

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO ex rel. )  
ANTHONY SYLVESTER )  
 )  
Relator, )  
 )  
vs. )  
 )  
TIM NEAL )  
WAYNE COUNTY CLERK )  
OF COURTS )  
 )  
Respondent. )

Case No.: 12-1742

ORIGINAL ACTION  
IN MANDAMUS

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RESPONDENT TIM NEAL'S  
MOTION TO DISMISS

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Daniel R. Lutz (# 0038486)  
Wayne County Prosecuting Attorney

Patrick L. Cusma (#0067256)  
116 Cleveland Ave., Suite 702  
Canton, Ohio 44702

Nathan R. Shaker (#0079302) (Counsel of Record)  
Assistant Prosecuting Attorney  
115 West Liberty Street  
Wooster, Ohio 44691  
Phone: (330) 262-3030  
Fax: (330) 287-5412

Attorney for Relator,  
Anthony Sylvester

Attorney for Respondent,  
Tim Neal

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SUPREME COURT OF OHIO

## TABLE OF CONTENTS

	<b>Page</b>
RESPONDENT, TIM NEAL, WAYNE COUNTY CLERK OF COURT'S, MOTION TO DISMISS.....	1
STATEMENT OF THE CASE AND FACTS .....	2
LAW AND ARGUMENT.....	3
Mandamus .....	3
Respondent has No Clear Legal Duty to Act.....	5
Relator has No Clear Legal Right to Relief and had an Adequate Remedy at Law.....	7
CONCLUSION .....	9
CERTIFICATE OF SERVICE .....	10

## Table of Authorities

	Page
<b>Cases</b>	
<i>Smith v. Leis</i> , 106 Ohio St.3d 209, 2005-Ohio-5125, 835 N.E.2d 5.....	5
<i>Smith v. Leis, Smith v. Leis</i> , 165 Ohio App.3d 581, 2006-Ohio-450, 847 N.E.2d 485 (1st Dist.)...4	4
<i>State ex. rel. Am. Civ. Liberties Union of Ohio, Inc. v. Cuyahoga Cty. Bd. of Commers.</i> , 128 Ohio St.3d 256, 261, 2011-Ohio-625, 943 N.E.2d 553 .....	3
<i>State ex rel. Brammer v. Hayes</i> , 164 Ohio St. 373, 130 N.E.2d 795 (1955) .....	3
<i>State ex rel. Edwards v. Toledo City School Dist. Bd. Of Ed.</i> , 72 Ohio St.3d 106, 647 N.E.2d 799 (1995) .....	3
<i>State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs.</i> , 80 Ohio St.3d 134, 684 N.E.2d 1222 (1997).....	8
<i>State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.</i> , 122 Ohio St. 3d 260, 2009-Ohio-2871, 910 N.E.2d 455 .....	3
<i>State ex rel. Jones v. Hendon</i> , 66 Ohio St.3d 115, 609 N.E.2d 541 (1993) .....	6
<i>State v. Leonard</i> , 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229.....	8
<i>State ex rel. Lorain v. Stewart</i> , 119 Ohio St. 3d 222, 2008-Ohio-4062, 893 N.E.2d 184 .....	5
<i>State ex rel. Russell v. Duncan</i> , 64 Ohio St.3d 538, 597 N.E.2d 142 (1992) .....	7-8
<i>State ex rel. Sampson v. Parrott</i> , 82 Ohio St.3d 92, 694 N.E.2d 463 (1998) .....	8
<i>State ex rel. Tubbs Jones v. Suster</i> , 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998).....	3
<i>State ex rel. Williams v. Fankhouser</i> , 11 <sup>th</sup> Dist. No. 2006-P-0006, 2006-Ohio-621607 .....	5, 8
<b>Statutes and Rules</b>	
Ohio Civil Rule 12(B)(6).....	1, 3, 8
Ohio Const. Art. IV, § 2(B)(1)(b).....	3
Ohio Criminal Rule 46.....	5, 6, 7
R.C. § 2109.49.....	4

R.C. § 2325.52.....3, 4, 5, 6, 7  
S. Ct. Prac.R. 10.5(A).....1, 3, 6, 8

**Attachments**

Judgment Entry Setting Bond dated June 27, 2011..... Att-1  
Judgment Entry of Change of Plea and Sentencing dated May 23, 2012.....Att-2

## **MOTION TO DISMISS**

Relator Anthony Sylvester's complaint for mandamus fails to state a claim which warrants relief. Therefore, Tim Neal, Wayne County Clerk of Court, moves this Court for an Order dismissing this case under Civ.R. 12(B)(6) and S. Ct. Prac. R. 10.5(A). The reasons for this Motion are more fully set forth below.

Respectfully Submitted,

Daniel R. Lutz (# 0038486)  
Wayne County Prosecuting Attorney

---

Nathan R. Shaker (# 0079302)  
Assistant Prosecuting Attorney  
115 West Liberty Street  
Wooster, Ohio 44691  
Phone: (330) 262-3030  
Fax: (330) 287-5412

Attorney for Respondent,  
Tim Neal, Wayne County Clerk of Court

## STATEMENT OF THE CASE AND FACTS

Relator Anthony Sylvester AAA Sly Bail Bonds is a licensed bondsman in the State of Ohio. On December 7, 2011, Relator's agent Chris Nickolas appeared before the Wayne County Common Pleas Court to post bond for Shannon Rowe in case 11-CR-0347 involving an indictment for deception to obtain a dangerous drug, a felony of the fourth degree. Rowe's bond in case 11-CR-0347 was set by the Honorable Judge Corey Spitler at five thousand dollars (\$5,000) with a deposit of five hundred dollars (\$500.00), ninety percent of which shall be returned upon final disposition of the case. A copy is attached at Attachment 1. Chris Nickolas attempted to tender a five thousand dollar (\$5,000.00) surety bond tendered by AAASLY Bailbonds.

Respondent Tim Neal, is the duly elected Clerk of Courts for Wayne County, Ohio. The Clerk of Court's responsibilities include taking bonds set by the Wayne County Court of Common Pleas. Respondent Tim Neal's office informed Chris Nickolas that he could not post a surety bond as the bond in case 11-CR-0347 was set at ten percent of five thousand dollars (\$5,000.00). At this time, Relator's agent Chris Nickolas tendered five hundred dollars (\$500.00) in cash to secure Shannon Rowe's release on case 11-CR-0347. Shannon Rowe has since pled guilty to the felony charges and has begun serving a thirty-six month prison sentence. May 23, 2012 Judgment Entry of Change of Plea and Sentencing.

Relator now seeks a writ of mandamus commanding the Wayne County Clerk of Courts to accept surety bonds in all cases where bond is set by the Court.

## LAW AND ARGUMENT

### *Standard of Review*

Dismissal of a complaint in mandamus is proper under Civ.R. 12(B)(6) and S. Ct. Prac. R. 10.5(A) if the complaint fails to state a claim for relief. The Court must presume all factual allegations are true and make all reasonable inferences in favor of the nonmoving party. *State ex rel. Edwards v. Toledo City School Dist. Bd. Of Edn.*, 72 Ohio St.3d 106, 108, 647 N.E.2d 799 (1995). Then, “it must appear beyond doubt that relator can prove no set of facts warranting relief.” *Id.*

### *Mandamus*

The Supreme Court has original jurisdiction in mandamus cases. Ohio Const. Art. IV, § 2(B)(1)(b). A writ of mandamus is an extraordinary judicial writ. *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998). As such, “[a] ‘writ of mandamus will not issue to compel the general observance of laws in the future.’” *State ex rel. Am. Civ. Liberties Union of Ohio, Inc. v. Cuyahoga Cty. Bd. of Commers.*, 128 Ohio St.3d 256, 261, 2011-Ohio-625, 943 N.E.2d 553. Instead, the purpose of mandamus is to compel the performance of actions already required by law. *State ex rel. Brammer v. Hayes*, 164 Ohio St. 373, 374, 130 N.E.2d 795 (1955). To be entitled to a writ of mandamus, the relator must establish a clear legal right to the relief requested, a corresponding clear legal duty on the part of the respondent to perform the requested act, and the lack of an adequate remedy for relator in the ordinary course of law. *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 122 Ohio St. 3d 260, 2009-Ohio-2871, 910 N.E.2d 455.

Relator seeks a writ of mandamus commanding the “Wayne County Clerk of Courts to accept surety bonds in all cases where bond is set by the Court.” Relator has not demonstrated a clear legal right to the relief requested, a clear legal duty on the part of respondent to perform the requested act, or the lack of an adequate remedy for relator in the ordinary course of law.

The basic right of a criminal defendant to be released pending his trial is protected under Section 9, Article I of the Ohio Constitution. At the present time, Section 9 provides, in pertinent part:

“All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.”

Since the “bail” requirements of Section 9, Article I are stated in somewhat general terms, the Supreme Court of Ohio has enacted procedural rules to assist trial courts in implementing those basic requirements. Specifically, Crim.R. 46 sets forth the various factors and conditions a trial court should consider in determining bail. In regard to the types of bail which can be used, subsection (A) of the rule states:

“(A) \* \* \* Any person who is entitled to release shall be released upon one or more of the following types of bail in the amount set by the court:  
“(1) The personal recognizance of the accused or an unsecured bail bond;  
“(2) A bail bond secured by the deposit of ten percent of the amount of the bond in cash. Ninety percent of the deposit shall be returned upon compliance with all conditions of the bond;  
“(3) A surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the defendant.”

As the wording of Crim.R 46(A) readily indicates, each of the three types of bail listed in the rule can be used separately as a valid means of setting a defendant's bail. In addition, the courts of this state have recognized a fourth type of bail, which is a combination of the two types in Crim.R. 46(A)(2) and (A)(3). Under this fourth type, the defendant has the option of posting his bail by satisfying any of the methods listed in the two provisions. See *Smith v. Leis*, 1st Dist. No. C-050957, 2006-Ohio-450, at ¶ 22.

### **A. Respondent has No Clear Legal Duty to Act**

It is axiomatic that, in order to obtain relief in mandamus, the party against whom mandamus is sought must be under a clear legal duty to perform the requested act. *State ex rel. Lorain v. Stewart*, 119 Ohio St. 3d 222, 2008-Ohio-4062, 893 N.E.2d 184, at ¶23. Relator seeks a writ of mandamus commanding the Wayne County Clerk of Courts to accept surety bonds in all cases where bond is set by the Court. This request on the claim that the Respondent has a clear legal duty to accept a surety bond, when bond was set by the trial court in accordance with Crim.R. 46(A)(2). Relator's claim is based on his interpretation of this Court's decision in *Smith v. Leis*, that any bonds set pursuant to Crim.R. 46(A)(2) would be an unconstitutional denial of surety. *Smith v. Leis*, 106 Ohio St.3d 209, 2005-Ohio-5125, 835 N.E.2d 5. In *Leis*, this Court held that "cash-only bail is unconstitutional under Section 9, Article I of the Ohio Constitution and is not authorized by either Crim.R. 46 or R.C. 2937.222." *Leis* at ¶1.

However, Relator cannot establish that Respondent has a clear legal duty to perform the requested acts. Specifically, Respondent's actions were made in accordance with Crim.R. 46(A)(2). Under the specific language of the trial court's order, only the posting of ten percent of an appearance bond of five thousand dollars would satisfy the bond requirement. Respondent was not obligated to accept the surety bond which the bail bondsman tried to submit on the defendant's behalf. *See State ex rel. Williams v. Fankhouser*, 11<sup>th</sup> Dist. No. 2006-P-0006, 2006-Ohio-621607. Instead, the Respondent's duty was simply to accept a ten percent deposit in accordance with the court order. Relator cannot establish that Respondent had a clear legal duty to do otherwise.

In the instant case, the Honorable Judge Spitler set bond pursuant to Crim.R. 46(A)(2), requiring a bond of five thousand dollars with a deposit of ten percent or five hundred dollars,

ninety percent of which shall be returned upon final disposition of this case. [Att-1]. Relator alleges that the required ten percent deposit denies the defendant access to surety once bail has been set. [Complaint at ¶9]. Essentially, Relator alleges that Respondent is requiring cash-only bail in violation of the Ohio Constitution by requiring a cash deposit in accordance with Crim.R. 46(A)(2). However, Relator's position is incorrect.

Crim.R. 46 (A)(2) has not been held unconstitutional. The underlying facts in *Leis*, the case relied upon by Relator, relate to Crim.R. 46(A)(3). In *Leis*, the trial court set bond at "\$1,000,000.00 straight, cash only." *Id.* "A 'straight bond' is under Crim.R. 46(A)(3) and may be posted by a surety, real estate, securities, or cash." *See Smith v. Leis*, 165 Ohio App.3d 581, 2006-Ohio-450, 847 N.E.2d 485 (1st Dist.). Under Crim.R. 46(A)(3), the defendant is given the option of choosing the method of payment. *Id.* The same is not true for Crim.R. 46(A)(2). Instead, the defendant has only one option under Crim.R. 46(A)(2); he must deposit ten percent of the amount of the bond in cash.

In applying Crim.R. 46(A)(3), some trial courts have attempted to limit a defendant's "posting" options by stating that "cash" was required for the entire amount of bond. *Id.*, *State ex rel. Jones v. Hendon*, 66 Ohio St.3d 115, 609 N.E.2d 541 (1993). The requirement of cash only for the entire amount is unconstitutional. *Id.* However, in the present case, a cash only bond was not set. Bond was set at 10% of \$5,000.00. The benefit of a 10% bond is that the defendant is only required to post ten percent of the entire bond in cash. *See State ex rel. Williams v. Fankhouser*, 11<sup>th</sup> Dist. No. 2006-P-0006, 2006-Ohio-621607. That is, the defendant is given the benefit of not having to cover ninety percent of the full amount set by the trial court. *Id.* Based on this reasoning, bond set pursuant to Crim.R. 46(A)(2) cannot be characterized as a "cash only" bond. *Id.* Because the case Relator relies upon pertains to Crim.R. 46(A)(3) and Crim.R.

46(A)(2) cannot be said to violate Section 9, Article I of the Ohio Constitution, the Relator cannot establish a clear legal duty on the part of the Respondent to accept surety under the present facts as Respondent's actions were made in accordance with Crim.R. 46(A)(2).

Further, after this Court determined that cash-only bail was unconstitutional in *Leis*, the 1st District, Hamilton County, subsequently considered the issue of excessive bail in *Smith v. Leis*, 165 Ohio App.3d 581, 2006-Ohio-450, 847 N.E.2d 485 (1st Dist.). The 1st District recognized that Crim.R. 46(A) provides that any person entitled to release shall be released upon one or more of the three types of bail as set forth in Crim.R. 46. In the 1st District's case, the trial court had set bail at "\$5,000.00, no 10%." *Id.* The 1st District recognized that the trial court's phrasing had led them to mistakenly analogize the bond set with a cash-only bond, recognizing that cash-only bonds are unconstitutional. *Id.* The 1st District went on to state that the ten percent option in Crim.R. 46(A)(2) is applicable only if the court specifically authorizes it. *Id.* As a result, applying this Court's prior decision in *Leis*, the 1st District upheld the validity of Crim.R. 46(A)(2).

As Crim.R. 46(A)(2) has not been held unconstitutional, Respondent did not act contrary to law. In light of the fact that Respondent is under no duty to accept a surety from Relator on a bond set in accordance with Crim. R. 46(A)(2), Respondent submits that Relator's Petition must be dismissed as a matter of law.

**B. Relator has No Clear Legal Right to Relief and had an Adequate Remedy at Law**

To be entitled to a writ of mandamus, the relator must also establish a clear legal right to the relief requested. *State ex rel. Gilmour Realty, Inc. v. Mayfield Hts.*, 122 Ohio St. 3d 260, 2009-Ohio-2871, 910 N.E.2d 455. Additionally, Courts have routinely denied mandamus where the Relator has an adequate remedy at law. *State ex rel. Russell v. Duncan*, 64 Ohio St.3d 538,

597 N.E.2d 142 (1992). Although Relator seeks a writ of mandamus compelling the Wayne County Clerk of Courts to accept surety bonds in all cases where bond is set by the court, Relator cannot establish a clear legal right to such relief. The underlying case and bond of which Relator complains has been disposed of and Relator seeks a writ of mandamus “commanding the Wayne County Clerk of Court to accept surety bonds in all cases where bond is set by the court.” [Complaint at ¶12]. Yet, a writ of mandamus will not issue to compel the general observance of laws in the future. *State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs.*, 80 Ohio St.3d 134, 135, 684 N.E.2d 1222, 1223, fn. 1, (1997). As such, Relator has no clear legal right to the relief requested.

Crim.R. 46(C) vests discretion in the trial court to impose any of the five conditions listed in Crim.R. 46(C)(1) to (5) when not satisfied that the preferred conditions of release will reasonably ensure the accused's appearance. *State ex rel. Jones v. Hendon*, 66 Ohio St. 3d 115, 118, 609 N.E.2d 541, 543-44 (1993). Moreover, following conviction, any error regarding pretrial bail is generally moot. *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 39. The subject of the bond herein has since pled guilty to felony charges and has begun serving a thirty-six month prison sentence. Therefore, Sylvester is not entitled to extraordinary relief in mandamus.

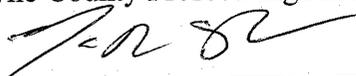
Furthermore, once the clerk of court acted in accordance with the Judgment Entry Setting Bond of June 27, 2011 and denied Relator's request to post a surety, the Relator's had an adequate remedy available to move for an amendment of the bond order to allow for the submission of the surety bond. *See Fankhouser*, 11<sup>th</sup> Dist. No. 2006-P-0006, 2006-Ohio-621607. Relator submitted no such motion. As a result, Relator had an adequate remedy at law, which he failed to utilize. *See State ex rel. Sampson v. Parrott*, 82 Ohio St.3d 92, 93, 694 N.E.2d 463 (1998). Because Relator failed to avail himself of this remedy, issuance of mandamus is inappropriate. Based on the foregoing, Relator's complaint fails as a matter of law and must be dismissed.

**CONCLUSION**

Respondent, Tim Neal, Wayne County Clerk of Courts, requests that this Court dismiss the Relator's Complaint for Writ of Mandamus.

Respectfully Submitted,

Daniel R. Lutz (# 0038486)  
Wayne County Prosecuting Attorney



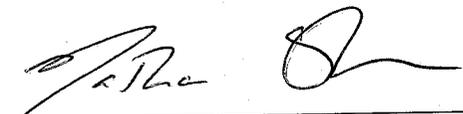
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Nathan R. Shaker (# 0079302)  
Assistant Prosecuting Attorney  
115 West Liberty Street  
Wooster, Ohio 44691  
Phone: (330) 262-3030  
Fax: (330) 287-5412

Attorney for Respondent,  
Tim Neal, Wayne County Clerk of Courts

## CERTIFICATE OF SERVICE

On November 16, 2012, a true and accurate copy of this Motion to Dismiss was sent to Attorney for Relator, Patrick L. Cusma, 116 Cleveland Ave., Suite 702, Canton, Ohio 44702, by regular U.S. Mail, postage prepaid.



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Nathan R. Shaker (# 0079302)

**ATTACHMENT #1**

JOURNAL ENTRY SETTING BOND DATED JUNE 27, 2011

IN THE WAYNE COUNTY COMMON PLEAS COURT

STATE OF OHIO

CASE NO. 11CR0347

vs.

Shannon Rowe  
13021 S. Portage St. Apt. B  
Doylestown, OH 44230

FILED - COURT  
11 JUN 27 AM 11:35  
TIM NEAL  
CLERK OF COURTS

PROSECUTOR'S RECOMMENDATION FOR BOND

The Prosecuting Attorney recommends that the defendant be released on the following conditions:

- Personal Recognizance
- 10 % of an Appearance Bond of \$5,000.-
- Cash Only of \_\_\_\_\_

Unsecured Appearance of \$ \_\_\_\_\_

**COPY TO ALL COUNSEL**

MAILED

Regular \_\_\_\_\_

Certified \_\_\_\_\_

Placed in box Pros Prob Def

By MEADWAY

Dep. Clerk 11-14-11

Precipe to the Clerk:

- Please issue summons to an appropriate officer and direct him to make personal service upon the defendant at the address stated in the caption of this request.
- Please issue a warrant to an appropriate officer and direct him to execute it upon the defendant at the address stated in the caption of this request.

[Signature]  
Assistant Prosecuting Attorney

JOURNAL ENTRY SETTING BOND

Pursuant to CR46 the defendant may be released on the following conditions:

- Personal Recognizance
- 10 % of an Appearance bond of \$5,000
- Cash Only of \_\_\_\_\_
- Surety Bond of \_\_\_\_\_
- Special Conditions \_\_\_\_\_

Unsecured Appearance of \$ \_\_\_\_\_

**JOURNALIZED**

JUN 27 2011

TIM NEAL, CLERK  
WAYNE COUNTY, OHIO

[Signature]  
Judge

**ATTACHMENT #2**

JUDGMENT ENTRY of CHANGE OF PLEA AND SENTENCING DATED MAY 23, 2012

✓

FILED  
IN THE COURT OF COMMON PLEAS, WAYNE COUNTY, OHIO  
COMMON PLEAS COURT

12 MAY 23 PM 4:08

STATE OF OHIO

Plaintiff

vs.

SHANNON ROWE

Defendant

TIM NEAL  
CLERK OF COURTS

CASE NO. ~~11-CR-0347~~  
11-CR-0360

JUDGMENT ENTRY  
CHANGE OF PLEA  
AND SENTENCING

Defendant appeared in open court on May 23, 2012, with counsel on an indictment charging him in Case No. 11-CR-0347 with: Count 1, Deception to Obtain a Dangerous Drug, a felony of the fourth degree, in violation of R.C. 2925.22(A); Count 2, Deception to Obtain a Dangerous Drug, a felony of the fourth degree, in violation of R.C. 2925.22(A); and Count 3, Deception to Obtain a Dangerous Drug, a felony of the fourth degree, in violation of R.C. 2925.22(A). In Case No. 11-CR-0360, he appeared on an indictment charging him with: Count 1, Burglary, a felony of the second degree, in violation of R.C. 2911.12(A)(2); and Count 2, Theft, a felony of the fifth degree, in violation of R.C. 2913.02(A)(1). On oral motion by the State, Count 1 was amended to Burglary, a felony of the third degree, in violation of R.C. 2911.12(A)(3).

The defendant was advised of all constitutional rights, of the consequences of any pleas of guilty, including the maximum prison sentence, maximum financial sanctions, applicable mandatory and presumed penalties, and possible extensions of the sentence in this case by action of the parole board and the judge with jurisdiction over a new felony. The court finds that the defendant understands those rights and consequences. After being so advised, the defendant knowingly, intelligently, and voluntarily waived his constitutional rights, including his right to counsel and entered a plea of guilty in Case No. 11-CR-0347 to Count 1 of the indictment. On oral motion of the State, Counts 2 and 3 of the indictment were dismissed. In Case No. 11-CR-0360, the defendant entered a plea of guilty to

Count 1, as amended of the indictment. On oral motion of the State, Count 2 was dismissed.

The court accepted the defendant's plea after inquiry made pursuant to Crim. Rule 11.

The defendant was afforded all rights pursuant to Crim. R. 32. The court has considered oral statements made during the sentencing hearing, as well as the principles and purposes of sentencing under R.C. 2929.11, and the seriousness and recidivism factors under R.C. 2929.12.

The defendant is sentenced as follows:

11-CR-0347

Count 1 Deception to Obtain a Dangerous Drug R.C. 2925.22(A)  
F4 18 months

11-CR-0360

Count 1 Burglary R.C. 2911.12(A)(3)  
F3 36 months

Concurrent with each other.

The defendant is ordered to pay the court costs.

The defendant was notified that he may be subject to post release control for up to three (3) years after his release from prison.

The Wayne County Sheriff shall convey the defendant to the custody of the Ohio Department of Rehabilitation and Corrections.

**COPY TO ALL COUNSEL** ✓

MAILED

Regular

Certified

Placed in box

By

Dep. Clerk

Hyde

Pros Prob Medway  
Records, MSCS

M. H. [Signature] 5-24-12

*[Signature]*

Mark K. Wiest, Judge

Dated:

5/23/12

**JOURNALIZED**

MAY 23 2012

TIM NEAL, CLERK  
WAYNE COUNTY, OHIO