

[Cite as *State v. White*, 2009-Ohio-2536.]

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

STATE OF OHIO

Plaintiff-Appellee

v.

MINDALE WHITE

Defendant-Appellant

Appellate Case No. 22986

Trial Court Case No. 08-CR-587

(Criminal Appeal from
Common Pleas Court)

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OPINION

Rendered on the 29th day of May, 2009.

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FAIN, J.

{¶ 1} Defendant-appellant Mindale White appeals from her conviction and

sentence for Forgery (Uttering), in violation of R.C. 2913.31(A)(3), following a jury trial. Her appellate counsel has filed a brief under the authority of *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, indicating that she could not find any potential assignments of error having arguable merit. We accorded White the opportunity to file her own, pro se brief; she has not done so.

{¶ 2} We have performed our duty, under *Anders*, to review the record independently. We have in our record a written transcript of the trial proceedings following the voir dire of the jury, including the parties' challenges for cause and peremptory challenges, but we do not have a written transcript of the voir dire of the jury. We do have, and have watched, that portion of the videotape of the trial, which is in our record, that includes the voir dire of the jury.

{¶ 3} There is overwhelming evidence in the record that a forged check purporting to be on the account of Logan Studios, in Dayton, was cashed at Dot's Market, a grocery store in Kettering, Ohio, on August 20, 2007. One of the two former owners of Logan Studios, Kenneth Logan, testified that the date shown on the check was at least two years after Logan Studios went out of business. He testified that the design of the check did not match the design of the checks used by Logan Studios when it was in business. Michael Miller was the purported maker of the check; that is, the person who purportedly signed the check on behalf of Logan Studios. Logan testified that Logan Studios never employed anyone by the name of Michael Miller, nor was anyone by that name ever authorized to write a check on behalf of Logan Studios.

{¶ 4} The check was made out to Mindale White. The evidence that White, the defendant-appellant, was the person who cashed the check at Dot's Market on August 20,

2007, was not as overwhelming, but was nevertheless ample to support her conviction. Colleen Karl, an employee of Dot's Market, identified the copy of the check that was admitted in evidence, and recognized her initials on the check, evidencing that she was the Dot's Market employee who cashed the check. She testified that it was her uniform practice to demand picture identification, and to compare the person presenting a check with the picture shown on the identification. She also testified that it was her uniform practice to compare the signature on the check with the signature on the identification. She testified that any discrepancies or doubts about the validity of the identification would result in her giving the check to a manager to determine whether to honor it. Finally, she testified that unless the check were signed in her presence, she would give the check to a manager to determine whether to honor it. If the check were given to a manager, the manager's initials would appear on the check if it were honored.

{¶ 5} Karl testified just over a year after she approved the check. She was not asked to, and did not, identify White at trial as the woman who presented the check to her.

{¶ 6} White did not present any witnesses in her own defense. Her argument to the jury was that someone else stole her identification, cashed the check using the stolen identification, and then returned the identification to her, with the result that she never knew that her identification had been stolen.

{¶ 7} White's appellate counsel, while finding no potential assignments of error having arguable merit, discusses in her brief two potential assignments of error involving ineffective assistance of trial counsel. The first of these is trial counsel's failure to have "ask[ed] the clerk to identify the Defendant." We find no reasonable possibility that putting this question to the clerk, Karl, would have led to a different outcome of the trial. The

State, in its closing argument, conceded the obvious – that Karl could not presently identify White as the woman who presented the check to her. To have put the question to Karl would have run the risk of eliciting an answer along the lines of: “Well, I’m pretty sure that the person sitting next to you at counsel table is the woman who presented the check to me, but I’m not sure enough to swear to it.” Experienced defense counsel wisely eschewed the opportunity to nail down a point in the defendant’s favor – that the only eyewitness to the offense could not identify the defendant – that had already been effectively made, with the concomitant risk of muddying the water.

{¶ 8} The second potential claim of ineffective assistance of trial counsel identified by appellate counsel is trial counsel’s failure to have called White to testify in her own defense. Appellate counsel dismisses this claim, as follows: “The trial attorney decided not to put her on the stand based on the fact that she got into a bar fight the night before and her face was beaten up. The Defendant also had a record of 5 felonies and currently was pending new charges for theft and receiving stolen property. Allowing the Defendant to testify would probably have resulted in this her [sic] criminal history being exposed to the jury.”

{¶ 9} We find nothing in the record to establish that White’s face was “beaten up” at the time of trial. The pending charges, also not established in the record, would presumably have been ruled inadmissible by the trial court.

{¶ 10} The matter of White’s prior felony record leads us to another potential assignment of error that should be discussed. White’s trial counsel filed a motion in limine to limit the State’s use of her prior record in cross-examining her. In her memorandum in support of her motion in limine, White first objects, under Evid. R. 609(B), to stale

convictions, meaning convictions where a period of more than ten years has elapsed since White was subject to confinement, post-release control, probation, community control sanction, shock probation, parole, or shock parole. White's memorandum in support of her motion in limine then continues as follows:

{¶ 11} "As to the cases where the convictions, releases from prison or releases from supervision are less than ten years old, the LEADS report is unclear as to which of the cases it lists resulted in convictions and which were merely arrests. Furthermore, it appears that some of the cases are listed multiple times. For instance, the arrest is identified, sometimes a judicial outcome is identified and sometimes imposition of a prison sentence is identified, so there would be three listings for a single case.

{¶ 12} "Additionally, no evidence of convictions less than ten years old for misdemeanors or fifth degree felonies is admissible. The rule is very clear that 'the crime must be punishable by * * * imprisonment in excess of one year.' [Evid. R. 609(A)(1).] Here, the convictions for misdemeanors or F5s cannot be mentioned before the jury.

{¶ 13} "Finally, Defendant urges a ruling that none of the convictions should be admitted. *State v. Allen* (1987), 29 Ohio St.3d 53. Defendant objects to the admissibility of any of the convictions on the basis that the danger of unfair prejudice outweighs the probative value of the evidence, since the jury will infer that the evidence is character evidence of a propensity to commit crimes, and thing [sic, 'think' is evidently intended] that since Ms. White has prior convictions, she must be guilty in this case. Furthermore, the convictions are inadmissible because it will confuse the issues and mislead the jury; specifically, the State may argue that Ms. White is exhibiting a pattern or practice of theft. However, the prior theft cases were run-of-the-mill shoplifting cases, and the facts were

totally different from this theft by passing a bad check case.”

{¶ 14} The record does not reflect that this motion in limine was ever ruled upon by the trial court, either in writing, or orally from the bench. We have considered whether assignments of error having arguable merit could be based upon either or both of the following claims: (1) that trial counsel was ineffective for having failed to obtain a ruling upon this motion in limine before the decision was made whether White would testify; or (2) that the trial court committed prejudicial error by having failed to rule upon this motion before trial, as a trial court is required to do by Crim. R. 12(F) “whenever possible.” We conclude that this record would not allow an assignment of error along either of these lines having arguable merit.

{¶ 15} For an assignment of error along either of these lines to result in reversal of White’s conviction would require a conclusion that: (1) White could have testified, truthfully, that she did not present the check to Karl; (2) the trial court, had it ruled, would have granted the motion in limine wholly or in part; (3) the ruling on the motion in limine would have resulted in White’s deciding to testify in her own defense; and (4) White’s testimony that she did not present the check to Karl, subject, of course, to cross-examination, would have had a significant likelihood of resulting in a different outcome. This record does not support these four conclusions, which would involve speculation on our part.

{¶ 16} We have reviewed the record in its entirety, and we find no potential assignments of error having arguable merit. We conclude that this appeal is wholly frivolous. Accordingly, the judgment of the trial court is Affirmed.

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BROGAN and GRADY, JJ., concur.

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