

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO *ex rel*,
ANTHONY SYLVESTER

Relator,

v.

TIM NEAL,
WAYNE COUNTY CLERK OF COURTS

Respondent.

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: CASE NO. 2012-1742
: Original Action in Mandamus
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REPLY BRIEF OF AMICUS CURIAE AMERICAN BAIL COALITION

Nathan R. Shaker (0079302)
*Counsel of Record
Daniel R. Lutz (0038486)
Wayne County Prosecuting Attorney
Assistant Prosecuting Attorney
Counsel of Record
115 West Liberty Street
Wooster, Ohio 44691
Telephone: 330.262.3030
Fax: 330.287.5412
Attorneys for Respondent Tim Neal

Patrick L. Cusma (0067256)
*Counsel of Record
116 Cleveland Avenue, Suite 702
Canton, Ohio 44702
Telephone: 330.454.9960
Fax: 330.454.9979
Attorney for Relator, Anthony Sylvester

Gregory P. Barwell (0070545)
*Counsel of Record
Quinn M. Schmiede (0085638)
Wesp/Barwell, LLC
6400 Riverside Drive, Suite D
Dublin, Ohio 43017
Telephone: 614.341.7576
Fax: 614.388.5693
Attorneys for Amici

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I. TABLE OF AUTHORITIES

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II. ARGUMENT

Respondent's brief fails to address Relator's constitutional arguments, thus disregarding fundamental legal precedents to advance their arguments. Instead, Respondent relies on inapposite state cases involving interpretation of a surety based upon their states' constitutional language. As will be advanced in the argument below, these foreign decisions have no place in the well-established precedent of Ohio constitutional interpretation set forth by this Court.

This matter is simple and the Relator and Amici's position is consistent with previous holdings of this Court that "cash-only" bonds are unconstitutional unless the accused is allowed to exercise his or her constitutional right to enlist a surety to post bail on his or her behalf. This Court has previously held that "the only apparent purpose in requiring a 'cash only' bond to the exclusion of the other forms provided in Crim.R. 46(C)(4) is to restrict the accused's access to a surety and, thus, to detain the accused in violation of Section 9, Article I. We found such a practice inappropriate in *State ex rel. Baker v. Troutman*, supra, and reaffirm that finding here." *State ex rel. Jones v. Hendon, et. al.*, 66 Ohio St.3d 115, 609 N.E.2d 541 (1993); see also *State ex rel. Baker v. Troutman*, 50 Ohio St. 3d 270, 272 (Ohio 1990) (Under Section 9, Article I, a criminal defendant, except a defendant in a capital case, has a right to nonexcessive bail on approval of sufficient sureties.); *Smith v. Leis*, 106 Ohio St.3d 309 (2005) (this Court held that "cash-only" bail violates both Section 9, Article I of the Ohio Constitution and Crim.R. 46, as amended).

A. This Court does not have to decide that Crim.R. 46 (A)(2) violates the Ohio Constitution.

The American Bail Coalition believes that the question posed by Respondent does not accurately reflect the argument put forth by the Relator. The question should read as follows:

Is forcing a defendant to post a 10% cash-only bond under Crim.R. 46 (A)(2), instead of allowing the defendant to post the full amount through a surety, a violation of the defendant's constitutional right?

The trial courts in Licking and Wayne County are failing to follow this Court's holding in *Jones v. Hendon* and *Smith v. Leis* by not permitting an accused to post a surety for the full amount of bond after it is set by the court. The holding in *Smith* is plain and unambiguous "[a]ccordingly, we find that where a judge imposes a bond as a condition of release under Crim.R. 46(C)(4), the judge's discretion is limited to setting the amount of the bond. *Once that amount is set, and the accused exercises his constitutional right to enlist a surety to post bail on his behalf, that being one of the options set forth in Crim.R. 46(C)(4), the clerk of courts must accept a surety bond to secure the defendant's release, provided the sureties thereon are otherwise sufficient and solvent.*" (Emphasis added) *Smith* at ¶36, quoting *Jones v. Hendon*, at 118.

It is apparent that the trial courts in Wayne and Licking County rely on the tortured interpretation of the Supreme Court's decision in *Smith v. Leis* by the Eleventh District Court of Appeals in *State ex rel. Williams v. Fankhauser*, 11th Dist. No. 2006-P-0006, 2006-Ohio-1170. The discretion of the trial court is to set an amount of bond and then it is up to the accused to determine whether they would like to deposit that amount in cash, use a surety or if the court provides - 10% of the bond. The trial court unequivocally cannot require an individual to deposit any sum of cash without allowing the individual to use a surety otherwise. Therefore, Crim.R. 46(A)(2) does not violate

Ohio's constitution if it works in concert with the other options provided in Crim.R. 46(A).

B. Section 9, Article I of the Ohio Constitution prohibits a trial court from requiring a defendant to post a “cash-only” bond pursuant to Criminal Rule 46(A)(2).

Respondent not only fails to understand the constitutional issue at hand in the present case, Respondent also fails to recognize the holding of this Court in *Smith v. Leis*. Respondent states in his brief that “this Court decided in *Smith v. Leis* and held that Article I, Section 9, also amended in 1998, was an Ohio guarantee that every person shall be bailable by a third party surety, a commercial bail bondsman.” (Respondent Brief, p. 4). That is not at all what this Court decided in *Smith*, the Court clearly held that a cash-only bail violates the Ohio constitution and Criminal R. 46. *Smith* at ¶14. The Court made no mention of a guarantee that every person shall be bailable by a commercial bail bondsman and that is not the position of the Relator or Amici. Respondent's statement is a red herring. The issue in this matter and the previous cases of *Smith* and *Jones*, is whether Ohio's Constitutional guarantee that all persons shall be bailable by sufficient sureties, is violated when trial courts mandate a cash-only bond.

Ohio's constitutional provision which provides that every accused be bailable by sufficient sureties allows the accused to be free pending a final determination of his or her innocence. Allowing the accused to be free pending trial is the primary purpose of bail and thus “sufficient sureties” is for the benefit of the accused, not the trial court. In order to protect the public and ensure adherence to the bail, the trial court has authority to post conditions outlined in Crim.R. 46(B), but this does not include cash-only security. This Court stated in *State ex rel. Jones v. Hendon, et. al.*, that “the only apparent purpose

in requiring a "cash only" bond to the exclusion of the other forms provided in [the criminal rule] is to restrict the accused's access to a surety and, thus, to detain the accused in violation of Section 9, Article I." *Jones* at 118.

The Respondent attempts to persuade this Court to follow other foreign state's judicial rulings regarding the definition of "surety." Respondent states that more than two-thirds of the states have a constitutional provision similar to Ohio's provision which ensures that defendants must be bailable by sufficient sureties. (Respondent Brief, p. 6). Respondent points specifically to Missouri Supreme Court's decision in *State v. Jackson*, 384 S.W.3d 208 (Mo. 2012) and Iowa Supreme Court's decision in *State v. Briggs*, 666 N.W. 2d 573 (Iowa 2003) to support its conclusion that "sufficient sureties" does not require a surety by a third party. Respondent's analysis of these cases incorrectly interprets the holding of the Supreme Court of Ohio in *Smith v. Leis*. Furthermore, Respondent fails to acknowledge that the *Smith v. Leis* decision occurred after *Briggs* and this Court considered that decision and several others throughout the country when making its decision that a cash-only bail would violate the constitution and Criminal R. 46.

This Court recognized and discussed that other courts reached similar conclusions that cash-only bail violates a constitutional right to be bailable by sufficient sureties. *Smith* at ¶65 (discussing *State v. Brooks*, 604 N.W.2d 345, 354 (Minn. 2000); *State v. Rodriguez*, 192 Mont. 411, 418-419 (Mont 1981); *Lewis Bail Bond Co v. Madison Cty Gen. Sessions Court* 1997 Tenn. App. LEXIS 784, at 12 (Tenn 1997); *State v. Golden*, 546 So.2d 501, 503 (La. App. 1989)). Like the Respondent, this Court noted Iowa's decision in *Briggs* and the Alabama case that follows *Briggs* and still held that cash-only

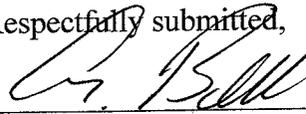
bonds violates Ohio's Constitution. *Id.* The Court found that despite the holding in *Briggs*, the language of Section 9, Article I, the explicit purpose of the 1998 amendment, the persuasive precedent in the other line of Ohio and foreign cases, and the lack of "contrary unambiguous intent by the General Assembly" ensured the Court that its prior precedent in *Baker* and *Jones* remained good law. *Id.* at ¶66. The Court continued to confirm that Section 9, Article I prohibits a cash-only bail because it infringes upon a defendant's constitutional right to bail by sufficient sureties. *Id.*

Respondent relies on the Missouri case law because it is the most recent. However, no new case law, statute or issue arose in Ohio between the *Smith* decision and the Missouri decision in *Jackson* in 2012 to overturn the valid precedent in *Smith*. In fact, the Supreme Court of Missouri stated in its decision that *Jackson* was the first opportunity they had to interpret their constitutional provision directly. *Jackson* at 212. This Court, on the other hand, has explored Section 9, Article I, several times, and, in *Smith* upheld its prior rulings in *Baker* and *Jones*. *Smith* at ¶66. There exists no reason why this Court, experienced and well-versed in Ohio's constitution and this specific provision, would overturn good case-law (thrice affirmed) that protects an accused's constitutional right to be bailable by sufficient sureties.

III. CONCLUSION

For the reasons set forth above, Amici respectfully urge the Court to prohibit all trial courts from setting a "cash-only" bond without permitting the individual to utilize a surety to post the full amount, and to grant a writ of mandamus.

Respectfully submitted,



Gregory P. Barwell (0070545)

*Counsel of Record

Quinn M. Schmiede (0085638)

Wesp/Barwell, LLC

6400 Riverside Drive, Suite D

Dublin, Ohio 43017

Telephone: 614.341.7576

Fax: 614.540.7466

Attorneys for Amici

IV. CERTIFICATE OF SERVICE

I certify that on April 4, 2013, I sent the foregoing to the below counsel of record, via U.S. Mail.

Daniel R. Lutz (0038486)
Wayne County Prosecuting Attorney
Nathan R. Shaker (0079302)
Assistant Prosecuting Attorney
Counsel of Record
115 West Liberty Street
Wooster, Ohio 44691
Phone: 330.262.3030
Fax: 330.287.5412
Attorneys for Respondent Tim Neal

Patrick L. Cusma (0067256)
116 Cleveland Avenue, Suite 702
Canton, Ohio 44702
Telephone: 330.454.9960
Fax: 330.454.9979
Attorney for Relator, Anthony Sylvester



Gregory P. Barwell