

[Cite as *State v. Moore*, 2010-Ohio-2596.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92025

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

TYSHYA MOORE

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

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

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

RELEASED: June 10, 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).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, Tyshya Moore (“Moore”), appeals the decision of the trial court. Having reviewed the arguments of the parties and the pertinent law, we hereby dismiss this appeal.

STATEMENT OF THE CASE

{¶ 2} Moore was arrested on February 12, 2008. On March 13, 2008, Moore was indicted in Case Number CR-507845-A, along with her accomplices Richard McGee (“McGee”) (Case No. CR-507845-B), and Gregory Holcomb (“Holcomb”) (Case No. CR-507845-C). McGee was also indicted for two separate, distinct robberies in Case Nos. CR-507434 and CR-507435. On March 31, 2008, at her arraignment, Moore pled not guilty. On May 13, 2008, pursuant to Rules 13 and 8 of the Ohio Rules of Criminal Procedure, the state filed a motion for joinder of cases under each of McGee’s three case numbers.¹

{¶ 3} On July 28, 2008, Moore’s case, and McGee’s two separate cases, proceeded to a jury trial. The state presented a total of 12 witnesses for all three cases, and McGee called two alibi witnesses. Moore presented no witnesses.

{¶ 4} After deliberations, the jury found Moore guilty of aggravated robbery with a one-year firearm specification, carrying concealed weapons, improper handling of firearms in a motor vehicle, and. The trial court sentenced Moore to an aggregate prison term of 5½ years. She was sentenced to one year for the

¹Moore filed her opposition to that motion on July 29, 2008, after trial had begun.

firearm specification, to be served prior to, and consecutive to, the four-year sentence for the aggravated robbery conviction. For the improper handling of firearms in a motor vehicle conviction, Moore was sentenced to six months, to run current to the 5 years. Moore now appeals those convictions.

STATEMENT OF THE FACTS

{¶ 5} On February 12, 2008, Lisa Gomersall (“Gomersall”), the victim in this matter, was employed by Cash Post as a branch manager at the Garfield Heights branch, located at 5721 Turney Road in Garfield Heights, Ohio. That particular Cash Post location is configured with one set of double doors that open to a foyer at the front of the store, followed by a second set of double doors that lead into the operating section of the store. Consequently, customers must be “buzzed” through the second set of doors by Cash Post employees.

{¶ 6} On February 12, 2008, at approximately 2:12 p.m., Gomersall was working alone at the branch. A young woman talking on her cell phone entered the branch and asked Gomersall for a loan application. The young woman then began filling out that form, and then left. In court, Gomersall identified that young woman as Moore. Shortly after Moore left, Gomersall looked through the branch drive-thru window and saw two men walk past the window and around the corner past the front windows of the branch.

{¶ 7} The same two men entered the branch’s vestibule shortly thereafter. The first man had his hood up and a scarf covering his face, and Gomersall motioned for him to pull his scarf down so she could see his face. Once the man

pulled the scarf down, Gomersall buzzed him through the second set of double doors. The man then put his scarf back up over his face. He was also wearing a black parka-style coat with a fur-lined hood. In court, Gomersall identified McGee as the person who wore that scarf and black parka with the fur-lined hood in her branch that day. While McGee held the security door open, a second man entered Cash Post, while pulling his sweatshirt up over his head to conceal his face.

{¶ 8} McGee approached Gomersall's teller window, and the second man walked to Gomersall's left and jumped over the counter while brandishing a handgun. McGee told Gomersall that she was being robbed. Gomersall opened her cash drawer and the second man removed all of the paper currency while McGee stood watch. Gomersall told the robbers there was no more money, and the men then fled the scene. As soon as the security door closed and locked, Gomersall called 911. Gomersall saw McGee and his accomplice run back past the front windows and past the drive-thru window. While fleeing, McGee looked back into the store at Gomersall through the windows. Approximately \$3,800 was taken in the robbery.

{¶ 9} Gomersall met with Garfield Heights police officers at her branch location. When officers responded to the 911 call, they immediately contacted Cash Post's corporate office to instruct them to prepare a copy of the store surveillance video. Concurrently, patrol officers were on the lookout for a white,

box-style truck — the description of a vehicle that had been reported as a vehicle seen leaving the scene of previous robberies.

{¶ 10} When officers observed a vehicle matching the description given, and the driver of that vehicle wearing clothing similar to that described by Gomersall, the officers conducted a traffic stop. Gomersall was taken to the location of the traffic stop where she identified both males as the persons who robbed her. Moore was in the front passenger seat. Gomersall was then taken back to the store location and completed a written witness statement.

{¶ 11} ASSIGNMENTS OF ERROR

{¶ 12} Moore raises the following for our review:

{¶ 13} “[1.] The trial court committed error and appellant was denied her right to a fair trial when the trial court denied appellant’s motion to sever.

{¶ 14} “[2.] The trial court committed error when it failed to comply with the mandatory requirements of Ohio Revised Code 2945.34.

{¶ 15} “[3.] The trial court committed error when it failed to declare a mistrial.

{¶ 16} “[4.] Appellant’s convictions are contrary to the evidence that was presented at trial.

{¶ 17} “[5.] The trial court committed error when it admitted evidence that was not relevant to appellant’s case.”

LEGAL ANALYSIS

{¶ 18} On September 2, 2008, Moore filed a notice of appeal. However, in April 2009, this court remanded the matter to the common pleas court because a review of the lower court file indicated that the trial court never resolved the forfeiture specification. On May 18, 2009, the common pleas court entered the following nunc pro tunc entry:

“***. In response to the Court of Appeals ruling on case number 92025, a review of the lower court file indicates that the trial resolved the forfeiture specification. ***. The jury returns a verdict of guilty of aggravated robbery 2911.01 A(1) FI 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) MI 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 MI 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 finds that prison is consistent with the purpose of R.C. 2929.11. The court imposes a prison sentence at the Ohio Reformatory for Women of 5 year(s). 1 year on the firearm spec to be served prior to and consecutive with 4 years on the base charge on count 1. Post release control is part of this prison sentence for 5 years for the above felony(s) under R.C. 2967.28. Credit for time served - sheriff to calculate and notify Ohio Department of Rehabilitation and Corrections. As to Counts 2 and 4, defendant is sentenced to County Jail for a term of 6 months. Counts to run concurrent to each other, and concurrent Count 1. Defendant advised of appeal rights. ***.”²

{¶ 19} Similarly, Moore’s co-defendant, McGee, filed an appeal, and this court returned that matter to the trial court to resolve the forfeiture specification. The trial court issued a nunc pro tunc entry that, however, did not resolve the

²See Journal Entry in Case No. CR-507845, filing date: 05/18/2009, proceeding date: 05/18/2009.

forfeiture issue. This court, for a second time, remanded the matter to the trial court for correction of its judgment of conviction because “a specific order of forfeiture is not contained within the judgment of conviction.” See *State v. McGee*, Cuyahoga App. No. 92026, 2010-Ohio-2082.

{¶ 20} The common pleas court then entered a nunc pro tunc order on February 9, 2010. Unfortunately, the nunc pro tunc order simply went on to impose the same sentences on Counts 1, 2, and 4 that the lower court had imposed in its previous entries. Consequently, McGee’s appeal was dismissed. Id.

{¶ 21} Likewise, in the case at bar, the issue of the forfeiture specification has not been resolved. Accordingly, the trial court’s judgment of conviction must be corrected.

{¶ 22} Before we can address Moore’s assignment of error, we must determine whether the judgment from which she 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.

{¶ 23} 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).

{¶ 24} 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.

{¶ 25} We find the common pleas court order is not final and appealable. Accordingly, we dismiss this appeal for lack of a final appealable order.

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.

LARRY A. JONES, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA A. BLACKMON, J., CONCUR

