[Cite as *State v. Clay*, 2010-Ohio-4558.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0126**
- vs -	:	
TIMOTHY W. CLAY,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 911.

Judgment: Appeal dismissed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Timothy W. Clay, appeals from the judgment entered by the Trumbull County Court of Common Pleas. The trial court imposed a five-year term of community control for Clay's convictions for trafficking in marijuana.

{¶2} The charges in this matter arose out of a confidential informant's purchases of marijuana from Clay.

{¶3} Clay was indicted on four counts of trafficking in marijuana. Two of the counts were charged as fifth-degree felonies, in violation of R.C. 2925.03(A)(1) & (C)(3)(a). The other two counts were charged as fourth-degree felonies, in violation of R.C. 2925.03(A)(1) & (C)(3)(b), due to the allegations that these offenses were committed in the vicinity of a juvenile. Clay pled not guilty to these charges, and a jury trial was held.

{¶4} The jury found Clay guilty of counts 1 and 4 of the indictment, which were fifth-degree felonies trafficking in marijuana. The jury found Clay guilty of count 2 of the indictment; however, the jury found this offense was not committed in the vicinity of a juvenile. Thus, in regard to count 2, Clay was found guilty of trafficking in marijuana, but the offense was a fifth-degree felony rather than a fourth-degree felony. The jury did not reach a verdict on count 3 of the indictment.

{¶5} On November 3, 2009, the trial court conducted a sentencing hearing. At the hearing, the trial court sentenced Clay to a five-year term of community control. In addition, the trial court informed Clay it would "impose the 12-month prison sentence as to each count and order them served consecutively for a total of 36 months in prison" if he violates the terms of the community control sanction.

{¶6} At the conclusion of the sentencing hearing, the assistant prosecutor informed the court that the state would be filing a motion to dismiss count 3 of the indictment. However, the state never filed a motion to dismiss this count and the record is devoid of an entry from the trial court dismissing count 3 of the indictment.

{¶7} The trial court issued a judgment entry of sentence. The entry mistakenly states that Clay was found guilty of all four counts of the indictment. In addition, the

entry incorrectly states that Clay was convicted of a fourth-degree felony in relation to count 2 of the indictment. The trial court then sentenced Clay to a five-year term of community control. The trial court imposed various conditions as part of the community-control sanction. Among other matters, these conditions ordered Clay to (1) serve 30 days in jail, (2) pay court costs, (3) obtain employment, and (4) remain drug and alcohol free.

{¶8} Clay has timely appealed the trial court's judgment entry to this court. Clay raises the following assignments of error:

{¶9} "[1.] The trial court erred by sentencing based upon the erroneous conclusion that appellant had been convicted of four offenses.

{¶10} "[2.] Appellant's convictions are against the manifest weight of the evidence."

{¶11} Prior to addressing the merits of Clay's assigned errors, we must determine if this court has jurisdiction to hear this appeal. We note it "'is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction.'" *Gehm v. Timberline Post & Frame*, 112 Ohio St.3d 514, 2007-Ohio-607, at ¶14, quoting *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20.

{¶12} Initially, we determine whether the trial court's judgment is a final, appealable order as a result of the sentence it imposed.

{¶13} "Instead of considering multiple offenses as a whole and imposing one, overreaching sentence to encompass the entirety of the offenses ***, a judge sentencing a defendant pursuant to Ohio law must *** impose a separate sentence for

each offense." *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, at ¶9, citing R.C. 2929.11 through 2929.19. See, also, *State v. Glavic* (2001), 143 Ohio App.3d 583, 588. (Citations omitted.)

{¶14} This court has held that when a trial court fails to impose a separate sentence for each of the defendant's convictions, the judgment entry is not a final, appealable order. *State v. Garner*, 11th Dist. No. 2002-T-0025, 2003-Ohio-5222, at ¶7. (Citations omitted.) In *State v. Garner*, this court held that this rule applies in situations where the trial court imposes a single term of community control on a defendant who has multiple convictions. Id. at ¶8-9. In explaining its rationale, this court held:

{¶15} "[T]he trial court imposed only a single sentence despite the fact that the jury found appellant guilty of two different crimes. This not only leaves one of the offenses without a sentence, but it also prevents this court from determining to which offense the given sentence actually applies. As a result, there is no final appealable [order] for this court to review." Id. at ¶10.

{¶16} The Third Appellate District has also found that a single community control sanction imposed for multiple convictions does not constitute a final, appealable order, holding:

{¶17} "[T]he trial court only imposed a single term of community control, regardless of the fact that it had found [the defendant] guilty of both of the charges. Therefore, because the judgment entry neither states which convictions are subject to community control sanctions nor does it impose a sentence for each conviction, the judgment entry does not constitute a final appealable order." *State v. O'Black*, 3d Dist. No. 1-09-46, 2010-Ohio-192, at ¶6.

{¶18} In the case sub judice, if the trial court intended to impose a community control sanction for each offense but allow Clay to serve those terms concurrently, the judgment entry should have clearly stated this. However, as worded, the trial court's entry imposed a single sentence for multiple convictions. Thus, the trial court's judgment entry is not a final, appealable order.

{¶19} In addition to the trial court's judgment entry not being a final, appealable order as a result of imposing a single term of community control, we note there is an unresolved issue at the trial court level. Both Clay and the state acknowledge the trial court erred by stating that Clay was convicted of count 3 of the indictment. Actually, the jury could not reach a verdict on this count. At the sentencing hearing, the assistant prosecutor indicated the state would file a motion to dismiss this count, yet no such motion appears in the record. Moreover, the trial court has not sua sponte dismissed count 3 of the indictment. Thus, count 3 of the indictment is still pending at the trial court level.

{¶20} In a criminal case, the trial court must dispose of all the charges against a defendant, and, if it does not do so, its judgment entry is not a final, appealable order. *State v. Rothe*, 5th Dist. No. 2008 CA 00044, 2009-Ohio-1852, at ¶9. (Citations omitted.) "In the case of a hung jury, jeopardy does not terminate when a hung jury is discharged, rather the case against the defendant remains pending until the remaining charge is either retried and/or dismissed with prejudice." Id. Moreover, we find the following language from the Fifth Appellate District applicable: "although a dismissal of the hung jury charge may be contemplated on the record, unless the dismissal is documented by a signed journal entry which is filed [in the docket], the order of the trial

court remains interlocutory and is not a final, appealable order." *State v. Robinson*, 5th Dist. No. 2007 CA 00349, 2008-Ohio-5885, at ¶11, citing *State v. Huntsman* (Mar. 13, 2000), 5th Dist. No. 1999-CA-00282, 2000 Ohio App. LEXIS 987.

{¶21} Since count 3 of the indictment is still pending, the trial court's judgment entry is not a final, appealable order.

{¶22} Finally, it appears the sentencing entry should be corrected to reflect the fact that the jury, with regard to count 2, found that it was not committed in the vicinity of a juvenile, which would make it a felony of the fifth degree.

{¶23} For the reasons stated above, the trial court's November 13, 2009 judgment entry is not a final, appealable order, and we do not have jurisdiction to hear this appeal.

{¶24} This appeal is hereby dismissed.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.