[Cite as *State v. Liddy*, 2011-Ohio-5866.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**MEMORANDUM OPINION**
Plaintiff-Appellee,	:	**CASE NO. 2010-L-135**
- vs -	:	
RICHARD J. LIDDY, SR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 06 CR 000068.

Judgment: Appeal dismissed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Richard J. Liddy, Sr., pro se, c/o Shirley and William Liddy, 535 Vasto Drive, Venice, FL 34285 (Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This appeal arises from the denial by the Lake County Court of Common Pleas of the postconviction "motion to set aside judgment and sentence pursuant to R.C. 2945.75(A)(2)" filed by appellant, Richard J. Liddy, Sr. Appellant was convicted in 2006, following a jury trial, of illegal manufacture of drugs and illegal assembly or possession of chemicals for the manufacture of drugs.

{¶2} On February 3, 2006, appellant was indicted for one count of illegal manufacture of methamphetamine, a felony of the second degree, and one count of

illegal assembly or possession of chemicals with the intent to manufacture drugs, a felony of the third degree. Appellant pled not guilty and the case was tried to a jury.

{¶3} The testimony at trial demonstrated that on August 15, 2005, appellant was involved with others in the manufacture of methamphetamine at a motel in Perry Township, Ohio. Appellant, along with others, purchased chemicals with the intent to bring them back to a lab operated at the motel to manufacture the drugs. He then used these chemicals in manufacturing methamphetamine.

{¶4} On April 5, 2006, the jury returned a verdict finding appellant guilty of both counts of the indictment.

{¶5} A sentencing hearing was held on April 11, 2006. At that hearing, evidence was presented that appellant was actively involved in methamphetamine labs prior to the crimes charged in this incident. Appellant involved his children in the use, illegal manufacture, and sale of methamphetamine. Appellant committed the crimes in the case sub judice as part of an organized criminal activity. The evidence demonstrated that appellant was involved in every step of the manufacture of this drug, and had extensive knowledge concerning its manufacture. Appellant had previously been convicted of grand theft, vandalism, felony escape, domestic violence, and petty theft. Appellant had a history of abusing drugs and refusing to acknowledge his problem or to accept treatment. The court noted the overwhelming nature of the evidence presented against appellant at trial.

{¶6} The trial court merged the two offenses for sentencing, and sentenced appellant to eight years in prison. Appellant appealed his conviction in a direct appeal, and on September 28, 2007, this court affirmed his conviction in *State v. Liddy*, 11th

Dist. No. 2006-L-083, 2007-Ohio-5225, discretionary appeal not allowed by the Supreme Court of Ohio at 116 Ohio St.3d 1510, 2008-Ohio-381 ("*Liddy I*").

{¶7} More than four years after his sentence, on May 18, 2010, appellant filed a "motion to set aside judgment and sentence pursuant to R.C. 2945.75(A)(2)," arguing that the jury's verdict was defective because it omitted the degree of the offense of which he was convicted or a statement that an aggravating element had been found to justify his conviction of a greater degree of the offense. Appellant argued the verdict therefore constituted a finding of guilt of the least degree of the offense charged. The trial court denied the motion, finding that appellant's motion was barred by res judicata. This appeal followed.

{¶8} While this appeal was pending, appellant died. On September 14, 2011, the assistant prosecuting attorney filed a notice in this court that appellant had died in prison on September 6, 2011. In her notice, the prosecutor said, "[t]he State does not intend to move to substitute a party." To date, no motion to substitute an appropriate party has been filed, nor have we been advised that a personal representative has been appointed for appellant.

{¶9} In *State v. Fisher* (June 30, 1994), 11th Dist. No. 93-T-4938, 1994 Ohio App. LEXIS 2922, this court held that *State v. McGettrick* (1987), 31 Ohio St.3d 138 "controls situations when an appellant dies during the pendency of an appeal." *Fisher*, supra, at *3. In *McGettrick*, the Supreme Court of Ohio held:

{¶10} "*** [W]hen a criminal defendant-appellant dies while his appeal is pending and no personal representative is, within a reasonable time, subsequently appointed, the state may suggest the decedent's death on the record and, upon motion by the state

for substitution of a party, the court of appeals should substitute any proper person, including the decedent's attorney of record, as party defendant-appellant and proceed to determine the appeal. Absent such a motion for substitution of a party, filed within a reasonable time 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." Id. at 142-143. (Footnote omitted.)

{¶11} This court in *Fisher* considered whether the foregoing dismissal is discretionary or mandatory. This court held that, despite use of the term "may," as opposed to "shall," the dismissal referenced by the Supreme Court in *McGettrick* is mandatory. *Fisher*, supra, at *4. This court held:

{¶12} "*** [I]n using the term 'may' rather than 'shall,' the *McGettrick* court's holding is stated in a manner which would appear to give an appellate court discretion in rendering the appeal moot, vacating the judgment, and dismissing the indictment. However, it is *** our impression that an appellate court 'must' proceed to dismiss the appeal, vacate the conviction, and dismiss the indictment when an appropriate party is not substituted by one with the power to request substitution under App.R. 29(A). This is because, as noted by the *McGettrick* court, pursuant to App.R. 29(A), substitution is not automatic; affirmative action is required before substitution may be afforded." *Fisher*, supra.

{¶13} As noted above, the state has opted not to substitute a party. As a result, the instant appeal is moot. *McGettrick*, supra; *Fisher*, supra. However, our holding today does not affect appellant's underlying conviction. In *McGettrick*, the defendant died while his *direct appeal* was pending. The Supreme Court held that, despite the

defendant's death, his personal representative could still challenge his conviction. Id. at 140. The Supreme Court stated that to hold otherwise "would effectively preclude a convicted criminal defendant from exercising his constitutional right to a *direct review of his criminal conviction*." (Emphasis added.) Id. The Supreme Court's holding regarding the vacation of the defendant's conviction and dismissal of all related criminal proceedings thus applies only to cases in which the defendant dies while his *direct appeal* is pending. In contrast to *McGettrick*, the instant appeal arose from the trial court's denial of appellant's motion for postconviction relief, and is not a direct appeal of his conviction. As a result, unlike the defendant in *McGettrick*, appellant has previously exercised his constitutional right to a direct appeal. Therefore, he is not entitled to again challenge his criminal conviction.

{¶14} We therefore hold the instant appeal is dismissed as moot; the judgment of the trial court denying appellant's motion to set aside judgment and sentence is vacated; but his conviction remains in full force and effect.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.