[Cite as *Mt. Vernon v. Hayes,* 2009-Ohio-6819.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
CITY OF MOUNT VERNON	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. 09-CA-00007
JUDSON H. HAYES	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Mount Vernon Municipal Court, Knox County, Ohio, Case No. 08-CRB-853
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 22, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
WILLIAM D. SMITH By: P. Robert Broeren 5 North Gay Street, Ste. 222 Mount Vernon, OH 43050	ROBERT E CESNER, JR. 456 Haymore Avenue North Worthington, OH 43085

Gwin, P.J.

{¶1} Appellant Judson H. Hayes appeals the judgment of the Mount Vernon Municipal Court, Knox County, Ohio, convicting and sentencing him for one count of theft, a misdemeanor of the first degree, in violation of Mount Vernon, Ohio, Municipal Code, Section 545.05. The appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On August 22, 2008, appellant entered a Wal-Mart store to pick up photographs he had left to be developed. He proceeded to the photo center located in the rear of the store, some distance from the front checkout counter. Appellant retrieved a package consisting of three separate envelopes of photographs from the staff. The staff asked if he wished to pay for them at the photo department counter; he declined. The photo department staff called asset protection officer Charity Delarwelle. Ms. Delarwelle observed the appellant leave the photo department without paying for the photographs, proceed through the store and pass the last point of sale without paying for the photographs. Appellant was detained at this point and the Mount Vernon Police Department was called.

{¶3} Appellant was charged with the offense of Petty Theft, also referred to as Shoplifting. A jury trial was commenced on January 22, 2009.

{¶4} Appellant testified on his own behalf at the trial. He testified that when he picked up the packet of developed photographs, the bar-code on the top envelope was blank. He further testified he was never asked for payment at the time the packet of photographs was delivered to him at the photo center. Appellant testified that on previous occasions when photographs had been ruined during the development

process, he would receive free photographs the next time he came in the store. Appellant testified that on three previous occasions he received free photographs as compensation for pictures that had been overexposed by the photo center. Accordingly, appellant testified that he reasonably believed, in conformity with past established practices, that there was no charge for the photographs he received on August 22, 2008 and for which he was thereafter charged with petty theft.

{¶5} Jennifer King and Gwen Davis, workers in the photo department, testified that they gave appellant the photographs; that appellant did not pay for the photographs in the photo department, and they then called asset protection associate Charity Delarwelle. Ms. King and Ms. Davis further testified that when asked, appellant stated that he would pay for the pictures at the front of the store.

{¶6} Gwen Davis testified that she called security when appellant did not pay for his pictures at the photo lab, "because we were—people at that time quite a few, you know, that wasn't paying at the counter because there was a lot of theft in the pictures." [T. at 98-99]. She further testified, "[appellant] always paid up front. He's never paid in the lab that I can remember since I've been there. He never looked at the pictures. He always just took the packages and paid up front." [T. at 100]. Appellant admitted Ms. Davis' written statement into evidence at trial.

{¶7} Ms. Delarwelle testified that she observed the appellant from the time that he left the photo department until he carried the photographs past the last point of sale. At no time did she observe appellant talking with anyone prior to walking past the cash registers. Further, Ms. Delarwelle testified that when she confronted appellant about the pictures, he stated that he had paid for the pictures in the photo department. Appellant

further began to look in his pocket for the receipt. When told by Ms. Delarwelle that she was present and did not observe appellant pay for the pictures in the photo department, appellant offered to pay for the photographs. The state admitted into evidence the written statement of Ms. Delarwelle given on January 15, 2009. Appellant admitted into evidence Ms. Delarwelle statement made at the time of the offense on August 22, 2008.

{¶8} On January 23, 2009, the jury rendered a verdict of guilty on the petty theft offense. Following a brief recess, the Court immediately proceeded to sentencing. Appellant was sentenced to 180 days in the Knox County Jail, with 105 days suspended and 75 days to be served. In addition, he was fined $250.00 plus court costs and placed on 2 years reporting probation.

{¶9} Appellant timely appealed raising the following two assignments of error for our consideration:

{¶10} "I. DEFENDANT-APPELLANT'S CONVICTION FOR PETTY THEFT DENIED HIM DUE PROCESS AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION FOR THE REASON HE WAS REPRESENTED BY INEFFECTIVE COUNSEL, AND, IN ADDITION, THE JURY WAS PERMITTED TO CONSIDER EVIDENCE WHICH WAS SO HIGHLY PREJUDICIAL THAT IT COULD NOT ARRIVE AT A RELIABLE VERDICT BASED UPON A FAIR TRIAL.

{¶11} "II. THE TRIAL COURT ERRED BY IMPOSING AN EXCESSIVELY HARSH SENTENCE UPON THE BASIS OF HIS BELIEF THAT DEFENDANT-

APPELLANT HAD COMMITTED NUMEROUS PRIOR THEFT OFFENSES FOR WHICH HE WAS NEITHER CHARGED NOR CONVICTED."

I.

{¶12} In his first assignment of error, appellant argues that he was denied effective assistance of trial counsel. We disagree.

{¶13} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶14} To prevail on this claim, appellant must meet both the deficient performance and prejudice prongs of *Strickland* and *Bradley*. *Knowles v. Mirzayance* (2009), --- U.S. ----, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251.

{¶15} To show deficient performance, appellant must establish that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, at 688. In light of "the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant," the performance inquiry necessarily turns on "whether counsel's assistance was reasonable considering all the circumstances." Id., at 688–689. At all points, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id., at 689.

{¶16} Appellant must further demonstrate that he suffered prejudice from his counsel's performance. See *Strickland*, 466 U. S., at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, at 694.

{¶17} The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, quoting *Strickland* at 697.

{¶18} In the case at bar, appellant argues that counsel was ineffective because counsel offered evidence that appellant, his client, had gotten pictures developed at the photo lab in the past and did not pay for them at any time. [Appellant's Brief at 7]. Further appellant contends that his trial counsel was ineffective because he failed to request a special instruction at that time to the effect that such evidence could only be considered for limited purposes, and not as a basis for judging the appellant's character in light of evidence concerning other crimes, wrongs or acts. [Appellant's Brief at 12].

{¶19} The admission of other-acts evidence under Evid.R.404 (B) "lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 66. Furthermore,

when applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 566 N.E.2d 1181 (citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 359 N.E .2d 1301).

{¶20} Evid.R. 404 sets forth a general bar against the use of character evidence. Of importance to the case *sub judice,* Evid.R. 404(B) provides as follows:

{¶21} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence or mistake or accident."

{¶22} R.C. 2945.59 provides: "[i]n any criminal case which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with prior or subsequent thereto, notwithstanding with such proof may show or tend to show the commission of another crime by the defendant."

{¶23} Section 2945.59 is to be strictly construed against the state, and to be conservatively applied by a trial court. *State v. DeMarco* (1987), 31 Ohio St.3d 191, 194, 509 N.E.2d 1256; The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment

regardless of whether he or she committed the crime charged in the indictment. See *State v. Curry* (1975), 43 Ohio St.2d 66, 68, 72 O.O.2d 37, 38, 330 N.E.2d 720, 723. This danger is particularly high when the other acts are very similar to the charged offense, or of an inflammatory nature. *State v. Schaim,* 65 Ohio St.3d 51, 60, 1992-Ohio-31, 600 N.E.2d 661,669; *State v. Miley*, Richland App. Nos. 2005-CA-67, 2006-CA-4670.

{¶24} Evidence of other acts is admissible if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Carter* (1971), 26 Ohio St.2d 79, 83, 269 N.E.2d 115, 117; *State v. Lowe,* 69 Ohio St.3d 527, 530, 1994-Ohio-345, 634 N.E.2d 616, 619. (Citing *State v. Broom* (1988), 40 Ohio St.3d 277, 282-283, 533 N.E.2d 682, 690-691; Evid.R. 404(B); R.C. 2945.59); *State v. Miley*, supra.

{¶25} Further, the prior act must not be too remote and must be closely related in nature, time, and place to the offense charged. *Schaim,* 65 Ohio St.3d at 60, 600 N.E.2d at 669. A prior act which is "* * * too distant in time or too removed in method or type has no permissible probative value." *State v. Snowden* (1976), 49 Ohio App.2d 7, 10, 359 N.E.2d 87, 91; *State v. Burson* (1974), 38 Ohio St.2d 157, 159, 67 O.O.2d 174, 175, 311 N.E.2d 526, 529.

{¶26} In the case at bar, whether appellant committed a crime is the crux of the dispute. If a crime did in fact occur, no dispute exists that appellant was the perpetrator. In other words, no dispute exists as to identity. *State v. Miley*, supra, 2006-Ohio-4670 at ¶ 73. As the identity of the person who had picked-up the photographs was not an issue

at trial, the other acts would not have been properly admitted to prove the appellant's scheme, plan, or system in committing the crimes charged. However, the testimony concerning appellant's prior act of picking-up photographs and not paying for them was admissible to show the absence of mistake or accident on his part.

{¶27} A decision regarding which defense to pursue at trial is a matter of trial strategy "within the exclusive province of defense counsel to make after consultation with his client." *State v. Murphy,* 91 Ohio St.3d 516, 524, 2001-Ohio-0112. This court can only find that counsel's performance regarding matters of trial strategy is deficient if counsel's strategy was so "outside the realm of legitimate trial strategy so as 'to make ordinary counsel scoff." '*State v. Woullard,* 158 Ohio App.3d 31, 813 N.E.2d 964, 2004-Ohio-3395, ¶ 39, quoting *State v. Yarber* (1995), 102 Ohio App.3d 185, 188, 656 N.E.2d 1322. Further, the Ohio Supreme Court has recognized that if counsel, for strategic reasons, decides not to pursue every possible trial strategy, defendant is not denied effective assistance of counsel. *State v. Brown* (1988), 38 Ohio St.3d 305, 319, 528 N.E.2d 523. When there is no demonstration that counsel failed to research the facts or the law or that counsel was ignorant of a crucial defense, a reviewing court defers to counsel's judgment in the matter. *State v. Clayton* (1980), 62 Ohio St.2d 45, 49, 402 N.E.2d 1189, citing *People v. Miller* (1972), 7 Cal.3d 562, 573-574, 102 Cal.Rptr. 841, 498 P.2d 1089; *State v. Wiley,* 10th Dist. No. 03AP-340, 2004-Ohio-1008 at ¶ 21.

{¶28} Appellant has not shown "that counsel's representation fell below an objective standard of reasonableness." *Strickland* at 687-688, 104 S.Ct. 2052. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id., at 688, 104 S.Ct. 2052. "Judicial scrutiny of

counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id*.,* at 689, 104 S.Ct. 2052. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id., at 690, 104 S.Ct. 2052; *Bradley*. *Knowles v. Mirzayance*, supra 129 S.Ct. at 1420. .

{¶29} Here, appellant has not shown that his counsel violated these standards. Appellant testified that on occasions in the past when photographs had been ruined during the course of development, he would receive free photos the next time he came in the store. He further testified that on three occasions he received free photographs as compensation for pictures that had been previously overexposed. According to appellant's testimony he was handed the developed photographs on August 22, 2008 with a blank bar code on top. Accordingly, appellant testified that he reasonably believed, in conformity with past established practices, that there was no charge for the photographs he received on August 22, 2008 and for which he was thereafter charged with petty theft. [T. at 166].

{¶30} In the case at bar, defense counsel's introduction of the prior occasions that appellant had pictures developed at the photo lab and did not pay for them was reasonable in light of his defense that he believed, in conformity with past established practices, that there was no charge for the photographs he received on August 22, 2008. Appellant cannot have his preverbal cake and eat it too; the state could have admitted the testimony and exhibits to show appellant had not paid for photographs earlier to counter appellant's claim that the store's policy was to give him the

photographs for free. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance of counsel. *State v. Carter* (1995), 72 Ohio St.3d 545, 558, 651 N.E.2d 965. In this case, the past instances were critical to explain appellant's defense.

{¶31} In addition, appellant has not demonstrated that he suffered prejudice from his counsel's performance. See *Strickland,* 466 U.S., at 691, 104 S.Ct. 2052 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). To prevail on his ineffective-assistance claim, appellant must show, therefore, that there is a "reasonable probability" that the jury would have found him not guilty of theft. Where there is sufficient independent evidence of a defendant's guilt, there is no prejudice and reversal is unwarranted. *State v. Moritz* (1980), 63 Ohio St.2d 150, 407 N.E.2d 1268.

{¶32} Jennifer King and Gwen Davis, workers in the photo department, testified that they gave appellant the photographs; that he did not pay for the photographs in the photo department; when he did not pay for the photographs in their department they called asset protection associate Charity Dellarwelle. [T. at 79]. Ms. Dellarwelle testified that she observed appellant from the time that he left the photo department and until he carried the photographs past the last point of sale. [T. at 120 -122].

{¶33} Additionally, the state introduced testimony that two of the three envelopes of pictures that appellant picked-up on August 22, 2008 had price stickers on them. [T. at 80]. Testimony from the store clerk established that the prices of two of the three packages were combined to generate a volume discount based upon the number of pictures. [Id.]. Further, when a customer is not charged for the photographs due to an

error on the store's part the clerk will mark the package with an "N/C." [Id. at 83]. Testimony was elicited that the Wal-Mart Photo lab produced neither the photographs nor the CD-ROM that the appellant had offered at trial. [Id. at 106-107; 159-160].

{¶34} Thus even without the challenged evidence, there was no reasonable probability that the outcome of the trial would have been different.

{¶35} Nor can we say that counsel's failure to request a limiting instruction was prejudicial to appellant. Appellant's defense was that he had been given free photographs in the past to compensate him for pictures damaged by the store. [T. at 156]. Appellant testified that the store clerk's were lying about both the present and past incidents. [T. at 166-167]. A defendant may decide, as a matter of trial strategy, not to request a limiting instruction because of concerns that it will only emphasize in the juror's minds the evidence of other criminal acts committed by defendant, to which the instruction applies, thereby reinforcing the prejudice. *State v. Tisdale*, Montgomery App. No. 19346, 2003-Ohio-4209 at ¶ 48. (Citing State *v. McDaniel* (August 19, 1992), Clark App. No. 2853); *State v. Harris,* Montgomery App. No. 19796, 2004-Ohio-3570 at ¶ 26.

{¶36} In the case at bar, appellant's testimony was that he did not do anything wrong on any of the occasions where he did not pay for photographs developed by the photo lab. Accordingly, not requesting a limiting jury instruction concerning the other acts may have been a matter of trial strategy. Under the facts of this case, we find such a strategy to be a reasonable one based upon appellant's defense that he reasonably believed, in conformity with past established practices, that there was no charge for the photographs he received on August 22, 2008.

{¶37} Appellant's first assignment of error is overruled.

II.

{¶38} In his second assignment of error, appellant argues that by imposing an excessively harsh sentence upon the basis of his belief that appellant had committed numerous prior theft offenses for which he was neither charged nor convicted. We disagree.

{¶39} Misdemeanor sentencing rests in the sound discretion of the trial court. R.C. 2929.22(A). *State v. Harpster*, Ashland App. No. 04COA061, 2005-Ohio-1046 at ¶ 6. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. We further note there is no constitutional right to an appellate review of a criminal sentence. *Moffitt v. Ross* (1974), 417 U.S. 600, 610-11, 94 S.Ct. 2437, 2444; *McKane v. Durston* (1894), 152 U.S. 684, 687, 14 S. Ct. 913. 917; *State v. Smith* (1997), 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668; *State v. Firouzmandi*, 5th Dist No. 2006-CA-41, 2006-Ohio-5823. An individual has no substantive right to a particular sentence within the range authorized by statute. *Gardner v. Florida* (1977), 430 U.S. 349, 358, 97 S.Ct. 1197, 1204-1205; *State v. Goggans*, Delaware App. No. 2006-CA-07-0051, 2007-Ohio-1433 at ¶ 28. In other words "[t]he sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction…It is not the duration or severity of this sentence that renders it constitutionally invalid…." *Townsend v. Burke* (1948), 334 U.S. 736, 741, 68 S.Ct. 1252, 1255.

{¶40} R.C. 2929.22 governs sentencing on misdemeanors and states the following as amended on January 1, 2004:

{¶41} "(B) (1) In determining the appropriate sentence for a misdemeanor, the court shall consider all of the following factors:

{¶42} "(a) The nature and circumstances of the offense or offenses;

{¶43} "(b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense;

{¶44} "(c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences;

{¶45} "(d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious;

{¶46} "(e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B) (1) (b) and (c) of this section.

{¶47} "(2) In determining the appropriate sentence for a misdemeanor, in addition to complying with division (B)(1) of this section, the court may consider any other factors that are relevant to achieving the purposes and principles of sentencing set forth in section 2929.21 of the Revised Code.

{¶48} "(C) Before imposing a jail term as a sentence for a misdemeanor, a court shall consider the appropriateness of imposing a community control sanction or a

combination of community control sanctions under sections 2929.25, 2929. 26, 2929.27, and 2929.28 of the Revised Code. A court may impose the longest jail term authorized under section 2929.24 of the Revised Code only upon offenders who commit the worst forms of the offense or upon offenders whose conduct and response to prior sanctions for prior offenses demonstrate that the imposition of the longest jail term is necessary to deter the offender from committing a future crime."

{¶49} R.C. 2929.21 as referenced in R.C. 2929.22(B) (2) states the following in pertinent part:

{¶50} "(A) A court that sentences an offender for a misdemeanor or minor misdemeanor violation of any provision of the Revised Code, or of any municipal ordinance that is substantially similar to a misdemeanor or minor misdemeanor violation of a provision of the Revised Code, shall be guided by the overriding purposes of misdemeanor sentencing. The overriding purposes of misdemeanor sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the impact of the offense upon the victim and the need for changing the offender's behavior, rehabilitating the offender, and making restitution to the victim of the offense, the public, or the victim and the public."

{¶51} Appellant argues the trial court abused his discretion by imposing an unreasonably harsh sentence upon the basis that appellant committed numerous theft offenses for which he neither was charged nor convicted.

{¶52} Appellant was convicted of theft in violation of Section 545.05 of the Codified Ordinances of the City of Mount Vernon, Ohio. (T. at 196). A misdemeanor of

the first degree carries a maximum sentence of one hundred and eighty days. Mount Vernon, Ohio, Municipal Code, Section 545.05(b). The trial court imposed a sentence of 180 days, but suspended 105 of those days. (T. at 203).

{¶53} The sentence imposed in this case is within the statutory limits for a first-degree misdemeanor. Mount Vernon, Ohio, Municipal Code 545.05(b). There is no requirement that a trial court in sentencing on misdemeanor offenses specifically state its reasons on the record. *State v. Harpster*, supra 2005-Ohio-1046 at ¶ 20; *State v. Adams,* Licking App. No.2002CA00089, 2003-Ohio-3169, ¶ 16.

{¶54} Pursuant to R.C. 2929.22(B) (2) and R.C. 2929.21, the trial court is permitted to consider "any other factors that are relevant" "to protect the public from future crime by the offender and others and to punish the offender." Courts have consistently held that evidence of other crimes, including crimes that never result in criminal charges being pursued, or criminal charges that are dismissed as a result of a plea bargain, may be considered at sentencing. *State v. Cooey* (1989), 46 Ohio St.3d 20, 35, 544 N.E.2d 895 (such uncharged crimes are part of the defendant's social history and may be considered); *State v. Tolliver,* 9th Dist. No. 03CA0017, 2003-Ohio-5050, ¶ 24 (uncharged crimes in a presentence investigation report may be a factor at sentencing); *United States v. Mennuti* (C.A.2, 1982), 679 F.2d 1032, 1037 (similar though uncharged crimes may be considered); *United States v. Needles* (C.A.2, 1973), 472 F.2d 652, 654-56 (a dropped count in an indictment may be considered in sentencing). This has long been the rule in Ohio:

{¶55} "[I]t is well-established that a sentencing court may weigh such factors as arrests for other crimes. As noted by the Second Circuit United States Court of Appeals,

the function of the sentencing court is to acquire a thorough grasp of the character and history of the defendant before it. The court's consideration ought to encompass negative as well as favorable data. Few things can be so relevant as other criminal activity of the defendant [.]" *State v. Burton* (1977), 52 Ohio St.2d 21, 23, 368 N.E.2d 297; *State v. Snook* (April 26, 1999), Stark App. No. 1998CA00244 at *4; *State v. Starkey*, Mahoning App. No. 06 MA 110, 2007-Ohio-6702 at ¶ 17-18.

{¶56} It appears to this Court that the trial court's statements at the sentencing hearing were guided by the overriding purposes of misdemeanor sentencing to protect the public from future crime by the offender and others and to punish the offender. R.C. 2929.21. Based on the transcript of the sentencing hearing and the subsequent judgment entry, this Court cannot find that the trial court acted unreasonably, arbitrarily, or unconscionably, or that the trial court violated appellant's rights to due process under the Ohio and United States Constitutions in its sentencing appellant to less than the maximum sentence of incarceration.

{¶57} A trial court is vested with discretion to impose a prison term within the statutory range. See *State v. Mathis,* 109 Ohio St.3d 54, 846 N.E.2d 1, 2006- Ohio-855 at ¶ 36. Appellate courts can find an "abuse of discretion" where the record establishes that a trial judge refused or failed to consider statutory sentencing factors. *Cincinnati v. Clardy* (1978), 57 Ohio App.2d 153, 385 N.E.2d 1342; *State v. Goggans*, supra, at ¶ 32. An "abuse of discretion" has also been found where a sentence is greatly excessive under traditional concepts of justice or is manifestly disproportionate to the crime or the defendant. *Woosley v. United States* (1973), 478 F.2d 139, 147. The imposition by a trial judge of a sentence on a mechanical, predetermined or policy basis is subject to

review. *Woosley*, supra at 143-145. Where the severity of the sentence shocks the judicial conscience or greatly exceeds penalties usually exacted for similar offenses or defendants, and the record fails to justify and the trial court fails to explain the imposition of the sentence, the appellate court's can reverse the sentence. *Woosley*, supra at 147. This by no means is an exhaustive or exclusive list of the circumstances under which an appellate court may find that the trial court abused its discretion in the imposition of sentence in a particular case. *State v. Firouzmandi,* supra at ¶56; *State v. Goggans*, supra, at ¶ 32.

{¶58} There is no evidence in the record that the judge acted unreasonably by, for example, selecting the sentence arbitrarily, basing the sentence on impermissible factors, failing to consider pertinent factors, or giving an unreasonable amount of weight to any pertinent factor. We find nothing in the record of appellant's case to suggest that his sentence was based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment.

{¶59} In light of the fact the sentence imposed in the instant action was within the statutory limits, and after review of the entire record in this matter, we conclude the trial court's attitude was not unreasonable, arbitrary, or unconscionable; therefore, we find the trial court did not abuse its discretion in sentencing appellant. *State v. Snook*, supra.

{¶60} Appellant's second assignment of error is overruled.

{¶61} The judgment of the Mount Vernon Municipal Court of Knox County, Ohio is hereby affirmed.

By Gwin, P.J.,

Hoffman, J., and

Edwards, J., concur

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. JULIE A. EDWARDS

WSG:clw 1207

[Cite as *Mt. Vernon v. Hayes,* 2009-Ohio-6819.]

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO

FIFTH APPELLATE DISTRICT

CITY OF MOUNT VERNON	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JUDSON H. HAYES	:	
Defendant-Appellant	:	CASE NO. 09-CA-00007

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Mount Vernon Municipal Court of Knox County, Ohio is hereby affirmed. Costs to appellant.

_____
HON. W. SCOTT GWIN

_____
HON. WILLIAM B. HOFFMAN

_____
HON. JULIE A. EDWARDS