[Cite as *State v. Echard*, 2009-Ohio-6616.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. RODNEY G. ECHARD Appellant	C. A. No. 24643 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 05 1562

DECISION AND JOURNAL ENTRY

Dated: December 16, 2009

Per Curiam.

INTRODUCTION

{¶1} The Grand Jury indicted Rodney Echard for domestic violence. It alleged that, because he had previously pleaded guilty to or been convicted of two or more prior domestic violence offenses, this latest offense was a felony of the third degree. Mr. Echard moved in limine, arguing that the guilty plea he entered in a 2002 case could not be used for enhancement purposes because the charge was dismissed after he completed a diversion program. After the trial court denied his motion, Mr. Echard pleaded no contest so that he could appeal the ruling. Because Mr. Echard's motion required a determination of the general issue for trial, it was not a pretrial motion under Rule 12(C) of the Ohio Rules of Criminal Procedure. Mr. Echard, therefore, forfeited his argument by pleading no contest. Because the court and parties mistakenly thought that he could appeal the issue, however, the judgment of the trial court is

reversed, and this matter is remanded to the trial court to allow Mr. Echard the option of withdrawing his plea.

CHARACTERIZING THE MOTION

{¶2} Mr. Echard's assignment of error is that the trial court incorrectly denied his motion in limine, by which he sought to have the State prohibited from enhancing the domestic violence charge in this case based on his plea to a charge in a previous case that was later dismissed. This Court must first consider the State's argument that, by pleading no contest, Mr. Echard forfeited his right to challenge the court's ruling on his motion.

{¶3} A motion in limine "is a precautionary request, directed to the inherent discretion of the trial judge, to limit the examination of witnesses by opposing counsel in a specified area until its admissibility is determined by the court outside the presence of the jury." *State v. Grubb*, 28 Ohio St. 3d 199, 201 (1986) (quoting *State v. Spahr*, 47 Ohio App. 2d 221, 224 (1976)). A motion to suppress is "[a] request that the court prohibit the introduction of illegally obtained evidence at a criminal trial." Black's Law Dictionary 1039 (8th ed. 2004). By his motion, Mr. Echard sought a preliminary ruling that evidence of his prior guilty plea would not be admissible at trial. He did not seek to prohibit the introduction of illegally obtained evidence. Accordingly, we construe Mr. Echard's motion in limine for what it was: a motion in limine.

{¶4} The Ohio Supreme Court has held that a trial court's ruling on a motion in limine is interlocutory in nature and does not preserve an evidentiary issue for appellate review in the absence of objection when the issue arises at trial. *Gable v. Gates Mills*, 103 Ohio St. 3d 449, 2004-Ohio-5719, at ¶35. This Court has held that, "[b]y failing to raise the issue[ ] involved [in a motion in limine] 'when the issue [was] actually reached and the context [ ] developed at trial,' [a]ppellant[] waived the right to raise th[e] issue on appeal." *Callahan v. Akron Gen. Med. Ctr.*,

9th Dist. No. 22387, 2005-Ohio-5103, at ¶23 (quoting *State v. Grubb*, 28 Ohio St. 3d 199, 203 (1986)). In *Grubb*, the Supreme Court explained that renewing a motion and/or objection in the context of when it is offered at trial is important because, "the trial court is certainly at liberty ' . . . to consider the admissibility of the disputed evidence in its actual context.'" *Grubb*, 28 Ohio St. 3d at 202 (quoting *State v. White*, 6 Ohio App. 3d 1, 4 (1982)).

{¶5} The Grand Jury indicted Mr. Echard for a felony of the third degree instead of a misdemeanor because he, allegedly, had "previously pleaded guilty to or been convicted" of two or more offenses of domestic violence. The Supreme Court has held that, if "[the] existence of a prior conviction does not simply enhance the penalty but transforms the crime itself by increasing its degree, [it] is an essential element of the crime . . . ." *State v. Brooke*, 113 Ohio St. 3d 199, 2007-Ohio-1533, at ¶8. "As with any other element, the prior conviction must be alleged and proven by the state." *State v. Bewley*, 9th Dist. No. 23693, 2007-Ohio-7026, at ¶13 (citing *Brooke*, 2007-Ohio-1533, at ¶8). By pleading no contest and foregoing a trial, Mr. Echard lost his opportunity to raise at trial whether the State could use his guilty plea in a prior case to prove an essential element of the latest domestic violence charge. He, therefore, did not preserve that issue for appeal.

{¶6} Mr. Echard also did not preserve his argument under Rule 12(I) of the Ohio Rules of Criminal Procedure. Rule 12(I) provides that "[a] 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." Within the criminal context, pretrial motions implicate only "any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue." Crim. R. 12(C). In order to fall under Rule 12(I), therefore, Mr. Echard's motion would have to be "capable of determination without the

trial of the general issue." In a criminal case, "determination of the general issue . . . is always the defendant's guilt or innocence of the offense or offenses alleged." *State v. Evans*, 2d Dist. No. 21669, 2007-Ohio-6587, at ¶12.

{¶7} By arguing that the State could not use the guilty plea he entered in a prior domestic violence case to establish the degree of the offense in this case, Mr. Echard challenged the sufficiency of the evidence as to one of the essential elements of the charged offense. See *State v. Brooke*, 113 Ohio St. 3d 199, 2007-Ohio-1533, at ¶8. His motion placed the question of whether he could be convicted of a felony of the third degree squarely at issue. Accordingly, because it went to his "guilt or innocence of the . . . offense alleged," it was not "capable of determination without the trial of the general issue" and was not a pretrial motion under Rule 12(C). *State v. Evans*, 2d Dist. No. 21669, 2007-Ohio-6587, at ¶12; Crim. R. 12(C). Mr. Echard's argument, therefore, was not preserved for appeal under Rule 12(I).

MISUNDERSTANDING ABOUT PRESERVATION

{¶8} Although Mr. Echard forfeited his enhancement argument by pleading no contest, the record shows that the parties and court mistakenly thought he could raise the issue on appeal. At the plea hearing, the prosecutor explained that "the defense wants to enter a no contest plea and the State's not opposed to him entering a no contest plea to appeal it regarding the issue of the Family Violence Court prior convictions." She told the court that "[Mr. Echard] would like to withdraw [his] former plea of not guilty, enter a plea of no contest to the indictment and appeal regarding the issue of the family violence court prior conviction." Mr. Echard's lawyer agreed with the prosecutor's summary, noting "[t]hat's the sum and substance of the . . . plea negotiation." The judge addressed Mr. Echard stating: "And my understanding is that the reason that your lawyer is suggesting you plead no contest is because there's an appeal issue that

you want to preserve. Do you understand all that?" Mr. Echard replied "[y]es, sir." After the court ensured that Mr. Echard understood the rights he was waiving, it accepted his plea. It specifically noted that he was not waiving his right to appeal. In its journal entry, the court explained that Mr. Echard had "retract[ed] his plea of Not Guilty heretofore entered and for negotiated plea to said Indictment, pleads No Contest . . . ."

{¶9} In *State v. Engle*, 74 Ohio St. 3d 525, 527 (1996), the Ohio Supreme Court considered the validity of a no contest plea that was entered on the mistaken impression that an issue the trial court had decided in limine was preserved for appeal. The Supreme Court noted that "[t]he record reflects that all the parties, including the judge and the prosecutor, shared the impression that appellant could appeal rulings other than a pretrial motion." *Id*. Because "[t]here [could] be no doubt that [Mrs. Engle's] plea was predicated on a belief that she could appeal the trial court's rulings," it concluded that the "plea was not made knowingly or intelligently." *Id*. at 528. The Supreme Court "remand[ed] this cause to the trial court with instructions that Mrs. Engle be given the opportunity to withdraw her plea and proceed to trial." *Id*.

{¶10} In *State v. Palm*, 9th Dist. No. 22298, 2005-Ohio-1637, Ms. Palm was indicted for obstructing justice, a felony of the fifth degree. *Id*. at ¶2. Before her trial began, a question arose regarding the elements that had to be proven for an offense of that degree. *Id*. at ¶4. Ms. Palm subsequently pleaded no contest to the charge, but attempted to preserve the offense level question for appeal. *Id*. at ¶5. This Court determined that the issue was not preserved. *Id*. at ¶13. It noted, however, that Ms. Palm had "entered her no contest plea pursuant to a plea bargain" and "expressly conditioned the entry of the plea on preservation of [the offense level] issue for appeal." *Id*. at ¶14. It, therefore, concluded that "the trial court's determination that

Ms. Palm entered her plea knowingly, intelligently, and voluntarily [was] suspect," and that she "should have . . . an opportunity to withdraw her plea and proceed to trial as originally planned." *Id*. This Court vacated the trial court's judgment, and remanded the case to the trial court for it to conduct another plea hearing. *Id*. at ¶15.

{¶11} A similar situation arose in *State v. Smith*, 9th Dist. No. 08CA009338, 2008-Ohio-6942, in that Mr. Smith's lawyer, the prosecutor, and the trial court judge all gave Mr. Smith the mistaken impression that he could enter a plea of no contest and appeal an evidentiary ruling that the trial court had made mid-trial. *Id*. at ¶4. This Court noted that "*Engle* and *Palm* recognize that the defense attorney, prosecuting attorney, and trial court judge play a significant role in the defendant's knowing, voluntary, and intelligent decision to enter a no contest plea. . . . [T]he attorneys and judges were in the position to explain [Mr. Smith's] rights to [him] and, unfortunately, they did not meet the high burden placed on them by the Ohio and United States Constitutions to ensure that [he] made a knowing, voluntary, and intelligent decision." *Id*. at ¶11. This Court concluded that it had "no choice but to vacate the conviction and plea, and remand this case to the trial court. [Mr. Smith] shall have the option of proceeding to trial or entering a new plea, fully advised of his rights." *Id*.

{¶12} As in *Engle*, *Palm*, and *Smith*, the prosecutor, trial court, and defense lawyer all gave Mr. Echard the mistaken impression that he could plead no contest and appeal the issue he had raised in his motion in limine. Accordingly, this Court has no choice but to sustain his assignment of error, vacate his conviction, and remand this case to the trial court with instructions that Mr. Smith be given the opportunity to withdraw his plea and proceed to trial. *State v. Engle*, 74 Ohio St. 3d 525, 528 (1996); *State v. Smith*, 9th Dist. No. 08CA009338, 2008-Ohio-6942, at ¶11. "[W]e are compelled to reach such a result because of what appears to be a

grave misunderstanding of the law on the part of the trial court, the prosecutor, and the defense attorney." *Engle*, 74 Ohio St. 3d at 528 (Resnick, J., concurring).

CONCLUSION

{¶13} Mr. Echard's assignment of error is sustained in part. The judgment of the Summit County Common Pleas Court is reversed and the case is remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.

CARLA MOORE
FOR THE COURT

CARR, J.
MOORE, P. J.
CONCUR

DICKINSON, J.
DISSENTS, SAYING:

{¶14} The majority has written that it is construing Mr. Echard's "motion in limine for what it was: a motion in limine." But that doesn't answer the question of whether this Court can review the trial court's denial of that motion. Under Rule 12(C) of the Ohio Rules of Criminal Procedure, any party may raise, "[p]rior to trial," "any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue," and, under Rule 12(I) of the Ohio Rules of Criminal Procedure, a "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 . . . ." The question of whether this Court can review the trial court's denial of Mr. Echard's "motion in limine," therefore, does not turn on whether it was a "motion in limine," but rather on whether it was a "pretrial motion" under Rules 12(C) and 12(I).

MOTIONS IN LIMINE — THERE IS MORE THAN ONE TYPE

{¶15} "In limine" means "at the outset." Black's Law Dictionary 803 (8th ed. 2004). Literally then, a motion in limine is simply a motion filed before or at the beginning of trial. Some are "pretrial motions" under Rules 12(C) and 12(I), and some are not.

{¶16} Some commentators have suggested that there are as many as three types of motions in limine. The first type has been called "permissive" or "inclusionary" motions in limine. Susan E. Loggans, *Motions in Limine*, in 2 Litigating Tort Cases § 19:3 (Roxanne Barton Conlin & Gregory S. Cusimano eds. 2009); Laurence M. Rose, *Effective Motions In Limine*, Trial, Apr. 1999, at 50. By this type, a party seeks a ruling that evidence it plans to offer at trial is admissible, will be received, and can be referred to in opening statement. Mr. Echard did not

seek a ruling that evidence he intended to offer was admissible, so his motion was not a "permissive" or "inclusionary" motion in limine.

{¶17} The second type has been called "prophylactic" or "preclusionary." Susan E. Loggans, *Motions in Limine*, in 2 Litigating Tort Cases § 19:3 (Roxanne Barton Conlin & Gregory S. Cusimano eds. 2009); Laurence M. Rose, *Effective Motions In Limine*, Trial, Apr. 1999, at 50-51. A "prophylactic" or "preclusionary" motion in limine does not seek a definitive ruling that evidence cannot be received, but rather seeks an order that the evidence cannot be mentioned at trial until the court decides, at the proper time during the trial, whether it is admissible. This is the type of motion in limine the Ohio Supreme Court described in *State v. French*, 72 Ohio St. 3d 446 (1995): "The purpose of a motion *in limine* 'is to avoid injection into [the] trial of matters which are irrelevant, inadmissible and prejudicial[,] and granting of [the] motion is not a ruling on evidence and, where properly drawn, granting of [the] motion cannot be error.'" *Id*. at 449-50 (quoting Black's Law Dictionary 1013-14 (6th ed. 1990) (brackets added by the Court in *French*)). As explained by Professor Rose, "[t]his type of motion is often used to preclude any reference in opening statements of potentially excludable and highly prejudicial matters. It is best applied when premature mention of the evidence that may or may not later be introduced would 'ring a bell that cannot by "unrung."'" Rose, Trial, Apr. 1999, at 51.

{¶18} A "prophylactic" or "preclusionary" motion can be used to ask a trial court to prohibit an opponent from referring to prejudicial evidence that will not be admissible unless and until a proper foundation is established. If the motion is granted, at the point during the trial when the proponent of the evidence wants to present it, he must seek a ruling on its admissibility outside the presence of the jury. As explained by the Ohio Supreme Court in *State v. Grubb*, 28

Ohio St. 3d 199, 201 (1986), "[t]he function of [this type of] motion as a precautionary instruction is to avoid error, prejudice, and possibly a mistrial by prohibiting opposing counsel from raising or making reference to an evidentiary issue until the trial court is better able to rule upon its admissibility outside the presence of a jury once the trial has commenced. In this sense, use of the motion serves the interests of judicial economy, as well as the interests of counsel and the parties, by helping to reduce the possibility of the injection of error or prejudice into the proceedings."

TYPE III: MR. ECHARD'S MOTION

{¶19} In concluding that the denial of Mr. Echard's motion in limine is not reviewable, the majority has treated it as a "prophylactic" or "preclusionary" motion and, if it were that type, it would not be reviewable. Because Mr. Echard pleaded no contest, the point during trial at which the State would have offered evidence of his prior conviction was never reached, and the trial court never had an opportunity to consider its admissibility in context. Mr. Echard's motion in limine, however, was not a "prophylactic" or "preclusionary" motion. He did not ask the Court to prohibit the State from referring to his prior guilty plea until the trial court could consider, in context, whether evidence regarding it was admissible. He asked the Court to rule that his prior guilty plea could not be used for enhancement purposes, regardless of what evidence the State might offer regarding it. His motion in limine, therefore, fell into the third type of such motions.

{¶20} The third type of motion in limine has been called "definitive" or "exclusionary." Susan E. Loggans, *Motions in Limine,* in 2 Litigating Tort Cases § 19:3 (Roxanne Barton Conlin & Gregory S. Cusimano eds. 2009); Laurence M. Rose, *Effective Motions In Limine*, Trial, Apr. 1999, at 51. As explained by Ms. Loggans, the granting of this type of motion in limine is a

"final *pre-trial* determination with respect to inadmissibility of a particular matter." Loggans, 2 Litigating Tort Cases § 19:3. Its grant "not only prevents evidence from being introduced, it also prevents opposing counsel and opposing witnesses from even mentioning the excluded evidence during the trial within the hearing of the jury." Rose, Trial, Apr. 1999, at 51. It is the "functional equivalent" of a motion to suppress.

STATE V. FRENCH

{¶21} In *State v. French*, 72 Ohio St. 3d 446 (1995), the Ohio Supreme Court considered "whether a challenge to the results of a breath alcohol test on the basis of failure to comply with regulations of the Ohio Department of Health may be raised by a criminal defendant in the form of an objection to the admissibility of that test result during the course of trial, when the defendant has not moved to suppress the test result upon that ground before trial." *Id*. at 448-49. A police officer, who had seen Ms. French driving faster than the posted limit, failing to dim her headlights, weaving, and repeatedly going left of center, stopped her and gave her a series of field sobriety tests, which she apparently failed. *Id*. at 447. He arrested her, and she submitted to a breath-alcohol test, which showed a concentration of .091 grams of alcohol per two hundred ten liters of breath. *Id*. That was less than the then legal limit of .10 grams. Accordingly, the officer did not charge her with a per se violation, but did charge her with violating what was then Section 4511.19(A)(1) of the Ohio Revised Code, driving under the influence of alcohol. *Id*.

{¶22} Although she did not file a motion to exclude the results of the breath-alcohol test before trial, on the day trial was set to begin, she orally moved in limine, arguing that the numerical concentration should not be received in evidence because the State did not intend to present expert testimony explaining the significance of the .091 result. *State v. French*, 72 Ohio

St. 3d 446, 448 (1995). The trial court ruled that the result would be received for the limited purpose of showing that there was alcohol in Ms. French's system. *Id*. At trial, the State did not present evidence that the breath-alcohol test had been conducted in compliance with Ohio Department of Health regulations. The officer who had stopped Ms. French, however, testified about the test results. *Id*. The jury convicted Ms. French of operating a vehicle while under the influence of alcohol, and she appealed. The appellate court reversed, holding that the trial court had erred by admitting the test results in the absence of both evidence of compliance with the Department of Health regulations and expert testimony explaining the significance of a test result below the statutory per se level. *Id*. The appellate court certified its decision to the Ohio Supreme Court. *Id*.

{¶23} As part of its analysis, the Supreme Court compared motions to suppress and motions in limine. It wrote that motions to suppress are the proper vehicle for a defendant seeking exclusion of evidence the State secured by violating his constitutional rights. *State v. French*, 72 Ohio St. 3d 446, 449 (1995). It noted, however, that evidence the State gathered in violation of a defendant's statutory rights, as opposed to his constitutional rights, will "not ordinarily" be excluded. *Id*. As mentioned previously, in discussing motions in limine, the Court described the second type, the "prophylactic" or "preclusionary" type: "The purpose of a motion *in limine* 'is to avoid injection into [the] trial of matters which are irrelevant, inadmissible and prejudicial and granting of [the] motion is not a ruling on evidence . . . .'" *Id*. at 449 (quoting Black's Law Dictionary 1013-14 (6th ed. 1990)). But, even though it described the "prophylactic" or "preclusionary" type of motion in limine as if it were the only type, the Court proceeded to write that there is another type: "Confusion and inaccuracy may arise, however, because a motion *in limine* may be used in two ways. It may be used as a preliminary means of

raising objections to *evidentiary issues* to prevent prejudicial questions and statements until the admissibility of the questionable evidence can be determined outside the presence of the jury. It may also be used as the *functional equivalent* of a motion to suppress evidence that is either not competent or improper due to some unusual circumstance not rising to the level of a constitutional violation." *Id*. at 450 (citing Palmer, Ohio Rules of Evidence, Rules Manual 446 (1984)). According to the Court, although challenges to admissibility of chemical test results for failing to follow Department of Health regulations are not constitutional challenges, "[t]he traditional distinction between a motion to suppress based upon a constitutional challenge and a motion in limine does not work as a bright-line rule where the motion to suppress is directed to breathalyzer test results based on a failure to comply with ODH regulations." *Id*. (quoting *Defiance v. Kretz*, 60 Ohio St. 3d 1, 4 (1991)). After noting that it had previously determined that, under what was then Rule 12(B)(3) and is now Rule 12(C)(3) of the Ohio Rules of Criminal Procedure, challenges to the admissibility of breath-alcohol test results for failure to comply with Department of Health regulations must be raised by pretrial motions to suppress in prosecutions under what were then the per se driving under the influence of alcohol prohibitions, Section 4511.19(A)(2) through (4) of the Ohio Revised Code, the Court held that such a challenge also had to be raised by a pretrial motion to suppress in a prosecution, like the one against Ms. French, under then Section 4511.19(A)(1) of the Ohio Revised Code. *Id*. at 451 (citing *State v. Ulis*, 65 Ohio St. 3d 83 (1992) and *Defiance v. Kretz*, 60 Ohio St. 3d 1 (1991)).

{¶24} The Court concluded that, because Ms. French had failed to raise her challenge to the breath-alcohol test result based on failure to comply with the Department of Health regulations by a pretrial motion to suppress, she had forfeited the right to require the State to prove compliance with those regulations as a prerequisite to admission of that result. *State v.*

French, 72 Ohio St. 3d 446, 451 (1995). It further concluded, however, that she had not forfeited her argument that the result was not admissible in the absence of expert testimony explaining its significance and that, in fact, the trial court had erred by receiving it in the absence of expert testimony. *Id*. at 452. Accordingly, it affirmed the appellate court's reversal of Ms. French's conviction and remanded to the trial court for further proceedings. *Id*.

{¶25} As noted above, in determining that Ms. French had forfeited her argument about the State's failure to comply with Department of Health Regulations by not raising it in a pretrial motion to suppress, the Supreme Court relied on what was then Rule 12(B)(3) and is now Rule 12(C)(3) of the Ohio Rules of Criminal Procedure. *State v. French*, 72 Ohio St. 3d 446, 451 (1995). As mentioned at the outset, under Rule 12(C) parties are permitted to raise, "[p]rior to trial," "any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue." Under subpart (3) of Rule 12(C), motions to suppress evidence on the ground that it was illegally obtained must be filed "[p]rior to trial." The Supreme Court determined that Ms. French's argument about Department of Health regulations fell on the motion to suppress side of the "not bright line" between motions to suppress and motions in limine, and that, therefore, she was required to file it prior to trial rather than just permitted to file it prior to trial. The issue in this case is not whether Mr. Echard was required to move prior to trial for a definitive ruling on his defense that his prior guilty plea can't be used for enhancement purposes, but whether he was at least permitted to do so. The test for determining the answer to that question under Rule 12(C) is not whether his motion was a "motion in limine," but rather whether it was "capable of determination without the trial of the general issue."

TEST: CAPABLE OF DETERMINATION
WITHOUT THE TRIAL OF THE GENERAL ISSUE

{¶26} By a two-count supplemental indictment, the State charged Mr. Echard with violating Sections 2919.25(A) and 2919.25(C) of the Ohio Revised Code by knowingly causing or attempting to cause harm to Cynthia Murdock and by, through threat of force, knowingly causing Cynthia Murdock to believe that he would cause imminent physical harm to her. The State further alleged, in both counts, that Mr. Echard had twice previously pleaded guilty to or been convicted of domestic violence or an offense of violence involving a family member or member of his household, elevating the charge of violating Section 2919.25(A) to a felony of the third degree and the charge of violating Section 2919.25(C) to a misdemeanor of the first degree. According to the indictment, the previous guilty pleas or convictions were in case numbers 02 CRB 8117 and 89 CRB 9154.

{¶27} The "general issue" to be tried in this case was whether Mr. Echard knowingly caused or attempted to cause harm to Ms. Murdock; whether he knowingly, through threat of force, caused her to believe that he would cause her imminent physical harm; and whether he twice previously pleaded guilty to or been convicted of domestic violence or an offense of violence involving a member of his family or household. If Mr. Echard had not pleaded no contest, a jury would have determined those questions based on the trial court's jury instructions and the evidence admitted at trial.

{¶28} By his motion in limine, Mr. Echard sought a ruling from the trial court that his guilty plea in case number 02 CRB 8117 could not be used for enhancement purposes because, following that guilty plea, he completed a diversion program and the State dismissed the charge against him. In order to rule on that motion, the trial court did not have to determine whether Mr. Echard knowingly caused or attempted to cause harm to Ms. Murdock; whether he

knowingly, through threat of force, caused her to believe that he would cause her imminent physical harm; or whether he had twice previously pleaded guilty to or been convicted of domestic violence or an offense of violence involving a member of his family or household. Further, the trial court did not need to know what other evidence the State or Mr. Echard would present at trial in order to decide the issue presented by the motion. For example, this was not a circumstance in which evidence of the guilty plea would be admissible if the State established a proper foundation, but not admissible if it failed to establish that foundation.

{¶29} The majority has suggested that, "[b]y arguing that the State could not use the guilty plea he entered in a prior domestic violence case to establish the degree of the offense in this case, Mr. Echard challenged the sufficiency of the evidence as to one of the essential elements of the charged offense." But, just as a motion to suppress evidence based on an argument that it was gathered in violation of the defendant's constitutional rights is not an argument that the defendant should be acquitted, neither is Mr. Echard's argument that his guilty plea in Case No. 02 CRB 8117 can't be used against him because the charge against him in that case was later dismissed. If the trial court had granted Mr. Echard's motion, the prosecutor could have proceeded to trial and, undoubtedly, at the end of that trial, Mr. Echard would have been acquitted of the enhanced charges. Alternatively, the prosecutor, under Rule 12(K) of the Ohio Rules of Criminal Procedure, could have certified that the granting of Mr. Echard's motion had made the prosecution's proof on the enhanced charge so weak "that any reasonable possibility of effective prosecution has been destroyed" and appealed that ruling under Section 2945.67 of the Ohio Revised Code. See *State v. Davidson*, 17 Ohio St. 3d 132, syllabus (1985). Under Rule 12(I), once Mr. Echard pleaded no contest in order to obtain a final order from the trial court, he had the same right to appeal the trial court's denial of his motion. See *Defiance v.*

Kretz, 60 Ohio St. 3d 1, 4 (1991) ("The defendant must, of course, enter a plea of no contest and a judgment must be rendered or there would be no final appealable order."). As noted by the Ohio Supreme Court in *State v. French*, 72 Ohio St. 3d 446 (1995), "the intent of the Rules of Criminal Procedure 'is to determine matters before trial when possible.'" *Id*. at 450 (quoting *Defiance v. Kretz*, 60 Ohio St. 3d 1, 4 (1991)). The majority's judgment thwarts that purpose.

{¶30} By pleading no contest, Mr. Echard did not forfeit his right to have this Court review the trial court's ruling on his motion in limine. Rather, by pleading no contest, he secured the right to have it do so.

A WASTE OF JUDICIAL RESOURCES

{¶31} As mentioned previously, in *State v. Grubb*, 28 Ohio St. 3d 199 (1986), the Supreme Court wrote that use of "prophylactic" or "preclusionary" motions in limine "serves the interests of judicial economy." *Id*. at 201. As is demonstrated by this case, the same can be said for allowing review of motions like Mr. Echard's following no-contest pleas, regardless of whether they are called "definitive" or "exclusionary" motions in limine or simply Rule 12(C) pretrial motions. Mr. Echard's motion presented a single, simple question of law: If a defendant pleads guilty to a charge of domestic violence and the State dismisses that charge before a final judgment is entered, may his guilty plea be used for enhancement purposes when he is again charged with domestic violence based on a subsequent attack on his girlfriend? This Court answered that question 28 years ago in *State v. Smith*, 9th Dist. No. 1731, 1981 WL 4177 (Sept. 23, 1981): "After the dismissal of an indictment, the defendant 'assumes his original status of one against whom formal charges have never been lodged.'" *Id*. at *2 (quoting *Columbus v. Stires*, 90 Ohio App. 2d 315, 317 (1967)). Upon the dismissal of the charge against him in the former case, Mr. Echard's guilty plea to that charge became void. It was as if it never happened,

and the trial court erred by determining that it could be used for enhancement purposes in this case. Rather than correcting that error, however, the majority has remanded to afford Mr. Echard an opportunity to withdraw his no-contest plea, go to trial, and be found guilty (assuming his girlfriend is still willing to testify against him). Then, if the trial court makes the same error, he can again appeal and finally get it corrected. Rule 12(I) was designed to avoid such waste of judicial resources, and I dissent from the majority's judgment otherwise.

APPEARANCES:

RHONDA L. KOTNIK, attorney at law, for appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.