

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	
-VS-	:	
	:	Case No. 2009-CA-00111
MICHAEL E. WHETSTONE	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Court of Common Pleas, Case No. 08CR00691
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JUDGMENT:	Dismissed
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DATE OF JUDGMENT ENTRY:	April 26, 2010
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APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KENNETH OSWALT	ROBERT C. BANNERMAN
EARL FROST	Box 77466
Licking County Prosecutor	Columbus, OH 43207-0098
20 S. 2nd St., 4th Fl.	
Newark, OH 43055	

Gwin, P.J.

{¶1} Defendant Michael Whetstone appeals a judgment of the Court of Common Pleas of Licking County, Ohio, which convicted him for one count of aggravated trafficking in drugs in violation of R.C. 2925.03 (A)(1)(C)(1)(c) and/or R.C. 2925.03 (A)(2)(C)(1)(c); one count of aggravated possession of drugs in violation of R.C. 2925.11 (A)(C)(1)(b); one count of aggravated possession of drugs in violation of R.C. 2925.11 (A)(C)(1)(a); and one count of possession of drug paraphernalia in violation of R.C. 2925.14 (C)(1). Appellant assigns two errors to the trial court:

{¶2} “I. APPELLANT’S JUDGMENT ENTRY IMPOSING SENTENCE IS NOT A FINAL APPEALABLE ORDER.

{¶3} “II. APPELLANT’S SENTENCES ON COUNTS ONE AND TWO WERE ALLIED OFFENSES OF SIMILAR IMPORT AND SHOULD HAVE MERGED AT SENTENCING.”

{¶4} Appellant pled no contest to all four counts of the indictment. The trial court sentenced appellant to three years on count one, three years on count two, and eight months on count three, to run consecutively with each other and consecutively to a sentence imposed in another case. The court also sentenced appellant to three years of post-release control, and granted the forfeiture specification carried by the first three counts. The court did not sentence appellant on count four, a misdemeanor count.

I.

{¶5} In his first assignment of error, appellant argues because the court convicted him on count four but did not sentence him on that offense, the sentencing entry is not a final appealable order. We agree.

{¶6} In *State v. Lewis*, Lorain App. No. 08-CA-09379, 2009-Ohio-3322, the Court of Appeals for the Ninth District held the failure of an entry to dispose of a court's ruling on each prosecuted charge renders the order of the court interlocutory. *Lewis* at paragraph 14, citations deleted. See also, *State v. Robinson*, Stark App. No. 2007-CA-00349, 2008-Ohio-5885; *State v. Coffman*, Delaware App. No. 06-CAA-090062, 2007-Ohio-3765. A court has the authority to dismiss a count, suspend a sentence, or run sentences consecutively or concurrently if permitted by law, but it has no authority to refuse to sentence altogether. *State v. Ford*, Summit App. No. 23269, 2006 -Ohio- 6961 at paragraph 6.

{¶7} Pursuant to Section 3 (B)(2), Article IV, of the Ohio Constitution, appellate courts have jurisdiction to review final orders or judgments of courts within their appellate districts. See also, *Gehm v. Timberline Post & Frame*, 112 Ohio St. 3d 514, 2007-Ohio-607, 861 N.E. 2d 519 at paragraph 13. If there is no final order, an appellate court has no jurisdiction to review the matter, *General Accident Insurance Company v. Insurance Company of North America* (1989), 44 Ohio St. 3d 17, 540 N.E. 2d 266.

{¶8} We find the order appealed from is not a final appealable order. Accordingly, we must dismiss the appeal and return the matter to the trial court. The trial court should conduct a new plea and sentencing hearing and should clarify the plea and sentence in count one, which presently is expressed as "and/or" and, as appellant argues, is problematic.

{¶9} For the foregoing reasons, the appeal is dismissed for lack of jurisdiction.

By Gwin, P.J., and

Farmer, J., concur;

Hoffman, J., concurs

separately

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

WSG:clw 0414

Hoffman, J., concurring

{¶10} I concur in the majority's decision Appellant's appeal should be dismissed for want of final appealable order. However, I do not believe this Court should render an advisory opinion with respect to further proceedings in the trial court.

HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-VS-

MICHAEL E. WHETSTONE

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2009-CA-00111

For the reasons stated in our accompanying Memorandum-Opinion, the appeal is dismissed for lack of jurisdiction. Costs to be split between appellant and appellee.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER