

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 84498**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**DWAYNE FAIR**

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DEFENDANT-APPELLANT

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~~JUDGMENT~~

**AFFIRMED**

Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-406838

**BEFORE:** Blackmon, J., Rocco, P.J., and Jones, J.

**RELEASED:** May 21, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Dwayne Fair appeals the trial court's denial of his petition for postconviction relief without a hearing. He assigns the following error:

"The trial judge erred in failing to grant the appellant an evidentiary hearing as is required by R.C. 2953.21(C)."

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision.<sup>1</sup> The apposite facts follow.

### **History**

{¶ 3} In May 2001, the Cuyahoga County Grand Jury indicted Fair for drug trafficking and possession of drugs. These charges arose from a controlled buy conducted by agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) in cooperation with the North Royalton Police Department. A jury found Fair

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<sup>1</sup>This appeal was filed on March 16, 2004. However, due to a separate appeal regarding sentencing pursuant to *State v. Foster*, the appeal was stayed pending the Ohio Supreme Court's resolution of the sentencing issues and Fair's subsequent resentencing. Since filing his appeal, Fair has been released from prison. However, he wishes to proceed with the appeal because he contends his conviction violated his constitutional right to due process.

guilty of all three counts. The trial court sentenced Fair to eleven years in prison.

{¶ 4} To connect Fair to the crimes, the State introduced a videotape of the drug transaction; the tape was admittedly of poor quality. The State, however, also introduced eyewitness testimony of a police detective who was present during the sale. Fair’s convictions were affirmed on appeal, but the case was remanded for resentencing.<sup>2</sup>

{¶ 5} Ultimately, Fair filed a petition for postconviction relief. He alleged that he received ineffective assistance of counsel because his lawyer failed to present alibi evidence concerning a cell phone call that was recorded and evidenced by his cell phone records. He claimed he could not have been involved in the sale because the call, which he placed between eighteen and twenty minutes after the drug transaction, was made from a location that he could not have reached within that time. The trial court denied the petition without a hearing; Fair appealed the decision. This court held as follows:

“The phone records show only that Fair’s call was routed through the cell site address at Richmond Road; this does not establish Fair’s location at the time the call was made, but shows only that he was nearest his carrier’s transmitting equipment located at that address. Without evidence showing a more exact location, this evidence is inconclusive. However, the cell site evidence corroborates the evidence of his arrival at his workplace at 5:39

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<sup>2</sup>*State v. Fair*, Cuyahoga App. No. 80501, 2002-Ohio-5561.

p.m., and this corroboration might have influenced a jury that otherwise determined that the workplace time records were inaccurate or otherwise mistaken.”<sup>3</sup>

{¶ 6} Although this court commented on the evidentiary value of the phone records, we did not resolve the case on that issue. We reversed and remanded the trial court’s denial of Fair’s petition based on Fair’s other contention that subsequent phone records corroborated his account of a phone message he left for the police detective after he was arrested, in which he attempted to show that he had been mistaken for someone else.<sup>4</sup> He claimed the police detective’s testimony to the contrary destroyed his credibility. This court remanded the matter after concluding that the trial court failed to consider the trial transcript before denying the petition without a hearing as required by R.C. 2953.21(C).

{¶ 7} On remand, the trial court again denied the petition and issued a six-page decision in which it detailed that it had reviewed the petition, “all files and records, and the transcript, pertaining to the proceedings against Petitioner.”<sup>5</sup> The trial court concluded the admission of the cell phone record indicating Fair’s location after the drug sale and the phone records indicating

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<sup>3</sup>*State v. Fair*, Cuyahoga App. No. 81998, 2003-Ohio-6337.

<sup>4</sup>Fair does not raise this argument in the instant appeal.

<sup>5</sup>Findings of Fact and Conclusions of Law, February 8, 2004.

that Fair did not call the detective at a time the detective claimed, would not have made a difference to the outcome of the trial. Thus, the trial court again denied the petition without a hearing, which is the subject of the instant appeal.

### **Hearing on Petition for Postconviction Relief**

{¶ 8} In his sole assigned error, Fair contends the trial court did not follow the directive of this court because it again denied the petition without conducting a hearing or reviewing the transcript in the underlying case. A hearing on a petition for postconviction relief is governed by R.C. 2953.21(C), which provides in pertinent part:

“Before granting a hearing, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court’s journal entries, the journalized records of the clerk of the court, and the court reporter’s transcript.”

{¶ 9} Thus, a criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing.<sup>6</sup> The trial court has a statutorily imposed duty to ensure that the petitioner adduces sufficient evidence to warrant a hearing.<sup>7</sup> A petition for

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<sup>6</sup>*State v. Cole* (1982), 2 Ohio St.3d 112; *State ex rel. Jackson v. McMonagle*, 67 Ohio St.3d 450, 1993-Ohio-143.

<sup>7</sup>R.C. 2953.21(C); *State v. Cole*, supra; see, also, *State v. Kapper* (1983), 5 Ohio St.3d 36; *State v. Carpenter* (1996), 116 Ohio App.3d 292, 295.

postconviction relief may be dismissed without a hearing when the petitioner fails to attach to the petition evidentiary material setting forth sufficient operative facts to demonstrate substantive grounds for relief.<sup>8</sup> The test to be applied is whether there are substantive grounds for relief that would warrant a hearing based upon the petition, the supporting affidavits and the files and records of the case.<sup>9</sup>

{¶ 10} In the instant case, the trial court stated several times in its Findings of Fact and Conclusions of Law that it considered the transcript when it reviewed Fair's petition.<sup>10</sup> Thus, there exists no basis for us to conclude the trial court did not consider the transcript prior to denying the petition.

{¶ 11} Moreover, we conclude the trial court properly denied the petition because there is no evidence that Fair was prejudiced by counsel's failure to present the cell phone records at trial. To establish a claim of ineffective assistance of counsel, a petitioner is required to demonstrate that his counsel's actions fell below an objective standard of reasonableness and that such action caused prejudice to appellant's case.<sup>11</sup>

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<sup>8</sup>*State v. Jackson* (1980), 64 Ohio St.2d 107; *State v. Apanovitch* (1995), 107 Ohio App.3d 82, 98.

<sup>9</sup>*State v. Strutton* (1988), 62 Ohio App.3d 248, 251.

<sup>10</sup>See, Findings of Fact, February 9, 2004 at pages 2, 3, and 4.

<sup>11</sup>*Strickland v. Washington*, 466 U.S. 668, 687-689, 104 S.Ct. 2052, 80 L.Ed.2d 674;

{¶ 12} As we stated in his prior appeal, the phone records show only that his call was routed through the cell site address at Richmond Road; this does not establish Fair's location at the time the call was made, but shows only that his call was nearest his carrier's transmitting equipment located at that address. It does not indicate he was actually at his work site or even in Richmond Heights, just near there. As we previously stated, without evidence showing a more exact location, this evidence is inconclusive.

{¶ 13} We did conclude in the prior appeal that the cell site evidence corroborates the evidence of his arrival at his workplace at 5:39 p.m. as indicated by the time he signed in at work. However, the detective testified that he himself drove the route from the North Royalton drug site to Fair's job site in Richmond Heights in 36 minutes and that was while going the speed limit. Therefore, it was possible for Fair to complete the drug sale at 5:02 p.m. and be at his work site by 5:39 p.m. Because the cell phone records do not demonstrate substantive grounds for relief, we conclude the trial court properly denied Fair's petition without a hearing.



{¶ 14} This court reheard oral argument on this case.<sup>12</sup> At the rehearing, Fair refined his argument to include that the law mandates a presumption of a hearing. However, this is not the law. As the Ohio Supreme Court in *State v. Calhoun*<sup>13</sup> explained:

“According to the postconviction relief statute, a criminal defendant seeking to challenge his conviction through a petition for postconviction relief is not automatically entitled to a hearing. *State v. Cole* (1982), 2 Ohio St.3d 112, 2 Ohio B. Rep. 661, 443 N.E.2d 169. Before granting an evidentiary hearing on the petition, the trial court shall determine *whether there are substantive grounds for relief* (R.C. 2953.21[C]), i.e., whether there are grounds to believe that ‘there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States.’ (Emphasis added.) R.C. 2953.21(A)(1).”<sup>14</sup>

{¶ 15} The Court went on to further state:

“In the interest of judicial economy and efficiency, we have held that it is not unreasonable to require the defendant to show in his petition for postconviction relief that such errors resulted in prejudice before a hearing is scheduled. See *State v. Jackson* (1980), 64 Ohio St.2d 107, 112, 18 Ohio Op. 3d 348, 351, 413 N.E.2d 819, 823. Therefore, before a hearing is granted, ‘the petitioner bears the initial burden to submit evidentiary documents containing *sufficient operative facts* to demonstrate the lack of competent counsel *and* that the defense was *prejudiced* by counsel's ineffectiveness.’ (Emphasis added.) *Id.* at syllabus.”<sup>15</sup>

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<sup>12</sup>The hearing was necessary because of a late conflict of interest discovered by one of the judges on the original panel.

<sup>13</sup>86 Ohio St.3d 279, 1999-Ohio-102.

<sup>14</sup>*Id.* at 282-83.

<sup>15</sup>*Id.* at 283.

{¶ 16} Therefore, contrary to Fair's assertion, according to the statute and Ohio case law, there is not a presumption of a hearing when a petition is filed. The burden is on the defendant to present evidence of substantive grounds for relief, before the trial court is required to hold a hearing. Accordingly, Fair's assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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PATRICIA ANN BLACKMON, JUDGE

KENNETH A. ROCCO, P. J., and  
LARRY A. JONES, J., CONCUR.