

[Cite as *State v. Marcoff*, 2010-Ohio-69.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92698

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PETER MARCOFF, III

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

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

BEFORE: Dyke, J., Rocco, P.J., and Kilbane, J.

RELEASED: January 14, 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), 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. 2.2(A)(1).

ANN DYKE, J.:

{¶ 1} Defendant-appellant, Peter Marcoff, III (“appellant”), appeals his conviction for aggravated riot. For the reasons that follow, we dismiss the appeal for lack of a final, appealable order.

{¶ 2} On November 17, 2008, following a trial, a jury found appellant guilty of one count of aggravated riot in violation of R.C. 2917.02(A)(1) and/or (A)(2) and/or (A)(3). Soon thereafter, on November 26, 2008, appellant filed a motion for judgment of acquittal or in the alternative for a new trial. He argued that the verdict was not sustained by sufficient evidence and that an error of law occurred when a jury instruction contained an incorrect statement of law that prejudiced him. The trial court never ruled upon said motion, and instead, sentenced appellant to one year of community control sanctions and three years of postrelease control.

{¶ 3} Appellant now appeals and presents five assignments of error for our review. Because the trial court failed to rule upon his motion for judgment of acquittal or his motion for a new trial pursuant to Crim.R. 33, we decline to address the merits of appellant’s appeal and dismiss the matter for lack of a final, appealable order.

{¶ 4} The Ohio Constitution limits an appellate court’s jurisdiction to reviewing only final orders or judgments. Section 3(B)(2), Article IV, Ohio Constitution; R.C. 2505.02. Accordingly, this court must “sua sponte dismiss appeals which are not from final appealable orders.” *State v. Martin*, Wayne App. No. 06CA0069, 2007-Ohio-5764, at ¶6.

{¶ 5} App.R. 4(B)(3) provides that “[i]n a criminal case, if a party timely files a motion for arrest of judgment or a new trial for a reason other than newly discovered evidence, the time for filing a notice of appeal begins to run when the order denying the motion is entered.” However, if a notice of appeal is filed while the motions are still pending, in that the trial court has yet to deny them, the notice of appeal is considered premature and does not impose jurisdiction upon an Ohio appellate court. *Dayton v. Huber*, Montgomery App. No. 19838, 2003-Ohio-6667, at ¶5, citing *State v. Soward* (1975), 47 Ohio App.2d 59, 60, 352 N.E.2d 155. See, also, *State v. Turner*, Cuyahoga App. No. 88489, 2007-Ohio-3264, at ¶17-18; *Cleveland v. Kline*, Cuyahoga App. No. 86665, 2006-Ohio-2087, at ¶2.

{¶ 6} In this matter, the trial court has not ruled upon appellant’s motion for acquittal or motion for a new trial in which he argues, not that there is newly discovered evidence, but that there was insufficient evidence to sustain his conviction and the jury was given improper instructions. Accordingly, we dismiss this appeal for lack of jurisdiction.

Appeal dismissed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of

Appellate Procedure.

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

ANN DYKE, JUDGE

KENNETH A. ROCCO, P.J., and
MARY EILEEN KILBANE, J., CONCUR