[Cite as *State v. Francis*, 2010-Ohio-2686.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0015**
- vs -	:	
ALAN M. FRANCIS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2005 CR 867.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Brian L. Summers, 7327 Center Street, Mentor, OH 44060 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Alan M. Francis, appeals the judgment of the Trumbull County Court of Common Pleas denying his motion to suppress evidence. Appellant was convicted, following his no contest plea, of aggravated murder and multiple counts of aggravated robbery. At issue is whether statements obtained by the police from appellant violated his *Miranda* rights and whether such statements were obtained in violation of his Sixth Amendment right to counsel. For the reasons that follow, we affirm.

{¶2} On December 6, 2005, appellant was indicted for two counts of aggravated murder, in violation of R.C. 2903.01, with death penalty specifications, pursuant to R.C. 2929.04, and three-year firearm specifications, pursuant to R.C. 2941.145; one count of aggravated burglary, a felony of the first degree, in violation of R.C. 2911.11, with a firearm specification; one count of aggravated robbery, a felony of the first degree, in violation of R.C. 2911.01, with a firearm specification; one count of robbery, a felony of the second degree, in violation of R.C. 2911.02; three counts of aggravated robbery, felonies of the first degree, each with a firearm specification; and one count of having a weapon while under disability, a felony of the third degree, in violation of R.C. 2923.13.

{¶3} Thereafter, appellant pled not guilty and, on January 4, 2006, filed a motion to suppress evidence. On December 5, 2006, appellant filed a supplemental brief in support of his motion. Pursuant to these filings, appellant sought to exclude oral statements made by him to police on November 23, 2005 and November 28, 2005. The court held four hearings on the motion between March 22, 2007 and June 29, 2007.

{¶4} On April 10, 2008, the trial court denied the motion to suppress, finding that, prior to making statements to police on November 23, 2005 and on November 28, 2005, appellant was advised of his *Miranda* rights and that he voluntarily waived them.

{¶5} On September 19, 2008, appellant filed a motion to reconsider the trial court's ruling regarding his November 23, 2005 statement, challenging his capacity to waive his *Miranda* rights based on his alleged ingestion of crack cocaine on the day of his arrest. Following hearings conducted on December 16, 2008 and December 19, 2008, the trial court issued a second judgment entry, dated December 29, 2008,

denying appellant's motion to suppress. The court again found that on November 23, 2005, appellant voluntarily waived his *Miranda* rights.

{¶6} Following the trial court's ruling, appellant entered a plea bargain with the state, pursuant to which he agreed to plead no contest to the 9-count indictment, including the firearm specifications, in exchange for the dismissal of the death specifications.

{¶7} Subsequently, the trial court found appellant guilty of the charges, and sentenced him to 30 years to life for the aggravated murder convictions. This sentence was to be served concurrently with appellant's sentence to 37 years in prison for three unrelated robberies and the disability charge, and a separate three-year term of imprisonment for the merged firearm specifications. The effective sentence imposed on appellant was 40 years to life, and was imposed pursuant to the parties' plea bargain.

{¶8} While this case was pending on appeal, at appellant's request, this court remanded the matter to the trial court to include in the record certain documents from the Niles Municipal Court. This court also granted appellee's request to remand the matter for the trial court to correct a typographical error in its December 29, 2008 judgment entry denying appellant's motion to suppress. The trial court corrected this entry and re-filed the record.

{¶9} On November 23, 2005, at about 5:30 a.m., Krystal Melius was working behind the counter at the Niles Fuel Mart when appellant entered the store. He went behind the counter, put a gun to Krystal's side, and said, "This is a stick up. Give me the money." Although she initially refused, Ms. Melius eventually opened the cash

drawer. Appellant reached in and grabbed cash. He said if she moved, he would "shoot to kill," and he walked out the door.

{¶10} Later that same day, at around 3:00 p.m., while Ms. Melius was at the cash register, she saw appellant in the line of customers. She quickly left the register and told the manager that the man who had robbed her that morning was in line. The manager called the police. Shortly thereafter, appellant and a second male left the store, entered a car, and left the area. Upon arrival of the police, Ms. Melius gave them appellant's description. He was arrested at a residence in nearby Weathersfield Township at about 3:30 p.m. Ms. Melius identified appellant from a photo array.

{¶11} Niles Police Chief Bruce Simeone, who was familiar with appellant from prior dealings with him, was present at his arrest. Chief Simeone testified that, at that time, appellant did not appear to be under the influence of drugs or alcohol. He testified appellant appeared to understand what was happening, and was able to follow the directions of police on the scene "perfectly."

{¶12} While appellant was being booked for the Fuel Mart robbery, Niles Detective Ron Wright found an emergency identification card for John Paul Crocker on appellant. Detective Wright was aware that Mr. Crocker had been murdered in Weathersfield two days earlier, and advised Chief Simeone that this card was found on appellant. Chief Simeone advised Weathersfield Police Chief Joseph Consiglio of this discovery.

{¶13} At about 5:00 p.m., Chief Consiglio met Chief Simeone at the Niles Police Department in order to interview appellant. They met with him in an interview room.

Chief Consiglio told appellant he was investigating a homicide and wanted to question him about his possession of the victim's identification.

{¶14} At about 5:15 p.m., Chief Consiglio advised appellant of his *Miranda* rights, using a form that outlines these rights. He read the *Miranda* rights form aloud to appellant, while appellant read along from a copy Chief Consiglio provided to him.

{¶15} The waiver form consists of two sections. The first section, entitled "Your Constitutional Rights," advises the defendant of each of the *Miranda* rights. Next to each of these rights is a line for the defendant to initial after he indicates he understands each right. The second section of the form, entitled "Waiver of Rights," is comprised of a paragraph in which the defendant confirms that he has read and understands his rights, and that he waives his rights and wishes to speak to police without counsel. At the end of this section, there is a line for the defendant to initial. At the bottom of the form there is a place for witnesses and the defendant to sign.

{¶16} Following the form, Chief Consiglio advised appellant of each of his rights, and, after advising him of each right, appellant initialed each right, indicating he understood it. While the chief was reading the waiver-of-rights section, appellant said, "I would like to have an attorney." Chief Consiglio said, "Fine. This interview is terminated. I can't ask you any more questions. We are done here." Appellant continued reading the form, and, after about one minute, he started to initial the waiver section. Chief Consigio said, "Wait a minute. You have invoked your rights to an attorney. You don't have to initial your Wavier of Rights." Appellant then said, "Well, I'll talk to you guys." Chief Consiglio said: "[Y]ou are initiating on your own accord, I have not asked you to do this. I have made no promises or threats. Was [there] coercion

used here to get you to talk to me?" Appellant said, "No, I'll talk to you guys. I want to talk to you guys."

{¶17} After appellant initialed the waiver section, Chief Consiglio read that section to him. Appellant then signed the bottom of the form. Chief Simeone also testified that Chief Consiglio read the waiver section to appellant.

{¶18} At the hearing held following appellant's motion for reconsideration, Chief Consiglio testified that he orally re-Mirandized appellant. He identified the notes taken by Captain Michael Naples, who was present during the interview, which confirm that at 1804, i.e., at 6:04 p.m., about 45 minutes after the interview began, Chief Consiglio re-Mirandized appellant.

{¶19} Chief Consiglio asked appellant if he could record the interview. Appellant said he would "rather not be video-taped or do an audio based on [sic] his friends have told him how we would use that in a court of law." Chief Simeone testified, "He said if we recorded it, he would not talk to us." Chief Consiglio questioned appellant for about two hours regarding the Crocker homicide, during which appellant made incriminating statements concerning his involvement. Mr. Crocker, an elderly, disabled Weathersfield resident, had been beaten, stabbed, and shot to death in his own home with his own gun. Thereafter, appellant stole his gun and identification.

{¶20} Both Chief Consiglio and Chief Simeone testified that appellant appeared to understand all of their questions. They both testified that appellant was "coherent" and did not appear to be under the influence of alcohol or narcotics. Chief Consiglio testified that he asked appellant if he was under the influence of drugs or alcohol, and he said he was not. Chief Simeone testified that he has arrested appellant in the past,

and had previously given him the *Miranda* warnings. Chief Consiglio testified that nothing was promised to appellant in exchange for his statement, and that no coercion was used against him. Both chiefs testified that appellant ate about five sandwiches and drank a soda during the questioning. Chief Simeone said that appellant did not appear to be tired and his speech was not slurred. Both chiefs testified that once appellant signed the waiver, he never asked for an attorney and never refused to answer any questions. Both chiefs testified that appellant's statement was made voluntarily.

{¶21} On Wednesday, November 23, 2005, appellant was charged with the Niles robberies and remained in jail during the Thanksgiving weekend. Then, on Monday morning, November 28, 2005, appellant was arraigned at the Niles Municipal court. The charges were read to him, bond was set, but appellant did not enter a plea. The case was set for preliminary hearing, but that hearing did not proceed as appellant was subsequently indicted.

{¶22} On November 28, 2005, shortly before his arraignment, Niles Police Detectives James Robbins and Daniel Adkins interviewed appellant at the Niles Police Department. Both detectives testified that appellant did not appear to be under the influence of drugs or alcohol. Detective Robbins testified that, prior to meeting with the detectives, appellant had breakfast and coffee.

{¶23} Detective Robbins told appellant they were investigating the robberies that had occurred in Niles the previous week. He asked appellant if they could record the interview and appellant had no objection to it. Consequently, Detective Robbins recorded the interview. Detective Robbins advised appellant of his *Miranda* rights,

using the same form described above. Appellant initialed each right and the waiver section, and also signed the form. Both detectives testified that, during the interview, appellant never objected to answering any questions. Appellant denied any involvement in the Niles robberies. After admitting some involvement in the homicide case, appellant asked for a lawyer. At that point Detective Robbins terminated the interview.

{¶24} Appellant appeals the trial court's judgment entries denying his motion to suppress. For his first assignment of error, appellant asserts:

{¶25} "The trial court erred as a matter of law by overruling defendant-appellant's motion to suppress the fruits of the unconstitutional interview of appellant on November 28, 2005, in violation of the Sixth Amendment."

{¶26} Appellant argues the trial court erred in denying his motion to suppress his statements made on November 28, 2005 to Detective Robbins and Detective Adkins, in violation of his right to counsel, because he had already been charged with the Niles robberies.

{¶27} Appellate review of a trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact. *State v. Lett*, 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, at ¶13, citing *State v. Burnside*, 100 Ohio St.3d 152, 154, 2003-Ohio-5372. "During a hearing on a motion to suppress evidence, the trial judge acts as the trier of fact and, as such, is in the best position to resolve factual questions and assess the credibility of witnesses." *Lett*, supra; *State v. Mills* (1992), 62 Ohio St.3d 357, 366. An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by competent, credible evidence. *State v.*

Guysinger (1993), 86 Ohio App.3d 592, 594. Accepting these facts as true, the appellate court independently reviews the trial court's legal determinations de novo. *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, at ¶19.

{¶28} Appellant does not argue his rights under *Miranda* were violated at the November 28, 2005 interview. Instead, he maintains that, because he was arrested and charged in the Niles robberies on November 23, 2005, five days before his interview, he was entitled to counsel during the November 28, 2005 interview and not subject to further interrogation. He argues the trial court violated his Sixth Amendment right to counsel by denying his motion to suppress.

{¶29} As a preliminary matter, we note that appellant did not raise the violation of his right to counsel as a separate argument in the trial court. However, because this issue is interrelated with appellant's waiver of his *Miranda* rights, and this issue was raised below, we address it. We note the state does not dispute appellant's right to assert this issue on appeal.

{¶30} In support of his argument, appellant relies on *Massiah v. United States* (1964), 377 U.S. 201. In that case, the Court held "that the petitioner was denied the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately [and secretly] elicited from him after he had been indicted and in the absence of his counsel." Id. at 206.

{¶31} Appellant does not, however, address two subsequent decisions of the United States Supreme Court, which have a direct impact on his argument. In *Patterson v. Illinois* (1988), 487 U.S. 285, the United States Supreme Court addressed

the ability of a defendant to waive his right to counsel after the defendant has been indicted. The Court held:

{¶32} "Petitioner's first claim is that because his Sixth Amendment right to counsel arose with his indictment, the police were thereafter barred from initiating a meeting with him. ***

{¶33} "*** The fact that petitioner's Sixth Amendment right came into existence with his indictment, i. e., that he had such a right at the time of his questioning, does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned. Had petitioner indicated he wanted the assistance of counsel, the authorities' interview with him would have stopped, and further questioning would have been forbidden (unless petitioner called for such a meeting). ***

{¶34} "***

{¶35} "As a general matter ***, an accused who is admonished with the warnings prescribed by this Court in *Miranda*, 384 U.S., at 479, has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on this basis will be considered a knowing and intelligent one." *Patterson*, supra, at 290-296.

{¶36} Thus, in *Patterson*, the Court held that even after a defendant has been indicted, he can assert his right to counsel or waive it, as long as the waiver has been knowingly, intelligently, and voluntarily made. Id.

{¶37} Thereafter, in *Michigan v. Harvey* (1990), 494 U.S. 344, the United States Supreme Court addressed the ability of a defendant, who had been indicted, to waive his right to counsel after he had obtained counsel. The Court held:

{¶38} "*** For the fruits of postindictment interrogations to be admissible in a prosecution's case in chief, the State must prove a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel. *Patterson*[, supra,] at 292, and n. 4 ***; *Brewer* [*v. Williams* (1977), 430 U.S. 387,] at 404. ***

{¶39} "***

{¶40} "*** *[N]othing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney*. ***

{¶41} "*** [W]e have explicitly declined to hold that a defendant who has obtained counsel cannot himself waive his right to counsel. *** A defendant's right to rely on counsel as a 'medium' between the defendant and the State attaches upon the initiation of formal charges, *** and respondent's contention that a defendant cannot execute a valid waiver of the right to counsel *without first speaking to an attorney* is foreclosed by our decision in *Patterson*. ***

{¶42} "Although a defendant may sometimes later regret his decision to speak with police, the Sixth Amendment does not disable a criminal defendant from exercising his free will. To hold that a defendant is inherently incapable of relinquishing his right to counsel once it is invoked would be 'to imprison a man in his privileges and call it the Constitution.'" (Internal citations omitted and emphasis added.) *Harvey*, supra, at 348-353.

{¶43} The Court in *Harvey* thus held that, even where a defendant has been indicted and obtained counsel, he can still validly waive his right to counsel without first speaking to an attorney. The holding in *Harvey* applies with greater force here because, at the time of his November 28, 2005 interview, appellant had not obtained counsel.

{¶44} Appellant concedes that Detectives Robbins and Adkins obtained a *Miranda* waiver from him before interrogating him. He does not argue that the waiver was invalid in any way. Instead, he argues the waiver is "irrelevant" because appellant had already been charged and therefore had a right to counsel, which, according to appellant, could not be validly waived. The holdings of the Supreme Court in *Patterson* and *Harvey* foreclose this argument.

{¶45} As a result, based on the foregoing authority, appellant was free to waive his right to counsel and to speak to the detectives as long as his waiver was voluntary.

{¶46} In the trial court's April 10, 2008 judgment entry, the court found that, prior to taking appellant's statement on November 28, 2005, appellant was properly advised of his *Miranda* rights. The court also found that, based on the testimony and audio recording, he understood those rights, and voluntarily waived them prior to giving a statement. The record supports these findings.

{¶47} First, it is well-established that "[a]n express written or oral statement of waiver of the right to remain silent or the right to counsel is usually strong proof of the validity of that waiver ***." *North Carolina v. Butler* (1979), 441 U.S. 369, 373. The Ohio Supreme Court adopted this holding in *State v. Scott* (1980), 61 Ohio St.2d 155, at paragraph one of the syllabus. It is undisputed that, after being advised of his rights,

appellant indicated on the waiver form and on the recording his understanding and waiver of his rights.

{¶48} Second, Detectives Robbins and Adkins testified that appellant did not appear to be under the influence of drugs or alcohol. Both said his demeanor was "fine." Detective Robbins testified that appellant had recently had coffee and breakfast. Detective Adkins testified that appellant was coherent and understood what was happening. During the interview, appellant never said he did not want to talk to the detectives. Further, he never said he did not understand any of Detective Robbins' questions. There is no evidence of promises, threats, or coercion. There is no evidence of physical deprivation or mistreatment. The audio recording of the November 28, 2005 interview reveals that appellant was coherent, articulate, and responsive. We note that on that recording, appellant told Detective Robbins that two days earlier, i.e., on November 26, 2005, he told the jailer to call Detective Robbins or Chief Simeone because he wanted to talk to them. Appellant was frustrated because he did not receive a call back from either officer. The record, therefore, supports the trial court's finding that appellant voluntarily waived his *Miranda* rights before talking to the detectives on November 28, 2005.

{¶49} We therefore hold that the trial court did not err in denying appellant's motion to suppress with respect to his statements made to police on November 28, 2005, in violation of his Sixth Amendment right to counsel.

{¶50} Appellant's first assignment of error is not well taken.

{¶51} For his second assigned error, appellant states:

{¶52} "The trial court erred as a matter of law by overruling defendant-appellant's motion to suppress the fruits of the unconstitutional interview of appellant on November 23, 2005, in violation of the Fifth Amendment and *Miranda v. Arizona* (1966), 384 U.S. 436."

{¶53} Appellant argues the trial court erred in denying his motion to suppress his statements made to Chief Consiglio and Chief Simeone on November 23, 2005.

{¶54} Appellant does not dispute that on November 23, 2005, Chief Consiglio read him each of the *Miranda* rights, and that he initialed each of the rights, indicating he understood each right. As the chief was reading the waiver section, appellant said he "would like to have an attorney." Further, appellant does not dispute the chief said, "This interview is terminated. I can't ask you any more questions. We are done here." When appellant began to initial the waiver, Chief Consiglio told him he did not have to initial it because he had asked for an attorney. Appellant then initialed the waiver, and said he wanted to talk to them.

{¶55} Appellant argues the police then proceeded to take a statement without advising him again of his rights. While appellant correctly states that in the court's April 10, 2008 judgment entry, the court found "a statement was *** taken without a re-reading of the form," the court in that entry found that appellant voluntarily waived his *Miranda* rights. Further, in the trial court's judgment entry, dated December 29, 2008, the court found that, based on the evidence presented at the reopened hearing, appellant was Mirandized a second time and therefore waived his *Miranda* Warnings twice on November 23, 2005. This finding is supported by Chief Consiglio's testimony

and the contemporaneous notes of Captain Michael Naples, who was present taking notes during the interview.

{¶56} Appellant argues that once he asked for an attorney, he was not subject to further interrogation, without the chiefs actually leaving him alone and attempting to secure an attorney for him. In support of this argument, appellant relies on *Edwards v. Arizona* (1981), 451 U.S. 477, in which the United States Supreme Court held:

{¶57} "*** [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, *** having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police*." (Emphasis added.) Id. at 484-485.

{¶58} In *Edwards*, the Court thus held that once a defendant invokes his right to counsel, police cannot further interrogate him without counsel being made available to him, unless the defendant himself initiates further conversation with the police.

{¶59} The issue presented for our review is whether, after invoking his right to counsel, appellant initiated subsequent conversation with the police.

{¶60} The trial court in its April 10, 2008 judgment entry found: "Defendant *** signed the waiver and clearly indicated he wished to talk further and it was proper for the interview to continue as Defendant by his actions and words reinitiated the interview

and there is no violation of his Fourth, Fifth or Fourteenth [Amendment] rights therefore presented."

{¶61} Appellant argues the trial court erred in making this finding for three reasons. First, he argues the chiefs were required to exercise "some level of disengagement." He argues the officers should have given appellant "at least a few moments for calm, deliberative thought about the situation ***." However, appellant has failed to cite any authority in support of this argument.

{¶62} Second, appellant argues that after appellant invoked his right to counsel, Chief Consiglio, rather than appellant, spoke first, and, therefore, appellant's subsequent statements must be suppressed. However, the record reveals that, about one minute after the chief said the interview was terminated, appellant began to initial the waiver section of the form. Chief Consiglio told him that because he had invoked his right to an attorney, he did not have to initial the waiver of rights. Appellant then said he would talk to them, that he wanted to talk to them.

{¶63} Appellant argues that, because Chief Consiglio was the first person to actually speak after appellant invoked his right to counsel by telling appellant he did not have to initial the waiver, the chief re-initiated his conversation with appellant. To the contrary, Chief Consiglio attempted to stop any further conversation with appellant by telling him he did not have to initial the form.

{¶64} Third, appellant argues, "the evidence suggested" that Chief Consiglio did not finish reading the waiver section of the rights form to him, and, therefore, his statement must be suppressed. However, we note that appellant initialed the waiver of rights section and signed the form. Further, Chief Consiglio testified on direct-

examination that after appellant initialed the waiver section, he read that section to him, although his testimony on cross-examination was more tentative. Chief Consiglio also testified that appellant signed the form as "the last thing he did." In addition, Chief Simeone testified that Chief Consliglio read the waiver section to appellant.

{¶65} Further, as noted above, in the trial court's December 29, 2008 entry, the court found that appellant was Mirandized and "waived his Miranda rights in writing and later again orally." The court found that appellant voluntarily waived his rights. The court also found:

{¶66} "Looking at the totality of the circumstances, [there was] no evidence to establish that Defendant was not alert or that he was under the influence of any substance. To the contrary, he appeared alert and responded to the questions and interview in a rational, lucid manner. Whether the entire context and effect of the waiver form was or was not read in its entirety, Defendant quite clearly indicated he understood the effect of continuing to sign the waiver after being told by both interviewers that the interview could not proceed if Defendant wanted counsel.

{¶67} "***

{¶68} "The police *** acted in an appropriate manner to insure Defendant knew what his rights were. He said he understood his rights as he initialed each part of the form, and he was specifically informed he should not sign the waiver of his rights if he wanted a lawyer. He chose to sign the waiver and after again being asked that he agreed there was no coercion or pressure was causing him to wish to proceed, he voluntarily, knowingly and intelligently chose to proceed."

{¶69} Based on our review of the record, there was competent, credible evidence to support the trial court's finding that Defendant by his actions and words reinitiated the interview. We therefore hold the trial court did not err in denying appellant's motion to suppress his November 23, 2005 statement.

{¶70} Appellant's second assignment of error is not well taken.

{¶71} For his third assignment of error, appellant contends:

{¶72} "The trial court erred as a matter of law by overruling defendant-appellant's motion to suppress the fruits of the November 23, 2005 interview based on the fact that appellant lacked voluntary capacity in violation of the Fifth Amendment."

{¶73} Appellant argues the trial court erred in denying his motion to suppress his November 23, 2005 statement because, he claims, he lacked the capacity to voluntarily waive his rights. We do not agree.

{¶74} "*** [I]t is well-settled that the taking of an involuntary confession violates the Due Process Clause of the Fourteenth Amendment. See, e.g., *Spano v. New York* (1959), 360 U.S. 315 ***. A coerced confession may also be found to violate the Fifth Amendment privilege against self-incrimination." *State v. Comstock* (Apr. 15, 1997), 11th Dist. No. 96-A-0058, 1997 Ohio App. LEXIS 3670, *7. "The question of voluntariness is a question of law, and as such, an appellate court must independently review the facts to arrive at its own conclusion as to whether a given confession was voluntary." (Citations omitted.) Id. at *6-*7. The state bears the burden of establishing the voluntariness of a confession by a preponderance of the evidence. *Colorado v. Connelly* (1986), 479 U.S. 157, 168-169.

{¶75} "In deciding whether a defendant's confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement." *State v. Edwards* (1976), 49 Ohio St.2d 31, paragraph two of the syllabus. A statement is voluntary "absent evidence that [the suspect's] will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct." *State v. Dailey* (1990), 53 Ohio St.3d 88, paragraph two of the syllabus.

{¶76} Based on our review of the record, both Chief Consiglio and Chief Simeone testified that appellant appeared to understand all of their questions. They both testified he was coherent and did not appear to be under the influence of alcohol or narcotics. Chief Simeone testified he had seen appellant under the influence of drugs in the past, but that he did not appear to be under the influence when he was with him on November 23, 2005. Chief Simeone also testified that he had arrested appellant in the past, and that he had previously Mirandized him. Chief Consiglio testified that he asked appellant if he was under the influence of drugs or alcohol, and appellant said he was not.

{¶77} At the reopened hearing, appellant presented three of his fellow crack users to testify on his behalf. Michelle Hacker testified that early in the morning on November 23, 2005, she shared crack with appellant. She said that she left him at about 8:30 a.m., and that at that time he was under the influence of crack. John Bonanno testified that he saw appellant smoke crack that morning, and that he was

under the influence. John Holbrook testified he also saw appellant that morning. He said appellant wanted to get high, but he had no idea if appellant was under the influence.

{¶78} Appellant was arrested for the Fuel Mart robbery at about 3:30 p.m. at a residence in Weathersfield Township. Niles Detective Ron Wright was present at the arrest, and testified appellant had no trouble walking out of the house. We note that no testimony was presented concerning whether appellant consumed any crack cocaine between the morning of November 23, 2005 and 5:15 p.m. that day, when appellant was interviewed.

{¶79} The trial court found in its December 28, 2008 judgment: "The evidence presented by Defendant through his three witnesses presents no *** credible evidence concerning Defendant's condition at 5:30 p.m. on the day of November 23, 2005. The State, however, has presented three credible witnesses whose testimony is that Defendant was lucid and sober."

{¶80} Appellant argues the latter finding is inconsistent with the court's finding in the same entry that the "Defendant was under the influence of crack cocaine at approximately 5:15 p.m. on November 23, 2005, when the Defendant was first Mirandized." This argument, however, is rendered moot by the trial court's correction of a typographical error in the judgment entry on remand to include the word "not." When the record was re-filed, the entry read: "The Defendant was *not* under the influence of crack cocaine at approximately 5:15 p.m. on November 23, 2005, when the Defendant was first Mirandized." (Emphasis added.) The correction of this typographical error rendered this sentence consistent with the remainder of the judgment entry.

{¶81} Finally, we note that this court addressed virtually the same argument appellant advances here in *State v. Klapka*, 11th Dist. No.2003-L-044, 2004-Ohio-2921. In that case the defendant argued that she was under the influence of heroin at the time of her interview with police and was, therefore, not able to give a voluntary statement, This court held:

{¶82} "Even if Klapka had ingested heroin prior to the interview, this, alone, would not render her statement involuntary. Since she exhibited no outward signs of intoxication and since she admits that she did not tell either Det. Sherwood or Lt. Walters that she had ingested the heroin, her purported ingestion of the heroin would not render her statement involuntary. See *State v. Smith*, 80 Ohio St.3d 89, 112, 1997-Ohio-355 ('Intoxication affecting one's state of mind, absent coercive police activity, would be an insufficient reason to exclude [a] voluntary confession.')." *Klapka*, supra, at ¶20.

{¶83} In the instant case, the testimony is undisputed that, during his interview with Chief Consiglio and Chief Simeone, appellant did not exhibit any outward signs of being under the influence of drugs. Moreover, when Chief Consiglio asked him if he was under the influence of drugs or alcohol, appellant said he was not. Finally, there is no evidence that the police engaged in any coercive police activity.

{¶84} Based on our review of the record, the trial court did not err in finding that appellant voluntarily waived his *Miranda* rights prior to his interview on November 23, 2005.

{¶85} Appellant's third assignment of error is not well taken.

{¶86} For his fourth assignment of error, appellant alleges:

{¶87} "Defendant-Appellant was denied the effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution."

{¶88} Appellant argues his trial counsel was ineffective with respect to his motion to suppress his November 28, 2005 statements to Detectives Robbins and Adkins and with respect to his no contest plea.

{¶89} The standard of review for ineffective assistance of counsel is whether the representation of trial counsel fell below an objective standard of reasonableness and whether the defendant was prejudiced as a result of the deficient performance. The defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *Strickland v. Washington* (1984), 466 U.S. 668, 686.

{¶90} The Supreme Court in *Strickland* held: "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. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, supra, at 688-689. There is a strong presumption that the attorney's performance was reasonable. Id. In the context of a guilty plea, the defendant must demonstrate that there is a reasonable probability that, but for his counsel's error, he would not have pleaded guilty and would

have insisted on going to trial. *Hill v. Lockhart* (1985), 474 U.S. 52, 58-59; see, also, *State v. Curd*, 11th Dist. No. 2003-L-030, 2004-Ohio-7222, at ¶110.

{¶91} This holding is equally applicable in the context of a no contest plea because in such case, as with a guilty plea, the defendant waives his right to trial. Crim.R. 11(B). Thus, in the context of a no contest plea, in asserting a claim of ineffective assistance of counsel, the defendant must demonstrate that, but for his attorney's error, he would not have entered his no contest plea and instead would have insisted on going to trial. *State v. Barnett*, 11th Dist. No. 2006-P-0117, 2007-Ohio-4954, at ¶52.

{¶92} "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[ly] impaired the defendant's knowing and intelligent waiver of his right to a trial." *State v. Winterbotham*, 2d Dist. No. 05CA100, 2006-Ohio-3989, at ¶40.

{¶93} 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. *State v. Gotel*, 11th Dist. No. 2006-L-015, 2007-Ohio-888, at ¶11; see, also, *State v. Kapper* (1983), 5 Ohio St.3d 36. In *Kapper*, the Supreme Court held:

{¶94} "'*** [A]n allegation of a coerced guilty plea involves actions over which the State has no control. Therefore, the defendant must bear the initial burden of submitting affidavits or other supporting materials to indicate that he is entitled to relief. Defendant's own self-serving declarations or affidavits alleging a coerced guilty plea are

insufficient to rebut the record on review which shows that his plea was voluntary. ***'" Id. at 38.

{¶95} Appellant does not make any showing or even argue that his no contest plea was not voluntarily entered or that, but for his counsel's alleged ineffectiveness, he would not have entered his no contest plea. He has therefore failed to properly support his claim.

{¶96} However, even if appellant had supported his claim, it would lack merit. Under appellant's first issue, he argues his trial counsel was deficient in failing to specifically argue his right to counsel was violated. He argues his counsel should have emphasized in his motion to suppress that the right to counsel is distinct from his *Miranda* rights.

{¶97} In any event, since we hold that appellant waived his *Miranda* rights, including his right to counsel, there was no Sixth Amendment violation. His trial counsel was, therefore, not deficient in failing to make this argument. Further, since we addressed and ruled on the issue, appellant has not been prejudiced by any failure of his trial counsel to sufficiently raise it.

{¶98} Appellant further argues that if his trial counsel had made this distinction, there is a reasonable probability that the outcome of the proceedings would have been different. However, in the context of a no contest plea, appellant was required to show that, but for counsel's error, he would not have pled no contest and instead would have insisted on going to trial. There is no such showing or argument here.

{¶99} Under his second issue, appellant argues that, because the state had previously offered a plea bargain, pursuant to which appellant would have received 30

years to life, his successor counsel was ineffective in allowing appellant to agree to a plea bargain wherein appellant obtained 40 years to life.

{¶100} The record does not reflect whether appellant rejected the initial offer or the circumstances under which the terms of the plea bargain changed. However, appellant cites no authority for the proposition that the state was obligated to keep its original offer open indefinitely. We note that the 30-year plea bargain was available as of April 18, 2008, and appellant did not plead no contest until January 22, 2009.

{¶101} In any event, during the change-of-plea hearing, appellant stated he understood his sentence would be 40 years to life, and he accepted the plea bargain. He also told the court he had reviewed the written plea agreement, and that he was satisfied with the representation provided by his counsel. In light of his acceptance of the plea bargain and his satisfaction with counsel, there is no showing that counsel was ineffective.

{¶102} Moreover, appellant does not show or even argue that, but for counsel's alleged error, he would not have pled no contest and instead would have insisted on going to trial. In fact, the record demonstrates that, despite his understanding of the increased sentence, appellant still decided to plead no contest.

{¶103} Appellant's fourth assignment of error is not well taken.

{¶104} For the reasons stated in the Opinion of this court, appellant's assignments of error are without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.