

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals Nos. L-11-1055
L-11-1056

Appellee

Trial Court Nos. CR0200503263
CR0200601453

v.

Raul Izquierdo

DECISION AND JUDGMENT

Appellant

Decided: October 19, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Ann M. Baronas, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This matter is before the court on a “Suggestion of Death” filed by appellee, the state of Ohio, on August 10, 2012, in which appellee states that appellant, Raul Izquierdo, has died while this appeal remains pending. Attached to appellee’s notice is a copy of a “Coroner’s Verdict” issued by Lucas County Coroner James R. Patrick, M.D.,

in which the coroner states that appellant died of a gunshot wound to the head on April 14, 2012.

{¶ 2} On June 6, 2006, appellant entered an *Alford* plea and was found guilty of one count of felonious assault, in violation of R.C. 2903.11(A)(1), a second degree felony, case No. CR0200503263. He was subsequently sentenced to a five-year prison sentence, which was ordered to be served concurrently with the sentences imposed in two other criminal cases. On February 4, 2011, a resentencing hearing was held pursuant to R.C. 2929.191, *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, and *State v. Barnes*, 118 Ohio St.3d 1404, 2008-Ohio-2388, 886 N.E.2d. 868. On February 8, 2011, the trial court issued a judgment entry in which it resentenced appellant to serve five years in prison, and notified him of the conditions of postrelease control pursuant to *Bloomer* and *Barnes*, *supra*.

{¶ 3} On March 10, 2011, appellant filed a notice of appeal from the February 8 judgment. Appellant died on April 14, 2012, while this appeal was pending.

{¶ 4} Ohio courts have held that where a convicted person dies pending appeal, and a motion for substitution of a party is not made within a reasonable time pursuant to App.R. 29(A), the appeal becomes moot and should be dismissed. *State v. Sumling*, 10th Dist. No. 75AP-402, 1975 WL 182019 (Dec. 16, 1975), *citing Makley v. State*, 128 Ohio St. 571, 192 N.E. 738 (1934). App.R. 29(A), states, in relevant part:

If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the court of appeals, the personal representative of

the deceased party may be substituted as a party on motion filed by the representative, or by any party, with the clerk of the court of appeals. * * *

If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as the court of appeals may direct.

{¶ 5} In *State v. McGettrick*, 31 Ohio St.3d 138, 142, 509 N.E.2d 378 (1987), the Ohio Supreme Court held that:

when a criminal defendant-appellant dies while his appeal is pending and no personal representative is, within a reasonable time, subsequently appointed * * * by the state * * *, the court of appeals may dismiss the appeal as moot, vacate the original judgment of conviction and dismiss all related criminal proceedings, including the original indictment.

{¶ 6} In *State v. Liddy*, 11th Dist. No. 2010-L-135, 2011-Ohio-5866, the defendant died while attempting to challenge the trial court's denial of his motion for postconviction relief. The Eleventh District Court of Appeals dismissed only the deceased's appeal as moot, and left intact his underlying criminal conviction. In so doing, the court reasoned that, unlike the scenario presented in *McGettrick*, the defendant in *Liddy* did not die while his direct appeal was pending. *Id.* at ¶ 13.

{¶ 7} As noted above, in this case, appellant Izquierdo died in April 2012, almost five years after his original conviction and sentence, while attempting to challenge the

trial court's resentencing order. The state filed a suggestion of death on August 10, 2012, however, no motion to substitute a party was filed pursuant to App.R. 29(A).

{¶ 8} On consideration we find that, due to appellant's death, this appeal has become moot and it is dismissed. We further find that since appellant's death did not occur while his direct appeal was pending, his underlying conviction remains in full force and effect.

{¶ 9} Appeal dismissed. Costs waived.

Appeal dismissed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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