

OPINION NO. 70-089**Syllabus:**

1. If the court by Section 2947.061, Revised Code, determines that a formal hearing is required to decide whether the relief sought is to be granted or denied, such hearing may be conducted in any manner which the court determines will enable the court to reach a sound decision. Otherwise an ex-parte hearing may be conducted.

2. In such hearing it is necessary for the defendant to be present only if the court determines that his presence is necessary to ascertain facts and/or to receive his probationary sentence.

3. If the presence of the defendant is required by the court, the cost of transporting him from the penal institution should be assessed in accordance with the provisions of Sections 2949.14 to 2949.19, inclusive, of the Revised Code.

To: David A. Cutright, Ross County Pros. Atty., Chillicothe, Ohio
By: Paul W. Brown, Attorney General, July 24, 1970

I have before me your request for my opinion with re-

gard to certain aspects of Section 2947.061, Revised Code. Your request asks the following questions:

- "(1) What is the nature of the hearing which is required by such sections?
- "(2) Is it necessary for the defendant to be present at such hearing?
- "(3) If it is required that the defendant be present at such hearing, then who is to bear the cost of transporting the defendant from the penal institution to the hearing?"

The purpose of Section 2947.061, supra, is to enable a common pleas court to place a first offender in prison to insure that he becomes aware of the penalty that may be paid by a convicted felon and then, after the felon has had an opportunity to understand fully what prison life is, to suspend the prison sentence and place him on probation.

Section 2947.061, supra, provides that the petition for suspension must be filed not less than thirty days nor more than sixty days after the date that the sentence, which is sought to be suspended, begins to run. This provision is considered to be mandatory, and hence, jurisdictional.

A convicted felon has no statutory or constitutional right to receive the benefit of the provisions of this section. Since the granting of relief thereunder is completely discretionary with the sentencing court, the court may prescribe such procedures as are necessary to reach a sound decision.

Under normal circumstances the basis for such procedure is well known to the sentencing court prior to sentence and is based upon the investigation and recommendation of the court probation officer.

Section 2947.061, supra, also provides that the court shall hear a motion filed thereunder within sixty days after the filing thereof and shall enter its ruling within ten days thereafter. It appears that in amending this section to set time limits for hearings, the legislature intended to provide an orderly procedure for the implementation of the provisions thereof, namely, that if relief is to be granted at all, it shall be granted in due course. This time limitation is considered to be directly in effect.

Should the presence of the petitioner be required at a hearing, by the court, such hearing may be conducted in such manner as the court prescribes. Where the sentence is to be vacated and the defendant placed on probation, the court may well find it necessary for him to be present in court to receive the provisions of his probation. If, upon examination of the petitioner the court determines that it does not disclose adequate grounds to warrant a defendant's presence in court to testify as to newly discovered facts, or the court determines that a vacation of sentence is not indicated, the court then may determine the matter in an ex-parte manner without the presence of the petitioner.

Should the court set a hearing and direct the presence

of the defendant therein, the sheriff of the county should be ordered to deliver him into the court. The transportation of the defendant should be assessed as costs. Sections 2949.14 to 2949.19 inclusive, of the Revised Code, govern the collection thereof.

It is therefore my opinion and you are advised that:

1. If the court by Section 2947.061, Revised Code, determines that a formal hearing is required to decide whether the relief sought is to be granted or denied, such hearing may be conducted in any manner which the court determines will enable the court to reach a sound decision. Otherwise an ex-parte hearing may be conducted.

2. In such hearing it is necessary for the defendant to be present only if the court determines that his presence is necessary to ascertain facts and/or to receive his probationary sentence.

3. If the presence of the defendant is required by the court, the cost of transporting him from the penal institution should be assessed in accordance with the provisions of Sections 2949.14 to 2949.19, inclusive, of the Revised Code.