parties appealed in error to this court. Pending an appeal, Wiggins died. The case will, therefore be abated as to him. 154 Tenn. at 84, 289 S.W. at 499.

Abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended. At common law, a suit, when abated, is absolutely dead. *Witt v. Ellis et al.*, 42 Tenn. 38, 40-41. Although neither of the aforesaid cases held specifically that the suit was abated *ab initio*, we believe this is the only common sense construction to place on the word abate as used therein. In Webster's International Dictionary (3rd ed. 1961), the word 'abatement' is defined:

The act or process of abating or the state of being abated; * * *seek** termination of the proceedings of an action by reason of some formal defect.

In 15 Am.Jur., Criminal Law § 553, it is stated that as a general rule, though not one without exception, a judgment imposing a fine and imprisonment in a criminal case abates on the death of the defendant pending a writ of error, and the fine cannot be enforced against his estate.

To the same effect is the case of *Bagley v. State of Florida* Fla.App., 122 So.2d 789, 83 A.L.R.2d 860 (1960). Bagley, who was convicted of a felony, died before his case was finally disposed of by the appellate court. Upon the fact of death being made known to the court, the Attorney General of Florida filed a motion to abate, *ab initio*, the proceedings on appeal and those in the trial court as well. The abatement was resisted by

the estate of the deceased for several reasons; one being that the abatement would operate to deprive the estate, relatives and friends, of the deceased defendant of whatever comfort or benefits they might have derived from the decision of the court.

The Florida court was concerned as to whether or not the abatement should include the proceedings in the trial court and said that in a large number of the cases reviewed the decisions do not indicate whether the criminal prosecution was abated ab initio, or only on the appeal.

The Iowa Supreme Court in the case of *State v. Kriechbaum*, 219 Iowa 457, 258 N.W. 110, 96 A.L.R. 1317 (1934), held that in such a case there is no unsuccessful party, nor a successful one. The court said:

Defendant's right of appeal inhered in the prosecution from the beginning. His right of appeal was as inviolable as any right of defense. Also his right of suspension of the judgment of the trial court until after the appeal had been heard. The judgment below could not become a verity until the appellate court made it so by an affirmance. If the appeal had been sustained, all the proceedings in the trial below would fall. The question of the defendant's guilt was therefore necessarily undetermined at the time of his death. 258 N.W. at 113.

The court then held that the death of the defendant abated the action as well as the mere appeal and the court defined the word 'abate' as meaning to render nonexistent.

In the case at bar, it is obvious that death withdrew the defendant from the jurisdiction of the Court. It left no apportionment of jurisdiction in the trial court or this Court. The action herein must, therefore, be deemed as abated in toto or not at all.

The subject at hand is fully annotated in 83 A.L.R.2d 864, and the annotator says that:

Although there is some authority reaching a contrary result, most of the few courts which have considered the matter have recognized the rule that the death pending appeal of a defendant convicted of a criminal offense abates not only the appeal, but likewise all proceedings had in the prosecution from its inception.

Cases from California, Colorado, Florida, Idaho, Indiana, Iowa, Missouri, and a number of decisions of the Supreme Court of Oklahoma, are cited in support of this general statement.

One of the cardinal principles and reasons for the existence of criminal law is to punish the guilty for acts contrary to the laws adopted by society. The defendant in this case having died is relieved of all punishment by human hands and the determination of his guilt or innocence is now assumed by the ultimate arbiter of all human affairs.

Based upon our investigation of the applicable law and what we believe to be the proper sense of justice, we hold that all proceedings in this case against Carver are abated *ab initio*.

Counsel for Koulis must suggest his death since all available facts are that he is dead. However, this matter must be remanded to the trial court so that the conviction and all proceedings are abated *ab initio*. So there be no dispute (and to avoid another appeal following remand) this Court should squarely Order that the matter be remanded and that the case, conviction and sentence be abated as a matter of law. His death precludes final resolution of Koulis' appeal which was briefed, argued and centered on his innocence. Thus justice dictates that his conviction and sentence evaporate as a matter of law.

CONCLUSION


There being no Order of restitution,² the State should not oppose this notice of suggestion of death and proposed disposition since, while it had every right to chase after him in life for his alleged crime, the State should allow Koulis the peace of death and not pursue him to the grave. Accordingly, since Koulis has died, this Court should remand

²*United States v. Christopher*, 273 F.3d 294 (3rd Cir. 2001) (where convicted criminal defendant dies after filing an appropriate appeal, his or her conviction will be abated; but order of restitution was more compensatory than penal in nature, and was not abated upon abatement of conviction itself.)


the matter with instructions to vacate the conviction and sentence and dismiss the case since same is abated *ab initio*. This will then render moot the appeal.

March 29, 2010

Respectfully submitted,



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Attorneys for Dr. Christ Koulis

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail to Mark A. Fulks, Assistant State Attorney General, Office of the Attorney General, 425 Fifth Avenue North, P.O. Box 20207, Nashville, TN 37202-0207 and Kim Helper, District Attorney General, P. O. Box 937, Franklin, Tennessee 37065-0937 on this the 29th day of March, 2010



David L. Raybin

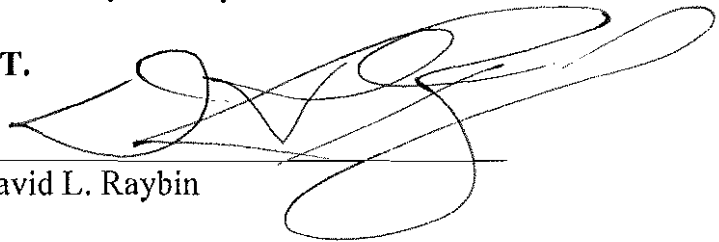
IN THE COURT OF CRIMINAL APPEALS
AT NASHVILLE

STATE OF TENNESSEE,)
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vs.) Case No. # M2007-02781-CCA-R3-CD
)
CHRIST KOULIS)

AFFIDAVIT OF DAVID L. RAYBIN

I, David L. Raybin, after duly being sworn, do state as follows: That the facts stated in the attached pleading are true and correct to the best of my information and belief. On March 19, 2010 I was informed that District Attorney Kim Helper advised my co-counsel, Lee Ofman, that his client has died that morning. Mr. Ofman verified this with Koulis' sister. I also called the sister whom I know from the years of litigation and verified that Koulis had died earlier that morning from an apparent heart attack at age 42. Koulis' ever-present cell phone is unanswered. I am attaching newspaper and other press accounts which convince me to an absolute certainty that my client is dead.

FURTHER AFFIANT SAITH NOT.



David L. Raybin

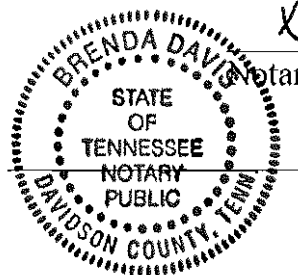
STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

Sworn to and subscribed before me this 29th day of March, 2010.



Notary Public

My commission Expires:



My Commission Expires JAN. 5, 2014

DR. CHRIST P. KOULIS



Dr. Christ P. Koulis, of Chicago, loving son of Pete and Athena Koulis; beloved brother of Antonia (Anargyros) Antonakos; dear father of Peter. Visitation Tuesday 3 to 9 p.m. at the **Oehler Funeral Home**, 2099 Miner St., (Rt. 14/Northwest Hwy. at Rand Rd.) Des Plaines. Funeral Wednesday 9:45 a.m. from chapel to St. John Greek Orthodox Church, 2350 E. Dempster, Des Plaines. Service 10:30 a.m. Interment Memorial Park Cemetery. For further info. and directions 847-824-5155 or oehlerfuneralhome.com.



Published in Chicago Tribune on March 28, 2010

Franklin murder trial defendant confirmed dead

Posted: Mar 26, 2010 5:07 PM CDT

FRANKLIN, Tenn. - Franklin police say a former plastic surgeon convicted in the 2007 murder of a Cool Springs woman was pronounced dead at a Chicago hospital Friday morning.

Police received confirmation from the Cook County, Illinois Medical Examiner's office that Christ Koulis died at Chicago's Northwestern Hospital at 5:45 a.m.

It's not clear how he died.

Koulis was convicted of criminally negligent homicide in September 2007 in Lesa Buchanan's murder.

Buchanan was killed on July 4, 2005 in her apartment in Cool Springs.

Koulis was released on an appeal bond after his conviction.

Pending that appeal, he had remained free without serving his court ordered two year sentence.



Christ Koulis was pronounced dead at a Chicago hospital Friday morning.



Koulis was convicted in Lesa Buchanan's murder in 2007.



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Franklin Murder Defendant Dies In Chicago

Plastic Surgeon Christ Koulis Convicted Of 2005 Murder

POSTED: 4:46 pm CDT March 26, 2010
UPDATED: 10:42 pm CDT March 26, 2010

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FRANKLIN, Tenn. -- Franklin police said the defendant in a 2007 Franklin murder trial suddenly died of a heart attack on Friday morning.

According to the Cook County, Ill., Medical Examiner's Office, plastic surgeon Christ Koulis, 42, was pronounced dead at Chicago's Northwestern Hospital at 5:45 am.

Koulis was charged with killing model Lisa Buchanan on July 4, 2005, at her Cool Springs apartment in Franklin, Tenn. Buchanan died after an overdose from the narcotic painkiller Oxycodone.

A jury convicted Koulis of criminally negligent homicide on Sept. 28, 2007.

Koulis was released on an appeal bond shortly after his conviction and remained free, pending that appeal, without serving his court-ordered two-year sentence, said Franklin police.

Previous Stories:

- February 19, 2008: Franklin Doctor Placed In Ky. Jail
- December 5, 2007: Former Doctor Sentenced In Death Of Girlfriend
- September 26, 2007: Mother Of Surgeon's Dead Girlfriend Testifies



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