

[Cite as *State v. Hagen*, 2015-Ohio-1164.]

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

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| STATE OF OHIO | : | |
| | : | Appellate Case No. 2014-CA-63 |
| Plaintiff-Appellee | : | |
| | : | Trial Court Case No. 13-CR-873 |
| v. | : | |
| | : | (Criminal Appeal from |
| THOMAS HAGEN | : | Common Pleas Court) |
| | : | |
| Defendant-Appellant | : | |
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OPINION

Rendered on the 27th day of March, 2015.

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RYAN A. SAUNDERS, Atty. Reg. No. 0091678, Clark County Prosecutor’s Office, 50 East Columbia Street, P.O. Box 1608, Springfield, OH 45501
Attorney for Plaintiff-Appellee

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Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Thomas Hagen appeals from his conviction and sentence, following a guilty plea, to one count of Theft, in violation of R.C. 2913.02(A)(1), a felony of the fifth degree, and one count of Theft, in violation of R.C. 2913.02(A)(2), also

a felony of the fifth degree. Hagen's appellate counsel has filed a brief under the authority of *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), indicating that she has not found any potential assignments of error having arguable merit. Neither have we. Accordingly, the judgment of the trial court is Affirmed.

I. The Offenses

{¶ 2} Hagen and his girlfriend, Ashlie Tossie, each opened an account at Security National Bank, and got debit cards. Hagen used an ATM to make what he claimed were deposits in each of the accounts; the deposit envelopes were, in fact, empty. Hagen and Tossie, acting in concert, then used the debit cards to purchase merchandise and to make cash withdrawals. The losses the bank sustained in relation to both accounts totaled \$5,441.62.

II. The Course of Proceedings

{¶ 3} Hagen was indicted on two counts of Theft, one relating to his bank account, and the other relating to Tossie's. Hagen ultimately pled guilty to both counts, and agreed that the proper amount of restitution was \$5,441.62. The State agreed that its recommendation as to the sentence would be based upon the extent to which Hagen paid restitution before the sentencing hearing.

{¶ 4} By the time of the sentencing hearing, Hagen had paid all \$5,441.62 in restitution. In recognition of that fact, the State recommended community control sanctions. The trial court declined to impose community control sanctions, noting that Hagen had lengthy records of both juvenile delinquency and adult felony convictions, and

that he had gone to prison four times, including a four-year sentence imposed in 2008. The trial court imposed a prison sentence of one year for each of the Theft convictions, but in recognition of Hagen's having paid restitution in full, ordered those prison sentences to be served concurrently, rather than consecutively.

{¶ 5} The trial court noted that Hagen was on post-release control, when he committed these Theft offenses, following his release from prison on a sentence for Complicity to Commit Burglary, and that the time remaining on his post-release control was a little over sixteen months. The trial court terminated the post-release control, and imposed a prison term of sixteen months and nine days – the remaining term of post-release control – which the trial court was required by law to order, and did order, to be served consecutively to the one-year Theft sentences. The trial court awarded jail-time credit, noted that all restitution had already been paid, and ordered Hagen to pay court costs.

{¶ 6} From his conviction and sentence, Hagen appeals.

III. There Are No Potential Assignments of Error Having Arguable Merit

{¶ 7} Hagen's appellate counsel has filed a brief under the authority of *Anders v. California, supra*, indicating that she could not find any potential assignments of error having arguable merit. By entry dated November 19, 2014, we gave Hagen 60 days within which to file his own, pro se brief. He has not done so.

{¶ 8} In her brief, counsel noted that she had considered four potential assignments of error, concluding that none of them had arguable merit. The first of these was that the trial court had erred by imposing maximum prison terms of one year for the

fifth-degree felony Theft offenses. In view of Hagen's extensive criminal history, including four prior prison sentences, we agree with counsel that no reasonable argument can be made that the trial court erred by imposing the maximum sentences.

{¶ 9} The next potential assignment of error that counsel considered was that the trial court had not followed "a particular procedure to impose a judicial sanction for violation of post-release control." We agree with counsel that no reasonable argument can be made along these lines. Hagen did not dispute that he was under post-release control when he committed these Theft offenses. Under R.C. 2929.141(A)(1), the trial court was permitted to impose a prison term for the post-release control violation for a term equal to the amount of time remaining on the post-release control sanction or twelve months, whichever was greater, and the same statute requires that the prison term so imposed be served consecutively to any prison term imposed for the new felony offense. Hagen did not dispute that he had sixteen months and nine days remaining on the pending post-release control sanction. Therefore, we find no potential assignment of error having arguable merit relating to this issue.

{¶ 10} The next potential assignment of error that counsel considered was that the two Theft convictions should have been merged. As counsel notes, R.C. 2913.61(C)(1) provides that thefts that are part of a continuing course of conduct shall be aggregated and charged as a single count, but only when the violations are committed by the offender in the offender's same relationship to the victim – here, Security National Bank. One of the Theft offenses with which Hagen was charged related to the bank account in his name, so that his relationship to the victim was direct, as a depositor. The other related to the bank account in Tossie's name, so that he had no direct relationship to the bank as

a depositor. Therefore, we agree with counsel that no reasonable argument can be made that the two Theft offenses were committed in Hagen's same relationship to the victim.

{¶ 11} Finally, counsel considered a potential assignment of error arising out of the trial judge's failure to have recused himself on account of his brother being a vice-president of the victim bank. At Hagen's urging, his trial counsel did raise this issue at the sentencing hearing, after the trial court had indicated that it was not going to follow the State's recommendation of community control sanctions. The trial court indicated that its relationship to the bank officer had not even occurred to it, and had played no role in its decision on sentencing. Clearly, Hagen was aware of the relationship before the sentencing hearing. As appellate counsel notes, disqualification of a trial judge before a hearing can only be achieved by an affidavit of disqualification filed with the Chief Justice of the Supreme Court of Ohio, and the failure to pursue that remedy waives any objection to a trial judge's participation in a proceeding. *State v. Cook*, 2d Dist. Champaign No. 2013 CA 22, 2014-Ohio-3165, ¶ 13-14. Accordingly, we agree with counsel that no reasonable argument can be made that the trial court erred in this regard.

{¶ 12} We have performed our duty, under *Anders v. California*, to independently review the record. After having reviewed the entire record, we find no potential assignments of error having arguable merit. The plea colloquy satisfied all the requirements of Crim.R. 11. The sentence was reasonable in view of Hagen's prior criminal history.

IV. Conclusion

{¶ 13} No potential assignments of error having arguable merit having been found, the judgment of the trial court is Affirmed.

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HALL and WELBAUM, JJ., concur.

Copies mailed to:

- Ryan A. Saunders
- Tara C. Dancing
- Thomas Hagen
- Hon. Douglas M. Rastatter