

[Cite as *State v. Rossi*, 2010-Ohio-4534.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23682
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CRB-1799
v.	:	
	:	(Criminal Appeal from Dayton
NICHOLAS E. ROSSI	:	Municipal Court)
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 24th day of September, 2010.

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FAIN, J.

{¶ 1} Defendant-appellant Nicholas E. Rossi appeals from an order denying his motion to vacate the trial court's prior order denying his motion for a new trial. We conclude that the trial court erred by denying Rossi's motion without ever having

considered the merits of his motion for a new trial. Therefore, the order from which this appeal is taken is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I

{¶ 2} Rossi was charged with one count of Sexual Imposition, in violation of R.C. 2907.06(A)(1), and with one count of Public Indecency, in violation of R.C. 2907.09(A)(1). Following a bench trial, Rossi was found guilty of both counts, and was sentenced accordingly.

{¶ 3} Rossi appealed from his conviction and sentence. We affirmed. *State v. Rossi*, Montgomery App. No. 22803, 2009-Ohio-1963. While his appeal was pending, Rossi filed a motion for a new trial under Crim. R. 33, based upon newly discovered evidence, in the form of a posting by his alleged victim on her My Space page that suggested she had been lying concerning the undesirability of Rossi's advances to her, in order to protect her relationship with her boyfriend.

{¶ 4} The trial court overruled this motion for a new trial in a handwritten entry, the entire text of which is as follows:

{¶ 5} "Def's motion for New Trial Overruled. The Court does not have jurisdiction, case is in 2 [sic, possibly meaning 2nd District?] Court of Appeals."

{¶ 6} Thereafter, we affirmed Rossi's conviction and sentence, thereby concluding our exercise of appellate jurisdiction in the case.

{¶ 7} On April 24, 2009, after we had affirmed his conviction, Rossi filed a "Motion to Have the Court Vacate its Prior Decision Overruling Defendant's Motion

for a New Trial and to Continue Stay of Execution.” The trial court denied this motion, finding that it did, indeed, have jurisdiction to overrule Rossi’s original motion for a new trial while the appeal was pending.

{¶ 8} Rossi appeals from the order denying his April 24, 2009 motion.

II

{¶ 9} Rossi’s sole assignment of error is as follows:

{¶ 10} “THE TRIAL COURT ERRED WHEN IT FOUND THAT IT HAD JURISDICTION TO DENY DEFENDANT’S TIMELY-FILED MOTION FOR A NEW TRIAL WHILE THE CASE WAS ON DIRECT APPEAL TO THIS COURT.”

{¶ 11} As framed, Rossi’s assignment of error is a non sequitur. It is clear from the terse, handwritten entry denying Rossi’s original motion for a new trial, that the trial court did not then reach and consider the merits of Rossi’s motion, but concluded that it had no jurisdiction to consider the motion while an appeal was pending.

{¶ 12} The essence of Rossi’s grievance on appeal, which is clearly urged in his reply brief, is that, as a result of the trial court’s initial decision that it had no jurisdiction to consider his motion for a new trial, and its subsequent decision that it did have jurisdiction to deny the motion, Rossi’s motion for a new trial has never been considered on its merits. We agree.

{¶ 13} We have held that a trial court may consider a motion for a new trial while an appeal is pending, and that it may *deny* the motion on its merits while an appeal is pending, because that would not interfere with the appellate court’s

exercise of its appellate jurisdiction, but that it may not *grant* the motion without first obtaining a remand from the appellate court for that purpose. *State v. Ferrell* (April 15, 1983), Montgomery App. No. 8150.

{¶ 14} Regardless of whether it did so correctly or incorrectly, the trial court clearly denied Rossi's motion for a new trial on purely jurisdictional grounds, because a direct appeal from his conviction was then pending, without reaching the merits of the motion.

{¶ 15} Rossi's prompt motion to vacate that decision, filed less than a month after the disposition of his appeal, was perhaps inartfully styled. Nevertheless, it is clear from the text of his motion that he was seeking to have the motion for a new trial reinstated, for consideration on its merits, the jurisdictional impediment to the consideration of his motion having been removed.

{¶ 16} The trial court's order denying this motion, from which this appeal is taken, is worth quoting in full:

{¶ 17} "This matter comes before the Court on Defendant's Motion to Vacate the Court's Decision of August 5, 2008 overruling his Motion for New Trial.

{¶ 18} "The Court finds that Defendant filed a Notice of Appeal on May 30, 2008. Defendant then filed a Motion for New Trial on June 30, 2008. *There were no grounds listed in the Motion and no attached legal memorandum.* This Court overruled the Motion for New Trial because the case was with the Court of Appeals. On April 17, 2009, the Court of Appeals issued its Decision affirming this Court's judgment.

{¶ 19} "On April 24, 2009, Defendant filed his Motion to Vacate the Decision

Overruling his Motion for New Trial and requested that his Stay of Execution be continued. The Court granted Defendant's Motion to Continue the Stay of Execution.

{¶ 20} "In the Motion to Vacate, Defendant asserts that if the Court did not have jurisdiction over the case while it was with the Court of Appeals, it also did not have jurisdiction to overrule his Motion for New Trial. The Court finds that it had the jurisdiction to overrule Defendant's Motion for New Trial while the case was with the Court of Appeals. *State v. Ferrell* (April 15, 1983), 2nd App. Dist. [Montgomery App.] No. 8150.

{¶ 21} "Defendant's Motion to Vacate is denied and the Stay of Execution is lifted." (Emphasis added.)

{¶ 22} Parenthetically, we note that the record does not bear out the trial court's statement, which we have italicized above, that there was no attached legal memorandum to Rossi's initial motion for a new trial. We find in the record a memorandum attached to his motion, citing newly discovered evidence, which is attached as an exhibit.

{¶ 23} It is clear from the record that the trial court has never considered Rossi's motion for a new trial on its merits. First, the trial court determined that it did not have jurisdiction to consider his motion while an appeal was pending. Then, after the appeal resulted in an affirmance, the trial court reversed itself and determined that it had had jurisdiction to deny the motion while the appeal was pending. But the trial court never reached, considered, and decided Rossi's motion for a new trial, under Crim. R. 33, based upon newly discovered evidence. We

agree with Rossi that due process requires that a motion for a new trial based upon newly discovered evidence, properly filed under the Ohio Rules of Criminal Procedure, must, at some point, be considered upon its merits.

{¶ 24} The State contends that the order from which this appeal is taken is not a final appealable order, citing several decisions involving orders denying motions to vacate prior orders denying motions for a new trial, filed after the appeal time had run out on the initial decision denying the defendant's motion for a new trial. We conclude that the order from which the appeal is taken in this case is a final appealable order.

{¶ 25} In this case, the trial court initially concluded that the pendency of a direct appeal from Rossi's conviction was a jurisdictional impediment to its consideration of Rossi's motion for a new trial. Then, promptly after the affirmance of his conviction, Rossi filed his new motion, which was, in effect, a motion to reinstate his motion for a new trial, the jurisdictional impediment represented by the pendency of the appeal having been removed. In this case, unlike in the cases cited by the State, Rossi is not seeking a second bite at the apple (a new trial based upon newly discovered evidence); he just wants his first bite, which he has yet to receive.

{¶ 26} Rossi's sole assignment of error is sustained.

III

{¶ 27} Rossi's sole assignment of error having been sustained, the order from which this appeal is taken is Reversed. This cause is Remanded for further proceedings consistent with this opinion, which should include consideration, on the

merits, of Rossi's motion for a new trial on grounds of newly discovered evidence.

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FROELICH and OSOWIK, JJ., concur.

(Hon. Thomas J. Osowik, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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