[Cite as *State v. McDaniel*, 2015-Ohio-1007.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 14CA47
	:	
KENNETH D. MCDANIEL, JR.	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Richland County Court of Common Pleas Case No. 2013 CR 0591 D
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	March 16, 2015

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
BAMBI COUCH PAGE RICHLAND CO. PROSECUTOR JOHN C. NIEFT 38 South Park St. Mansfield, OH 44902	CASSANDRA J.M. MAYER 234 Park Ave. W. Mansfield, OH 44902

Delaney, J.

{¶1} Defendant-appellant Kenneth D. McDaniel, Jr. appeals from the April 22, 2014 judgment entry of the Richland County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are adduced from the suppression hearing held on March 4, 2014.

{¶3} On August 29, 2013, two Mansfield police officers were dispatched for a report of a stolen vehicle. Specifically, dispatch learned through a "G.P.S. locator" that a vehicle reported stolen in Columbus was now in the area of McPherson and Howard Streets in Mansfield.

{¶4} Ptl. Jared Kingsborough located a vehicle matching the stolen car's description in the driveway of 437 Howard Street, appellant's residence. Kingsborough remained in his cruiser watching the vehicle, as did Ptl. Korey Kaufman in a separate cruiser a short distance away. Eventually the officers decided to approach the residence and make contact.

{¶5} Kingsborough knocked on the front door and appellant answered. The officer asked if he knew who owned the car in the driveway and appellant responded the person who drove the car, "Franklin," was inside the house. Appellant described Franklin as an older black male who came to the house for a haircut and was still inside. Appellant wore a towel and said he was about to get in the shower. Kingsborough asked permission to come in but was denied; he asked appellant to go inside and have Franklin step out to speak to him.

{¶6} Appellant shut the door and went back inside. He reappeared moments later and said Franklin must have run out the back of the house. Kaufman, in the meantime, was at the rear northwest corner of the residence watching for anyone to come out. Kingsborough asked Kaufman if he saw anyone and he said no. Kingsborough confronted appellant with the information that no one left the house. Appellant returned inside briefly, came back out, and told Kingsborough "he's hiding inside" and "come in and get him."

{¶7} Kingsborough remained at the front door, unwilling to enter the residence until backup arrived. Appellant left the front door open slightly and after he was out of Kingsborough's view, the officer heard the sound of an argument and "tussling." Kingsborough then kicked the door all the way open but did not enter until Ptl. Garner arrived for backup.

{¶8} Upon entering, Kingsborough observed appellant and Franklin pushing each other back and forth in the kitchen. The two were separated and cuffed.

{¶9} In the meantime, Ptl. Kaufman had been watching the back of the house and observed someone other than appellant briefly "pop his head out of" the rear doorway. Kaufman radioed Kingsborough to advise him another male was present. Whether this was Franklin was never determined. After Ptl. Garner arrived and entered the house with Kingsborough, Kaufman heard the sounds of a struggle so he, too, ran to the front of the house and entered. Appellant and Franklin were already separated and secured.

{¶10} As Kaufman then walked out of the house, he noticed suspected narcotics and the barrel of a firearm protruding from a bag on a coffee table.

{¶11} Officers briefly swept the residence for occupants and contacted the Metrich task force regarding the suspected narcotics. Metrich obtained a search warrant for the house and upon execution found 63 grams of crack cocaine, $11,500 cash, five handguns, and a tactical shotgun.

{¶12} Appellant was charged by indictment with one count of cocaine trafficking [R.C. 2925.03(A)(1) and (C)(4)(a), a felony of the fifth degree, Count I] and one count of cocaine possession in excess of 25 grams [R.C. 2925.11(A) and (C)(4)(e), a felony of the first degree, Count II]. Count II contained forfeiture specifications for the cash and firearms. Appellant entered pleas of not guilty.

{¶13} Appellant moved to continue the trial, suppress the evidence, and bifurcate the two counts for trial. A hearing was held on the three motions on March 4, 2014 and all were overruled.

{¶14} Appellant later changed his pleas of not guilty to ones of no contest and was found guilty as charged. The trial court sentenced him to a prison term of six months on Count I concurrent with a term of three years on Count II. The trial court also imposed a mandatory 5-year term of post-release control and a fine of $10,000.

{¶15} At sentencing, appellant orally moved for fines and costs to be waived because he was indigent. The trial court granted permission to file an affidavit of indigency but overruled the motion.

{¶16} Appellant now appeals from the trial court's decisions overruling his motions to suppress, continue the jury trial, and waive fines and costs.

{¶17} Appellant moved to supplement the record with additional materials not before the trial court which cannot properly be considered here. We overruled the motion to supplement.

{¶18} Appellant raises three assignments of error:

ASSIGNMENTS OF ERROR

{¶19} "I. THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE IN THE FOLLOWING WAYS: A.) WHEN IT FOUND THAT THE AFFIDAVIT TO OBTAIN THE SEARCH WARRANT CONTAINED SUFFICIENT INFORMATION TO ESTABLISH PROBABLE CAUSE FOR THE SEARCH WARRANT BECAUSE NO AFFIDAVIT WAS SUBMITTED INTO EVIDENCE FOR THE COURT TO REVIEW; B.) WHEN IT FOUND THAT APPELLANT GAVE CONSENT TO ENTER HIS RESIDENCE; C.) WHEN IT FOUND EXIGENT CIRCUMSTANCES EXISTED TO ENTER APPELLANT'S RESIDENCE WITHOUT A WARRANT; D.) WHEN IT FOUND PROBABLE CAUSE FOR THE ARREST OF APPELLANT FOR OBSTRUCTING JUSTICE."

{¶20} "II. FURTHER, THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S REQUEST FOR A CONTINUANCE OF HIS JURY TRIAL TO ALLOW FOR A NEW JURY POOL FOR THE FOLLOWING REASONS: A.) BECAUSE THERE WOULD BE AN INSUFFICIENT NUMBER OF JURORS AVAILABLE BECAUSE DURING THE PRIOR TRIAL WITH THE SAME POOL, A SIGNIFICANT NUMBER OF PROSPECTIVE JURORS WERE EXCUSED FOR CAUSE DUE TO STRONG FEELINGS RELATED TO DRUGS DURING VOIR DIRE; B.) BECAUSE MEMBERS OF THE EMPANELED JURY FROM THE PRIOR TRIAL, WHICH WOULD BE PART OF

THIS POOL, AND LIKELY ON THE PANEL DUE TO THE ISSUE IN (A), HEARD THE STATE ALLEGE THAT APPELLANT'S ATTORNEY WAS A "LONG-TIME DRUG DEALER [WHO] KNOWS MORE ABOUT IT THAN THESE VETERAN DETECTIVES."

{¶21} "III. MOREOVER, THE TRIAL COURT ERRED IN FAILING TO WAIVE THE MANDATORY DRUG FINE DUE TO APPELLANT'S INDIGENCE AS PRESENTED AT THE SENTENCING HEARING AND SUPPORTED IN THE COURT REQUESTED SUPPLEMENTAL INFORMATION PROVIDED."

ANALYSIS

I.

{¶22} In his first assignment of error, appellant argues the trial court erred in overruling his motion to suppress. We disagree.

{¶23} Appellate review of a trial court's decision to deny a motion to suppress involves a mixed question of law and fact. *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998). During a suppression hearing, the trial court assumes the role of trier of fact and, as such, is in the best position to resolve questions of fact and to evaluate witness credibility. *State v. Brooks*, 75 Ohio St.3d 148, 154, 661 N.E.2d 1030 (1996). A reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Medcalf*, 111 Ohio App.3d 142, 145, 675 N.E.2d 1268 (4th Dist.1996). Accepting these facts as true, the appellate court must independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court's decision meets the applicable legal standard. *State v. Williams*, 86 Ohio App.3d 37, 42, 619 N.E.2d 1141 (4th Dist.1993), overruled on other grounds.

{¶24} There are three methods of challenging a trial court's ruling on a motion to suppress on appeal. First, an appellant may challenge the trial court's finding of fact. In reviewing a challenge of this nature, an appellate court must determine whether the trial court's findings of fact are against the manifest weight of the evidence. See, *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982); *State v. Klein*, 73 Ohio App.3d 486, 597 N.E.2d 1141 (4th Dist.1991). Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. See*, Williams*, supra. Finally, an appellant may argue the trial court has incorrectly decided the ultimate or final issues raised in a motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry*, 95 Ohio App.3d 93, 96,620 N.E.2d 906 (8th Dist.1994).

Search Warrant

{¶25} The affidavit and search warrant were not admitted into evidence at the suppression hearing by either party. In his motion to suppress, appellant argued generally "the eventual search warrant obtained lack[ed] the foundation necessary to support the issuance of any search warrant to enter and search [appellant's] home without the consent of [appellant]. The factors set forth in the search warrant affidavit were not supported by reliable, credible evidence and were not verified to any level of reliability." In its Judgment Entry of March 6, 2014, the trial court found the affidavit detailed a controlled buy from appellant and described Kaufman's observation of a

handgun and narcotics inside the residence, therefore probable cause existed for the search warrant. On the record at the suppression hearing, the trial court stated:

> * * * *.
>
> Then the next category of objection in the motion to suppress is that the eventual search warrant obtained lacks the foundation necessary to support the issuance of any search warrant to enter and search without any consent. First of all, he had given his consent to enter.
>
> With regard to the search, though, there was some very specific probable cause which differentiates it from the other cases that [defense counsel] was citing in which there was this course of intelligence and conduct which justified the search, where in this case there is a prior transaction with the [appellant] selling to someone else in March at his residence at 437 Howard Street.
>
> Then the even more important, the most important piece of evidence is Officer Kaufman, who is an experienced officer dealing with drugs, sees a gun, sees what appears to be drugs on the coffee table, so that there is strong evidence that there is currently drugs in the residence at that time. He wasn't permitted to field test it, he wasn't permitted to play with it at all, he only had access to that because it was in plain view as he was entering for a legitimate purpose. So there was nothing else he could do prior to the warrant. I believe that there was probable cause, the prior drug

transaction, and particularly the apparent presence of cocaine and a gun in the residence.

* * * *.

T. 75-76.

{¶26} When challenging the sufficiency of an affidavit on the basis of lack of probable cause to support the issuance of the warrant, it is the duty of a reviewing court to simply ensure that the magistrate had a substantial basis for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). A judge may issue a search warrant only upon a finding that "probable cause for the search exists." Crim.R. 41(C). When reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant, an appellate court should accord great deference to the magistrate's judgment. See, *State v. Mills*, 62 Ohio St.3d 357, 367, 582 N.E.2d 972, 982 (1992); *State v. DeLeon*, 76 Ohio App.3d 68, 600 N.E.2d 1137 (1991); *United States v. Travisano*, 724 F.2d 341 (C.A.2, 1983.)

{¶27} A search warrant and its supporting affidavits enjoy a presumption of validity. *Franks v. Delaware,* 438 U.S. 154, 171, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *State v. Roberts,* 62 Ohio St.2d 170, 178, 405 N.E.2d 247 (1980); *U.S. v. Ventresca,* 380 U.S. 102, 105–106, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); *State v. George,* 45 Ohio St.3d 325, 330, 544 N.E.2d 640 (1989). When a motion to suppress attacks the validity of a search conducted pursuant to a warrant, the burden of proof is on the defendant to establish that evidence obtained pursuant to the warrant should be suppressed. *State v. Dennis,* 79 Ohio St.3d 421, 426, 683 N.E.2d 1096 (1997); *State v. Carter,* 2d Dist. No. 2011 CA 11, 2011-Ohio-6700, 2011 WL 6835278, ¶ 11.

{¶28} Lewis R. Katz, in *Oh. Arrest, Search & Seizure,* "Motion to Suppress and the Suppression Hearing," Section 27:8 (June 2014), describes the defendant's burden upon challenging a search pursuant to a warrant:

> There is a presumption of regularity when an arrest or a search is authorized by a warrant. A judicial officer has conducted a prior review of the facts and circumstances supporting the request for the warrant and has decided that probable cause exists to justify the intrusion. Generally, any defect in the warrant process or the execution will be readily provable from the affidavits, warrant, and return of the execution on file with the court and is accessible to the defendant. Consequently, the burden of establishing any factual matter proving a defect or error in form falls on the defendant who seeks to exclude the evidence. The defendant must raise any defects in the warrant at the trial court and may not raise those issues for the first time on appeal. Whether probable cause existed to issue the warrant will be ascertainable within the four corners of the supporting affidavits and record of oral testimony taken in support of the request for a warrant. The reviewing court determines whether there was sufficient information presented to the magistrate to justify a finding of probable cause and issuance of a warrant. The reviewing court may not augment the written affidavit with testimony unless such testimony was taken by the

> magistrate prior to the issuance of the warrant, transcribed and made part of the affidavit. (Citations omitted).
>
> * * * *.

{¶29} In the instant case, as noted above, the search warrant and the affidavit were not admitted into evidence by either party during the suppression hearing. Appellant did not enter the affidavit before the trial court or present any evidence beyond cross-examination of the officers. We find appellant has thus failed to carry its burden in rebutting the presumed validity of the affidavit in the absence of any evidence of deliberate falsehood or reckless disregard for the truth.

{¶30} First, it is axiomatic that any error on the part of the trial court must affirmatively appear on the record or an appellate court will presume that the judgment and proceedings below were valid. See, generally, *State v. Prince*, 71 Ohio App.3d 694, 595 N.E.2d 376 (1991); *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515 (1987); *State v. Frost*, 14 Ohio App.3d 320, 471 N.E.2d 171 (1984); *State v. Render*, 43 Ohio St.2d 17, 330 N.E.2d 691 (1975). For purposes of appellate review, the appellant has the burden of showing error by reference to the matters in the record. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).

{¶31} In this case, we may not speculate upon the content of the affidavit and search warrant when those documents are not in the record before us and apparently were not before trial court at hearing on the motion to suppress. *State v. Robinson*, 53 Ohio St.2d 211, 373 N.E.2d 1257 (1978) (per curiam). When the search warrant is not entered into evidence, “nothing in the record exemplifies the claimed error.” *State v. Lutz*, 1st Dist. Hamilton No. 810003, 1981 WL 10104, *1 (Nov. 10, 1981), citing

Robinson, supra; see also, *State v. Fugate*, 2nd Dist. Greene No. 2006 CA 111, 2007-Ohio-6589, ¶ 13 [In the absence of the search warrant and affidavit in the record, "we have nothing to pass upon and thus presume the validity of the trial court's proceedings."]; *State v. Cooley*, 1st Dist. Hamilton No. C-930644, 1994 WL 570254, *8 (Oct. 19, 1994) ["Obviously, without the affidavit itself to examine, and in light of the deferential standard of review set forth in *Gates,* we cannot say that the trial court, "given all the circumstances set forth in the affidavit," erred in finding probable cause."].

{¶32} In *State v. Doolouka*s, 4th Dist. Adams No. 555, 1994 WL 21750, *2 (Jan. 25, 1994), the Fourth District Court of Appeals noted:

> It is axiomatic that any error on the part of the trial court must affirmatively appear on the record or an appellate court will presume that the judgment and proceedings below were valid. [ ]. Without the search warrant and the affidavit submitted in support of the search warrant, or without testimony adduced at the suppression hearing reciting the information contained in the warrant and in the affidavit, we cannot properly review the issuing magistrate's determination. For purposes of appellate review, the appellant has the burden of showing error by reference to the matters in the record. (Citations omitted).

{¶33} Finally, appellant raised no argument here as to deliberate falsity or reckless disregard for the truth. Appellant argues in his reply, "Any indication related to possible veracity or reckless disregard for the truth allegations, were mentioned in closing argument as one of the arguments made by [appellant] that he could not

proceed to elicit any evidence in support of veracity issues because neither the affidavit nor the search warrant were introduced as evidence and made part of the record." It was appellant's burden to produce such evidence, however, and argument does not meet this burden. As *Franks* tells us, "* * * the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine." *Franks v. Delaware*, supra, 438 U.S. at 171.

{¶34} In *State v. Abrams*, the state appealed from the decision of the trial court granting a motion to suppress because the prosecutor did not admit the search warrant and affidavit into evidence at the hearing. 12th Dist. Preble No. 315, unreported,1983 WL 4357 (May 4, 1983) (per curiam). The appellate court noted first the defendant's motion to suppress did not meet the *Franks* requirements: the motion was conclusory, not supported by evidence, and made no allegations of deliberate falsehood or reckless disregard for the truth. Id., citing *Franks,* supra. In reversing the trial court's decision granting the motion to suppress, the Twelfth District concluded:

> As we noted earlier in this decision, there is a presumption of validity of an affidavit supporting a search warrant. To rebut this presumption, the movant must establish deliberate falsity or reckless disregard by the affiant, not the governmental informant. *Franks*, supra, at 171.
>
> From the testimony elicited at the suppression hearing, it is clear that the defendant did not establish either one of these elements. It is immaterial that the state failed to introduce the affidavit or the search warrant into evidence. There were adequate

> references to both items by the witness, the prosecutor and defendant's own counsel to conclude with certainty that these items did, in fact, exist.
>
> Therefore, since the defendant failed to rebut the presumption of validity of the affidavit, the trial court erred by sustaining the motion to suppress.
>
> *State v. Abrams*, 12th Dist. Preble No. 315, 1983 WL 4357, *5 (May 4, 1983) (per curiam).

{¶35} We note the uncontroverted testimony of the officers supports the trial court's finding of probable cause and appellant failed to rebut the affidavit's presumption of validity. Further, because the affidavit is not in the appellate record, we must presume the validity of the proceedings in the lower court.

Consent

{¶36} Appellant next argues he did not give voluntary consent for Kingsborough to enter the home because the officer's continuous and persistent requests for permission eventually became coercive. We disagree with appellant's characterization of the record on this point. There is no evidence Kingsborough persisted in his requests to enter to the point that appellant's consent to enter could not be deemed voluntary. Kingsborough's undisputed testimony established three contacts with appellant prior to entry: 1) appellant answered the door and Kingsborough told him why he was there; 2) appellant came back to the door after checking inside for Franklin and said "he must have run out the back," which Kingsborough disputed; and 3) appellant went back inside, came back to the door, and told the officer "he's in here hiding, come and get

him." Kingsborough then entered after backup arrived and observed appellant inside engaged in a "tussle" with Franklin.

{¶37} We are bound to accept the factual determinations of the trial court during a suppression hearing so long as they are supported by competent and credible evidence. *State v. Harris*, 98 Ohio App.3d 543, 546, 649 N.E.2d 7 (8th Dist.1994); *State v. Claytor*, 85 Ohio App.3d 623, 627, 620 N.E.2d 906 (4th Dist.1993). We find the uncontroverted evidence supports the trial court's finding of consent.

Exigent Circumstances

{¶38} In the Judgment Entry overruling the motion to suppress, the trial court found exigent circumstances existed because Kingsborough heard the sounds of a physical struggle inside the residence before backup arrived. Appellant argues, though, that this evidence did not substantiate an emergency rising to the level of exigent circumstances.

{¶39} The Ohio Supreme Court explained the emergency-aid subset of exigent circumstances in *State v. Applegate*, 68 Ohio St.3d 348, 349-50, 1994-Ohio-356, 626 N.E.2d 942 (1994).

> A warrantless police entry into a private residence is not unlawful if made upon exigent circumstances, a "specifically-established and well-delineated exceptio[n]" to the search warrant requirement. [ ]."'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' " [ ]. The U.S. Supreme Court has noted "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury

> to invoke the emergency-aid exception." [ ]. Rather, "[a]n action is 'reasonable' under the Fourth amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively,* justify [the] action.' " [ ]. (Internal citations omitted.)

{¶40} Here, as in *Applegate*, supra, we find "[t]he movements of the officers were conservative, prudent and reasonable," and objectively justified under the circumstances. 68 Ohio St.3d at 350. The officers knew at least one other person was inside the residence in addition to appellant and heard sounds of a physical confrontation.

Obstruction

{¶41} Finally, appellant argues no probable cause existed to arrest him for the misdemeanor offense of obstruction. We disagree. A warrantless arrest is valid if the arresting officer possessed probable cause to believe that the suspect committed an offense. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964); *State v. Otte*, 74 Ohio St.3d 555, 559, 1996-Ohio-108, 660 N.E.2d 711 (superseded on other grounds). The test for probable cause to justify an arrest is "whether at that moment the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Beck*, supra, 379 U.S. at 91. In determining whether probable cause to arrest existed, a reviewing court should examine the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 230-231, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Probable cause is a lesser standard of proof than

that required for a conviction, such as proof beyond a reasonable doubt or by a preponderance of the evidence. *State v. Young*, 146 Ohio App.3d 245, 254, 2001-Ohio-4284, 765 N.E.2d 938 (11th Dist.2001).

{¶42} The existence of probable cause to arrest is not dependent upon the "ultimate judicial determination of guilt or innocence, which is resolved on a reasonable doubt standard," but whether the officer had "probable cause sufficient to authorize [the defendant's] arrest." *State v. Williams*, 2nd Dist. Montgomery No. 16306, unreported, 1997 WL 822672, *2 (Nov. 21, 1997).

{¶43} In the instant case, Kingsborough testified appellant obstructed when he claimed Franklin ran out the back door despite Kaufman's statement to the contrary; also, in the officer's estimation, appellant did not take sufficient time to actually look through the house for Franklin. The citation and resulting conviction (or lack thereof) are not in the record before us but both parties note appellant was cited pursuant to Mansfield Codified Ordinance 527.07(A), which states: "No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance of a public official of any authorized act within the public official's capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties." We agree with the trial court and find the facts and circumstances within Kingsborough's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent person in believing appellant impeded his investigation of the stolen vehicle.

{¶44} Appellant's first assignment of error is overruled.

II.

{¶45} In his second assignment of error, appellant argues the trial court should have granted his motion to continue the jury trial due to purported issues with the potential jury pool. We disagree.

{¶46} At the conclusion of the suppression hearing, defense trial counsel moved to continue the jury trial because she determined there would be an insufficient number of jurors available and potential jurors might be prejudiced due to appellee's argument in another unrelated trial. The trial court disagreed with counsel's characterization of appellee's argument in the unrelated case and noted counsel would have the opportunity to voir dire jurors about potential prejudice. The motion to continue was therefore denied. On appeal, appellant moved to supplement the record with portions of the unrelated trial record in support of the argument here. We overruled the motion because this information was not before the trial court when it ruled upon the motion to continue and is therefore inappropriate for our review.

{¶47} The decision to grant or deny a continuance is entrusted to the broad, sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Unger*, 67 Ohio St.2d 65, 67, 423 N.E.2d 1078 (1981). Among the factors to be considered by the court in determining whether the continuance was properly denied are: (1) the length of the requested delay, (2) whether other continuances had been requested and granted, (3) the convenience or inconvenience to the parties, witnesses, counsel and court, (4) whether the delay was for legitimate reasons or whether it was "dilatory, purposeful or contrived", (5) whether the defendant contributed to the circumstances giving rise to the request, (6) whether denying the

continuance will result in an identifiable prejudice to the defendant's case, and (7) the complexity of the case. Id. at 67–68; *State v. Wheat,* 5th Dist. Licking No.2003–CA–00057, 2004–Ohio–2088 at ¶ 16. In the instant case, the trial court did not abuse its discretion in denying appellant's request for a continuance, a motion filed seven days before trial.

{¶48} Appellant's arguments are not supported by the record before us. The trial court had an interest in controlling its own docket and ensuring the prompt and efficient administration of justice. *See Unger,* 67 Ohio St.2d at 67, 423 N.E.2d 1078. Its decision to overrule the motion to continue is not an abuse of discretion.

{¶49} Appellant's second assignment of error is not well taken and is therefore overruled.

III.

{¶50} In his third assignment of error, appellant asserts the trial court should have waived the mandatory fine on his drug offenses despite never filing an affidavit of indigency. We disagree.

{¶51} R.C. 2929.18(B)(1) states:

> For a first, second, or third degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code, the sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of this section. If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent

> and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender.

{¶52} An affidavit of indigency was never filed in this case, before sentencing or after. At the sentencing hearing on April 21, 2014, when the trial court mentioned imposition of mandatory fines, defense trial counsel[1] asked the trial court to find appellant indigent due to businesses he closed. The trial court inquired about appellant's ownership of rental properties and appellant responded he still owned the rentals. (T. 7). The trial court responded that appellant raised the issue of indigence but "would have to provide me an affidavit to show me he doesn't have any of those properties. Of course, it's subject to risk for perjury, it needs to be accurate." The trial court later stated the mandatory fine was "temporarily impos[ed] * * *until we have a chance to consider the indigency."

{¶53} On May 22, 2014, appellant filed a "Motion to Find Defendant Indigent for Purposes of Suspension of Mandatory Fine" to which are attached a number of documents including a tax return but no affidavit of indigency.

{¶54} Appellant argues, though, that he essentially provided the same information that would have been provided on an affidavit of indigency. We disagree. An affidavit is a written declaration under oath. R.C. 2319.02. Further, appellant could have filed an affidavit of indigency immediately after the sentencing hearing and the affidavit would have been timely filed. See, *State v. Mays*, 11th Dist. Lake No. 25-L-052, 2006-Ohio-3890 ["Accordingly, an affidavit of indigency may be properly filed with

[1] Defense trial counsel is also appellate counsel.

the clerk of court and time stamped *at any time* prior to the filing of the trial court's judgment entry on sentence for purposes of invoking the statutory procedure established for waiving the mandatory fine."] In this case, the filing of an affidavit was never accomplished.

{¶55} The required filing of an affidavit of indigency for purposes of avoiding a mandatory fine is a jurisdictional issue. *State v. Gipson*, 80 Ohio St.3d 626, 633, 1998-Ohio-659, 687 N.E.2d 750. R.C. 2929.18(B)(1) requires the sentencing court to impose a mandatory fine upon an offender unless the offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and unless the court determines that the offender is an indigent person and is unable to pay the mandatory fine. "Thus, the trial court could not have avoided imposing the statutory fine since the required affidavit of indigency was never properly 'filed' with the court prior to sentencing." *Gipson*, supra, 80 Ohio St.3d at 633. Moreover, the burden is upon the offender to affirmatively demonstrate he is indigent and is unable to pay the mandatory fine. Id. at 635.

{¶56} There is a lack of evidence in the record before us to show an inability to pay the mandatory fines. *State v. Heger*, 5th Dist. Perry No. 2008-CA-1, 2009-Ohio-2691, ¶ 42. The trial court properly imposed the mandatory fine and in doing so did not commit an abuse of discretion.

{¶57} Appellant's third assignment of error is overruled.

CONCLUSION

{¶58} Appellant's three assignments of error are overruled and the judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J. and

Wise, P.J.

Baldwin, J., concur.