

[Cite as *State v. Spence*, 2003-Ohio-3178.]

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY**

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 1-03-04

v.

DANIEL J. SPENCE

OPINION

DEFENDANT-APPELLANT

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas
Court**

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: June 17, 2003

ATTORNEYS:

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For Appellee**

WALTERS, J.

{1} Defendant-Appellant, Daniel Spence, appeals his conviction and sentence for second degree burglary, in violation of R.C. 2911.12(A)(1), from the Allen County Common Pleas Court. On appeal, Appellant contends that the conviction was against the manifest weight of the evidence; however, upon review of the record, we do not find that the trier of fact clearly lost its way or that this presents the exceptional case where the evidence weighs heavily against conviction. Appellant additionally argues that the trial court erred by ordering that a subsequent sentence for a separate and unrelated conviction for receiving stolen property be served consecutively to the sentence imposed in this case. However, Appellant failed to appeal the sentence relating to his conviction for receiving stolen property, thus the issue is not properly before this Court for review. Accordingly, we affirm the judgment of the trial court.

{2} On September 11, 2001, at 5:30 a.m., officers from the Lima, Ohio Police Department were dispatched to a residence because someone was apparently breaking into an automobile parked in the driveway. Upon their arrival, one officer went to the driveway located on the side of the house and saw that the glove box in the car was open and items were strewn about the front seat; however, no one was seen in or around the car. The officer then looked into an open window of the house and saw Appellant standing in the living room. The

evidence at trial indicated that Appellant had used the window to gain entrance into the house. By the time the officer went to the front of the house, Appellant had exited from the front door followed by a resident, Diane Harner, who was visibly upset and screaming, and the other officers had apprehended Appellant.

{3} Among the items Appellant was carrying when apprehended was a dart case and a bottle of aspirin, which apparently were taken from Harner's automobile. Furthermore, Harner testified that she witnessed a Taco Bell chalupa wrapper fall from Appellant's pocket as the police were searching him. She stated that before falling asleep on the couch of her living room and being awakened by Appellant, she and her family had eaten Taco Bell for dinner and an uneaten chalupa was left on a couch-side table in her living room. Harner also testified that following the incident she found a pocket knife that was always kept in her car and two credit cards that did not belong to anyone in her family on the floor of her entryway inside the house.

{4} Appellant was indicted for one count of aggravated burglary, a first degree felony, in violation of R.C. 2911.11(A)(2). After a bench trial, Appellant was convicted of the lesser included offense of burglary, a second degree felony, in violation of R.C. 2911.12(A)(1). Following his conviction, Appellant was sentenced to six years incarceration. Thereafter, Appellant was sentenced to six

months for receiving stolen property in a separate case, which was ordered to be served consecutive to the six-year burglary sentence.

{5} From his conviction and sentence for burglary, Appellant appeals, asserting two assignments of error for our review.

Assignment of Error I

The Allen County Common Pleas Court's finding Appellant guilty of burglary was against the manifest weight of the evidence.

{6} For his first assignment of error, Appellant contends that the conviction was against the manifest weight of the evidence. Specifically, Appellant argues that the State failed to prove that a trespass occurred or that Appellant had the intent to commit a theft offense.

{7} The standard to apply when reviewing manifest weight claims has been set forth as follows:

[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the * * * [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.¹

Furthermore, an appellate court should grant a new trial only in an exceptional case “where the evidence weighs heavily against the conviction.”²

¹ *State v. Martin* (1983), 20 Ohio App.3d 172, 175; *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

² *Id.*

{8} Appellant was convicted for violating R.C. 2911.12(A)(1), which provides:

(A) No person, by force, stealth, or deception, shall do any of the following:

(1) Trespass in an occupied structure * * * when another person other than an accomplice of the offender is present, with purpose to commit in the structure * * * any criminal offense.

{9} The evidence herein reveals that after having broken into and stolen items from Harner's automobile, Appellant climbed into the open window of Harner's residence. Harner was then awakened on her living room couch by Appellant, and she became extremely upset. When Appellant was arrested, he had items from Harner's car in his possession. Additionally, the evidence supports that while inside the home, he consumed a Taco Bell chalupa, constituting theft. The evidence further supports the inference that upon entering the residence and but for being caught by Harner, Appellant had the purpose to commit additional criminal offenses within the structure. Based upon the evidence presented, we are unable to say that this constitutes an exceptional case where the evidence weighs heavily against conviction. Accordingly, we overrule Appellant's first assignment of error.

Assignment of Error II

The Allen County Common Pleas Court erred in imposing consecutive sentences on Appellant's two felonies.

{10} Appellant claims that the trial court erred in imposing sentence for the separate and unrelated receiving stolen property conviction consecutive to the sentence imposed in the case sub judice. The judgment entry of sentence in this case makes no mention of consecutive sentences, and, while the court sentenced Appellant for both convictions at the same hearing, Appellant has failed to appeal the entry of sentence for receiving stolen property, which was ordered to be served consecutively to the already imposed sentence in this case. Accordingly, this alleged error is not properly before this Court.³ As such, we must overrule Appellant's second assignment of error.

{11} Having found no error prejudicial to Appellant herein, in the particulars assigned and argued, the judgment of the trial court is affirmed.

Judgment affirmed.

BRYANT, P.J. and CUPP, J., concur.

³ See, e.g., *State v. Bay* (2001), 145 Ohio App.3d 402, 407, citing App.R. 4(A).