

[Cite as *State v. Keyes*, 2015-Ohio-1879.]

STATE OF OHIO)
)ss:
COUNTY OF LORAIN)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 14CA010642

Appellee

v.

RAYSHAUN N. POWELL

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF LORAIN, OHIO
CASE No. 10CR081774

Appellant

DECISION AND JOURNAL ENTRY

Dated: May 18, 2015

SCHAFFER, Judge.

{¶1} Defendant-Appellant, Rayshaun Powell, appeals the judgment of the Lorain County Court of Common Pleas denying his motion for leave to file a Crim.R. 33 motion for a new trial. For the reasons that follow, we vacate the trial court’s judgment.

I.

{¶2} Powell was indicted on one count of rape in violation of R.C. 2907.02(A)(2). After a bench trial, the trial court announced Powell’s conviction on May 31, 2012. The trial court subsequently sentenced him to an eight-year prison term. Powell directly appealed his conviction to this Court, and we originally affirmed his conviction. *State v. Powell*, 9th Dist. Lorain No. 12CA010284, 2014-Ohio-63, *appeal not allowed*, 139 Ohio St.3d 1405, 2014-Ohio-2245.

{¶3} Since our original decision in the direct appeal, Powell has sought relief from a variety of avenues. Pertinent to the resolution of this matter, he filed a motion to reopen his

direct appeal pursuant to App.R. 26(B), which we granted on May 21, 2014. Powell has received new appointed appellate counsel and the reopened appeal remains pending.

{¶4} On July 23, 2014, while Powell’s reopened direct appeal remained pending, he again sought to obtain relief from his rape conviction. This time, he filed a motion for leave to file a delayed motion for a new trial. The trial court denied Powell’s motion. He now appeals this denial, asserting two assignments of error for our review. To facilitate our analysis, we elect to address the assignments of error together.

II.

ASSIGNMENT OF ERROR I

POWELL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL REFUSED TO INTERVIEW OR SUBPOENA WITNESSE [SIC], VIOLATING THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ABUSED IT’S [SIC] DISCRETION WHEN IT DENIED POWELL’S MOTION FOR LEAVE TO FILE A MOTION FOR NEW TRIAL.

{¶5} In his assignments of error, Powell essentially argues that the trial court should have granted his motion for leave to file a motion for new trial. We are unable to reach the merits of his argument, however, since the trial court lacked jurisdiction when it issued its denial of his motion.

{¶6} “When a defendant has filed a direct appeal, the trial court retains all jurisdiction not inconsistent with the reviewing court’s jurisdiction to reverse, modify, or affirm the judgment.” *State v. Harmon*, 9th Dist. Summit No. 21465, 2003-Ohio-5052, ¶ 9; *see also Majnaric v. Majnaric*, 46 Ohio App.2d 157 (9th Dist.1975), paragraph one of the syllabus (“When an appeal is pending, the trial court is divested of jurisdiction except to take action in aid

of the appeal.”). Based on this principle, we have previously recognized that “ ‘[a] motion for a new trial is inconsistent with a notice of appeal of the judgment sought to be retried.’ ” *Id.*, quoting *State v. Loper*, 8th Dist. Cuyahoga Nos. 81297, 81400, 81878, 2003-Ohio-3213, ¶ 104. Due to this inconsistency, “a notice of a direct appeal divests the trial court of jurisdiction to consider a motion for a new trial.” *State v. Yeager*, 9th Dist. Summit No. 21676, 2004-Ohio-1239, ¶ 8. In light of these principles, when a trial court rules on a motion for new trial while a direct appeal is pending in a reviewing court, its order is void for want of jurisdiction and we are required to vacate the judgment and remand the matter. *See, e.g., State v. Ross*, 9th Dist. Summit No. 26694, 2014-Ohio-2867, ¶ 76 (“[O]nce the defendant filed his notice of appeal * * *, the trial court was divested of jurisdiction to rule upon his motion for a new trial. The court’s new trial ruling is vacated pursuant to that determination.”); *Yeager* at ¶ 9 (vacating trial court’s order on motion for new trial and remanding matter for further proceedings). These principles apply with equal force when a reopened direct appeal is pending before a reviewing court. *See State v. Taogaga*, 8th Dist. Cuyahoga No. 79845, 2002-Ohio-5062, ¶ 17 (finding that trial court lacked jurisdiction to resentence the defendant since his reopened appeal remained pending before the reviewing court); *State v. Godfrey*, 5th Dist. Licking No. 99 CA 95, 2000 WL 329802, * 4 (Feb. 28, 2000) (finding that trial court lacked jurisdiction to address motion to withdraw guilty plea while reopened appeal remained pending with the reviewing court).

{¶7} Here, Powell filed his motion for leave to file a motion for new trial on July 23, 2014 while his reopened direct appeal remained pending before this Court. Accordingly, based on our holdings in *Harmon*, *Yeager*, and *Ross*, the trial court lacked jurisdiction to consider the motion due to the pending appeal and it erred in deciding the motion on its merits. The trial

court's denial of Powell's motion is therefore vacated. Since Powell's assignments of error relate to the merits of his argument for a new trial, we decline to address them.

III.

{¶8} Since the Lorain County Court of Common Pleas lacked jurisdiction to rule on Powell's motion for leave to file a motion for new trial, we vacate the trial court's judgment denying Powell's motion and remand this matter for further proceedings consistent with this opinion.

Judgment vacated,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JULIE SCHAFER
FOR THE COURT

WHITMORE, P. J.
MOORE, J.
CONCUR.

APPEARANCES:

RAYSHAUN POWELL, pro se, Appellant.

DENNIS P. WILL, Prosecuting Attorney, and NATASHA RUIZ GUERRIERI, Assistant Prosecuting Attorney, for Appellee.