

[Cite as *State v. Linnean*, 2009-Ohio-6639.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92596

STATE OF OHIO

PLAINTIFF-APPELLEE

VS.

SHANE LINNEAN

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Criminal Appeal from the
Cuyahoga County Common Pleas Court
Case No. CR-511283

BEFORE: Boyle, J., Blackmon, P.J., and Jones, J.

RELEASED: December 17, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, Shane Linnean, appeals from a judgment of the Cuyahoga County Court of Common Pleas finding him guilty of aggravated riot and sentencing him to one year of community control. We dismiss the appeal as being premature because a motion for a new trial is still pending in the trial court. Accordingly, we do not have jurisdiction to hear the appeal.

Procedural Facts and History

{¶ 2} On November 17, 2008, following a jury trial, Linnean was found guilty of aggravated riot, in violation of R.C. 2917.02. On December 1, 2008, prior to sentencing, Linnean moved for a new trial pursuant to Crim.R. 33 and requested an oral hearing. He asserted two grounds in support of his motion: (1) the state's leading witness committed misconduct by telling the jury that Linnean "was the local or residential cocaine dealer," thereby depriving him of a fair trial; and (2) the state improperly indicted the aggravated riot count as a single count with an "and/or" indictment, instead of three separate counts, and that based on the defective indictment and jury charge, Linnean was denied a unanimous verdict. He also filed a motion to dismiss the conviction, incorporating the arguments raised in his motion for a new trial and the arguments raised by one of his co-defendants.

{¶ 3} On December 16, 2008, the trial court sentenced Linnean to one year of community control. The court, however, never ruled on Linnean's motion for a new trial.

{¶ 4} On December 29, 2008, Linnean filed a notice of appeal and attached a copy of the judgment of conviction. Linnean raises six assignments of error attacking the underlying appeal.

Final Appealable Order

{¶ 5} Although not raised by either party, “[w]e have a duty to sua sponte consider whether the entry from which this appeal is taken constitutes a final appealable order.” *State v. Untied*, 5th Dist. No. 2001-0019, 2002-Ohio-2471, citing *Whitaker-Merrell v. Geupel Constr. Co.* (1972), 29 Ohio St.2d 184. Absent a final appealable order, we are without jurisdiction to consider an appeal. See Section 3(B)(2), Article IV of the Ohio Constitution; R.C. 2501.02.

{¶ 6} Under App.R. 4(B)(3), if a criminal defendant files a timely motion for a new trial, the time for filing a notice of appeal begins to run when the order denying the motion is entered. *Dayton v. Huber*, 2d Dist. No. 19838, 2003-Ohio-6667; see, also, *State v. Turner*, 8th Dist. No. 88489, 2007-Ohio-3264, ¶17-18. A notice of appeal filed prior to a trial court's ruling on a timely motion for a new trial under Crim.R. 33 is deemed premature and will not confer jurisdiction upon the court of appeals. *Id.*, citing *State v. Soward* (1975), 47 Ohio App.2d 59, 60; see, also, *Cleveland v. Kline*, 8th Dist. No. 86665,

2006-Ohio-2087, ¶2; *State v. Wright*, 6th Dist. No. E-02-034, 2003-Ohio-5266, ¶18; *Untied*, 2002-Ohio-2471, ¶24.

{¶ 7} Our review of the record reveals that the trial court has not yet ruled upon Linnean’s motion for a new trial pursuant to Crim.R. 33. Linnean’s notice of appeal, therefore, has not invoked the jurisdiction of this court, and the time for filing a notice of appeal has yet to commence.

{¶ 8} Accordingly, because we lack jurisdiction to consider this appeal at this time, the appeal is hereby dismissed at appellant’s costs.

{¶ 9} A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

PATRICIA ANN BLACKMON, P.J., and
LARRY A. JONES, J., CONCUR