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ADVANCE SHEET HEADNOTE
December 13, 2021

2021 CO 79

No. 20SC790, *People v. Johnson* – Restitution – Statutory Interpretation – Common Law – Abatement.

In this case, the supreme court considers whether the General Assembly has abrogated the common law doctrine of abatement ab initio as to restitution orders in criminal cases. The court holds that the statute governing restitution requires a final conviction to maintain an order of restitution. Therefore, if a defendant dies of natural causes while his direct appeal is still pending, the abated conviction cannot support an obligation to pay restitution. Accordingly, the court overrules the division of the court of appeals decision in *People v. Daly*, 313 P.3d 571, 578 (Colo. App. 2011), and affirms the judgment of the court of appeals in the present matter.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2021 CO 79

Supreme Court Case No. 20SC790
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 17CA822

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Eddie Wayne Johnson.

Judgment Affirmed

en banc

December 13, 2021

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JUSTICE HOOD delivered the Opinion of the Court.

¶1 Defendant, Eddie Wayne Johnson, died of natural causes before completing the direct appeal of his criminal convictions in this case. Under the common law doctrine of abatement ab initio,¹ when a criminal defendant dies under these circumstances, his convictions and all proceedings associated with them must be vacated. *People v. Griffin*, 2014 CO 48, ¶ 4, 328 P.3d 91, 92. A division of the court of appeals therefore applied this doctrine to vacate Johnson’s underlying convictions and a large restitution order associated with them.

¶2 The prosecution claims that certain statutory changes and policy considerations should have allowed the district court’s restitution order to survive Johnson’s death. But because the General Assembly has not clearly abrogated the doctrine of abatement ab initio as to restitution, we affirm the court of appeals’ decision in *People v. Johnson*, 2020 COA 124, 487 P.3d 1262, vacating the district court’s restitution order.

I. Facts and Procedural History

¶3 In January 2017, a jury found Johnson guilty of multiple counts of securities fraud and theft. The district court also adjudicated Johnson a habitual criminal;

¹ “Ab initio” is a Latin term meaning “[f]rom the beginning.” *Ab initio*, Black’s Law Dictionary (11th ed. 2019).

sentenced him to forty-eight years in prison; and ordered him to pay approximately \$220,000 in costs, fees, and restitution.

¶4 Johnson appealed. But while his direct appeal was pending, Johnson died from cancer. Johnson's counsel filed a motion notifying the court of appeals of Johnson's death and requesting the abatement ab initio of the convictions and restitution order.

¶5 The prosecution objected. While conceding that non-restitution fees, fines, and costs abated, the prosecution argued that, per *People v. Daly*, 313 P.3d 571, 578 (Colo. App. 2011), and section 18-1.3-603(1), (4), C.R.S. (2021), the restitution order remained valid. Because restitution constitutes a separate civil judgment, the prosecution believed it should remain intact.

¶6 The division disagreed. It concluded that the doctrine extinguished Johnson's restitution order entered as part of his sentence and, accordingly, remanded to the district court with directions to vacate the order. *Johnson*, ¶ 20, 487 P.3d at 1266.

¶7 We granted certiorari to review whether the order of restitution imposed against Johnson survives his death.²

² We granted certiorari to review the following issue:

II. Analysis

¶8 We first identify the standard of review and then briefly examine the common law doctrine of abatement ab initio as it has emerged in Colorado. With that backdrop in mind, we consider whether the General Assembly has clearly abrogated the doctrine, such that a restitution order now survives a defendant who dies of natural causes³ during direct appeal. We conclude that it hasn't.

A. Standard of Review and Rules of Statutory Interpretation

¶9 We review questions of statutory interpretation de novo. *Cowen v. People*, 2018 CO 96, ¶ 11, 431 P.3d 215, 218. When interpreting statutes, our primary goal is to ascertain and give effect to legislative intent. *Id.* at ¶ 12, 431 P.3d at 218. To do so, we begin with the plain meaning of the statutory language, “giving its words and phrases their plain and ordinary meaning,” *McCulley v. People*, 2020 CO

Whether the court of appeals erred by splitting with Colorado precedent to apply the doctrine of abatement ab initio to restitution orders when a criminal defendant dies while his direct appeal is pending.

³ The issue of whether the doctrine of abatement ab initio should apply when a defendant commits suicide while his direct appeal is pending is not squarely at issue, given that Johnson died of natural causes. Therefore, we leave that conundrum for another day. See generally Patrick H. Gallagher, *The Aaron Hernandez Case: The Inconsistencies Plaguing the Application of the Abatement Doctrine*, 53 Gonz. L. Rev. 263, 268–69, 291–92 (2018).

40, ¶ 10, 463 P.3d 254, 257, and if the language is unambiguous, we look no further, *Cowen*, ¶ 12, 431 P.3d at 218.

¶10 While the General Assembly may abrogate common law doctrines, “[a] statute is not presumed to alter the common law except to the extent that such statute expressly provides.” *Beach v. Beach*, 74 P.3d 1, 4 (Colo. 2003). “[I]f the legislature wishes to abrogate rights that would otherwise be available under the common law, it must manifest its intent either expressly or by clear implication.” *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004) (quoting *Vaughan v. McMinn*, 945 P.2d 404, 408 (Colo. 1997)). We therefore strictly construe statutes in derogation of the common law. *Id.*

B. Abatement Ab Initio

¶11 The abatement ab initio doctrine is a longstanding facet of Colorado common law. This court first recognized it more than a century ago, *see Overland Cotton Mill Co. v. People*, 75 P. 924, 925 (Colo. 1904) (recognizing that legal “proceedings are abated by operation of law” when a defendant dies during direct appeal), and Colorado courts and other jurisdictions have repeatedly applied the doctrine in cases where a defendant dies before his direct appeal of a criminal conviction is finished, *e.g.*, *Griffin*, ¶ 9, 328 P.3d at 93 (surveying cases in which the doctrine of abatement ab initio has been applied on direct appeal but concluding that it does not apply to a defendant’s case if he dies while the petition for certiorari

review is pending); *Crowley v. People*, 223 P.2d 387, 388 (Colo. 1950) (concluding that “the death of the defendant . . . put an end to an infliction or enforcement of the punishment imposed” by the trial court).

¶12 Abatement ab initio establishes that when a defendant dies while his conviction is on appeal, all criminal proceedings against him are vacated. *Overland Cotton Mill*, 75 P. at 925. “[T]he appeal does not just disappear, and the case is not merely dismissed. Instead, everything associated with the case is extinguished, leaving the defendant ‘as if he had never been indicted or convicted.’” *United States v. Estate of Parsons*, 367 F.3d 409, 413 (5th Cir. 2004) (quoting *United States v. Estate of Parsons*, 314 F.3d 745, 749 (5th Cir. 2002)); accord *Griffin*, ¶ 4, 328 P.3d at 92. Abatement, therefore, “render[s] the entire proceedings a nullity.” *People v. Lipira*, 621 P.2d 1389, 1390 (Colo. App. 1980).

¶13 Courts have embraced two primary rationales for the doctrine: finality and mootness. *Griffin*, ¶¶ 5-6, 328 P.3d at 92-93. The finality (or right of appeal) rationale “rests on the notion that ‘an appeal is an integral part of our system of adjudicating guilt or innocence and defendants who die before the conclusion of their appellate review have not obtained a final adjudication of guilt or innocence.’” *Id.* at ¶ 5, 328 P.3d at 92 (quoting *People v. Valdez*, 911 P.2d 703, 704 (Colo. App. 1996)). Without finality, which includes the statutory right of direct appeal, “courts would have to choose among disregarding a finding of guilt,

entering an unreviewed judgment, or adjudicating an imaginary appeal of a deceased defendant's conviction." *United States v. Rich*, 603 F.3d 722, 729 (9th Cir. 2010).

¶14 The second rationale relates to mootness. Penological goals of retribution and specific deterrence arguably disappear when a defendant dies. "[A]ssum[ing] that the primary purpose of the criminal justice system is to punish offenders, and that the death of the defendant renders enforcement of the punishment impossible," the "state's interests in protecting society have been satisfied." *Griffin*, ¶ 6, 328 P.3d at 93. Thus, because the state loses its "substantial interest in attempting to maintain the conviction[,] . . . the entire criminal proceeding abates from the beginning." *Id.* (quoting *State v. Griffin*, 592 P.2d 372, 373 (Ariz. 1979)).

¶15 With the doctrine firmly in mind, we now turn to the primary question before us: Has the General Assembly, expressly or by clear implication, chosen to abrogate abatement ab initio as to restitution?

C. The Restitution Statute

¶16 Section 18-1.3-603 governs restitution orders. It states in part: "Any order for restitution entered pursuant to this section is a final civil judgment in favor of the state and any victim. Notwithstanding any other civil or criminal statute or rule, any such judgment remains in force until the restitution is paid in full." § 18-1.3-603(4)(a)(I).

¶17 Subsection (4)(a)(II) is the only provision addressing what happens in the event of a defendant's death:

Notwithstanding the provisions of subparagraph (I) of this paragraph (a), two years after the presentation of the defendant's original death certificate to the clerk of the court or the court collections investigator, the court may terminate the remaining balance of the judgment and order for restitution if, following notice by the clerk of the court or the court collections investigator to the district attorney, the district attorney does not object and there is no evidence of a continuing source of income of the defendant to pay restitution.

¶18 The prosecution contends that subsection (I) reveals the General Assembly's intent to allow restitution orders to survive a defendant's death, while subsection (II) provides the sole mechanism by which a court may terminate a restitution order based on a defendant's death (and that proceeding requires the consent of the district attorney, which is lacking here).

¶19 In staking out its position, the prosecution leans heavily on *Daly*, in which a division of the court of appeals held that "the [abatement ab initio] doctrine does not apply to civil judgments created by restitution orders." 313 P.3d at 578. Instead, "to vindicate [a defendant's] statutory right to an appeal, [his] estate is entitled to challenge the restitution order that forms the basis for the civil judgment." *Id.*

¶20 The *Daly* division reached this conclusion by interpreting what is now section 18-1.3-603(4)(a)(I). (The statute at the time did not include

subsection (4)(a)(II).) The division concluded that “the legislature saw civil judgments created by [section] 18-1.3-603(4)(a) as an important part of guaranteeing victims’ rights.” *Daly*, 313 P.3d at 576. In the *Daly* division’s view, the General Assembly demonstrated its intent to make “these civil judgments robust and durable” when it declared that “they cannot be erased by criminal or civil statutes or rules,” *id.* at 576–77; thus, according to the division, requiring defendants to pay victims restitution serves important public goals, the attainment of which necessitates that our restitution statutes be liberally construed, *id.* at 575. The *Daly* division also maintained that a current criminal conviction isn’t required to support a restitution order. *Id.* at 577. Rather, it reasoned that all a restitution order needs is a valid conviction *at the time* the court imposed the obligation. *Id.* Accordingly, the division concluded that the General Assembly exempted restitution orders from abatement ab initio, providing for their survival after the death of a defendant. *Id.* at 578.

¶21 While the *Daly* division’s analysis is certainly reasonable (particularly in emphasizing legislative changes to better address the rights of victims), it fails to comport with more recent decisions of this court. For example, earlier this year, in *People v. Roddy*, 2021 CO 74, ¶ 26, ___ P.3d ___, we observed that the legislature has confined restitution to a defendant’s criminal conduct that has resulted in a conviction, such that the defendant is deemed an “offender” in the parlance of the

statute. Therefore, “absent an agreement between the defendant and the prosecution at the time the plea is entered, a court may not impose restitution for pecuniary losses proximately caused by conduct exclusively related to dismissed charges.” *Id.* at ¶ 5. *Roddy* relied in part on another post-*Daly* opinion from this court, *Cowen*, in which we similarly held that “Colorado’s restitution statutes do not allow a trial court to impose restitution for pecuniary losses caused by conduct that formed the basis of a charge of which the defendant has been acquitted.” ¶ 2, 431 P.3d at 216.

¶22 The logic of these decisions suggests, and we conclude, that a *final* conviction is a requirement for maintaining an order of restitution. See *United States v. Brooks*, 872 F.3d 78, 89 (2d Cir. 2017) (“The statutory predicate for restitution . . . is a conviction, and once that conviction has been vacated – even by abatement upon the death of the defendant – there is no longer a basis to require payment of restitution.”); *United States v. Volpendesto*, 755 F.3d 448, 453 (7th Cir. 2014) (“Restitution . . . cannot be disentangled from the criminal conviction that underlies the sentence.”); *Johnson*, ¶ 16, 487 P.3d at 1266 (“Section 18-1.3-603(1) expressly ties a restitution order to a conviction . . .”).

¶23 And a conviction becomes final only after the court of appeals has issued a mandate. *People v. Cali*, 2020 CO 20, ¶ 24, 459 P.3d 516, 521. Here, Johnson’s direct appeal was still pending when he died; because no mandate had issued, his

conviction wasn't final; without a final conviction, he may not be deemed an offender for the purpose of maintaining a restitution order.

¶24 Furthermore, we agree with the *Johnson* division's interpretation of each of the key statutory provisions. Subsection 18-1.3-603(4)(a)(I) "does not explicitly or by clear implication abrogate . . . abatement *ab initio*," as the common law doctrine is "neither a statute nor a rule." *Johnson*, ¶ 17, 487 P.3d at 1266. And subsection (4)(a)(II) shouldn't be read as the sole refuge from a continuing restitution obligation. Like the *Johnson* division, we construe this subsection to address the situation where, after direct appeal (if one is timely filed), the defendant dies before paying restitution in full *but a valid and final conviction still stands*. Therefore, section 18-1.3-603(4)(a)(II) simply encompasses a different subset of cases from that at issue here. *Id.* at ¶ 18, 487 P.3d at 1266.

¶25 We aren't persuaded by the prosecution's argument that there is a material difference between a defendant who dies during the pendency of a direct appeal and a living defendant whose conviction is reversed and who is later acquitted. *Cf. Nelson v. Colorado*, 137 S. Ct. 1249, 1256 n.10 (2017) (noting that "an invalid conviction is no conviction at all"). The prosecution argues that only in the latter scenario has the presumption of innocence been restored. Perhaps, but that isn't the pertinent question. Restitution isn't based on the absence of the presumption of innocence but rather on the enduring validity of the underlying judgment of

conviction. In *Nelson*, the Supreme Court held that a state is obligated to refund fees, costs, and restitution when a defendant's conviction is invalidated by a reviewing court due to reversal on appeal and later acquittal or dismissal with prejudice. *Id.* at 1252. In writing for the Court, Justice Ginsburg observed that "Colorado may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions." *Id.* at 1256. And the Second Circuit aptly observed that in *Nelson*, the Court "made a point of not parsing the reasons that a conviction was reversed or vacated." *United States v. Libous*, 858 F.3d 64, 67 n.3 (2d Cir. 2017); *see also United States v. Ajrawat*, 738 F. App'x 136, 139 (4th Cir. 2018) (noting that *Nelson* made "clear the question is *whether* the conviction was vacated, rather than *why* the conviction was vacated").

¶26 We find additional support for our conclusion in decisions of the federal circuit courts. As noted by the division, most federal circuits have concluded that abatement applies to restitution orders.⁴ *Johnson*, ¶ 11, 487 P.3d at 1265. And,

⁴ *See, e.g., Volpendesto*, 755 F.3d at 454 ("Without a final criminal conviction, there can be no order of restitution . . ."); *Rich*, 603 F.3d at 729 ("Just as it is inappropriate to impose restitution on a living individual who was never indicted or convicted, so it is inappropriate to impose restitution on the estate of a deceased individual who, in the eyes of the law, was never indicted or convicted."); *Estate of Parsons*, 367 F.3d at 415 ("[T]he order of restitution cannot stand in the wake of [the defendant's] death."); *United States v. Logal*, 106 F.3d 1547, 1552 (11th Cir. 1997) ("To uphold the restitution order . . . violates the finality principle.").

following the Supreme Court’s 2017 *Nelson* decision, no federal circuit court has held that a restitution order can stand when the underlying conviction falls.⁵

¶27 We agree with the division here that the General Assembly hasn’t clearly acted to exclude restitution orders from abatement ab initio. See *Johnson*, ¶ 15, 487 P.3d at 1266. We therefore overrule the division’s decision in *Daly*.⁶

III. Conclusion

¶28 The common law doctrine of abatement ab initio applies to a restitution order imposed on a defendant who dies during the pendency of his direct appeal. Accordingly, we affirm the judgment of the court of appeals.

⁵ See, e.g., *United States v. Ziglar*, No. 20-4293, 2021 WL 5072078, at *1 (4th Cir. Nov. 2, 2021) (“[I]n light of the Supreme Court’s ruling in *Nelson*, the death of a defendant during the pendency of a direct appeal also requires abatement of orders of restitution and forfeiture, and any paid portion of a special assessment.” (citation omitted)); *United States v. Coddington*, 802 F. App’x 373, 374 (10th Cir. 2020) (“Based on *Nelson*, the Government concedes the restitution order against [the defendant] must be vacated if his convictions are vacated.”); *United States v. Robertson*, 980 F.3d 672, 676 (9th Cir. 2020) (“Abatement of the convictions . . . nullifies the accompanying restitution order.” (quoting *Rich*, 603 F.3d at 728)); *Brooks*, 872 F.3d at 89 (“Following the recent guidance of the U.S. Supreme Court, . . . when a criminal conviction abates upon the death of a defendant, any restitution ordered as a result of that conviction must also abate.”). While *Nelson* and its progeny relied primarily on procedural due process requirements imposed by the federal constitution, its logic path is of a piece with our statutory resolution of the case before us now.

⁶ We denied review of the following question: Whether this court should modify or abandon the abatement ab initio doctrine. Therefore, we do not address the State’s briefing that reaches this question.