[Cite as *State v. Hohvart,* 2008-Ohio-5047.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	CASE NO. 07 MA 95
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
JOHN HOHVART,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Common Pleas Court, Case No. 04CR1381.
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Attorney Paul Gains Prosecuting Attorney Attorney Rhys Cartwright-Jones Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	John Hohvart, *Pro se* #A483-103 Grafton Correctional Institution 2500 South Avon Beldon Road Grafton, Ohio 44044

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 26, 2008

VUKOVICH, J.

{¶1} Defendant-appellant John Hohvart appeals the decision of the Mahoning County Common Pleas Court which granted summary judgment to plaintiff-appellee State of Ohio on his petition for post-conviction relief, dismissing it without an evidentiary hearing. The issue raised in this appeal is whether the trial court erred when it dismissed the petition. For the reasons expressed below, the judgment of the trial court is hereby affirmed.

STATEMENT OF FACTS AND CASE

{¶2} On October 3, 2004, Hohvart was in a relationship with Jennifer Whaley while he was separated from his wife.[1] On that day, Whaley was staying at Hohvart's apartment while Hohvart went out with a friend. They eventually met up after midnight and drove to Arby's for some food. They received an incorrect order and on the way back to correct the order Hohvart got into an argument with Whaley. According to Whaley, Hohvart locked her in the car, began hitting her head against the inside of the vehicle, and hit her nose with his elbow.

{¶3} Eventually, Hohvart's car ran out of fuel. Whaley escaped from Hohvart, flagged down a passing vehicle, and was driven to a nearby gas station where she contacted authorities and was taken for medical treatment. Whaley's nose was broken and required reconstructive surgery, two of her teeth were knocked loose, and a cheekbone was fractured. Police seized Hohvart's car and, after obtaining a warrant, tested blood in the car which was found to be consistent with Whaley's DNA.

{¶4} Hohvart was indicted for abduction and felonious assault on November 18, 2004. Defense counsel never moved to suppress any evidence and the matter proceeded to a jury trial. But, prior to trial, the court ruled that the state could not introduce evidence about a prior instance of domestic violence that Hohvart committed against his wife, unless Hohvart opened the door for the introduction of this evidence. During the presentation of evidence, the state alleged that Hohvart opened the door to the introduction of this evidence and the trial court agreed. Hohvart was convicted on both counts and the trial court sentenced him to maximum, consecutive sentences.

{¶5} On November 4, 2005, Hohvart filed a pro se petition for post-conviction

[1]The underlying facts and procedural history of this case are borrowed largely verbatim from this court's disposition of Hohvart's direct appeal in *State v. Hohvart*, 7th Dist. No. 06MA43, 2007-Ohio-5349.

relief in the trial court setting forth four claims, each of which were based on some form of ineffective assistance of counsel. He claimed that his trial counsel failed: (1) to properly investigate, interview and call witnesses; (2) to challenge the jurisdiction of the Mahoning County Common Pleas Court; (3) to file a motion to suppress evidence found in his car after it was seized; and (4) to challenge alleged prosecutorial and judicial misconduct. The state responded with a motion for summary judgment on April 19, 2007, primarily arguing that Hohvart's claims were barred under the doctrine of res judicata.

{¶6} On May 2, 2007, Hohvart filed a motion for extension of time within which to respond to the state's motion for summary judgment. Without ruling on Hohvart's motion for an extension of time, the trial court granted the state's motion for summary judgment on May 10, 2007. Hohvart filed a belated May 22, 2007 motion in opposition to the state's motion for summary judgment. Hohvart appealed the trial court's decision to this court; he has filed an appellate brief setting forth four assignments of error.[2]

FIRST AND SECOND ASSIGNMENT OF ERROR

{¶7} "THE TRIAL COURT COMMITTED ERROR BY GRANTING APPELLEE'S SUMMARY JUDGMENT ON THE BASIS OF RES JUDICATA WITHOUT FIRST CONSIDERING THE PLETHORA OF AFFIDAVITS AND OTHER SUFFICIENT EVIDENTIARY DOCUMENTS EXHIBITED AND ATTACHED TO THE POST CONVICTION RELIEF PETITION, IN VIOLATION OF THE UNITED STATES CONSTITUTION'S FIFTH AND FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSES AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION."

{¶8} "THE TRIAL COURT ERRED IN VIOLATION OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION WHEN RENDERING FINDINGS OF FACT AND CONCLUSIONS OF LAW [F.O.F.C.O.L.] IN POSTCONVICITION [SUMMARY JUDGMENT] PROCEEDINGS THAT ARE UNCLEAR, NOT SPECIFIC, INCOMPLETE AND FAILS MISERABLY TO PASS THE ADEQUACY TEST AND

[2]In the meantime, Hohvart, represented by appointed counsel, had filed a delayed, direct appeal of his conviction and sentence to this court raising five assignments of error. Four issues concerning his conviction – other acts evidence, suppression, separation of witnesses, and cumulative error – were found without merit. This court found merit to his fifth assignment of error, reversing and vacating his sentence pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *State v. Hohvart*, 7th Dist. No. 06MA43, 2007-Ohio-5349.

ISSUED INSUFFICIENT, INCOMPREHENSIBLE [F.O.F.C.O.L.] NOT PERTINENT TO THE [EXHIBITS] EVIDENCE DEHORS THE RECORD, INCLUDING, BUT NOT LIMITED TO FIVE (5) AFFIDAVITS."

{¶9} Due to the commonality of the arguments, the first two assignments of error are addressed together. The arguments made not only address the merits of Hohvart's post-conviction petition, but also address the adequacy of the trial court's findings of fact and conclusion of law. We will begin our analysis with the merits of the petition.

{¶10} In his petition, Hohvart claimed trial counsel was ineffective for failing to: (1) properly investigate, interview and call certain witnesses; (2) challenge Mahoning County Common Pleas Court's jurisdiction; (3) file a motion to suppress evidence found in his car after it was seized; and (4) challenge alleged prosecutorial and judicial misconduct. Each of these claims will be addressed in turn, however, it is pointed out that the majority of his arguments are made under the first and fourth claims.

INVESTIGATE, INTERVIEW AND CALL CERTAIN WITNESSES

{¶11} The crux of his argument under this claim is that Whaley, the victim, was not a credible witness and that his trial counsel did not do enough to attack her credibility. Also, Hohvart maintains that had his trial counsel sufficiently attacked Whaley's credibility, it could have established that the alleged incident occurred in Trumbull County, negating Mahoning County Common Pleas Court's jurisdiction.

{¶12} In particular, Hohvart focuses on Exhibit A attached to his petition. It is a written statement penned by the responding officer, Patrolman Linert. He explains about being dispatched to the gas station where he encountered Whaley talking with station employees. He observed injuries to her facial area and informed her that an ambulance was on the way to treat her. She was uncooperative and refused treatment. Patrolman Linert learned from the stations' employees and Whaley herself that the incident leading to her injuries had occurred in Weathersfield Township, located in Trumbull County, Ohio. When Patrolman Linert told her that he would have to summon Weathersfield Township Police since the incident occurred in their jurisdiction, she protested because she claimed to know some of their officers. When Weathersfield Township Police arrived she walked away. Receiving no further cooperation from Whaley, both Weathersfield Township Police and Patrolman Linert cleared the scene. He ended his statement noting that he later learned from

Patrolman McIntyre that Whaley had stated that the incident carried over into Austintown Township (which is located in Mahoning County, Ohio) and now wished to file a report with their police department.

{¶13} To highlight the inconsistencies in her story, Hohvart also points to Exhibit B, Whaley's subsequent written statement to Austintown Township Police indicating that the attack occurred in Austintown Township, Mahoning County, Ohio.

{¶14} The Ohio Supreme Court has held that the doctrine of res judicata applies to post-conviction relief proceedings. *State v. Perry* (1967), 10 Ohio St.2d 175, 226, paragraph eight of the syllabus. This doctrine bars an individual from raising a defense or claiming a lack of due process that was or could have been raised at trial or on direct appeal. *State v. Ishmail* (1981), 67 Ohio St.2d 16, 18. Further, and as a practical matter, the doctrine of res judicata bars claims that are unsupported by evidence from outside the original record. *State v. Combs* (1994), 100 Ohio App.3d 90, 97. "'To overcome the res judicata bar, evidence offered dehors the record must demonstrate that the petitioner could not have appealed the constitutional claim based upon information in the original record.' *State v. Lawson* (1995), 103 Ohio App.3d 307, 315." *State v. Clark*, 7th Dist. No. 06MA26, 2007-Ohio-2707, ¶14.

{¶15} Here, Patrolman Linert's statement (Exhibit A) was provided by discovery on December 27, 2004. (Docket 9.) A copy of the Austintown Township Police Department's report (Exhibit C), including Whaley's statement (Exhibit B & D), were provided through discovery on February 14, 2005. (Docket 41.) Therefore, these documents constituted part of the original record and are not material properly considered in post-conviction proceedings. Hohvart should have challenged his trial counsel's effectiveness in this regard in his direct appeal and, therefore, was barred from doing so in post-conviction proceedings.

{¶16} Even assuming that these documents were not part of the original record, Hohvart cannot establish ineffectiveness on the part of his trial counsel. To prove an allegation of ineffective assistance of counsel, appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *Strickland v. Washington* (1984), 466 U.S. 668, 687; *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. Second, appellant must demonstrate that he was prejudiced by counsel's performance. Id. To show that he has been prejudiced by counsel's deficient

performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus.

{¶17} Here, Hohvart's trial counsel's performance did not fall below an objective standard of reasonable representation. Concerning the events at the gas station, Hohvart's trial counsel cross-examined Whaley as follows:

{¶18} "Q. Do you know the name of the police officer that came out to the Pilot [gas station]?

{¶19} "A. I can't remember?

{¶20} "Q. If I mentioned the name Linert, L-i-n-e-r-t, would that ring a bell?

{¶21} "A. It rings a bell, yes.

{¶22} "Q. So perhaps we're now talking about an officer whose name is Linert from Austintown Township that came to the Pilot?

{¶23} "A. Okay.

{¶24} "Q. And do you know how or why he came to the Pilot Station?

{¶25} "A. Because when the gentleman in the white SUV walked me into the Pilot Station, he either asked the people at the cash register or he himself called the police department for me.

{¶26} "Q. Somebody -- so someone made a phone call to Austintown and Officer Linert then responded?

{¶27} "A. Yes, sir. I asked him to call the police.

{¶28} "Q. At that time you did not provide any report.

{¶29} "A. No, sir, I gave him my name.

{¶30} "Q. Afterwards.

{¶31} "A. I gave him my name when he came out to the Pilot Station.

{¶32} "Q. But you did not give a detailed report as to what happened?

{¶33} "A. No, I told him the basics, and I said that I did not want to file a report right then; I was scared; and I wanted to go to the hospital.

{¶34} "Q. Okay. Do you remember Lane Ambulance arriving?

{¶35} "A. Yes, sir.

{¶36} "Q. And did the medical techs want to provide you with some assistance?

{¶37} "A. Yes, sir.

{¶38} "Q. And did you refuse them?

{¶39} "A. They did help clean me up, but I did refuse the transportation to the hospital, yes.

{¶40} "Q. Okay. And then as I understand it -- and that officers from Weathersfield Township arrived?

{¶41} "A. Yes, sir.

{¶42} "Q. What?

{¶43} "A. Yes, sir.

{¶44} "Q. Thank you. But you didn't want to talk to them either?

{¶45} "A. No, it didn't happen in Weathersfield. It did not happen in Weathersfield. I knew one of the officers that came out. I had worked with him before, and I was extremely embarrassed and ashamed.

{¶46} "Q. Hadn't you told Officer Linert that this episode had taken place in Weathersfield Township?

{¶47} "A. I told him that we were at the Pilot Arby's on Salt Springs Road when it started. I told him that I was hit, the car left, and that most of the beating happened in Austintown that I could recall.

{¶48} "Q. Well, how is it -- forget that. Do you know whether or not Officer Linert called Weathersfield Township?

{¶49} "A. I think he did, yes.

{¶50} "Q. Okay. Do you know what motivated him to call Weathersfield Township?

{¶51} "A. Possibly that it had started at the Salt Springs Arby's Pilot Station." (Tr. 387-390.)

{¶52} As the above cross-examination illustrates, Hohvart's trial counsel tested Whaley's credibility on this issue. Hohvart does not explain how interviewing or calling Patrolman Linert or the gas station employees would have further illustrated this inconsistency in Whaley's stories. His counsel's approach was clearly within the purview of reasonable representation and accepted trial tactics.

{¶53} Additionally, even if Hohvart could establish that his trial counsel's performance was ineffective, he cannot demonstrate that he was prejudiced by that performance. As this court observed in Hohvart's direct appeal, his "case boiled to a 'he-said, she-said' dispute and his version of events was simply not credible." *State v.*

Hohvart, 7th Dist. No. 06MA43, 2007-Ohio-5349, at ¶27. In the end, Hohvart cannot convincingly argue that the result of the trial would have been different.

FAILURE TO CHALLENGE MAHONING COUNTY'S JURISDICTION

{¶54} Hohvart argues the trial court incorrectly concluded that his claim of ineffective assistance of counsel for failing to challenge the trial court's jurisdiction was barred by res judicata. In the trial court's decision it stated that appellate counsel had challenged Mahoning County's jurisdiction in the direct appeal and, as such, the trial court concluded that the claim was barred by res judicata. That statement is factually incorrect because appellate counsel did not raise Mahoning County's jurisdiction as an assignment of error on the direct appeal. Regardless of its factual inaccuracy, the trial court's legal conclusion was still correct. Res Judicata bars this claims because it *could* have been raised on direct appeal. *Ishmail*, 67 Ohio St.2d at 18.

FAILURE TO FILE A SUPPRESSION MOTION

{¶55} In the direct appeal, appellate counsel raised an issue with trial counsel's failure to file a suppression motion. We stated that given the record, it was difficult to conclude whether or not Hohvart would have been successful if a suppression motion would have been filed. However, we did explain that his argument for ineffective assistance of counsel would still fail because he was unable to show the prejudice prong of the *Strickland* test. *State v. Hohvart*, 7th Dist. No. 06MA43, 2007-Ohio-5349, ¶27. As this issue was raised and disposed of on the merits, res judicata applies.

PROSECUTORIAL AND JUDICIAL MISCONDUCT

{¶56} Hohvart argues that his trial counsel was ineffective for failing to challenge ex parte communications between the trial court judge and agents of the Federal Bureau of Investigation (FBI) concerning his case. He states that the agents promised him that they were assured by the trial court judge that if he did not cooperate by providing information on other, unrelated criminal investigations, that Hohvart would receive maximum and consecutive sentences . Hohvart maintains that once his trial counsel learned of the communications, he should have moved for the trial court judge to recuse himself.

{¶57} In support of this claim, Hohvart cites to various exhibits attached to his petition for post-conviction relief, including Exhibits G, H, I, J, M, N, O, P and Q. The main underlying source for this claim arises from Exhibit M, Hohvart's own self-serving affidavit; all the others rely on or flow from it. In it, Hohvart alleges that Special Agents

Herbert Fitzgerald (Fitzgerald) and Joseph Buschner (Buschner) of the FBI visited him on five or six occasions while he was incarcerated in the Mahoning County Jail awaiting trial. He claims that they offered to help him with his case in exchange for help from him relating to other, unrelated criminal investigations. He claims that he denied their offers repeatedly, but they continued to visit him at the jail in hopes that he would reconsider.

{¶58} On one occasion in January 2005, Hohvart stated that he told the agents that he would not help them until he saw something in writing. According to Hohvart, Fitzgerald pulled out a business card belonging to the trial court judge which had the agent's business address handwritten on the back. (Exhibit G.) Fitzgerald told Hohvart that he and Buschner had met with the judge "behind closed doors" and that the judge had given them the "green light" to help Hohvart with a bond reduction, reduction in charges and sentencing, and possible dismissal of charges. They told him that if he cooperated with them that he could be released at the next scheduled hearing on his case. (Exhibit J.) If he did not cooperate, they told him that the hearing would be cancelled and that they could "personally guarantee" that the judge would impose maximum, consecutive sentences. If the agents could formally arrange the "offer," Fitzgerald said he would send him a letter written in code. Hohvart attached the letter to his petition. (Exhibit I.)

{¶59} The remaining exhibits (Exhibits N, O, P, and Q) are affidavits from people to whom Hohvart related this story – a fellow jail inmate and Hohvart's grandmother, aunt and uncle.

{¶60} Evidence attached to a petition for post-conviction relief must meet "some threshold standard of cogency." *State v. Lawson* (1995), 103 Ohio App.3d 307, 315. That threshold is not met by evidence which is "only marginally significant and does not advance the petitioner's claim beyond mere hypothesis and a desire for further discovery." Id. Additionally, "where a petitioner relies upon affidavit testimony as the basis of entitlement to post-conviction relief, and the information in the affidavit, even if true, does not rise to the level of demonstrating a constitutional violation, then the actual truth or falsity of the affidavit is inconsequential." *State v. Calhoun* (1999), 86 Ohio St.3d 279, 284.

{¶61} Even when affidavits are filed in support of the petition, although a trial court "should give [them] due deference," it may also "judge their credibility in

determining whether to accept the affidavits as true statements of fact." Id. at 284. In assessing the credibility of affidavit testimony, the consideration should be given to "all relevant factors." Id. Among those factors are (1) whether the judge reviewing the post-conviction relief petition also presided at the trial, (2) whether multiple affidavits contain nearly identical language, or otherwise appear to have been drafted by the same person, (3) whether the affidavits contain or rely on hearsay, (4) whether the affiants are relatives of the petitioner, or otherwise interested in the success of the petitioner's efforts, and (5) whether the affidavits contradict evidence proffered by the defense at trial. Moreover, a trial court may find sworn testimony in an affidavit to be contradicted by evidence in the record by the same witnesses, or to be internally inconsistent, thereby weakening the credibility of that testimony. Id. Depending on the entire record, one or more of these or other factors may be sufficient to justify the conclusion that an affidavit asserting information outside the record lacks credibility. Id. at 285.

{¶62} In this case, the trial court was correct to question the credibility of the affidavits. The trial court judge who reviewed Hohvart's petition was the same judge who presided over his trial. Hohvart's affidavit is self-serving. This court has recognized that evidence out of the record in the form of a petitioner's own self-serving affidavit alleging a constitutional deprivation is insufficient to compel a hearing. *State v. Dukes* (Feb. 8, 1999), 7th Dist. No. 96CA127, citing *State v. Combs* (1994), 100 Ohio App.3d 90, 98. All the other affidavits simply relate back to Hohvart's in that they recite what Hohvart told them. Therefore, they rely on hearsay. In addition, three of the affiants are relatives of Hohvart.

{¶63} Additionally, Hohvart points to a letter the trial court judge sent to Disciplinary Counsel for the State of Ohio in which he acknowledges the meeting with the FBI agents. A copy of the letter was attached to Hohvart's belated May 22, 2007 motion in opposition to the state's motion for summary judgment. Although the letter was not included with Hohvart's petition, its existence does nothing to further his claim of judicial misconduct. To the contrary, the letter proves the judge maintained his neutrality. The judge stated that the agents made no requests and that he made no promises concerning the treatment of Hohvart's case, other than to assure them that he would hold a hearing concerning the possibility of a pretrial reduction in bond if

Hohvart cooperated with them. He also stated that he informed both Hohvart's counsel and counsel for the state of the meeting.

{¶64} In sum, Hohvart failed to present cogent evidence that his trial counsel was ineffective for failing to challenge alleged judicial misconduct on the part of the trial court judge. And, considering all the above, the petition failed to provide substantive grounds for relief.

{¶65} Having found no merit with his substantive claims, we now turn to his argument that the trial court's review of the petition and findings of fact and conclusions of law were inadequate. Hohvart contends that upon examining the trial court's May 10, 2007 judgment entry granting the state's motion for summary judgment, it is apparent that the trial court "did not do any conductive, or reasonable, examination of the documents provided as exhibits in support of the petition." As a result, Hohvart maintains that this court "is unable to determine the grounds on which the trial court reached its decision."

{¶66} We find no merit with his assertion. When a trial court dismisses a petition for post-conviction relief, it is required to make findings of fact and conclusions of law. R.C. 2953.21(C); *State ex. rel. Konoff v. Moon* (1997), 79 Ohio St.3d 211, 212. The purpose of the requirement is "to apprise the petitioner of the reasons for the trial court's judgment and to permit meaningful appellate review." *Konoff*, 79 Ohio St.3d at 212. This purpose can be served despite the fact that the trial court does not label its judgment entry as findings of fact and conclusions of law if that is what its words import. *State ex rel. Carrion v. Harris* (1988), 40 Ohio St.3d 19, 20.

{¶67} As indicated earlier, Hohvart set forth four claims in his petition for post-conviction relief. In its judgment entry, the trial court dealt with each in turn. Concerning Hohvart's claims that his trial counsel failed to properly investigate, interview and call witnesses, the court properly noted that the evidence in support of this claim was not outside the record. Therefore, the court concluded that this claim could have been raised in his direct appeal and was barred under the doctrine of res judicata. Hohvart also claimed that his trial counsel was ineffective for failing to challenge the jurisdiction of the Mahoning County Common Pleas Court and to file a motion to suppress evidence found in his car after it was seized. Citing *State v. Perry* (1967), 10 Ohio St.2d 175, the court determined that Hohvart raised those claims in his direct appeal and, therefore, was barred by res judicata. Regarding his claims of

prosecutorial and judicial misconduct, the court explained that the affidavits Hohvart submitted in support were self-serving and concluded that he had not suffered prejudice. This decision was sufficient to comply with its requirement to issue findings of fact and conclusions of law. We find no merit with his argument to the contrary. In conclusion, the first and second assignments of error lack merit.

THIRD ASSIGNMENT OF ERROR

{¶68} "THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION, VIOLATING CIV.R. 1(B), WHEN NOT ALLOWING APPELLANT AMPLE-TIME AND OPPORTUNITY TO FILE OPPOSITION TO APPELLEE'S MOTION FOR SUMMARY JUDGMENT BEFORE RENDERING ITS JUDGMENT ON MAY 10, 2007, THUS VIOLATING ALSO SECTION 16, OF ARTICLE I OF THE OHIO CONSTITUTION DENYING APPELLANT'S RIGHTS UNDER THE DUE PROCESS CLAUSE (14TH AMENDMENT) OF THE UNITED STATES CONSTITUTION."

{¶69} Hohvart maintains the trial court erred in granting summary judgment without giving him an opportunity to respond to the state's motion. Initially, it should be noted that the state of the record in this case complicates the resolution of this issue. In their appellate briefs, the parties are in agreement that the state filed its motion for summary judgment on April 19, 2007. (Hohvart's Brief, p. 19, State's Brief, p. 13.) However, the filing of the motion does not appear on the docket sheet and the motion itself is nowhere in the record.

{¶70} On May 2, 2007, Hohvart filed a motion seeking a fifteen-day extension of time to oppose the state's summary judgment motion. Although his copy of the state's motion reflected a certificate of service dated April 19, 2007, Hohvart contends that could not have been correct since the envelope in which it was mailed to him was postmarked April 25, 2007, and he did not receive it until April 26, 2007. Hohvart attached a photocopy of the envelope in support of his motion. In its appellate brief, the state essentially concedes this point, stating:

{¶71} "It should be noted that the certificate of service attached to the State's motion for summary judgment states that the service copy was mailed to Appellant on the day of filing, April 19, 2007. However, Appellant has provided a copy of an envelope post marked April 25, 2007. If this is in fact the envelope used to mail Appellant the service copy of said motion, it can only be assumed that interoffice

clerical delay caused this lapse of time." (State's Brief, p. 13, fn. 61.)

{¶72} Without ruling on Hohvart's motion for an extension of time, the trial court granted the state's summary judgment motion on May 10, 2007. Generally, a post-conviction proceeding is civil in nature and, therefore, governed by the Ohio Rules of Civil Procedure. See *State v. Nichols* (1984), 11 Ohio St.3d 40. See, also, *State v. Heddleston* (Sept. 24, 2001), 7th Dist. Nos. 98CO29, 98CO37, 98CO46. However, a post-conviction proceeding is also a statutory creation and is controlled by the statute's procedural requirements (R.C. 2953.21) when they conflict with the civil rules. *Heddleston*, 7th Dist. Nos. 98CO29, 98CO37, 98CO46. "This principle may logically be extended to local rules. Thus, local rules apply in post-conviction proceedings to the extent they are not inconsistent with R.C. 2953.21." *In re J.B.*, 12th Dist. Nos. CA2005-06-176, CA2005-07-193, CA2005-08-377, 2006-Ohio-2715, at ¶46 (Internal citations omitted).

{¶73} Loc.R. 4(C)(2) of the Court of Common Pleas of Mahoning County, General Division, provides:

{¶74} "Opposition briefs shall be filed no later than fourteen (14) days from the date of filing of a motion unless, with leave of Court, an extension is granted. Motions may be heard and ruled upon the day following the cut-off for filing briefs."

{¶75} Here, given the state of the record, it is unclear which date should be used as the date of filing for the state's summary judgment motion. There are three possible choices: (1) April 19, 2007, the date filed-stamped on the copy of the undocketed motion; (2) April 25, 2007, the date stamped on the envelope in which Hohvart claimed he received the motion; or (3) April 26, 2007, the date Hohvart claims to have actually received the motion. With a fourteen-day period within which to respond, the possible filing deadlines for Hohvart's response would have been May 3, May 9, and May 10, 2007, respectively. The trial court issued its ruling on May 10, 2007.

{¶76} However, regardless of the date we use there is no basis for reversal. The trial court's decision to rule on the motion when it did, did not prejudicially affect his due process rights.

{¶77} It has been held that "to demonstrate a reversible denial of due process, * * * an appellant typically must make a strong showing of identifiable prejudice." *In re C.W.*, 9th Dist. No. 06CA0033-M, 2006-Ohio-5635, ¶9, citing *Estes v. Texas* (1965),

381 U.S. 532, 542-543. Furthermore, the First Appellate District has explained that a petitioner is not prejudiced by his not being allowed to respond to the state's motion. *State v. Shepard* (March 26, 1999), 1st Dist. No. C-980569. This is because a trial court can summarily dismiss a petition without submission from either party when the post-conviction petition, the files and record of the case show that the petitioner is not entitled to relief. Id. See, also, *State v. McCaleb*, 11th Dist. No. 2004-L-003, 2005-Ohio-4038, ¶18.

{¶78} We agree with the First District's conclusion in *Shepard* and adopt it as our own. Thus, if the petition for post-conviction relief shows no substantive grounds for relief, a petitioner is not prejudiced by the trial court ruling on the state's motion for summary judgment before he/she responds to it.

{¶79} Here, as is discussed at length above, there is no merit with Hohvart's substantive arguments and thus, he is not entitled to relief. Therefore, there is no cause for reversal under the third assignment of error. This assignment of error lacks merit.

FOURTH ASSIGNMENT OF ERROR

{¶80} "THE TRIAL [SIC] ERRED IN NOT CONDUCTING A HEARING ON APPELLANT'S PETITION FOR POST CONVICTION RELIEF, DENYING, WHERE A PLETHORA OF EXHIBITS [EVIDENCE DEHOR THE RECORD] SUPPORTING THE PETITION CONTAINING SUFFICIENT OPERATIVE FACTS TO WARRANT A HEARING."

{¶81} Under this assignment of error, in addition to making due process arguments which were addressed and disposed of in the third assignment of error, Hohvart argues that the trial court erred in not holding an evidentiary hearing on the post-conviction petition. The Ohio Supreme Court has explained that "[i]n post-conviction cases, a trial court has a gatekeeping role as to whether a defendant will even receive a hearing." *State v. Gondor,* 112 Ohio St.3d 337, 2006-Ohio-6679, ¶51. It has also explained that a trial court is permitted to dismiss a petition for post-conviction relief without a hearing "where the petition, the supporting affidavits, the documentary evidence, the files, and the records do not demonstrate that petitioner set forth sufficient operative facts to establish substantive grounds for relief." *State v. Calhoun* (1999), 86 Ohio St.3d 279, paragraph two of the syllabus.

{¶82} As was explained above, the petition was properly dismissed because there was no substantive grounds for relief. Thus, Hohvart was not entitled to a hearing. His argument under the fourth assignment of error lacks merit.

{¶83} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
Waite, J., concurs.