

[Cite as *State v. McGee*, 2010-Ohio-2082.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92026

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RICHARD McGEE

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-507845

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

RELEASED: May 13, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Richard McGee appeals from the sentence imposed upon him, arguing that the court erred by making the sentence in this case consecutive to the sentence imposed in another case. We find the common pleas court's order is not final and appealable. Therefore, we must dismiss this appeal.

{¶ 2} Appellant was charged in three counts of a four-count indictment filed March 18, 2008. He was charged with aggravated robbery with two firearm specifications and a forfeiture specification; carrying a concealed weapon with a forfeiture specification; and improper handling of a firearm with a forfeiture specification. The case was tried to a jury commencing July 28, 2008. At the conclusion of the trial, the jury found appellant guilty of aggravated robbery and a one-year firearm specification pursuant to R.C. 2941.141; the jury found appellant not guilty of a three-year firearm specification pursuant to R.C. 2941.145. The jury also found appellant guilty of carrying a concealed weapon and improperly handling firearms in a motor vehicle.

{¶ 3} On August 8, 2008, the common pleas court entered judgment. The judgment entry indicated that the jury had returned verdicts finding

appellant “guilty of aggravated robbery * * * with firearm specification,” “carrying concealed weapons * * * with forfeiture specification,” and “improperly handling firearms in a motor vehicle * * * with forfeiture specification.” The court sentenced the defendant to one year on the firearm specification, to be served prior and consecutive to a sentence of seven years’ imprisonment on the base aggravated robbery charge. The court further determined that this sentence should be served consecutive to the sentence imposed in Common Pleas Court Case No. CR-507434. Finally, the court sentenced appellant to a six month term in the county jail on each of the remaining two charges, to be served concurrently with one another and with the sentence on the aggravated robbery charge.

{¶ 4} Appellant filed his notice of appeal from this judgment on September 2, 2008. In April 2009, however, this court returned this matter to the common pleas court because “a review of the lower court file indicates that the trial court never resolved the forfeiture specification.” On May 18, 2009, the common pleas court entered the following entry “nunc pro tunc”:

“The jury returns a verdict of guilty of aggravated robbery 2911.01 A(1) F1 with firearm specification - 1 year (2941.141) under count(s) 1 of the indictment.

“The jury returns a verdict of guilty of carrying concealed weapons 2923.12 A(2) M1 with forfeiture specification (2941.1417) as charged in count(s) 2 of the indictment.

“The jury returns a verdict of guilty of improperly handling firearms in a motor vehicle 2923.16 B M1 with forfeiture specification (2941.1417) as charged in count(s) 4 of the

indictment.

As to counts 2 and 4, forfeiture specification to include RG40 revolver, serial number filed off.

“The court considered all required factors of the law.

“The court imposes a prison sentence at the Lorain Correctional Institution of 8 year(s). 1 year on the firearm spec to be served prior to and consecutive with 7 years on the base charge on count 1; concurrent to counts 2 and 4. Total of 8 years.

Sentence to be served consecutive to CR 507434 for a total of 20 years.

“* * *

“As to counts 2 and 4, defendant sentenced to county jail for a term of 6 months. Counts run concurrent to each other and concurrent to count 1.”

{¶ 5} On February 5, 2010, this court remanded this case to the common pleas court again for “correction” of its judgment of conviction because “a specific order of forfeiture is not contained within the judgment of conviction.” The common pleas court then entered the following order on February 9, 2010:

“Journal entry of 5/18/2009 is vacated; corrected to read:

“**Nunc pro tunc entry of 8-1-08 in response to court of appeals ruling on Case Number 92026, a review of the lower court file indicates that the trial court never resolved the forfeiture specification.**

“* * *

“The jury returns a verdict of guilty of aggravated robbery 2911.01 A(1) F1 with firearm specification - 1 year (2941.141) under count(s) 1 of the indictment.

“The jury returns a verdict of guilty of carrying concealed weapons 2923.12 A(2) M1 with forfeiture specification (2941.1417) as charged in count(s) 2 of the indictment.

“The jury returns a verdict of guilty of improperly handling firearms in a motor vehicle 2923.16 B M1 with forfeiture specification (2941.1417) as charged in count(s) 4 of the

indictment.

“As to counts 2 and 4, forfeiture specification to include RG40 revolver, serial number filed off; to be forfeited to the Garfield Hts. Police Department.”

The entry went on to impose the same sentences on counts 1, 2, and 4 that the court had imposed in its previous entries.

{¶ 6} Before we can address appellant’s assignment of error, we must determine whether the judgment from which he has appealed was a final appealable order. “A court of appeals has no jurisdiction over orders that are not final and appealable.” *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330, 897 N.E.2d 163, ¶6.

{¶ 7} This court has held that a criminal judgment entry is not a final order if it does not dispose of a forfeiture specification. *State v. Byrd*, Cuyahoga App. No. 91090, 2009-Ohio-1876; see, also, *State v. Lewis*, Lorain App. No. 08CA09379, 2009-Ohio-3322, ¶4 (“the requirements for a final appealable order apply to specifications attendant to convictions”; major drug offender specification not resolved); *State v. Carrasquillo*, Lorain App. No. 08CA009424, 2009-Ohio-3140, ¶4 (same; firearm specification not resolved). The trial court’s entry here did not dispose of the forfeiture specification attached to the aggravated robbery count. Therefore, we must dismiss this appeal.

{¶ 8} It appears that the forfeiture specifications in this case were not

submitted to the jury. See R.C. 2981.04(B) (“If a person * * * is convicted of an offense * * * and the complaint, indictment, or information * * * contains a specification covering property subject to forfeiture under section 2981.02 of the Revised Code, the trier of fact shall determine whether the person's property shall be forfeited”). There is no indication in the record that the appellant waived a jury trial on the specification, or that the court made any determination of the forfeiture issue. *Id.* Consequently, the trial court cannot resolve the forfeiture specifications via a “nunc pro tunc” entry, as it has attempted to do to date. See, e.g., *McKay v. McKay* (1985), 24 Ohio App.3d 74, 75, 493 N.E.2d 317.

Dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

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

KENNETH A. ROCCO, PRESIDING JUDGE

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