[Cite as *State v. Fugate*, 2007-Ohio-6589.]

IN THE COURT OF APPEALS FOR GREENE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2006 CA 111
v.	:	T.C. NO. 05 CR 910
KARL FUGATE	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 7th day of December, 2007.

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Karl W. Fugate, filed September 21, 2006. On November 28, 2005, a Greene County Grand Jury indicted Fugate on multiple felony counts, including aggravated burglary, rape, kidnaping, aggravated robbery, tampering with evidence, intimidation of a victim, theft, theft of drugs, and burglary. On December

9, 2005, Fugate filed a Motion to Suppress, Branch III of which asked the court to "suppress any and all collected DNA evidence" pursuant to a search warrant. On March 28, 2006, the trial court sustained the motion to suppress, finding that the search warrant issued was "facially defective." Specifically, in relevant part, the court noted, "Paragraph H of the affidavit is the only paragraph in which an allegation is made that connects the defendant to illegal sexual conduct and the method allegedly used in engaging in that illegal conduct. These facts are in the affidavit as provided by an unnamed confidential informant. This paragraph nor any other paragraph in the search warrant establishes [sic] the credibility or reliability of the information obtained from the confidential informant. * * * This court does not suggest that probable cause cannot be established for the purpose for obtaining DNA samples from the defendant. * * * This affidavit as written does not provide this Court with sufficient facts to find this warrant facially valid."

{¶ 2} The State obtained a second search warrant for Fugate's DNA, and on April 24, 2006, Fugate filed a Motion to Suppress DNA Evidence. On May 31, 2006, the trial court overruled the motion after a hearing on May 26, 2006, finding that "there is sufficient probable cause established by the facts presented in the affidavit to create a substantial basis justifying the execution of the warrant." The court further rejected Fugate's argument that the warrant was invalid under the fruit of the poisonous tree doctrine. The court concluded, "As long as a second search warrant does not rely on any evidence obtained as a result of an improper first search warrant, there is no authority preventing the State from obtaining a second warrant."

{¶ 3} On June 5, 2006, Fugate entered a plea of plea of no contest to the charges against him and he was sentenced to a total prison term of 103 years, 31 years of which is a mandatory term. The court classified Fugate as a sexual predator.

{¶ 4} Fugate asserts three assignments of error which we will consider together. They are as follows:

{¶ 5} "THE TRIAL COURT ERRED IN ALLOWING THE DNA OF APPELLANT INTO EVIDENCE AS THE DNA SHOULD BE EXCLUDED AS FRUIT OF THE POISONOUS TREE."

{¶ 6} And,

{¶ 7} "THE PROCUREMENT AND APPLICATION OF THE SECOND WARRANT, VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS."

{¶ 8} And,

{¶ 9} "THE TRIAL COURT EXCEEDED ITS SCOPE AND AUTHORITY IN ALLOWING THE EVIDENCE DERIVED FROM THE SECOND WARRANT INTO EVIDENCE, THUS VIOLATING APPELLANT'S RIGHT TO DUE PROCESS."

{¶ 10} Fugate argues, "during the motion to suppress hearing [he] argued, successfully, that the evidence should be suppressed because of a deficient affidavit. Detective Jahns was the affiant for Warrant I, was in open court as the State of Ohio party representative, offered testimony and was cross examined by Defense Counsel regarding the affidavit, gathered all the necessary information presented, was again the affiant for the subsequent warrant II, and in that second affidavit directly addressed all the deficiencies outlined by the Court as a result of Mr. Fugate's successful arguments. Therefore, the evidence seized from search warrant II was the indirect result of an earlier unlawful seizure. Accordingly, the DNA evidence seized pursuant to Warrant II should be excluded from evidence as fruit of the poisonous tree. * * * As the evidence seized in this matter is DNA evidence gathered by cotton swabs from the mouth of Appellant, clearly the independent source limitation, the attenuated connection limitation, and the inevitable discovery limitation do not apply. * * * since the

affiant was present and active in the suppression preceding [sic] and knew the results of the first test, he could not have acted in good faith reliance on the warrant. Finally, by placing himself in the position of the issuing Judge, the Trial Judge was not detached form [sic] the matter."

{¶ 11} The State points out that Fugate pled guilty to two felony charges in another matter and argues that "any challenge to a search warrant for a DNA sample is moot under the inevitable discovery doctrine where the defendant has been convicted of a felony and sentenced to a prison term under R.C. 2901.07."

{¶ 12} We initially note that we agree with the trial court that there is no authority for Fugate's proposition that the State is precluded from seeking a second warrant after the trial court determined that the first one lacked probable cause. Regarding the second warrant, "[w]e are required to 'determine the appeal on its merits on the assignments of error set forth in the briefs under App. R. 16, the record on appeal under App. R. 9, and, unless waived, the oral argument under App.R. 21.' App. R. 12(A)(1)(b). We 'sustain or overrule only assignments of error and not mere arguments.'" *Dunina v. Stemple*, Miami App. No. 2007 CA 9, 2007-Ohio-4719. "'An appellant bears the burden of showing prejudicial error by reference to matters in the record.'" Id., quoting *Shirley v. Kruse*, Greene App. No. 2006-Ohio-CA-12, 2007-Ohio-193. If the search warrant and affidavit of the officer supporting the warrant are the subject of an assigned error but are not in the record on appeal, and supplementation of the record was not sought on appeal, even though purported copies of the warrant and affidavit are attached to appellant's brief, we presume the regularity of the proceedings below, because there is no record evidence before us to validate appellant's argument. *State v. Eff*, Cuyahoga App. No. 79731, 2002-Ohio-2559.

{¶ 13} While a copy of the second search warrant and its supporting affidavit are attached to

Fugate's brief, they are not a part of the record before us. We have reviewed the transcript of the hearing on Fugate's second motion to suppress; while the parties stipulated to the documents at issue at the hearing, the documents were not admitted into evidence. In their absence, we have nothing to pass upon and thus presume the validity of the trial court's proceedings. Judgement affirmed.

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GRADY, J. and VALEN, J., concur.

(Hon. Anthony Valen retired from the Twelfth District Court of Appeals sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

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