

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-08-1443

Appellee

Trial Court No. CR0200802852

v.

David Allen Wallerstein

**DECISION AND JUDGMENT**

Appellant

Decided: December 18, 2009

\* \* \* \* \*

Julia R. Bates, Lucas County Prosecuting Attorney, and  
Michael J. Loisel, Assistant Prosecuting Attorney, for appellee.

Nicole I. Khoury, for appellant.

\* \* \* \* \*

OSOWIK, J.

{¶ 1} This is an appeal from a sentencing judgment of the Lucas County Court of Common Pleas which found appellant guilty of felony theft and sentenced appellant to a one-year term of incarceration, to be served consecutively with an additional one-year

term of incarceration imposed for committing a felony while on postrelease control. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, David Allen Wallerstein, sets forth the following single assignment of error:

{¶ 3} "1. The Trial Court violated Mr. Wallerstein's Constitutional Rights by Imposing a Sentence that was not the shortest authorized, and by imposing consecutive sentences."

{¶ 4} On July 18, 2008, the resident of a duplex on Western Avenue in central Toledo arrived home and discovered appellant in her residence. The resident asked appellant, who was known by the victim, to leave. Appellant refused. Appellant's proffered justification for his presence in the duplex was that he was providing "security" for her apartment based upon his premise that the building was a crack house. Coinciding with appellant's unlawful stay in the victim's apartment, multiple items of personal property were stolen from the apartment.

{¶ 5} On August 20, 2008, appellant was arraigned on one count of burglary, in violation of R.C. 2911.12, a felony of the second degree. On November 17, 2007, pursuant to a voluntarily negotiated plea agreement, appellant entered a plea to an amended offense of theft, in violation of R.C. 2913.02, a felony of the fifth degree. A presentencing investigation and report were conducted. On December 12, 2008, appellant was sentenced to a one-year term of incarceration to be served consecutively

with an additional one-year term of incarceration for committing a felony while out on postrelease control. Timely notice of appeal was filed.

{¶ 6} In the sole assignment of error, appellant asserts that the trial court erred and abused its discretion in sentencing appellant to a non-minimum consecutive sentence. In support, appellant cites to various burglary cases, all of an exceptionally serious nature, in which the defendants received nine-year terms of incarceration in an apparent effort to assert that because those defendants received less than maximum sentences, appellant's one-year sentence for felony theft is too severe.

{¶ 7} In the wake of the seminal 2006 Ohio Supreme Court decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, trial courts are now vested with full discretion to impose any sentence within the statutory range without the previous requirement of making specific statutory findings or stating specific reasons for imposing maximum, consecutive, or more than minimum sentences. In conjunction with this, relevant case law establishes that discussion of the seriousness of the offense and of the likelihood of recidivism during sentencing demonstrates that the trial court properly considered the remaining sentencing factors outlined in the general sentencing statutes. *State v. Swartz*, 6th Dist. No. L-06-1401, 2007-Ohio-5304.

{¶ 8} We have carefully reviewed the record of evidence in this matter. We note, as did the trial court at sentencing, that appellant possesses an exceptionally lengthy and serious criminal record. Also, it is undisputed that the contested sentence imposed in this

matter properly falls within the appropriate statutory sentencing range for the offense of felony theft.

{¶ 9} The trial court stated at sentencing in pertinent part, "It's up to you. You know you can't take a drug and alcohol counselor with you 24 hours a day. It's you, and if you are in a confined situation, you do fine. If you're not, that's a choice you make, and I note on a number of your releases where you've been placed on parole, as well as this case, you violate. I mean, this is your responsibility. This isn't anybody else's. You've been given the education and understanding of what it takes. Candidly, you haven't made the effort to deal with it. And you keep saying that the court sent you back. You have a terrible record, 8 felonies, 14 misdemeanors. You're a multiple parole violator, so even when you get out you do it. You know, honestly, you don't leave any court in a position to do anything but to impose incarceration based upon this report, this record."

{¶ 10} Appellate court review of a trial court's felony sentence is conducted pursuant to an abuse of discretion standard. An abuse of discretion implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Given appellant's substantial and serious criminal history, pattern of violations while out on parole, and commission of the underlying offense in the current case while out on parole, the record unequivocally demonstrates that the trial court's imposition of a one-year term of incarceration for felony theft consecutive to an additional one-year term of incarceration for committing that felony while out on post-release control was not arbitrary, unreasonable or unconscionable. It was within the

statutory range and the discretion of the trial court in sentencing appellant. As such, we find appellant's assignment of error not well-taken.

{¶ 11} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the cost of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

\_\_\_\_\_  
JUDGE

Arlene Singer, J.

\_\_\_\_\_  
JUDGE

Thomas J. Osowik, J.  
CONCUR.

\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.