

OPINION NO. 92-010**Syllabus:**

An individual whose pretrial release is conditioned upon his remaining in his residence and being subject to supervision by law enforcement officers through an electronic monitoring device is not in detention, as defined by R.C. 2921.01(E), for purposes of R.C. 2921.34(A), and thus the individual does not violate R.C. 2921.34(A) when he removes his electronic monitoring device or leaves his residence without authority from the court.

To: Lee C. Falke, Montgomery County Prosecuting Attorney, Dayton, Ohio

By: Lee Fisher, Attorney General, March 31, 1992

You have requested an opinion relating to the pretrial release of individuals under an electronic home detention program. The opinion request letter states that

the Montgomery County Court of Common Pleas has established a pretrial electronic home detention program. Under this program, the court authorizes the pretrial release of an eligible individual accused of a criminal offense on his personal recognizance.¹ The individual's pretrial release, however, is conditioned upon his remaining in his residence and being subject to supervision by law enforcement officers through an electronic monitoring device. Based upon these facts, you have asked whether an individual granted pretrial release under an electronic home detention program violates R.C. 2921.34 when he removes his electronic monitoring device or leaves his residence without authority from the court.

The Offense Of Escape

R.C. 2921.34(A) defines the offense of escape as follows:

No person, knowing he is under detention or being reckless in that regard, shall purposely break or attempt to break such detention, or purposely fail to return to detention, either following temporary leave granted for a specific purpose or limited period, or at the time required when serving a sentence in intermittent confinement. (Emphasis added.)

Thus, absent an appropriate defense, an individual who knows he is under detention or is reckless in that regard and who purposely breaks or attempts to break such detention commits the offense of escape.

What Is Detention

Explicit in the language of R.C. 2921.34(A) is the rule that the offense of escape occurs when an individual knowingly breaks or attempts to break detention. For purposes of R.C. 2921.34(A),

"[d]etention" means arrest, or confinement in any facility for custody of persons charged with or convicted of crime or alleged or found to be delinquent or unruly, or detention for extradition or deportation. For a person confined in a county jail who participates in a county jail industry program pursuant to section 5147.30 of the Revised Code, "detention" includes time spent at an assigned work site and going to and from the work site. *Detention does not include supervision of probation or parole, nor constraint incidental to release on bail. (Emphasis added.)*

R.C. 2921.01(E). *See generally* R.C. 1.42 ("[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly"); *Woman's Int'l Bowling Congress v. Porterfield*, 25 Ohio St. 2d 271, 257 N.E.2d 781 (1971) (syllabus, paragraph two) ("[w]here a statute defines terms used therein which are applicable to the subject matter affected by the legislation, such definition controls in the application of the statute").

Thus, an individual under constraint incidental to release on bail is not under detention. R.C. 2921.01(E). A resolution of your specific question, therefore, turns on whether the condition of release that an individual remain in his residence and subject to supervision through an electronic monitoring device constitutes "constraint incidental to release on bail" rather than "detention."

¹ Your letter states that "[a] Defendant who is permitted to participate in [the electronic home detention program] is released from jail on a 'Conditional Own Recognizance' or 'COR' bond." There is no reference to a "conditional own recognizance bond" in either the Ohio Revised Code or the Ohio Rules of Criminal Procedure. A member of the staff of the Montgomery County Court of Common Pleas, however, has informed a member of my staff that an individual discharged from legal custody on a "conditional own recognizance bond" is released on his "personal recognizance," or his "own recognizance," pursuant to R. Crim. P. 46 or R.C. 2937.29.

Pretrial Release Under An Electronic Home Detention Program Does Not Constitute Detention

Pursuant to R. Crim. P. 46(A), all individuals "are entitled to bail, except in capital cases where the proof is evident or the presumption great." *Accord* Ohio Const. art. I, §9. 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." *See also* R. Crim. P. 46(A) ("[t]he purpose of bail is to insure that the defendant appears at all stages of the criminal proceedings"). An individual entitled to bail may be granted pretrial release as follows:

(C) Pretrial release in felony cases. Any person who is entitled to release under division (A), shall be released on his *personal recognizance* or upon the execution of an unsecured appearance bond in an amount specified by the judge or magistrate, unless the judge or magistrate determines that such release will not assure the appearance of the person as required....

(D) Pretrial release in misdemeanor cases. A person arrested for a misdemeanor and not released pursuant to Crim. R. 4(F), shall be released by the clerk of court, or if the clerk is not available the officer in charge of the facility to which the person is brought, on his *personal recognizance*, or upon the execution of an unsecured appearance bond in the amount specified in the bail schedule established by the court. (Emphasis added.)

R. Crim. P. 46. An individual entitled to bail, thus, may be granted pretrial release on his personal recognizance. *Id.*; *see also* R.C. 2937.29 ("[w]hen 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").

Implicit in the language of R. Crim. P. 46 is the proposition that personal recognizance is a form of bail. The language of R. Crim. P. 46 reveals plainly that the Ohio Supreme Court intended that personal recognizance serve as security for the appearance of an individual to appear at all stages of a criminal proceeding.² *See also* R.C. 2937.29. As stated above, bail is security for the appearance of an individual to appear at all stages of a criminal proceeding. R.C. 2937.22. Hence, insofar as personal recognizance is security for the appearance of an individual to appear at all stages of a criminal proceeding, personal recognizance constitutes a form of bail. *See State v. Merlo*, C.A. No. 9904, slip op. at 4-6 (Ct. App. Summit County Apr. 29, 1981) (unreported); 1987 Op. Att'y Gen. No. 87-016 at 2-99; *see also* 1987 Op. Att'y Gen. No. 87-062 at 2-382. *See generally Black's Law Dictionary* 1144, 1290 (6th ed. 1990) ("personal recognizance" is "[a] species of bail in which the defendant acknowledges personally without sureties his obligation to appear in court at the next hearing or trial date of his case").

If a court determines, however, that personal recognizance will not reasonably assure the appearance of the individual at all stages of a criminal proceeding, the court may, either in lieu of or in addition to release on personal recognizance,

impose any of the following conditions of release that will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

- (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;

² The Ohio Rules of Criminal Procedure are promulgated by the Ohio Supreme Court pursuant to Ohio Const. art. IV, §5(B).

(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;

(5) Impose any other constitutional condition considered reasonably necessary to assure appearance.

R. Crim. P. 46(C). Pursuant to this rule, a court is empowered to impose any constitutional condition of release considered reasonably necessary to assure the appearance of an individual at all stages of a criminal proceeding.

A condition of release imposed by a court pursuant to R. Crim. P. 46(C) is, therefore, directly related to an individual's release on bail. In other words, if an individual is not released on bail, it is unnecessary for a court to impose a condition of release that will reasonably assure the appearance of an individual at all stages of a criminal proceeding. A condition of release imposed by a court pursuant to R. Crim. P. 46(C), accordingly, constitutes constraint incidental to release on bail, not detention.

This conclusion is buttressed by the opinion in *State v. Diodati*, Case No. 90-A-1569 (Ct. App. Ashtabula County Aug. 30, 1991) (unreported). The court of appeals examined the definition of "detention" set forth in R.C. 2921.01(E) and stated:

The pertinent sentence in the definition of "detention" reads as follows:

"***Detention does not include supervision of probation or parole, nor constraint incidental to release on bail." R.C. 2921.01(E).

Appellant construes "constraint incidental to release on bail" as the temporary physical detainment that occurs prior to the actual posting of the bond.

It appears to this court that this portion of the definition must be construed as having nothing to do with any physical detainment. When read in context with the forepart of the sentence regarding probation and parole supervision, it is only logical to conclude that "constraint" in this context pertains to some type of restriction or condition which has been placed on an accused (which would be applicable after his formal release from custody) and would be a condition of his bail. These conditions of bail, such as restrictions on the travel, [association], or place of abode of the person during the period of release, are similar to the requirements to communicate and keep in contact with a probation or parole officer when a person is under such supervision.

Supervision of probation and parole, as well as constraint incidental to release, all may restrict a person's freedom to some degree, in some aspect while he is out on bail; but this type of limited intrusion or constraint does not fall within the intended meaning of detention. Therefore, it was expressly excluded in the definition. As such, when read in context, the more appropriate construction of "constraint incidental to release on bail", is that it refers to some restriction, limit or regulation placed on an accused as a condition of bail, during the actual release from jail.

State v. Diodati, slip op. at 6 and 7. The court in *Diodati*, thus, concluded that a restriction placed on an individual as a condition of bail is not "detention" within the meaning of R.C. 2921.01(E).

In light of the foregoing, it is apparent that the condition of release that an individual remain in his residence and subject to supervision through an electronic monitoring device imposed by the Montgomery County Court of Common Pleas constitutes constraint incidental to release on bail. As noted above, the individual is released on his personal recognizance, which is a form of bail. Furthermore, the condition of release with which you are concerned is directly related to the individual's release on his personal recognizance. Since constraint incidental to release on bail does not constitute detention, as defined in R.C. 2921.01(E), for purposes of R.C. 2921.34(A), an individual who removes his electronic monitoring device or leaves his residence without authority from the court is not breaking or attempting to break detention. Accordingly, an individual does not violate R.C. 2921.34(A) when he removes his electronic monitoring device or leaves his residence without authority from the court.

Conclusion

It is, therefore, my opinion, and you are hereby advised, that an individual whose pretrial release is conditioned upon his remaining in his residence and being subject to supervision by law enforcement officers through an electronic monitoring device is not in detention, as defined by R.C. 2921.01(E), for purposes of R.C. 2921.34(A), and thus the individual does not violate R.C. 2921.34(A) when he removes his electronic monitoring device or leaves his residence without authority from the court.