

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel
ANTHONY SYLVESTER
AAA SLY BAIL BONDS

Relator

vs.

TIM NEAL
WAYNE COUNTY CLERK OF
COURTS

Respondent

CASE NO. 2012-1742

ORIGINAL ACTION OF MANDAMUS

REALTOR ANTHONY SYLVESTER'S RESPONSE
TO RESPONDENT TIM NEAL'S MOTION TO DISMISS

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Anthony Sylvester

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Attorney for Respondent

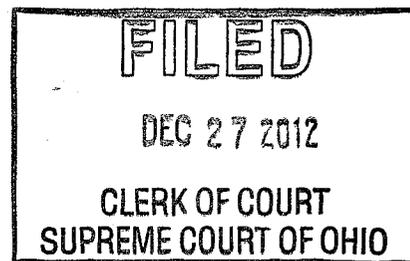


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STATEMENT OF THE CASE

Relator, Anthony Sylvester/AAA Sly Bail Bonds ("Sylvester") is a licensed bail bondsman in the State of Ohio. Respondent, Timothy Neal, ("Neal") is the duly elected Clerk of Courts for Wayne County, Ohio whose responsibilities include the taking and posting of bonds as they are set by the Wayne County Common Pleas Court.

On December 7, 2011, Sylvester's agent, Chris Nickolas attempted to post a five-thousand-dollar surety bond to secure the release of Shannon Rowe, a defendant in Wayne County Common Pleas Court case number 11-CR-0347. The Wayne County Clerk's office refused to accept the surety bond. On June 27 2011, the Wayne County Common Pleas Court journalized an entry on a pre-printed form which stated the following:

JOURNAL ENTRY SETTING BOND

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

- Personal recognizance
- Unsecured Appearance of \$ _____
- 10% of an Appearance bond of _____
- Cash Only of _____
- Surety Bond of _____

Special Conditions _____

The Journal Entry showed a check mark in the box next to "10% of an Appearance Bond of" and in the line following was hand-written "\$5,000".

(A copy of this Journal Entry is attached as Attachment A.)

Sylvester's agent, Mr. Nickolas, attempted to post a five-thousand-dollar surety bond to procure Shannon Rowe's release. The Wayne County Clerk's office refused to accept the surety bond for the full bond amount because the only box checked on the

Journal Entry was the box for "10% of an Appearance Bond of \$5,000". Nickolas then posted the five hundred dollars in cash in order to secure Rowe's release.

Sylvester agrees that Neal has correctly stated the present procedural posture of this case. Sylvester files this Memorandum in Opposition pursuant to this Court's order to file a response to the motion to dismiss by December 27, 2012.

II. LAW AND ARGUMENT

(A) Elements of Writ, Standard for Motion to Dismiss

The fundamental criteria for issuing Writ of Mandamus are well-established:

"In order to be entitled to a writ of mandamus, realtor must show (1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that realtor has no plain and adequate remedy in the ordinary course of the law.

State, ex rel. National City Bank v. Bd. of Education (1977), 52 Ohio St.2d 81, 369 N.E.2d 1200, *State ex rel. Harris v. Rhodes* (1978), 54 Ohio St.2d 41,42,374 N.E.2d 641.

A Mandamus is a civil action. *State ex rel. Maxwell v. Kainrad* (2004), 11th Dist. No.2004-P-0042, 2004- Ohio-5458. Respondent has moved this Court to dismiss Relator's Mandamus action. A motion to dismiss, filed pursuant to Civ.R. 12(B)(6), is a procedural mechanism which tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 605 N.E.2d 378, 1992- Ohio-

“Since a mandamus action is considered civil in nature, a petition for a writ can be dismissed for failing to state a viable claim when the nature of the allegations are such that, even if those allegations are viewed in a manner most favorable to the realtor, they are still legally insufficient to show that the realtor will be able to prove a set of facts entitling him to the writ.”

State ex rel. Maxwell, supra.

In order to dismiss a complaint under Civ.R. 12(B)(6), it must appear beyond doubt that the relator can prove no set of facts warranting relief. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus. “A claim that a relator possesses an adequate legal remedy precluding a writ of mandamus seeks an adjudication on the merits, which is normally improper in a Civ.R. 12(B)(6) determination.” *State ex rel. Edwards v. Toledo City Sch. Dist. Bd. of Edn.* (1995), 72 Ohio St.3d 106, 109, 647 N.E.2d 799, citing *State ex rel. Birdsall v. Stephenson* (1994), 68 Ohio St.3d 353, 355, 626 N.E.2d 946.

In considering a motion to dismiss, “the magistrate treats all factual allegations of the complaint as if proven and makes all reasonable inferences in favor of relator.” *Mitchell v. Lawson Milk Co* (1988), 40 Ohio St.3d 190, 532 N.E.2d 753. A writ cannot issue to control the respondent’s exercise of discretion, but it can be issue to compel a public officer to engage in the exercise of discretion when there is a clear legal duty to do so. *State ex rel Martin v. Corrigan* (1986), 25 Ohio St.3d29, 494 N.E.2d 1128.

The Ohio Constitution provides, in relevant part,

All persons shall 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 requires; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

* * * *

Ohio Const. Art. I, § 9.

Setting the amount of bail required in a criminal case is the function of the court. Crim. R. 46. Bail is security for the appearance of an accused to appear and answer to a specific criminal or quasi-criminal charge in any court or before any magistrate at a specific time or at any time to which a case may be continued, and not depart without leave. R.C. § 2937.22. If a bond is set at \$5000.00 surety it can be satisfied by posting \$5,000.00 cash with the Clerk. It is, however, the duty of the Clerk of Courts to receive and issue receipt for the bail posted by the accused in that criminal case no matter how it is posted. R.C. § 2937.22. Upon the posting of the bail, the Clerk's Office notifies the agency holding the accused that the bail has been posted and that the accused may be released. A clerk of courts is a ministerial officer, one who performs a fixed and designated function that involves no exercise of discretion. The clerk makes and has custody of the court's records, has the power to certify the correctness of transcripts from those records, and files the court's papers, enters its judgements, and issues writs and process in the court's name. *State v. Wilson* (1995), 102 Ohio App.3d 467, 657 N.E.2d 518.

A court, in a criminal case, must set bail in allailable cases. The trial court, after due consideration of all the factors set forth in Crim.R.46, determines the amount of bail that would be requires in the case to secure the appearance of the accused. Once the

Court makes that determination, the Court determines whether to impose any conditions on that release. Crim. R. 46(B) sets forth the conditions that the Court may consider. Once the Court has set the amount of bail, and added in any conditions it deems appropriate, the accused is remanded to custody until the bail is posted. That bail is posted with the Clerk of Courts.

The issue before the Court is a very simple question with Constitutional implications. The same question raised in this Petition was raised before the Eleventh District Court of Appeals in 2006 in *State ex. rel. Williams v. Fankouser*, 2006-Ohio-1170 (11th Dist. 2006). Both the Eleventh District in its *Fankouser* holding, and Neal in his motion to dismiss, acknowledge that Crim. R. 46(A)(2) does require a criminal defendant to post cash as the only means of securing his or her release from jail. *Fankouser* at ¶ 24, Resp. Motion to Dismiss. Pg. 6.

Sylvester asserts that such decision violates this Court's decision in *Smith v. Leis* and therefore also violates Art. 1 Sect. 9 of the Ohio Constitution.

In reaching its decision the Eleventh District in *Fankouser* merely stated that this Court's *Leis* decision interpreted only Crim. R. 46(A)(3), and thus had no application to Crim. R. 46(A)(2). Sylvester does not dispute that the underlying issue in *Leis* arose under Crim. R. 46(A)(3). However, if this Court's *Leis* decision did not address Crim. R. 46 (A)(2), as Neal and The Eleventh Circuit suggest, then the question as to whether Crim. R. 46(A)(2) is Constitutional when a Court designates it as the *only* type of bail allowed, remains a question that has yet to be determined.

It is axiomatic that the purpose of bail is to facilitate the release of the accused prior to adjudication of the charges, while at the same time safeguarding the community

from potentially dangerous criminals. It therefore follows that a trial court must have the ability to restrict the *type* of bail that is allowed. However, restrictions on the *type* of bail available to the accused should only be allowed to the extent that such restrictions further a *legitimate* state interest.

For example, it is clear that a trial court must have the ability to prohibit an accused charged with very serious crimes from being released under the conditions set forth in Crim. R. 46(A)(1), i.e signature and personal recognizance bonds. It is further clear that a trial court would be justified in prohibiting release under both Crim R. 46(A)(1) and (A)(2).

What is *not* clear is what *legitimate* justification might be proffered for allowing release under the terms of Crim. R. 46(A)(2) but *prohibiting* release under Crim. R. 46(A)(3). Sylvester asserts that such a prohibition serves no legitimate state interest, and is therefore an unconstitutional infringement on an accused's rights under the Ohio Constitution, Article 1, Section 9.

The issue to be determined by this Court is whether, it is consistent with the statutory purposes of Crim. R. 46, this Court's decision in *Smith v. Leis*, and the Ohio Constitution Section 9 Article 1, to require an accused to post bail in accordance with Crim. R. 46(A)(2) while prohibiting the accused from posting bail in accordance with Crim. R. 46(A)(3).

Sylvester asserts that such discretion resurrects the ability of a trial court to require a "cash only" bond. The Ohio Supreme Court has twice struck down "cash only" bonds. *Smith v. Leis* (2005), 106 Ohio St. 3d 309, 2005-Ohio-5125, *State ex rel. Jones v. Hendon* (1993), 66 Ohio St.3d 115, 609 N.E.2d 541. In both cases, the Supreme Court

struck down the use of cash only bonds, holding that such bonds violated an individual's Ohio Constitutional right to enlist a surety to post bail on his behalf. *Smith, supra, State ex rel. Jones, supra.*

(B) Clear right to relief sought

Sylvester has a clear right to the relief requested. Bail has been set by the trial court and it is Neal's duty to accept the bail posted so that the defendant can be released from detention. The issue before this Court is whether Neal can require a cash deposit of \$500 in order to secure the accused's release, or whether a surety posted by a bondsman for the full amount can be accepted. By posting a surety bond in the amount of \$5,000.00 the bail bondsman is in effect posting \$5,000.00. It is clear according to this Court's own ruling in *Smith v Leis* that a Court can set the amount of bond and put conditions on a defendant's release, but it cannot limit whether the bond is posted as cash or surety. If a Court limits a defendant's choice of how to post the bond it would be an unconstitutional denial of the defendant's rights under Section 9, Article I of the Ohio Constitution, R.C. 2933.2122 and this Court's ruling in *Smith v. Leis*, 106 Ohio St. 3d 209, 2005-Ohio-5125, 835 N.E. 2d 5.

Neal urges this Court to rely on, *State ex rel, Williams v. Fankhauser* 11th Dist. No. 2006-P-0006, 2006-Ohio-621067, a tortured interpretation of this Court's decision in *Smith v. Leis*. *Fankhauser* was decided by the Eleventh District Court of Appeals which is not binding in Wayne County. This Court was clear in *Leis* that cash only bond is unconstitutional. When a court requires bond be posted in accordance with Crim R. 46(A)(2) and prohibits posting by the means provided in Crim. R. 46(A)(3), they are

simply requiring the posting of a cash only bond and prohibiting the use of sureties. This is contrary to this Court's holding in *Leis, supra*.

(C) Clear Duty to Act

Neal seeks a dismissal of Sylvester's Mandamus action asserting that Neal had no clear legal duty to act because Neal was merely following the orders of the Court. Sylvester asserts that Neal had a clear duty to act because Neal is the officer designated by statute to accept bail and issue the receipt for the same.

Neal had a clear duty to act under his statutory duties and under this Court's decision in *Smith v. Leis* because denying a defendant the right to use a surety is in effect the reinstatement of cash only bail, which this court ruled unconstitutional in *Leis*. Neal states his office acted in accordance with Crim.R. 46(A)(2). If this Court agrees with Neal's position, then this Court would be denying defendant's right to bail by "sufficient sureties" and requiring the posting of a "cash only" bond. Therefore, it is Neal's obligation to accept a surety bond in the amount of the bond as set by the Court and not to demand ten percent cash.

Neal's argument that Crim. R. 46 (A)(2) requires the defendant to post a cash only bond is contrary to this Court's ruling in *Smith v. Leis*. Furthermore, Neal's argument that requiring bail to be posted under the terms of Crim. R. 46(A)(2) while prohibiting the use of terms under Crim. R. 46(A)(3) as always being beneficial to the defendant, is spurious. The underlying facts of the present case as well as those presented in *Fankhouser*, clearly establish that it would have been beneficial for the defendant to be able to utilize Crim. R. 46(A)(3).

Furthermore, Neal can demonstrate no legitimate governmental interest in allowing the accused to utilize Crim. R. 46(A)(2), while at the same time prohibiting the accused from utilizing Crim. R. 46(A)(3). The decision to post a ten-percent cash bond, or employ a surety to post the full amount, should be left to the defendant not to the Courts. This provides the defendant with the greatest coverage of his rights under the Ohio Constitution. Limiting a defendant's rights by requiring him to post cash under Crim. R. 46(A)(2) while prohibiting the posting of a surety under Crim. Rule 46(A)(3) is a violation of Section 9, Article I of the Ohio Constitution and a violation of Neal's statutory duties. Therefore Neal had a clear duty to act.

(D) No Adequate Legal Remedy

The relief Sylvester seeks is a Writ directing Neal to accept surety bonds proffered in accordance with Crim. R. 46(A)(3), whenever the trial court has allowed bond to be posted in accordance with Crim. R. 46(A)(2). Neal asserts that dismissal is proper because Sylvester has an adequate legal remedy in that Sylvester could simply move the trial court to modify the bond. Sylvester asserts that he has no adequate legal remedy, because Sylvester lacks standing to file a motion to modify the bond; only the defendant has such standing.

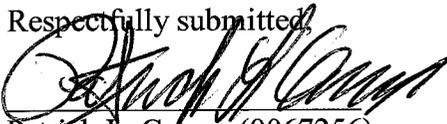
This case presents an issue of Constitutional importance, not only to Sylvester, but to all others similarly situated in the State of Ohio. Sylvester has no legal remedy to correct the refusal of Neal to accept a surety in a case where the Court has required the posting of a ten-percent cash only bond.

Cases where dismissal of a Mandamus action was appropriate have focused on whether there exists another legal remedy to obtain the relief requested other than a Mandamus action. Mandamus actions have been dismissed when the relief requested could be obtained by filing a direct appeal, by filing an administrative appeal, by filing a motion to intervene, etc. The crux of those decisions turns on whether there is a legal action that can be pursued to procure the relief sought. See, e.g. State ex rel Ms. Parsons Constr., Inc. v. Moyer (1995), 72 Ohio St. 3d 404, 406-407, 650 Ohio St. 3d 157, 159, 609 N.E. 2d 1266, State ex rel. Asti v. Ohio Dept. of Youth Servs. (2005), 107 Ohio St.3d 262, 838 N.E. 2d 658.

CONCLUSION

For the reasons set forth above, Sylvester asserts he has a clear right to the relief requested, that Neal has a clear duty to act and Sylvester has no adequate remedy to obtain the relief requested. Therefore this Court must deny Respondent's Motion to Dismiss.

Respectfully submitted,



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Attorney for the Defendant
116 Cleveland Ave Suite 702
Canton, Ohio 44702
330-454-9960
330-454-9979 fax

CERTIFICATE OF SERVICE

On December 24, 2012, a true and accurate copy of the forgoing was served on Attorney for the Respondent, Nathan R. Shaker, Wayne County Prosecutor's Office 115 West Liberty St., Wooster, Ohio 44691 via e-mail and by regular U.S. Mail.

IN THE WAYNE COUNTY COMMON PLEAS COURT

STATE OF OHIO

CASE NO. 11 CR 0347

vs.

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

FILED IN COURT
11 JUN 27 AM 11:36
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

Unsecured Appearance of \$ _____

10 % of an Appearance Bond of \$5,000.-

Cash Only of _____

COPY TO ALL COUNSEL

MAILED

Regular

Certified

Placed in box

By

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

Unsecured Appearance of \$ _____

10 % of an Appearance bond of \$5,000

Cash Only of _____

Surety Bond of _____

Special Conditions _____

JOURNALIZED

JUN 27 2011

TIM NEAL, CLERK
WAYNE COUNTY, OHIO

[Signature]
Judge