

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- VS -	:	CASE NO. 2012-P-0033
AMELIA L. BREGITZER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Ravenna Division, Case No. R2011 TRC 7799.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Patricia J. Smith, 9442 State Route 43, Streetsboro, OH 44241 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Amelia L. Bregitzer, appeals from the judgment of the Portage County Municipal Court, Ravenna Division, convicting her of Operating a Motor Vehicle While Under the Influence of Alcohol. The issues to be determined by this court are whether a defendant may pursue an ineffective assistance of counsel claim on appeal when she pled no contest to the charges, whether a trial court abuses its discretion in denying a motion to suppress as untimely when it is filed approximately eight months late, and whether a trial court errs in determining that a motion to suppress

is withdrawn when counsel withdraws and the defendant does not appear on the date of the motion hearing. For the following reasons, we affirm the decision of the lower court.

{¶2} On June 9, 2011, Bregitzer was charged with Operating a Motor Vehicle While Under the Influence of Alcohol (OVI), a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1)(a) and 4511.19(A)(1)(d), as well as with two minor misdemeanor traffic violations.

{¶3} On August 24, 2011, Bregitzer, through counsel, filed a Motion to Suppress, asserting various grounds to suppress the results of her field sobriety test and the tests of her alcohol level, including whether the testing equipment was properly calibrated. This motion was set for a hearing on September 29, 2011. The motion was subsequently reset for hearing on November 21, 2011.

{¶4} On October 4, 2011, Bregitzer's counsel filed a Motion to Withdraw as counsel, due to irreconcilable differences, which was granted by the trial court on October 7, 2011.

{¶5} On November 29, 2011, a "Criminal Pre-Trial Report" was filed, signed by the prosecutor, but not by the defendant, defense counsel, or the court. It stated that the defendant "FTA," or failed to appear, and also stated "Mt W/drawn," apparently indicating that the Motion to Suppress was withdrawn. This report was dated November 21, 2011. The matter was then set for trial on December 22, 2011.

{¶6} Bregitzer requested a continuance of that trial date, which was granted. After the trial was reset for January 31, 2012, Bregitzer requested another continuance. In a January 26, 2012 Judgment Entry, the trial court found that Bregitzer "could have applied for [a] public defender at any time" during the months after her counsel withdrew, and denied the motion for a continuance. Bregitzer then applied for court

appointed counsel, counsel was appointed, and a third trial date was set for March 21, 2012.

{¶7} Bregitzer's appointed counsel filed another Motion to Suppress on March 13, 2012, again asserting various grounds for suppression of evidence.

{¶8} On March 21, 2012, a Motion/Trial Hearing was held. At that hearing, the court noted that it thought the first Motion to Suppress, filed on August 24, 2011, had been "withdrawn by virtue of the fact that the defendant did not appear and there was no attorney to represent her at that time." The court noted that several continuances of the matter had been granted due to Bregitzer's requests. The court further stated that the second Motion to Suppress was "not timely filed," although it did not expressly state that the Motion was overruled or denied. Defense counsel stated that, pursuant to a conference with the prosecutor and the court, it was indicated that the Motion would be denied because it was untimely filed.

{¶9} Defense counsel stated that Bregitzer wanted to enter a plea of no contest. The trial court went over Bregitzer's rights that would be waived by entering the plea. During this review of the rights, Bregitzer asked several questions regarding the motions to suppress and inquired as to whether she could "re-file" the motions, to which the trial court responded negatively. The trial court stated that she could file an appeal of the court's denial of her motion to suppress with the appellate court. Bregitzer stated that she understood her rights and a written plea of no contest and waiver of rights was filed. Bregitzer's plea of no contest to OVI, a misdemeanor of the first degree, in violation of R.C. 4511.19(A)(1)(a), was accepted by the court.

{¶10} Bregitzer was sentenced to serve 90 days in jail, given credit for three days served in the driver intervention program, and the remaining 87 days of the

sentence were suspended. She was also ordered to pay a \$750 fine, with \$375 suspended.

{¶11} On April 23, 2012, the trial court granted a stay of execution of sentence pending the result of this appeal.

{¶12} Bregitzer timely appeals and raises the following assignments of error:

{¶13} “[1.] The appellant was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment[s] to the United States Constitution and the Ohio Constitution where counsel failed to file a timely supplement to the previously filed Motion to Suppress, failed to file a timely Motion in Limine, and advised the defendant to enter a plea without being aware that a Motion to Suppress was properly pending before the court.

{¶14} “[2.] The trial court abused its discretion and violated the defendant’s right to due process when it denied the Motion to Suppress without a hearing and in error found that the original Motion to Suppress was withdrawn.”

{¶15} In her first assignment of error, Bregitzer asserts that her counsel was ineffective by failing to file a motion in limine, failing to request a continuance, and failing to supplement the August 24, 2011 Motion to Suppress to raise an issue related to the unreliability of the Intoxilyzer 8000 breath test.

{¶16} The Ohio Supreme Court has adopted a two-part test to decide whether an attorney’s performance is below the constitutional standard for effective assistance of counsel. To reverse a conviction due to ineffective assistance of counsel, the defendant must prove “(1) that counsel’s performance fell below an objective standard of reasonableness, and (2) that counsel’s deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding.”

State v. Madrigal, 87 Ohio St.3d 378, 388-389, 721 N.E.2d 52 (2000), citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). “In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s performance was reasonable considering all the circumstances. * * * Judicial scrutiny of counsel’s performance must be highly deferential.” *Strickland* at 688-689. “There is a strong presumption that the attorney’s performance was reasonable.” *State v. Gotel*, 11th Dist. No. 2006-L-015, 2007-Ohio-888, ¶ 10.

{¶17} This court has repeatedly held that “[a] plea of guilty or no contest waives any prejudice a defendant suffers arising out of his counsel’s alleged ineffective assistance, except with respect to a claim that the particular failure alleged impaired the defendant’s knowing and intelligent waiver of his right to a trial.” (Citation omitted.) *State v. Barnett*, 11th Dist. No. 2006-P-0117, 2007-Ohio-4954, ¶ 55; *State v. Casto*, 11th Dist. No. 2009-P-0027, 2010-Ohio-828, ¶ 42; *State v. Francis*, 11th Dist. No. 2009-T-0015, 2010-Ohio-2686, ¶ 92. It has been held that the failure to suppress evidence has no prejudicial impact upon a conviction based on a no contest plea, “because the conviction does not result from the unsuppressed evidence.” *State v. Fitzgerald*, 2nd Dist. No. 2001-CA-124, 2002-Ohio-3914, ¶ 44.

{¶18} While Bregitzer asserts various grounds for her ineffective assistance of counsel claim, including counsel’s failure to file a timely motion to suppress, failure to file a motion in limine, and failure to properly pursue or amend the motion to suppress, none of these relate to the voluntariness of her plea or allege Bregitzer’s ability to knowingly waive her right to a trial was impaired by these actions. These arguments cannot be considered since the plea of no contest waived any prejudice suffered as a result of the alleged ineffective assistance of counsel as it relates to these issues.

{¶19} Regarding the knowing and intelligent nature of a plea and waiver of the right to a trial, “[a] claim that a guilty or no contest plea was induced by ineffective assistance of counsel must be supported by evidence showing his plea was involuntary.” *Francis* at ¶ 93.

{¶20} In the present matter, Bregitzer does not make any showing or advance any specific argument that her no contest plea and corresponding waiver of rights were not given knowingly and they were involuntary. Bregitzer does note in her brief that “counsel erroneously advised the appellant to enter a plea of no contest to the charge,” although she does not further elaborate on this statement, except to assert that counsel should have requested the court to supplement the motion to suppress or file a motion in limine. This does not directly relate to whether her plea was involuntary. Although counsel may have been able to file additional motions on Bregitzer’s behalf, this does not render her plea involuntary. While there may be conflict regarding whether the motions to suppress were properly denied, the record indicates that both the trial court and defense counsel believed that these motions had either been denied or withdrawn. That counsel advised Bregitzer to enter a plea at that point in the proceedings does not show any coercion or involuntary waiver of her rights.

{¶21} Further, Bregitzer was fully informed of her rights and that certain rights would be waived upon entering a plea. The court went over issues related to the motions to suppress and answered questions asked by Bregitzer to clarify that she understood her right to file an appeal. Bregitzer stated in court that she understood her rights, she was not threatened or forced to enter the plea, her plea was voluntary, and she did not have any questions. She also signed a waiver listing the various rights waived.

{¶22} Since Bregitzer failed to point to a violation related to the voluntary nature of her plea and waiver of rights resulting from her counsel's alleged ineffectiveness and prejudice was waived as to the other grounds raised in this assignment of error, we cannot find merit in her claim regarding ineffective assistance of counsel.

{¶23} The first assignment of error is without merit.

{¶24} In her second assignment of error, Bregitzer argues that the trial court erroneously found that her first Motion to Suppress was withdrawn and denied her second Motion to Suppress due to it being untimely filed.

{¶25} As an initial matter, we note that, in contrast to an error regarding the ineffective assistance of counsel, arguments related to the trial court's errors in denying the motions to suppress can be raised in the present matter. "The plea of no contest does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence." Crim.R. 12(l); *State v. Bump*, 11th Dist. No. 2010-A-0028, 2011-Ohio-6687, ¶ 42 ("[u]nlike a plea of no contest, a plea of guilty operates as a waiver of claimed errors of the trial court in failing to suppress evidence") (citation omitted).

{¶26} "The decision as to whether to permit the untimely filing of a motion to suppress, under Crim.R. 12, will not be reversed on appeal absent a showing of an abuse of discretion." *State v. Moore*, 11th Dist. No. 2011-G-3027, 2012-Ohio-3885, ¶ 22. An abuse of discretion standard has also been applied when determining whether a motion to suppress may be denied for a defendant's failure to appear. See *State v. Brown*, 9th Dist. No. 23637, 2008-Ohio-2670, ¶ 21-22.

{¶27} We will first address the argument related to the dismissal of the second, March 13, 2012 Motion to Suppress, as untimely. "All pretrial motions * * * shall be

made within thirty-five days after arraignment or seven days before trial, whichever is earlier.” Crim.R. 12(D). “The court has discretion to extend the time for making a motion to suppress when in the interest of justice.” *State v. Johnson*, 11th Dist. No. 2011-T-0075, 2012-Ohio-3035, ¶ 13; Crim.R. 12(D). Failure to file a timely motion to suppress evidence is grounds for denial of the motion. *State v. Sherrod*, 11th Dist. No. 2009-L-086, 2010-Ohio-1273, ¶ 43, citing *State v. Wade*, 53 Ohio St.2d 182, 373 N.E.2d 1244 (1978), paragraph three of the syllabus.

{¶28} In the present matter, the March 13 Motion to Suppress was found by the trial court to be untimely. It was filed approximately eight months after Bregitzer was arraigned on June 14, 2011. In the present matter, regarding the initial August 24, 2011 Motion to Suppress, it must be noted that after the withdrawal of counsel and Bregitzer’s failure to appear at the suppression hearing set on November 21, 2011, several months passed during which the matter was set for trial and several continuances were granted. Bregitzer did not take any action to file any motions on her own behalf and did not seek counsel from October 7, 2011, when counsel withdrew, until January 27, 2012, when she applied for court-appointed counsel. Even when appointed counsel took over the case, it took an additional six weeks to file the second Motion to Suppress and no reasons were stated on the record to support a finding that allowing the untimely motion would be in the interest of justice. Based on the foregoing, we cannot find that the trial court abused its discretion by denying the March 13, 2012 Motion to Suppress as untimely. See *State v. Fuller*, 4th Dist. No. 10CA5, 2011-Ohio-860, ¶ 18 (the trial court did not abuse its discretion in denying a motion to suppress as untimely when it was filed approximately eleven months late and newly appointed counsel took five weeks to file a motion to suppress after appointment); *State v. Fornshell*, 5th Dist. No. 10 CA 48,

2011-Ohio-3560, ¶ 13-15 (when appellant waited almost a year, and after two scheduled trial dates had passed, to request leave to file an untimely motion to suppress and failed to provide details for his failure to timely pursue such a motion, it was not an abuse of discretion to deny the request).

{¶29} Bregitzer also asserts that the trial court erred by finding her initial August 24, 2011 Motion to Suppress was withdrawn and by not holding a hearing on the motion.

{¶30} As an initial matter, it appears that the record is somewhat unclear as to the ruling made on this motion. The Motion was filed on August 24, 2011. A suppression hearing was set for November 21, 2011. The record indicates that notice of this hearing was sent to Bregitzer on September 29, 2011. Pursuant to the Criminal Pre-Trial Report and the trial court's statement at the hearing, Bregitzer did not appear at the suppression hearing. In the Criminal Pre-Trial Report, the prosecutor also noted that the Motion to Suppress was withdrawn. Pursuant to these facts, the trial court found that the motion could not be pursued and/or was denied due to Bregitzer's failure to appear, although it was stated in terms of the motion being "withdrawn." It has been held that a trial court did not abuse its discretion in denying a motion to suppress due to the defendant's failure to appear and was not required to reschedule his suppression hearing, given the trial court's inherent authority to protect its docket. *Brown*, 2008-Ohio-2670, ¶ 23 and 33, citing *Mayer v. Bristow*, 91 Ohio St.3d 3, 7, 740 N.E.2d 656 (2000) (discussing the trial court's inherent authority to protect its docket).

{¶31} We note that, in *Mentor v. Caswell*, 123 Ohio App.3d 256, 704 N.E.2d 26 (11th Dist.1997), this court found that a trial court erred by denying a continuance of a suppression hearing where the client was not present, since a defendant has a right to

be present at his or her suppression hearing. However, in the present matter, neither counsel nor Bregitzer appeared before the trial court during the appointed time for the suppression hearing, Bregitzer did not attempt to obtain counsel prior to the hearing, no motion for a continuance was filed, no hearing was held, and the matter was then set for trial. Further, neither Bregitzer, nor her counsel, appointed several months later, sought to reopen the initial Motion, supplement the Motion, or request a hearing on that Motion. In light of this lack of action on behalf of Bregitzer, it cannot be found that the trial court abused its discretion in this matter.

{¶32} Since the trial court found that this matter was essentially withdrawn by virtue of Bregitzer's failure to appear, we cannot find that the court was required to hold a hearing on the Motion. To the extent that it may be argued by Bregitzer that no formal ruling was issued on the docket or during the March 21, 2012 hearing, this issue was not disputed by trial counsel below. See *State v. Romandetti*, 9th Dist. No. 23388, 2007-Ohio-363, ¶ 9 (“[i]f, as the record before us indicates, the court did not issue a ruling, Defendant has waived objection by failing to obtain a ruling prior to his plea”).

{¶33} The second assignment of error is without merit.

{¶34} For the foregoing reasons, the judgment of the Portage County Municipal Court, Ravenna Division, convicting Bregitzer of Operating a Motor Vehicle While Under the Influence of Alcohol, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

THOMAS R. WRIGHT, J.,

concur.