[Cite as *State v. Patterson*, 2009-Ohio-6953.]

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

STATE OF OHIO	C.A. No. 09CA0014-M
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JAMES S. PATTERSON	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellant	CASE No. 08-CR-0110

DECISION AND JOURNAL ENTRY

Dated: December 31, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, James Patterson, appeals from the judgment of the Medina County Court of Common Pleas, denying his motion to suppress a prior felony conviction. This Court affirms.

I

{¶2} In 1998, Patterson received a felony conviction for driving under the influence of alcohol ("DUI"), in violation of R.C. 4511.19. Patterson was sentenced to one year of community control and a total of forty-five days in jail. The trial court's journal entry provided that a violation of the foregoing terms could result in "a prison term of 1 year or extensions, as provided by law." Patterson's 1998 DUI conviction amounted to his fifth DUI conviction.

{¶3} On March 4, 2008, a grand jury indicted Patterson on one count of operating a motor vehicle while under the influence ("OVI"), in violation of R.C. 4511.19(A)(1)(a)(e). Because Patterson had a prior felony DUI conviction, his OVI charge was elevated to a felony of

the third degree. On October 24, 2008, Patterson filed a motion to suppress his 1998 DUI conviction. Patterson argued that his 1998 conviction was void because he was never informed of post-release control. Accordingly, Patterson argued that the void conviction could not be used to enhance his current OVI charge to a third-degree felony. The trial court held a hearing and denied Patterson's motion, concluding that his prior conviction was not void. Subsequently, Patterson withdrew his initial plea and pleaded no contest to a violation of R.C. 4511.19(A)(1)(a)(e), a third-degree felony. The trial court sentenced Patterson to a total of two years in prison.

{¶4} Patterson now appeals from the trial court's denial of his motion to suppress and raises one assignment of error for our review.

II

Assignment of Error

> "THE TRIAL COURT ERRED IN PERMITTING APPELLEE TO USE APPELLANT'S PRIOR FELONY CONVICTION FOR DRIVING UNDER THE INFLUENCE TO ENHANCE THE PRESENT CHARGE OF DRIVING UNDER THE INFLUENCE OF DRUGS OR ALCOHOL IN VIOLATION OF R.C. 4511.19(A)(1)(A) AND (E) TO A FELONY OF THE THIRD DEGREE."

{¶5} In his sole assignment of error, Patterson argues that the trial court erred in denying his motion to suppress. Specifically, he argues that his prior felony DUI conviction is void because he was never informed of post-release control. As such, he argues that his void conviction could not support the enhancement of his current OVI conviction. Because Patterson did not preserve his argument for appeal, we do not address it on the merits.

{¶6} The State may use an offender's previous OVI or DUI convictions to increase the current charges against him and to enhance his sentence upon conviction. See R.C. 4511.19(G)(1)(e) (governing increased penalties for an offender with a prior felony conviction

under Section 4511.19). When a prior conviction actually "transform[s] the crime itself by increasing its degree[,] *** [t]he prior conviction is an essential element of the crime and must be proved by the state." *State v. Allen* (1987), 29 Ohio St.3d 53, 54.

{¶7} The Ohio Supreme Court has held that:

> "A 'motion to suppress' [i]s a '[d]evice used to eliminate from the trial of a criminal case evidence which has been secured illegally, generally in violation of the Fourth Amendment (search and seizure), the Fifth Amendment (privilege against self incrimination), or the Sixth Amendment (right to assistance of counsel, right of confrontation etc.), of U.S. Constitution.'" *Hilliard v. Elfrink* (1996), 77 Ohio St.3d 155, 158.

In extremely limited instances, the Court has recognized a motion to suppress as a proper vehicle for non-Fourth, Fifth, or Sixth Amendment challenges. See, e.g. *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 5 ("[A] pretrial motion to suppress is the proper procedure for challenging breathalyzer test results when the defendant is charged with a violation of R.C. 4511.19(A)(3)."). The Court has cautioned, however, that "the principles developed in those cases must be narrowly construed" because they represent "specific narrow departures *** by [the Court] from settled law regarding suppression of evidence." *Hilliard*, 77 Ohio St.3d at 158. As such, unless a specific, recognized departure from the settled law applies, a motion to suppress may only be used to challenge evidence obtained in violation of one's Fourth, Fifth, or Sixth Amendment rights. Id.

{¶8} A defendant may use a motion to suppress to challenge a prior DUI conviction if the basis for the challenge is that the prior conviction was uncounseled. *State v. McCallum*, 9th Dist. No. 08CA0037-M, 2009-Ohio-1424, at ¶12-16. An argument that a conviction was uncounseled amounts to a Sixth Amendment challenge, an appropriate basis for a motion to suppress. See *Hilliard*, 77 Ohio St.3d at 158. Yet, Patterson sought to challenge his prior DUI conviction through a motion to suppress on the basis that it was void for lack of a post-release

control notification. "A defendant does not have a constitutional right to be advised of post-release control[.]" *State v. Souris*, 9th Dist. No. 24550, 2009-Ohio-3562, at ¶5. As such, an improper post-release control notification does not amount to a constitutional violation that could be addressed through a motion to suppress. *Hilliard*, 77 Ohio St.3d at 158.

{¶9} Recently, this Court addressed the issue of whether a defendant could rely upon any pretrial motion to preserve a non-constitutional challenge to a prior conviction that, if proven, would serve as the basis for enhancing the degree of the defendant's current conviction. See *State v. Echard*, 9th Dist. No. 24643, 2009-Ohio-6616. In *Echard*, a defendant sought to challenge a prior domestic violence conviction, the existence of which would elevate his current offense to a third-degree felony. Echard filed a motion in limine to challenge the existence of his prior conviction and entered a no contest plea after the trial court denied his motion. In considering Echard's appeal, we noted that pretrial motions only properly address issues that are "capable of determination without the trial of the general issue." Id. at ¶6, quoting Crim.R. 12(C). We concluded that, when a prior conviction is an essential element of an offense that the State must prove at trial, a challenge to the sufficiency of that prior conviction is an issue that is not "capable of determination without the trial of the general issue." *Echard* at ¶7. Accordingly, we held that a defendant cannot preserve such a challenge for appeal simply by raising it in a pretrial motion. Id.

{¶10} Patterson challenged the existence of his prior DUI conviction in a pretrial motion and entered a plea of no contest after the court denied his motion. Patterson's motion to suppress was not a proper method for preserving his challenge to his prior conviction on appeal. Id. Accordingly, we limit our discussion to the effect of Patterson having pleaded no contest in this matter.

{¶11} A plea of no contest "is not an admission of [a] defendant's guilt, but is an admission of the truth of the facts alleged in the indictment[.]" Crim.R. 11(B)(2). "Where the indictment *** contains sufficient allegations to state a felony offense and the defendant pleads no contest, the court must find the defendant guilty of the charged offense." *State v. Bird* (1998), 81 Ohio St.3d 582, syllabus.

{¶12} Patterson's indictment provides, in relevant part, that:

> "JAMES S. PATTERSON unlawfully did operate a motor vehicle within this state, while under the influence of alcohol, drugs of abuse, or a combined influence of both, *having previously been convicted of a violation of this section which was a felony*, in violation of Section 4511.19(A)(1)(a)(e) of the Ohio Revised Code, a felony of the third degree (F-3), contrary to the statute in such cases made and provided and against the peace and dignity of the State of Ohio." (Emphasis added.)

By pleading no contest, Patterson admitted that he had a prior felony conviction under R.C. 4511.19(A)(1)(a)(e). Crim.R. 11(B)(2). When an offender has a prior felony conviction under R.C. 4511.19(A)(1)(a)(e), any subsequent conviction constitutes a felony of the third-degree. R.C. 4511.19(G)(1)(e). Because he admitted a prior felony conviction, the prerequisite for his current third-degree felony conviction, Patterson cannot now challenge the validity of his prior conviction or the propriety of the offense level for his current conviction on appeal. By only asserting his challenge in a pretrial motion and pleading no contest when his motion was denied, Patterson failed to preserve these arguments for appeal. *Echard* at ¶5. Additionally, we note that, unlike *Echard* and the cases relied on therein, there is no evidence in the transcript from Patterson's plea hearing to suggest that his no contest plea was in any way predicated on his right to appeal the denial of his suppression motion. Id. at ¶8-12. As such, his sole assignment of error is overruled.

III

{¶13} Patterson's sole assignment of error is overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

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 Medina, 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 Appellant.

BETH WHITMORE
FOR THE COURT

CARR, P. J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶14} I concur in the judgment because were this appeal decided on the merits, the trial court's decision would be affirmed. Mr. Patterson was charged with a third-degree felony for

operating a motor vehicle while under the influence. In order to elevate the offense to a third-degree felony, the State alleged that Mr. Patterson had a prior felony OVI conviction. Mr. Patterson filed a suppression motion arguing that his 1998 DUI conviction was void because the trial court completely failed to advise him that he could be subject to post-release control. Further, Mr. Patterson contended that because he completed his prior DUI sentence, he could not be resentenced for the 1998 offense. The majority has found that because Mr. Patterson has not alleged a constitutional violation in his suppression motion, he has not properly preserved this argument for review on the merits. However, in my view, this Court can properly review the denial of Mr. Patterson's suppression motion because it was a proper pretrial motion under Rule 12(C) of the Ohio Rules of Criminal Procedure.

{¶15} Rule 12(C) provides that 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." After a ruling upon a pretrial motion, the defendant may enter a plea of no contest which "does not preclude a defendant from asserting upon appeal that the trial court prejudicially erred in ruling on a pretrial motion[.]" Crim.R. 12(I). Mr. Patterson raised a purely legal question in his suppression motion, namely, whether the State could employ a void conviction as the basis for satisfying the prior conviction requirement contained in R.C. 4511.19(G)(1)(e). Thus, he raised by way of a pretrial motion an issue that was "capable of determination without the trial of the general issue." Crim.R. 12(C). However, the majority has found that Mr. Patterson was precluded from filing a motion to suppress because "an improper post-release control notification does not amount to a constitutional violation that could be addressed through a motion to suppress." Arguably, Mr. Patterson has raised a question of constitutional concern given that his fundamental liberty interests are at stake. However, even if

Mr. Patterson has not raised a constitutional question, the Supreme Court of Ohio has repeatedly rejected the notion that a motion to suppress is strictly limited to constitutional violations. For example, in *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, syllabus, the Supreme Court of Ohio held that a suppression motion was the proper pretrial procedure for challenging admissibility of Breathalyzer test results, and that the defendants' pleas of no contest did not waive their appeal from an adverse ruling on their suppression motions. In so ruling, the *Kretz* Court rejected the court of appeals' determination that the admissibility of the Breathalyzer test results was a preliminary ruling on an evidentiary matter, and thus the defendants' no contest plea waived any evidentiary issues assigned as error. Id. at 4. Instead, the *Kretz* Court reasoned that the defendants' motion was not a "liminal motion" because "the only issue left for determination at trial [wa]s whether the defendant[s] [were] operating a vehicle in the state of Ohio-an issue irrelevant to the test's admissibility." Id. The *Kretz* Court further rejected the court of appeals' more rigid view that "a ruling on a preliminary motion, though labeled a motion to suppress, could not be appealed (absent a final ruling at trial) unless the motion presented a constitutional challenge[,]" finding instead that "the 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 [B]reathalyzer test results based on a failure to comply with ODH regulations." Id.

{¶16} Similarly, in *State v. French* (1995), 72 Ohio St.3d 446, the Supreme Court of Ohio reiterated its unwillingness to strictly limit motions to suppress to constitutional violations. Id. at 450-451. The *French* Court also declined to elevate form over substance, in finding that a pretrial motion in limine 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 constitution violation." (Emphasis in original.) Id. at 450.

{¶17} The majority concedes that the Supreme Court of Ohio has not always limited suppression motions to constitutional violations. However, citing *Hilliard v Elfrink* (1996), 77 Ohio St.3d 155, the majority concludes that the exceptions to consideration of the exclusionary rule pursuant to a motion to suppress represent "specific narrow departure[s], for essentially pragmatic reasons, by this court from settled law regarding suppression of evidence[.]" Id. at 158. In my view, the legal issue presented in this case fits squarely within the analytical framework of *Kretz* and *French* hence, such a departure is warranted. The issue of whether the prior conviction is void and thus, may not be the basis of a third-degree felony charge under R.C. 4511.19(G)(1)(e), is not liminal in nature. The resolution of the issue is not tentative or precautionary, nor is it subject to change at trial. Mr. Patterson sought the purely legal determination that his prior conviction could not be used for enhancement purposes regardless of what evidence the State might offer. Thus, had the matter gone to trial, there were no facts for a jury to determine. Nor did Mr. Patterson raise an issue that could be viewed as going to the weight of the evidence as there would be nothing to "weigh" at trial. As in *Kretz*, a successful ruling on Mr. Patterson's motion "'renders the [S]tate's proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed.'" *Kretz*, 60 Ohio St.3d at 4, quoting *State v. Davidson* (1985), 17 Ohio St.3d 132, syllabus. Similarly, if he receives an unfavorable ruling, his defense is destroyed and "[i]f [he] pleads no contest after such a ruling, judicial economy will be served by appeal of the pivotal issue rather than forcing [him] through a futile trial." *Kretz*, 60 Ohio St.3d at 4.

{¶18} In *Kretz*, the Supreme Court of Ohio stated that the intent of the Rules of Criminal Procedure "is to determine matters before trial when possible." Id. Mr. Patterson raised a legal question that was clearly capable of determination without trial of the general issue. The result espoused by the majority will now thwart the underlying intent of the criminal rules and instead force parties to go to trial where the trial court will ultimately address precisely the same legal issue that it could have resolved prior to trial. Such a result causes a waste of judicial resources and imposes an unnecessary burden on an already overtaxed judicial system.

{¶19} Finally, I believe that the majority's ruling can produce harsh and inequitable results. The majority relied in part on *State v. Echard*, 9th Dist. No. 24643, 2009-Ohio-6616, a case recently decided by this Court. In that case, Echard filed a motion in limine arguing that a prior guilty plea he entered to allow him to complete a diversion program, thus ultimately resulting in a dismissal of a domestic violence charge, could not be used for enhancement of a subsequent felony domestic violence offense. Id. at ¶1. The majority ruled that Echard's motion in limine was not a proper Rule 12(C) motion because it required a determination of the general issue for trial. Id. Hence, Echard forfeited his argument on appeal after entering a plea of no contest. Id. However, the *Echard* majority also determined that because the parties and the trial court were under the mistaken impression that Echard could enter a no contest plea and subsequently appeal the denial of his motion, Echard should be permitted the option of withdrawing his plea upon remand. Id.

{¶20} In the instant matter, it also appears that the trial court believed that Mr. Patterson could appeal its decision. At the conclusion of the suppression hearing, the trial court stated:

> "You set out a very interesting issue. And with all due respect to everybody, I could be dead wrong on this, but I think logically it makes sense to me that PRC is given at the time of sentencing.

> "And perhaps the Court of Appeals-because there is no more enlightenment than what the three of us have been talking about right now-can give us more enlightenment on this issue.
>
> "So with that in mind, Mr. Salisbury, will you do the entry for me, please?"

However, unlike in *Echard*, Mr. Patterson has been deprived of review on the merits of his case under circumstances where it appears the he received the impression that he had a right to appeal the trial court's adverse ruling.

{¶21} Notwithstanding, I join in affirming the judgment of the trial court, because, in my view, had this Court considered the merits of Mr. Patterson's appeal, the judgment of the trial court would have been affirmed.

{¶22} Under R.C. 2967.28(C), "[a]ny sentence to a prison term for a felony of the * * * fifth degree * * * shall include a requirement that the offender be subject to a period of post-release control of up to three years after the offender's release from imprisonment, if the parole board, * * * determines that a period of post-release control is necessary for that offender." Additionally, R.C. 2929.14(F)(2) provides that "[i]f a court imposes a prison term for a felony of the * * * fifth degree * * * it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, * * * if the parole board determines that a period of post-release control is necessary." Moreover, at the offender's sentencing hearing, "if the sentencing court determines * * * that a prison term is necessary or required, the court shall * * * [n]otify the offender that [he] may be supervised under section 2967.28 of the Revised Code after [he] leaves prison if [he] is being sentenced for a felony of the * * * fifth degree[.]" R.C. 2929.19(B)(3)(d).

{¶23} In light of these provisions, the Ohio Supreme Court has determined that the failure to comply with the provisions requiring notification of post-release control renders the

sentence void. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, syllabus. However, in this case, the trial court did not sentence Mr. Patterson to "a prison term[,]" rather, it sentenced Mr. Patterson to community control. R.C. 2929.14(F)(2). Thus, the post-release control provisions do not apply to his case, and hence, his sentence is not void. Accordingly, I join in affirming the judgment of the trial court.

APPEARANCES:

PAUL R. ST. MARIE, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and RUSSELL HOPKINS, Assistant Prosecuting Attorney, for Appellee.