

[Cite as *State v. Leahy*, 2010-Ohio-2876.]

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-090393
	:	TRIAL NO. B-0808998
Plaintiff-Appellee,	:	
	:	<i>DECISION.</i>
vs.	:	
	:	
GRETCHEN LEAHY,	:	
	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 25, 2010

*Joseph T. Deters*, Hamilton County Prosecutor, and *Scott Heenan*, Assistant Prosecutor, for Plaintiff-Appellee,

*Scott Rubenstein* and *Rubenstein & Thurman*, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

**CUNNINGHAM, Presiding Judge.**

{¶1} Defendant-appellant Gretchen Leahy appeals her convictions for theft and possession of heroin after a no-contest plea. Leahy argues that the trial court erred by declining to consider her untimely filed motion to suppress evidence. We find no abuse of the trial court's discretion, and we affirm Leahy's convictions.

I.

{¶2} On November 24, 2008, the Hamilton County Grand Jury indicted Leahy for the theft of personal property worth \$5000 or more and the possession of less than one gram of heroin. Leahy waived her presence at an arraignment held on December 5, 2008, and defense counsel entered a not-guilty plea on her behalf. Leahy was released on her own recognizance. Thereafter, Leahy requested a bill of particulars and discovery from the state.

{¶3} On January 27, 2009, after having requested several continuances, Leahy moved for intervention in lieu of conviction pursuant to R.C. 2951.041. In her motion, she indicated that she had been accepted in an appropriate drug-treatment facility. Upon recommendation by the trial court, her case was reassigned to the specialized docket of the Hamilton County Drug Court.

{¶4} In early March 2009, a presentence-investigation report revealed that Leahy was ineligible for intervention in lieu of conviction because of a previous intervention. Of course, Leahy presumably knew of her prior intervention. At Leahy's request, the trial court continued the case for a treatment assessment and changed Leahy's bond to OR Adapt. Her bond was revoked and a capias was issued on March 11, 2009, because Leahy had failed to comply with the conditions of the bond. Leahy was placed at a secured treatment facility for assessment. Her case was continued several times for the assessment. And on May 11, 2009, the case was

continued for pretreatment at the secured facility. On that same date, Leahy moved to suppress the state's evidence in the case, claiming that the evidence had been obtained by law enforcement in violation of her constitutional rights as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution.

{¶5} On June 1, 2009, the trial court found Leahy's motion to suppress untimely and denied Leahy's request for a hearing on the merits of the motion. Leahy then entered a no-contest plea to the offenses. The trial court accepted the plea and imposed sentence.

II.

{¶6} In her sole assignment of error, Leahy argues that the trial court erred by refusing to allow her to be heard on her motion to suppress evidence. Essentially, she contends that the trial court abused its discretion by denying her leave to file the motion to suppress out of time.

{¶7} A motion to suppress is a pretrial motion.<sup>1</sup> The time for filing a motion to suppress is governed by Crim.R. 12(D), which requires that the motion be made within 35 days after arraignment or seven days before trial, whichever is earlier. The court may exercise its discretion to extend the time for making a motion to suppress where it is "in the interest of justice" to do so.<sup>2</sup> The failure to comply with the time requirement of Crim.R. 12(D) constitutes a waiver of the defense or objections, "but the court for good cause shown may grant relief from the waiver."<sup>3</sup>

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<sup>1</sup> Crim.R. 12(C)(3).

<sup>2</sup> Crim.R. 12(D); see *Akron v. Milewski* (1985), 21 Ohio App.3d 140, 142, 487 N.E.2d 582; *State v. Karns* (1992), 80 Ohio App.3d 199, 204, 608 N.E.2d 1145.

<sup>3</sup> Crim.R. 12(H). See *State v. F.O.E. Aerie 2295* (1988), 38 Ohio St.3d 53, 526 N.E.2d 66, paragraph two of the syllabus; *State v. Wade* (1978), 53 Ohio St.2d 182, 373 N.E.2d 1244, paragraph three of the syllabus, vacated in part on other grounds (1978), 438 U.S. 911, 98 S.Ct. 3138; *State v. Moody* (1978), 55 Ohio St.2d 54, 66, 377 N.E.2d 1008.

{¶8} We review the trial court’s decision whether to consider an untimely motion to suppress under an abuse-of-discretion standard.<sup>4</sup> An abuse of discretion means that the trial court’s decision is unreasonable, arbitrary, or unconscionable.<sup>5</sup> Generally, a trial court abuses its discretion by refusing to entertain a motion to suppress that is untimely due to the state’s failure to provide necessary discovery.<sup>6</sup>

{¶9} Leahy does not contend that she was unable to file the motion in time because of a lack of information. Rather, she contends that the interest of justice required the trial court to entertain her untimely motion because of the “unusual” procedural posture of the case and the merits of her motion. The state argues that there was no abuse of discretion because the motion was meritless. We hold that the trial court did not abuse its discretion, without regard to the merits of the motion to suppress, the verified facts of which are not before us.

{¶10} In denying Leahy’s request for consideration of the untimely motion, the trial court noted that Leahy was on the drug court’s “treatment track” and that she had been found to be an appropriate candidate for treatment after an assessment. Leahy had initiated this treatment track when she requested intervention in lieu of conviction, a diversion program that, like a guilty plea that results in a criminal conviction, removes factual guilt from the case and renders objections to the admissibility of evidence irrelevant.<sup>7</sup> Although Leahy was not eligible for intervention in lieu of conviction, she remained eligible for treatment, and she had remained supportive of this “track.” The court made clear at the pretrial hearing that Leahy had taken one of the limited places at the treatment facility for

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<sup>4</sup> *State v. Robson*, 165 Ohio App.3d 621, 623, 2006-Ohio-628, 847 N.E.2d 1233, ¶9; *State v. Shelton*, 1st Dist. Nos. C-060789 and C-060790, 2007-Ohio-5460, ¶5.

<sup>5</sup> See *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.

<sup>6</sup> See *State v. Sargent* (Aug. 17, 1994), 2nd Dist. No. 3042; *Shelton* at ¶5, citing *State v. Murphy* (1982), 1st Dist. Nos. C-810203 and C-810270.

<sup>7</sup> See R.C. 2951.041.

the assessment and pretreatment, and with those procedures completed, the court could not justify holding Leahy at the treatment facility due to delays created by Leahy in the resolution of the case. Thus, in the event of such a delay, Leahy would have been transferred from the facility to jail.

{¶11} The time limitation of Crim.R. 12(D) is designed to facilitate the early determination of issues that should be resolved prior to a trial. Pursuant to the rule, the time to file a motion to suppress in this case expired in early January 2009, over two weeks before Leahy requested intervention in lieu of conviction. And Leahy did not move to suppress the evidence until over a month after she had officially learned that she was ineligible for intervention, five months after arraignment.

{¶12} Although a trial date had not been set, at the time Leahy filed her motion, many resources had been diverted towards her treatment. The trial court's consideration of the motion at that point would have run counter to the purpose of the drug court, which is "to facilitate [the] efficient and effective treatment of drug addicted offenders."<sup>8</sup>

{¶13} Under these facts, we cannot say that the trial court's refusal to consider the untimely motion was an abuse of discretion. Leahy waived her objection by failing to move to suppress the evidence within the time requirement of Crim.R. 12(D).<sup>9</sup> Accordingly, we overrule the assignment of error, and we affirm the judgment of the trial court.

Judgment affirmed.

**SUNDERMANN and HENDON, JJ.**, concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

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<sup>8</sup> Loc.R. 25 of the Court of Common Pleas of Hamilton County, General Division.

<sup>9</sup> Crim.R. 12(H).