

FILED
December 18, 2008

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MATTHEW JON FERNANDEZ,
Defendant-Appellant.

No. 08-6096
(D.C. No. 5:07-CR-00153-R-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **BRISCOE**, **BALDOCK**, and **HOLMES**, Circuit Judges.

On direct appeal from his conviction for drug-related charges, Defendant-Appellant Matthew Jon Fernandez contended that his constitutional rights under the Fifth and Sixth Amendments were violated by the introduction at trial of hearsay statements made by unidentified confidential informants. Additionally, Mr. Fernandez contended that the district court erred by denying his motion to suppress physical evidence, and in calculating his sentence. While the appeal was

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

pending and before oral argument, however, counsel for both parties joined in the filing of a motion to dismiss this appeal informing this court that Mr. Fernandez died on December 3, 2008. “[D]eath pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.” United States v. Davis, 953 F.2d 1482, 1486 (10th Cir. 1992) (quoting Durham v. United States, 401 U.S. 481, 483 (1971) (per curiam) (footnote omitted) overruled on other grounds, Dove v. Untied States, 423 U.S. 325 (1976) (per curiam)); see also United States v. Sloan, 26 Fed. Appx. 890 (10th Cir. Feb. 6, 2002) (unpublished) (remanding case, with directions to vacate the judgment of conviction and dismiss the underlying indictment, where appellant died pending the direct appeal of his sentence).

Accordingly, we GRANT the joint motion to dismiss this appeal. Further, this case is REMANDED to the district court with directions to VACATE the judgment of conviction and DISMISS the underlying indictment.

This case is also removed from the presently scheduled January 16, 2009, oral argument calendar, and counsel are excused from attendance.

Entered for the Court

Mary Beck Briscoe
Circuit Judge