

OPINION NO. 87-016**Syllabus:**

Although Ohio law provides procedures for bringing a person before the court after a failure to appear when released on a form of bail other than a release on personal recognizance pursuant to R.C. 2937.29, there is no authority to arrest such person for a separate offense of failure to appear similar to that provided in R.C. 2937.43 or to impose penalties analogous to those set forth in R.C. 2937.99. When a person has been released on a form of bail other than a release on personal recognizance, the court is limited to the forfeiture of bail proceedings set forth in R.C. 2937.35-.39 as punishment for the failure to appear, but a writ of *habeas corpus* may be issued to secure that person's appearance.

To: Stephen M. Stern, Jefferson County Prosecuting Attorney, Steubenville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 2, 1987

I have before me your request for my opinion regarding which procedure should be employed when an accused released on bail fails to appear in court as scheduled. More specifically, you have indicated that when an accused released on his own recognizance, pursuant to R.C. 2937.29, thereafter fails to appear, the court having jurisdiction may issue a warrant for his arrest, R.C. 2937.43, and impose a penalty as set forth in R.C. 2937.99. You have inquired whether a court may proceed against the accused released on bail in a manner analogous to that provided by R.C. 2937.43 and R.C. 2937.99 for persons failing to appear after a release on personal recognizance, or whether the court is limited to the forfeiture of bail proceedings set forth in R.C. 2937.35-.39.

In order to analyze your question it is necessary to distinguish a release on bail from a release on personal recognizance. R.C. 2937.22 defines bail as "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 further provides that bail may take any of the following forms:

(A) The deposit of cash by the accused or by some other person for him;

(B) The deposit by the accused or by some other person for him in form of bonds of the United States, this state, or any political subdivision thereof in a face amount equal to the sum set by the court or magistrate. In case of bonds not negotiable by delivery such bonds shall be properly endorsed for transfer.

(C) The written undertaking by one or more persons to forfeit the sum of money set by the court or magistrate, if the accused is in default for appearance, which shall be known as a recognizance.

See generally 1970 Op. Att'y Gen. No. 70-036.

A release on personal recognizance is a form of bail in that it is a written undertaking¹ of a defendant as defined in R.C. 2937.22(C), see State v. Merlo, (unreported) No. 9904 (Ct. App. Summit County April 29, 1981). However, if the accused is released on personal recognizance but fails to appear, a violation of R.C. 2937.29 occurs. That section provides:

When from all the circumstances the court is of the opinion that the accused will appear as required, either before or after conviction, the accused may be released on his own recognizance. A failure to appear as required by such recognizance shall constitute an offense subject to the penalty provided in section 2937.99² of the Revised Code. (Footnote added.)

¹ See R.C. 2937.44 (providing suggested written forms for the recognizance of an accused or a witness).

² R.C. 2937.99 sets forth the penalties to be imposed for a failure to appear after having been released on a personal recognizance as follows:

Whoever fails to appear as required, after having been released pursuant to section 2937.29 of the Revised Code, shall:

(A) If the release was in connection with a charge of the commission of a felony or pending appeal after conviction of such felony, be fined not more than five thousand dollars or imprisoned in the penitentiary not less than one nor more than five years, or both;

(B) If the release was in connection with a charge of the commission of a misdemeanor, or for appearance as a witness, be fined not more than

R.C. 2937.43 authorizes the court to issue a warrant for the arrest of the accused under such circumstances. It reads:

Should the accused fail to appear as required, after having been released pursuant to section 2937.29 of the Revised Code, the court having jurisdiction at the time of such failure may, in addition to any other action provided by law, issue a warrant for the arrest of such accused. (Emphasis added.)

When an accused released on bail fails to appear, R.C. 2937.35-.39 provide for forfeiture of the bail. The cash sum deposited may be distributed as a fine for the offense, R.C. 2937.36(A). The securities deposited may be sold, R.C. 2937.36(B), and dealt with as forfeited cash bail. Upon forfeiture of a secured recognizance, the accused and each surety shall be notified of the default and given an opportunity to show cause "why judgment should not be entered against each of them for the penalty stated in the recognizance." R.C. 2937.36(C). In addition, R.C. 2937.37 provides for judgment against a surety on a recognizance and levy on his personal property.

Unlike the secured recognizance, a release on "personal recognizance" denotes a pretrial release "based on the person's own promise that he will show up for trial." Black's Law Dictionary 1030 (5th ed. 1979). In other words, the term indicates a form of release in which no bond is required; the "defendant acknowledges personally without sureties his obligation to appear in court at the next hearing or trial date of his case." Id. Thus, the Revised Code provides for two procedures: one to be followed when an accused fails to appear after having been released on bail, and another to be followed when an accused fails to appear after having been released on his own recognizance.³

The separate treatment afforded for a failure to appear after release on a personal recognizance is consistent with the

one thousand dollars or imprisoned not more than one year, or both.

This section does not apply to misdemeanors and related ordinance offenses arising under Chapters 4501., 4503., 4505., 4509., 4511., 4513., 4517., 4549., and 5577. of the Revised Code, except that this section does apply to violations of sections 4511.19, 4549.02, and 4549.021 of the Revised Code and ordinance offenses related to such sections. (Emphasis added.)

³ I note that one released on a personal recognizance shall, in addition, have the forfeiture proceedings instituted against him if he has given bail. See Crim. R. 46(K) ("any person released pursuant to any provision of this rule" [which includes a release on personal recognizance] who fails to appear shall forfeit bail and "[a]ny person released on his personal recognizance shall, in addition, be deemed to have been released pursuant to R.C. 2937.29") (emphasis added). Thus, a failure to appear on a personal recognizance under R.C. 2937.29 permits the institution of forfeiture proceedings and creates a separate offense punishable by R.C. 2937.99.

provisions of R. Crim. P. 46.⁴ R. Crim. P. 46(A) provides, in part, that "[a]ll persons are entitled to bail, except in capital cases where the proof is evident or the presumption great." R. Crim. P. 46(B) provides for pretrial release where summons has issued and the defendant has appeared by directing that "the judge shall release the defendant on his personal recognizance, or upon the execution of an unsecured appearance bond." R. Crim. P. 46(C) and (D) provide that a defendant shall be released on his personal recognizance or upon the execution of an unsecured appearance bond unless it is determined that such release will not assure his appearance, or if the person "has a history of failure to appear when required," R. Crim. P. 46(D). In the event that a release on personal recognizance or unsecured appearance bond is determined to be insufficient to assure an appearance, more stringent conditions may be applied to the release. For example, R. Crim. P. 46(C) provides that in felony cases any combination of the following conditions of release may be imposed for the purpose of assuring the appearance of the person for trial:

- (1) Place the person in the custody of a designated person or organization agreeing to supervise him;
- (2) Place restrictions on the travel, association, or place of abode of the person during the period of release;
- (3) Require the execution of an appearance bond in a specified amount, and the deposit with the clerk of the court before which the proceeding is pending of either \$25.00 or a sum of money equal to ten percent of the amount of the bond, whichever is greater. Ninety percent of the deposit shall be returned upon the performance of the conditions of the appearance bond;
- (4) Require the execution of a bail bond with sufficient solvent sureties, or the execution of a bond secured by real estate in the county, or the deposit of cash or the securities allowed by law in lieu thereof, or;
- (5) Impose any other constitutional condition considered reasonably necessary to assure appearance.

R. Crim. P. 46(D) sets forth similar conditions which may be applied to the pretrial release of one accused of a misdemeanor when it is determined that a release on personal recognizance "will not reasonably assure appearance as required" or if the person "has a history of failure to appear" or poses "a danger to himself or others if released immediately." R. Crim. P. 46

⁴ The Criminal Rules were promulgated by the Ohio Supreme Court pursuant to Ohio Const. art. IV, §5(B), which provides, in part: "The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right....All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Since R. Crim. P. 46 became effective July 1, 1973, see R. Crim. P. 59, the rule supersedes any conflicting statute which was enacted prior to the effective date of the Criminal Rules. See generally 1981 Op. Att'y Gen. No. 81-091.

thus allows for release on personal recognizance or unsecured appearance bond as distinguished from the conditioned forms of release. However, R. Crim. P. 46(K), imposes the threat of a separate criminal charge, R.C. 2937.29, carrying the criminal sanctions set forth in R.C. 2937.99, for an accused released on personal recognizance. R. Crim. P. 46(K) establishes the following sanctions:

Any person released pursuant to any provision of this rule who fails to appear before any court as required, is subject to the punishment provided by law, and any bail given for his release shall be forfeit.

Any person released on his personal recognizance shall, in addition, be deemed to have been released pursuant to R.C. 2937.29. (Emphasis added.)

The emphasized portion of R. Crim. P. 46(K) illustrates that R.C. 2937.29 is intended to have continued effectiveness, even after adoption of the Criminal Rules. See note 4, *supra*. I conclude, therefore, that R.C. 2937.29 is consistent with R. Crim. P. 46. The first paragraph of R. Crim. P. 46(K) permits the forfeiture of bail proceedings to be instituted against "[a]ny person released pursuant to any provision of this rule," including a release on personal recognizance. There is no authority, however, to proceed under R.C. 2937.43 and R.C. 2937.99 against one who fails to appear after a release on a form of bail other than a personal recognizance.⁵ Those

⁵ Many states have enacted statutes similar to R.C. 2937.99 and R. Crim. P. 46 as a bail reform measure to eliminate or restrict the activities of bail bondsmen whose operations had, in the past, been largely uncontrolled. See generally Murphy, Revision of State Bail Laws, 32 Ohio State L. J. (1971). For example, in 1964 Illinois revised its bail bond statutes and included authorization to release an accused on his own recognizance. The revision included a statement of legislative intent: "[t]his section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused." Ill. Ann. Stat. Ch. 38, §110-2 (Smith-Hurd 1970); *Id.* R. Crim. P. 46 exhibits a preference for a release on personal recognizance or upon the execution of an unsecured appearance bond unless it is determined that such release will not assure the appearance of the person as required. See 2 O. Schroeder - L. Katz, Ohio Criminal Law Practice and Forms (1974) (author's discussion following R. Crim. P. 46). In order to encourage use of the personal recognizance, R.C. 2937.99 and R. Crim. P. 46(K) allow an accused to be charged with a separate criminal offense which carries the criminal sanctions set forth in R.C. 2937.99, thus alleviating, in many cases, the need to require a secured bond. If R.C. 2937.43 and R.C. 2937.99 are construed to permit their application against persons failing to appear after having been released on other forms of bail, it would clearly defeat the apparent intent of the legislature to encourage, where appropriate, use of the release on personal recognizance or unsecured appearance bond and the imposition of criminal sanctions instead of the secured forms of release involving financial loss through forfeiture.

sections apply expressly to a release on personal recognizance under R.C. 2937.29 only, and make no mention of their applicability in the event that an accused is released on another form of bail. It is axiomatic that while the jurisdiction and power of the court to admit to bail are conferred by the Ohio Constitution, such jurisdiction and power must be exercised in the mode pointed out by rule or statute. State v. Clark, 15 Ohio 595 (1846); see R. Crim. P. 46, R.C. Chapter 2937. In addition, Ohio law provides that "[s]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." R.C. 2901.04. Thus, to read R.C. 2937.29, R.C. 2937.43, and R.C. 2937.99, all of which expressly address the offense of failure to appear after a release on personal recognizance, as allowing their application to persons who fail to appear after release on other forms of bail would clearly violate two basic principles of Ohio law.

Although a person failing to appear after a release on bail may not be arrested for and charged with a separate offense of failure to appear, his presence before the court may be acquired through various means; most commonly upon the execution of a writ of capias. See generally Fricker v. Stokes, 22 Ohio St. 3d 202, 490 N.E.2d 577 (1986); State v. Pembaur, 9 Ohio St. 3d 136, 459 N.E.2d 217 (1984); State v. MacDonald, 48 Ohio St. 2d 66, 357 N.E.2d 40 (1976); Noble v. McMaken, 45 Ohio St. 2d 236, 344 N.E.2d 129 (1976); 1961 Op. Att'y Gen. No. 2214, p. 261. See also R. Crim. P. 4(F) (upon release after an arrest for a misdemeanor, a warrant may issue after defendant fails to appear in response to a summons as set forth in R. Crim. P. 4(C)(2)); R. Crim. P. 4.1 (providing an optional procedure for minor misdemeanor cases which includes the issuance of a citation ordering the defendant to appear at a stated time and place and informing the defendant that he may be arrested if he fails to appear at the time and place stated in the summons); R.C. 2935.26(A)(4)(a) (same); State v. Slatter, 66 Ohio St. 2d 452, 423 N.E.2d 100 (1981). Thus, a person who has failed to appear after having been released on bail may be brought before the court pursuant to one of the above procedures, but such person may not be arrested for and charged with the separate offense under R.C. 2937.29. In addition, there is no authority for the imposition of penalties similar to those found in R.C. 2937.99 in such a case. The express language of R.C. 2937.29, R.C. 2937.43 and R.C. 2937.99 indicates that the General Assembly intended to afford different treatment to persons who fail to appear after having been released on a personal recognizance and to persons released on other forms of bail.

It is, therefore, my opinion, and you are advised that although Ohio law provides procedures for bringing a person before the court after a failure to appear when released on a form of bail other than a release on personal recognizance pursuant to R.C. 2937.29, there is no authority to arrest such person for a separate offense of failure to appear similar to that provided in R.C. 2937.43 or to impose penalties analogous to those set forth in R.C. 2937.99. When a person has been released on a form of bail other than a release on personal recognizance, the court is limited to the forfeiture of bail proceedings set forth in R.C. 2937.35-.39 as punishment for the failure to appear, but a writ of capias may be issued to secure that person's appearance.