[Cite as *State v. Bean*, 2009-Ohio-5037.]

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

STATE OF OHIO

Plaintiff-Appellee

v.

RAVEN BEAN, JR.

Defendant-Appellant

Appellate Case No. 23229

Trial Court Case No. 2008-CR-2831/02

(Criminal Appeal from
Common Pleas Court)

. . . . . .

O P I N I O N

Rendered on the 25th day of September, 2009.

. . . . . .

MATHIAS H. HECK, JR., by CARLEY J. INGRAM, Atty. Reg. #0020084, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

DANIEL E. BRINKMAN, Atty. Reg. #0025365, 120 West Second Street, Suite 2000 Liberty Tower, Dayton, Ohio 45402
Attorney for Defendant-Appellant

. . . . . .

FAIN, J.

{¶ 1} Defendant-appellant Raven Bean, Jr., appeals from his conviction and sentence, following a jury trial, for Theft, of property of a value of $500 or more, a

violation of R.C. 2913.02(A)(1). Bean's 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 he could not find any potential assignments of error having arguable merit. We have reviewed the entire record, and we agree with Bean's appellate counsel – we cannot find any potential assignments of error having arguable merit, either. Consequently, we conclude that Bean's appeal is wholly frivolous, and the judgment of the trial court is Affirmed.

I

{¶ 2} On the morning of June 9, 2008, Bean and a friend, Virginia Fitzpatrick, went to a Wal-Mart store in Montgomery County and took five digital cameras from the store without paying for them. Fitzpatrick concealed three of the cameras in her purse; Bean concealed two of the cameras in his pants pockets. An alarm went off as they crossed the threshold while leaving the store, but the cashier who went to the exit was not authorized to stop a suspected shoplifter.

{¶ 3} Later that morning, Bean sold, or pawned, two of the cameras to the Ohio Loan Company, a pawnshop in Montgomery County. Fitzpatrick sold the three remaining cameras "on the street" later that day.

{¶ 4} By the next day, the Wal-Mart store had found three torn-open camera boxes in the store, and discovered that five digital cameras were missing and unaccounted for. Samuel Wagner, an asset protection manager, reviewed store surveillance video records, and saw a man and woman removing merchandise from the shelves that he identified as digital cameras. The videos show the pair paying for

some other item of merchandise at a check-out counter, and then leaving the store. The videos show a cashier walking quickly up to the exit after the couple left the store. The videos show the pair getting into a car in the store parking lot, and leaving.

{¶ 5} We have reviewed the videos, and we can see the woman in the videos removing three items of merchandise that Wagner identified as digital cameras, and the man removing one item of merchandise that Wagner identified as a digital camera. But Wagner pointed out that the videos do show both the man and the woman making their way to another part of the store where digital cameras are also displayed for sale. Wagner identified the man in the video as being Bean, whom he saw in open court.

{¶ 6} Finally, Wagner testified that the total value of the digital cameras taken from the store exceeded $700.

{¶ 7} Fitzpatrick pled guilty to Theft, and was sentenced to seven months, to run concurrently with at least one other sentence she was serving. She testified for the State at Bean's trial. She testified that by the time she and Bean took the cameras, at the latest, they had a plan to do so; in other words, they were acting in concert. Her testimony incriminating Bean was corroborated by the fact that five digital cameras were missing from the store and could not be accounted for, by the torn boxes for three of the cameras, and by the store surveillance video. Her testimony was also corroborated by two employees of the Ohio Loan Company, each of whom testified that Bean had sold or pawned a camera, at different times that morning, to the witness in exchange for $40. Each transaction was also evidenced by a receipt bearing Bean's photograph and thumbprint.

{¶ 8} Bean testified in his own defense. He admitted that he had pawned two

of the cameras, although he claimed to have done so solely to accommodate Fitzpatrick, who did not have the necessary identification to accomplish the transaction. He testified that he did not suspect the origin of the cameras in Fitzpatrick's possession (i.e., that she had stolen them from the Wal-Mart) until just after he had pawned them. Cross-examination on this subject produced the following colloquy:

{¶ 9} "Q. Did you go directly to the pawn shop?

{¶ 10} "A. Yes.

{¶ 11} "Q. Virginia drove you there?

{¶ 12} "A. Yes.

{¶ 13} "Q. She asked you, you know, hey I don't have an ID, can you help me out?

{¶ 14} "A. (Nods head). (Indiscernible).

{¶ 15} "Q. Is that kind of what she said?

{¶ 16} "A. Basically.

{¶ 17} "Q. And you agreed to do so?

{¶ 18} "A. Yes.

{¶ 19} "Q. Having no idea where these cameras came from?

{¶ 20} "A. I had an inclination, yeah, afterwards.

{¶ 21} "Q. Okay. But at the time you had no idea?

{¶ 22} "A. No, I did not.

{¶ 23} "Q. Even though you were just in the electronics section selecting these cameras?

{¶ 24} "A. (Smiles)."

{¶ 25} When confronted with the video of him taking merchandise from the shelf at Wal-Mart, Bean testified that it was a child's toy. Wagner testified that this shelf only had digital cameras and digital camera accessories.

{¶ 26} Despite Bean's protestation of innocence, the jury found him guilty as charged, and, in a separate verdict form, found that the value of the stolen property equaled or exceeded $500. The trial court entered a judgment of conviction on the verdict. Bean was sentenced to the maximum term of imprisonment of twelve months.

{¶ 27} From his conviction and sentence, Bean has appealed. His appellate counsel has filed a brief under the authority of *Anders v. California*, supra, reflecting that he could find no potential assignments of error having arguable merit. By entry filed herein on May 27, 2009, we allowed Bean sixty days within which to file his own, pro se brief. He has not done so.

II

{¶ 28} In his *Anders* brief, Bean's appellate counsel has set forth two potential assignments of error that were considered, but found by counsel to have no arguable merit:

{¶ 29} "THE TRIAL COURT ERRED IN IMPOSING A GREATER SENTENCE ON THE DEFENDANT THAN HIS CO-DEFENDANT, WHO RECEIVED A SEVEN MONTH SENTENCE.

{¶ 30} "THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING THE DEFENDANT TO THE MAXIMUM SENTENCE OF 12 MONTHS AND A SENTENCE OF 5 OR MORE [sic] MONTHS THAN THE CO-DEFENDANT."

{¶ 31} Both Bean and his co-perpetrator, Fitzpatrick, have significant prior criminal records. Bean's prior criminal record consists of a prior conviction for Robbery and a prior conviction for Theft. As Bean's appellate counsel notes, felony sentencing decisions are confided to the discretion of the sentencing judge, whose decision is entitled to substantial deference.

{¶ 32} Although the trial court did differentiate between Fitzpatrick and Bean, imposing a seven-month sentence upon Fitzpatrick, and a twelve-month sentence upon Bean, there is a valid basis for that distinction. After she was apprehended and charged, Fitzpatrick co-operated by admitting her guilt, and by testifying against Bean. She testified that she was not promised anything in exchange for her testimony against Bean. By contrast, Bean did not admit his guilt. He testified under oath that he was innocent, and the jury disbelieved him. The jury's verdict is necessarily inconsistent with Bean's testimony. The trial court was entitled to take into consideration, in its sentencing decision, not only Bean's lack of co-operation, but also his decision to testify falsely.

{¶ 33} We agree with Bean's appellate counsel that the assignments of error he considered have no arguable merit.

III

{¶ 34} Under *Anders v. California*, supra, we have an independent duty to review the record, and we have done so. We have been furnished with a written transcript of all of the trial proceedings except the voir dire of the jury. We have the video recording of the voir dire of the jury, and we have watched that recording in its entirety. We have

not found any potential assignments of error having arguable merit.

{¶ 35} We do note one potential assignment of error that we have considered. In her voir dire examination of the jury, the prosecutor said the following:

{¶ 36} "[An] important part of being on the jury is to figure out what evidence is relevant. A good example of that is, you know, when an officer pulls someone over for speeding. Some things that are going to be important are the color of the car, you know, *does this person have any prior speeding tickets*, are there any, is there anybody else in the car. But probably what's not going to be relevant is, you know, did the officer pull over other folks on the road so that they could be witnesses to the speeding ticket. You know, that doesn't make a lot of sense; *that wouldn't really be relevant, what other drivers on the road, you know, saw with regard to a speeding ticket*. Does anybody have a problem with that concept? Or does everybody understand that?" (Emphasis added.)

{¶ 37} The first italicized portion of the above-quoted remark by the prosecutor endorses precisely the inference forbidden by Evid. R. 404(B) – that because the accused committed a previous violation of the law in question, he likely committed the violation with which he is presently charged. The second italicized portion suggests that when an officer has evidence of a violation, whether as a result of his own, unaided observation, or as a result of the use of a device – a radar gun in this instance, evidence offered by other eyewitnesses would not be not relevant and need not be considered. Both of these points are erroneous and troubling. If this represents this prosecutor's standard comment to explain the concept of relevance during voir dire, we suggest that she should fashion a different explanation for use in the future. And the

color of the car and whether there were passengers would not be relevant per se, although each fact might become relevant, depending upon the particular circumstances of the case. The color of the car would likely only be relevant for identification purposes, which is not likely to be an issue if the defendant is pulled over and cited.

{¶ 38} The above-quoted comment by the prosecutor during voir dire was not the subject of an objection. Therefore, it could only be a basis for reversal if it amounted to plain error. The evidence in this case was straightforward and compelling. We see no plausible argument that the above-quoted comment amounts to plain error, or that defense counsel's failure to have objected would satisfy the prejudice requirement for a reversal based upon ineffective assistance of counsel.

IV

{¶ 39} We agree with Bean's appellate counsel that there are 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.

. . . . . .

BROGAN and GRADY, JJ., concur.

Copies mailed to:

Mathias H. Heck
Carley J. Ingram
Daniel E. Brinkman
Raven Bean, Jr.

Hon. Michael Tucker