[Cite as *State v. Armstrong*, 2017-Ohio-625.]

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. 2016-T-0029
- vs -	:	
RICHARD ARMSTRONG,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 15 CR 00201.

Judgment: Affirmed.

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

Gary L. VanBrocklin, 4717 Market Street, P.O. Box 3537, Boardman, OH 44513 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Richard Armstrong, appeals his convictions for Illegal Conveyance of Drugs of Abuse onto the Grounds of a Specified Governmental Facility and Possession of Drugs. The issue before this court is whether an offender may raise a claim of ineffective assistance of counsel with respect to a motion to suppress evidence after pleading no contest to the charges. For the following reasons, we affirm the decision of the court below.

{¶2} On April 29, 2015, the Trumbull County Grand Jury returned an Indictment against Armstrong, charging him with Illegal Conveyance of Drugs of Abuse onto the Grounds of a Specified Governmental Facility, a felony of the third degree in violation of R.C. 2921.36(A)(2) and (G)(2); and Possession of Drugs, a misdemeanor of the first degree in violation of R.C. 2925.11(A) and (C)(2)(a).

{¶3} On May 7, 2015, Armstrong was arraigned and entered a plea of not guilty.

{¶4} On June 5, 2015, Armstrong filed a Motion to Suppress, contending that the traffic stop that resulted in his arrest was illegal.

{¶5} On October 27, 2015, a hearing was held on the Motion to Suppress. The trial court subsequently denied the Motion and issued Findings of Fact & Conclusions of Law.

{¶6} On October 29, 2015, Armstrong entered a plea of no contest to the Indictment.

{¶7} On February 18, 2016, a sentencing hearing was held. The trial court sentenced Armstrong to serve thirty-six months in prison for Illegal Conveyance concurrently with six months in prison for Possession.

{¶8} On March 9, 2016, the trial court issued an Entry on Sentence.

{¶9} On March 24, 2016, Armstrong filed a Notice of Appeal. On appeal, he raises the following assignment of error:

{¶10} "[1.] Appellant was denied his sixth and fourteenth amendment right to the effective assistance of counsel when defense counsel's performance fell below an objective standard of reasonableness."

{¶11} Specifically, Armstrong contends that trial counsel was deficient for only challenging the traffic stop itself and not Armstrong's continued detention following the initial stop and for failing to challenge his conviction for Illegal Conveyance on the grounds that the police officers knew he possessed contraband when he was taken to a detention facility.

{¶12} Before considering the merits of these claims, we must address the State's argument that Armstrong waived his right to raise these claims by virtue of having pled no contest to the charges. The State's argument is with merit.

{¶13} "The plea of no contest is not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." Crim.R. 11(B)(2).

{¶14} "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. Bregitzer*, 11th Dist. Portage No. 2012-P-0033, 2012-Ohio-5586, ¶ 17.[1]

{¶15} With respect to suppression issues, a no contest or guilty plea precludes claims of ineffective assistance because the offender is unable to demonstrate the prejudice necessary to support such a claim.

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1. However, "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 [a direct appeal]." *Bregitzer* at ¶ 25; *see* Crim.R. 12(I) ("[t]he 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").

> [T]he failure to suppress evidence has no prejudicial impact upon a conviction based on a guilty plea "because the conviction does not result from the unsuppressed evidence, but from the defendant's admission, by his plea, of the facts alleged in the [indictment]. Thus, a failure to suppress evidence resulting from a deficiency in trial counsel's legal representation will not satisfy the prejudice prong of * * * *Strickland v. Washington,* [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)]." *See State v. Fitzgerald*, 2nd Dist. Greene No. 2001-CA-124, 2002-Ohio-3914, ¶44. This court followed the Second District's holding in *Fitzgerald* in *State v. Bregitzer*, 11th Dist. Portage No. 2012-P-0033, 2012-Ohio-5586, ¶17.

State v. Strong, 11th Dist. Ashtabula No. 2013-A-0003, 2013-Ohio-5189, ¶ 31; *State v. Evans*, 8th Dist. Cuyahoga No. 94984, 2011-Ohio-3046, ¶ 18 ("Evans's no-contest plea renders counsel's failure to file a motion to suppress his confession irrelevant") and 19-22 (cases cited).

{¶16} The sole assignment of error is without merit.

{¶17} For the foregoing reasons, Armstrong's convictions for Illegal Conveyance of Drugs of Abuse onto the Grounds of a Specified Governmental Facility and Possession of Drugs are affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

COLLEEN MARY O'TOOLE, J., concurs with a Concurring Opinion.

{¶18} I concur with the majority's well-reasoned opinion, however, I write separately to note the dilemma faced by criminal defendants in appellant's situation. Appellant's trial counsel filed a motion to suppress which was denied by the trial court. Appellant then entered a plea of no contest to the charges contained in the indictment.

{¶19} As the majority notes a plea of not guilty or no contest waives any prejudice arising out of counsel's alleged ineffective assistance. But, the majority also notes that an ineffective assistance of counsel argument *can* be raised related to a trial court's error in denying a motion to suppress. Appellant concedes the record does not support a direct attack on the decision of the trial court denying his motion to suppress. Appellant avers that trial counsel was ineffective in litigating the motion—thus leaving this court without a record from which to determine if the trial court erred. Appellant argued that trial counsel only challenged the reason for the traffic stop and not continued detention of appellant beyond the time necessary to issue the citation.[2]

{¶20} Appellant is arguing that—but for the ineffective assistance of trial counsel the record would contain evidence that the trial court erred in denying his motion to suppress (an appealable issue despite his plea).

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1. This writer notes that the car appellant was a passenger in was stopped at 9:40 a.m. and appellant was Mirandized by the officer at 9:45 a.m.

{¶21} Appellant is essentially claiming that he is caught in a Catch-22.[3] The record will not support that the trial court erred in denying his motion to suppress because trial counsel failed to properly argue the motion—but appellant cannot argue that his trial counsel was ineffective in arguing the motion to suppress because he subsequently plead no contest.

{¶22} The only way for appellant to preserve this issue for appeal would have been to take his case to trial. However, as a matter of public policy, do we want to encourage defendants to take their cases to trial solely for the purpose of being able to raise a possible ineffectiveness of counsel claim on appeal?

{¶23} The age-old rule regarding defendants pleading no contest in these situations should be reexamined and an exception should be created for those situations in which the claim of ineffective assistance of counsel (which is non-appealable) is *directly* related to a claim that is appealable—such as the denial of a motion to suppress. In such a situation the appellate court should review the record to determine if trial counsel's performance fell below accepted standards to the detriment of the client.

{¶24} However, it is not within the purview of this court to create such an exception.

{¶25} I reluctantly concur.

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2. A Catch-22 is a paradoxical situation from which an individual cannot escape because of contradictory rules. *Random House Dictionary, Random House,* 2017. The term was coined by Joseph Heller, who used it in his 1961 novel *Catch-22*.