IN THE SUPREME COURT OF OHIO

CASE NO. 2021-0742

Appeal from the Court of Appeals
First Appellate District
Hamilton County, Ohio
Case No. C-200153

ALLEGHENY CASUALTY COMPANY

Appellant

vs.

STATE OF OHIO

Appellee

MERIT BRIEF OF APPELLANT ALLEGHENY CASUALTY COMPANY

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INTRODUCTION

This case is before the Court to address two issues. The first issue to be determined is whether Ohio law permits a trial court to enter judgment against a surety on a bond forfeiture when the trial court has failed to comply with the notice mandates of R.C. 2937.36(C). Additionally, the Court is asked to determine whether limiting the defense of impossibility of performance to in-state police actions is discriminatory to businesses writing bonds in the State of Ohio. In answering these questions, Appellant, Allegheny Casualty Company, asks the Court to find that a court's violations of the mandates of R.C. 2937.36(C) are a denial of a surety's due process rights. Appellant also asks the Court to find that the defense of impossibility of performance applies when the accused who is released on a bond fails to appear in court due to incarceration, regardless of whether the incarceration is due to an in-state or out-of-state police action.

Bail is a form of security that can be in the form of cash or a recognizance. Courts are permitted to accept a surety bond, a form of recognizance, as bail. Should the accused fail to appear in court when ordered, the trial court can order the bail forfeited. If the bail forfeited is a recognizance such as a surety bond, the court must take additional action outlined in R.C. 2937.36(C). The court must notify the accused and the surety and give them a date certain to show cause why a judgment should not be entered for the penalty stated in the recognizance. If no good cause is shown, then the court or magistrate may enter judgment against the surety, in an amount not exceeding the penalty of the bond as set in the adjudication of forfeiture.

R.C. 2937.36(C) was amended in 2011 to include a fifteen (15) day deadline for notice to the accused and each surety of the declaration of forfeiture. No timeline existed in the previous version of the statute. The date certain to show cause why judgment should not be entered against the surety as penalty was also amended, extending the timeframe from "not less than twenty nor

more than thirty days from the date of mailing notice" to "not less than forty-five nor more than sixty days from the date of mailing notice". It is evident the legislature considered these time lines thoughtfully when amending the statute. The statute was undoubtedly amended to provide courts with guidance and uniformity as to notification to sureties regarding the forfeiture of bonds, as well as providing sureties with time to locate and produce a non-appearing defendant prior to a show cause hearing.

The purpose of R.C. 2937.36(C) is to afford due process by allowing the surety to be heard prior to the forfeiture. If adulteration of the plain terms of R.C. 2937.36 is allowed, the surety's due process rights at their core are adversely affected. The use of the word "shall" by the General Assembly indicates that the obligations in R.C. 2937.36(C) are mandatory. Yet the First District Court of Appeals' decision renders the timing requirements of R.C. 2937.36(C) meaningless and adversely affects every surety and bail bond company operating in Ohio. The public has an interest in a predictable procedure for administering bail bonds, and the First District's decision runs afoul of such concepts.

In this case the First District declared that the notice mandates of R.C. 2937.36(C) can be discarded if no independent prejudice can be shown. *See State v. Jackson*, 1st Dist. Hamilton No. C-200153, 2021-Ohio-1646, ¶ 22.

The First District's decision is in direct conflict with the Fifth District Court of Appeals decisions in *State v. Dye*, 5th Dist. Fairfield No. 17 CA 00045, 2018-Ohio-4551 and *State v. Kinser*, 5th Dist. Muskingum No. CT2019-0064, 2020-Ohio-1219. In *Dye* and *Kinser*, the Fifth District found that the trial court erred when it entered judgment against the sureties on bail bonds despite failing to abide by the statutory mandates of R.C. 2937.36(C). No finding of prejudice was required.

While other Ohio appellate courts have likewise required a finding of prejudice, unlike the First District, the Ninth District found prejudice based on the delayed notice of the declaration of forfeiture. *See State of Ohio v. C.L.* 9th Dist. Lorain No. 20CA011699, 2021-Ohio-3396. The Twelfth District found that the impossibility of producing the accused at a hearing due to her incarceration in another jurisdiction was sufficient to show prejudice. *See State v. Wane,* 12th Dist. Butler Nos. CA2020-01-010, CA2020-01-011, CA2020-01-014 and CA2020-01-015, 2020-Ohio-4874. Here, the First District rejected the position that prejudice was shown because the accused's incarceration in another jurisdiction rendered it impossible to produce him at the show cause hearing. The First District provides no guidance as to what must be shown by a surety to establish prejudice. Due to the split in Ohio's appellate courts, guidance from this Court is warranted.

The First District's decision gives trial courts latitude to disregard the statute and set their own deadlines for notices. If the decision is left to stand, the timing of notifying a surety of bond forfeiture could depend on which judge is assigned to a case. Each of Ohio's individual courts should not have unfettered discretion as to how or if statutory guidelines will be applied when notifying surety of a forfeited bond.

The First District's decision undermines the concepts of fairness and inserts unpredictability in the administration of bail bonds. The appellate court's opinion usurps the role of the General Assembly as the arbiter of Ohio's public policy by ignoring specific notice provisions in R.C. 2937.36(C) while also injecting an additional requirement – a finding of prejudice before a surety can be exonerated from a rendered judgment on a bond forfeiture. Requiring a finding of prejudice before any relief can be afforded to a surety (a requirement that is undefined by the appellate court and that the legislature never intended), despite a lack of notice

as expressly prescribed by the General Assembly, should not be the law in the First District or elsewhere in Ohio. To protect the procedural due process rights of sureties, the law in Ohio should be that failure to comply with the timing requirements in R.C. 2937.36(C) is sufficient to require a reversal of a judgment against a surety on a bond forfeiture.

The First District's justification for disregarding the importance of the notice deadlines set forth in R.C. 2937.36(C) was that the performance promised by Appellant was legally impossible. The appellate court acknowledged that the accused "was incarcerated in Kentucky during [the] entire [notice] period, so there was nothing Allegheny could have done differently." *State v. Jackson*, 2021-Ohio-1646, ¶ 22.

While production of the body of the defendant at the show cause hearing contemplated under R.C. 2937.36(C) constitutes a showing of good cause, production of the defendant's body is not the only means of establishing good cause why judgment should not be entered against the surety. *See State v. Holmes*, 57 Ohio St. 3d 11, 13, 564 N.E.2d 1066 (1991), citing, *State v. Hughes*, 27 Ohio St.3d 19, 20, 27, 501 N.E.2d 622 (1986) ("a surety may be exonerated if good cause 'by production of the body of the accused *or otherwise' is shown*.") Impossibility of performance serves as good cause why judgment should not be entered against a surety. The Second and Twelfth appellate districts have found that one way to show good cause is to present evidence of the accused's incarceration in another jurisdiction in Ohio. *See State v. Yount*, 175 Ohio App.3d 733, 2008-Ohio-1155, 889 N.E.2d 162 (2d Dist.); *Wane*. When a defendant is incarcerated in another jurisdiction, the defendant's appearance is forbidden by law and therefore the promised performance is impossible. This reasoning comports with the basic rules governing the performance of contracts, and a surety bond is a contract to which such rules should apply. *See State v. Scherer*, 108 Ohio App.3d 586, 591, 671 N.E.2d 545 (2d Dist.1995).

The First and Fourth districts have held otherwise when the accused is incarcerated outside of the State of Ohio. *See, Jackson*; *State v. Lott*, 1st Dist. Hamilton No. C-130543, 2014-Ohio-3404 (incarceration in Indiana did not render performance legally impossible); *State v. McKinney*, 4th Dist. Pickaway No. 20CA17, 2021-Ohio-3108 (denying a surety relief due to impossible performance when the accused at issue was incarcerated in Michigan); *State v. Sexton*, 132 Ohio App.3d 791, 794, 726 N.E.2d 554 (4th Dist.1999) (holding good cause did not exist to excuse a surety's failure to produce the defendant, who had violated a condition of his bond by voluntarily leaving Ohio without permission, and was then subsequently incarcerated in South Carolina).

In rejecting Appellant's reliance on *Yount* and *Wane* in this case, the First District implied that had the accused been incarcerated in another county *in Ohio,* such intrastate incarceration could serve as good cause for why a judgment of forfeiture should not be entered against surety. *See Jackson* at ¶¶ 14-16, distinguishing *Yount* and *Wane*. However, because the accused was arrested a mere 19 miles away from Cincinnati, the appellate court determined that the Kentucky-based incarceration, unlike an Ohio incarceration, does not amount to impossibility of performance. This distinction without difference is discriminatory to businesses writing bonds in the State of Ohio.

The message to sureties from Ohio's courts cannot be that forfeiture of a bond despite impossibility of performance is simply the price of doing business in Ohio. Public policy calls for the encouragement of bondsman to enter into bail contracts in order to facilitate the release of defendants whose guilt has yet to be determined and to relieve the state of the cost of providing for the defendants while in jail. Discouraging sureties from assisting Ohioans is a step in the wrong direction. This is the incorrect message to send especially when criminal justice reform is such an important matter of public policy that it is being addressed by Ohio's General Assembly in a

bipartisan manner. A lack of access to bail bonds will have a direct negative impact on accused Ohioans' ability to return to their homes, jobs, and families before trial. Legislative efforts are being made to shrink jail populations and reform harmful systems in which pretrial detention is often predicated on how much money a person has. The First District's decision runs afoul of these efforts by discouraging sureties and bail bond companies from doing business in Ohio.

Exoneration of sureties from liability due to bond forfeiture when a defendant is incarcerated in an out-of-state jurisdiction is the current trend among states as diverse as California and Texas. In fact the legislatures of at least fifteen states have established explicitly by statute that a bail-bond surety is, or at least may be, entitled to relief from liability where a defendant's appearance is prevented by incarceration in another jurisdiction. Courts of at least six states have held that sureties were entitled to at least partial, if not full relief under such circumstances. The law in Ohio should be that judgment on a bond forfeiture will not lie when a surety shows good cause for defendant's failure to appear in court due to incarceration in any jurisdiction in the United States.

In sum, Appellant, Allegheny Casualty Company, seeks reversal of the First District's decision because it is wrongly decided and prevents sureties like Appellant from practically protecting its interests. Appellant respectfully asks the Court to adopt its propositions of law and find that a surety is denied procedural due process when a court fails to abide by the notice mandates of R.C. 2937.36(C). Additionally, the law in Ohio should be that a surety should be exonerated from liability on a forfeited bond based on impossibility of performance if the surety cannot produce an accused when ordered to do so because the accused is incarcerated in any jurisdiction in the United States. Impossibility of performance should apply as good cause for

failure of the surety to perform regardless of whether the incarceration is due to an in-state or out-of-state police action.

STATEMENT OF THE CASE AND FACTS

Jaquan Jackson was indicted for aggravated possession of drugs and aggravated trafficking in drugs in November of 2018 in Hamilton County Court of Common Pleas.

Allegheny Casualty Company posted a $50,000 surety bond in this matter on or about November 8, 2018. (Supp. 1.) Jackson pled guilty to the charges on March 22, 2019. (Supp. 2-4.) Sentencing was set for April 17, 2019. (Supp. 5.)

On or about March 23, 2019, the day after he pled to the charges in the Hamilton County Court of Common Pleas, Jackson was arrested and jailed in the Campbell County Detention Center in Covington, Kentucky on drug possession and weapon and driving offenses. (Supp. 11-14).

A review of the Index of Record on Appeal filed with this Court shows missing critical information and a failure to follow the precise procedures set forth in R.C. 2937.36(C). For example, no entry of failure to appear at the sentencing hearing is noted on the docket on April 17, 2019, in fact, there is no docket entry on or relating to April 17, 2019 whatsoever. (Supp. 18.) Additionally, although the First District states that the "sentencing hearing was continued to May 21, 2019" (*Jackson* at ¶ 3), there is no entry relating to the continuation on the docket nor is there evidence that notice of the continued sentencing date was provided to anyone. (Supp. 18.) However, on May 21, 2019, the Hamilton County Court of Common Pleas issued a capias and ordered the bond forfeited. (Supp. 20.)

On July 3, 2019, forty-three days after the order forfeiting the bond, the Hamilton County Court of Common Pleas filed a Notice to Surety. (Supp. 21.) The Notice to Surety stated that the bond had been forfeited and it ordered Allegheny Casualty Company and bail bondsman Danny

Seifu to produce Jackson's body or show cause why judgment should not be entered against them pursuant to R.C. 2937.36. The court set a hearing for September 4, 2019. (Supp. 21.)

While the Notice to Surety stated that regular mail service was to be made on July 3, the Index of Record on Appeal suggests that the Clerk filed a certificate of regular mail as to Seifu and Allegheny Casualty Company five days later, on July 8, 2019, forty-eight days after the May 21, 2019 declaration of forfeiture of the bond. (Supp. 18.)

On July 18, 2019, the Hamilton County Court of Common Pleas again filed the Notice to Surety with regular mail service requested. (Supp. 22.) The Index of Record on Appeal suggests that the Clerk filed a certificate of regular mail as to Seifu and Allegheny Casualty Company on July 19, 2019, fifty-nine days after the declaration of forfeiture. (Supp. 18.)

Both notices sent to Seifu were returned undelivered. (Supp. 23.) In fact, Seifu was unavailable during this timeframe because he had been indicted in a criminal matter in Federal Court. *See United States v. Seifu,* S.D.Ohio No. 1:19-cr-00049-MRB-1. The fact that Seifu was not protecting Allegheny Casualty Company's interests made the following of proper notice procedures even more vital to Appellant.

Although no entry appears on the docket on September 4, 2019, the September 27, 2019 Magistrate's decision on judgment indicates that the show-cause hearing was held on September 4, 2019. (Supp. 24.) On September 27, 2019, the Magistrate entered judgment on the bond forfeiture. (Supp. 24.)

On October 23, 2019, Allegheny Casualty Company filed a Motion for Reconsideration and to Set Aside Bond Forfeiture Judgment and Release Surety from Liability. (Supp. 6-14.) In the motion, Appellant pointed out the lack of entry relating to the sentencing hearing on April 17, 2019, and the lack of any docket entry between April 17, 2019 and May 21, 2019. (Supp. 7.) Appellant

argued that it was not timely served with notice of the bond forfeiture in accordance with the time frame set forth in R.C. 2937.36, that it was legally impossible to produce Jackson's body because he had been incarcerated in Kentucky since March 23, 2019 (the day after he pled guilty in Hamilton County), and that it was entitled to relief from forfeiture under R.C. 2937.40. (Supp. 6-14.)

On February 19, 2020, the trial court issued an order providing Allegheny Casualty Company until March 19, 2020 to object to the Magistrate's September 4, 2019 decision. (Supp. 28.) Appellant filed its objections on March 13, 2020, with evidence of Jackson serving a 3.5 year sentence at the Department of Corrections according to the Campbell County Court in Kentucky. (Supp. 29-45.)

On March 24, 2020, the trial court denied Allegheny Casualty Company's Motion for Reconsideration and to Set Aside Bond Forfeiture Judgment and Release Surety from Liability. (Supp. 46.)

Appellant timely appealed to the First Appellate District from the trial court's order. The appellate court erred in affirming the trial court's denial of Allegheny Casualty Company's Motion for Reconsideration and to Set Aside Bond Forfeiture Judgment and Release Surety from Liability. *See State v. Jackson*, 1st Dist. Hamilton No. C-200153, 2021-Ohio-1646.

This Court accepted the discretionary appeal of Appellant, Allegheny Casualty Company. 09/22/2021 Case Announcements, 2021-Ohio-3233.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: When A Trial Court Violates The Mandates Of R.C. 2937.36(C) It Denies A Surety Due Process.

Courts are authorized by Crim.R. 46(A) to release an accused upon the posting of an amount and type of bail set by the court. The purpose of bail is to ensure the appearance of a criminal defendant before the court at a specific time. *Holmes*, 57 Ohio St.3d at 14; R.C.

2937.22(A). Bail is a form of security that can be in the form of cash or a recognizance. Courts are permitted to accept a surety bond, a form of recognizance, as bail.

Recognizance is a "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." *State v. Dye*, 2018-Ohio-4551, ¶¶ 24-25, citing R.C. 2937.22(A)(3). Crim.R. 46(A)(3) authorizes the court to accept a surety bond as bail.

Should the accused fail to appear in court when ordered, the trial court can order the bail forfeited. If the bail forfeited is a recognizance such as a surety bond, the court must take additional action outlined in R.C. 2937.36. *See Wane*, at ¶ 13.

R.C. 2937.36(C) governs the notice of forfeiture of recognizance bonds, providing that:

> [u]pon declaration of forfeiture, the magistrate or clerk of the court adjudging forfeiture *shall* * * * notify the accused and each surety within fifteen days after the declaration of forfeiture by ordinary mail * * * of the default of the accused and the adjudication of forfeiture and require each of them to show cause on or before a date certain to be stated in the notice, and which *shall not* be less than forty-five nor more than sixty days from the date of mailing notice, why judgment should not be entered against each of them for the penalty stated in the recognizance.

(Emphasis added.)

In this case, although Jackson allegedly failed to appear at the April 17, 2019 sentencing hearing, there is no contemporaneous order noting the failure to appear. There is no entry indicating that Jackson's sentencing hearing had been continued from April 17, 2019 to May 21, 2019. The court continued the bond through the continued sentencing hearing without notice to Appellant or its agent. While courts have held that sureties are given constructive notice of a continuation of bond after a guilty plea or conviction *by way of the court's judgment entry* (*See, e.g., State v. Guzman*, 3d Dist. Allen No. 1-19-11, 2020-Ohio-539, ¶ 23), again, here, there was no judgment entry indicating that the hearing had been continued to May 21, 2019.

Instead, on May 21, 2019, 34 days after Jackson's alleged failure to appear on April 17, the trial court arbitrarily declared a forfeiture at a hearing for which no notice was provided. (Supp. 18.) The requisite notice to defendant and surety of the May 21, 2019 forfeiture declaration was not sent within 15 days of the declaration, it was sent 48 days later. In fact, the first notice of Jackson's alleged failure to appear on April 17 was on July 8 - - 83 days after the hearing.

The use of the term "*shall"* in R.C. 2937.36(C) has meaning. This Court has explained, "'"Shall" means must.' * * * And '[t]he word "must" is mandatory. It creates an obligation.'" *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, 81 N.E.3d 1242, ¶ 13. "In statutory construction, * * * the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage." (Emphasis added.) *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 271 N.E.2d 834 (1971), paragraph one of the syllabus. A court's main objective in statutory construction is to determine and give effect to the legislative intent. *State v. Morgan*, 153 Ohio St. 3d 196, 2017-Ohio-7565, 103 N.E.3d 784, ¶ 20, citing *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees*, 72 Ohio St.3d 62, 65, 647 N.E.2d 486 (1995). In determining the intent of the General Assembly, the Court looks primarily to the language of the statute itself. *Morgan*, citing, *Stewart v. Trumbull Cty. Bd. of Elections*, 34 Ohio St.2d 129, 130, 296 N.E.2d 676 (1973).

The Ninth District acknowledged that the use of the word "shall" indicates that the obligations set forth in R.C. 2937.36(C) are mandatory, not permissive. *See State of Ohio v. C.L.* 2021-Ohio-3396, ¶ 7, citing, *Dorrian*. The Ninth District concluded that "absent an expression of legislative intent that is clear and unequivocal from the language of the statute itself, this Court cannot construe R.C. 2937.36(C) as anything but mandatory." *State of Ohio v. C.L.* at ¶

7, citing, *Dorrian; Morgan*. While the Ninth District found prejudice in the case, the prejudice was based on a five (5)-years delay of the notice of the declaration of forfeiture. While the delay of notice was significant, it was due to a violation of the clear statutory notice requirements. The Ninth District's interpretation of R.C. 2937.36(C) should be applied by the Court.

The rule of law in Ohio should be that a trial court errs by ordering a bond forfeited absent compliance with the notification requirements of R.C. 2937.36(C). The Fifth District Court of Appeals applied this rule in *State v. Dye*, 5th Dist. Fairfield No. 17 CA 00045, 2018-Ohio-4551 and *State v. Kinser*, 5th Dist. Muskingum No. CT2019-0064, 2020-Ohio-1219. In *Dye*, the appellant posted a bond and the defendant failed to appear for a hearing, causing the court to order the bond forfeited. Ninety-one (91) days after the defendant's failure to appear, the court sent notice of a show cause hearing. The notice was sent well-beyond the fifteen (15) days mandated by R.C. 2937.36(C).

On appeal, it was argued that the trial court abused its discretion by failing to follow the mandates of R.C. 2937.36(C). *Dye* at ¶ 19. The Fifth District explained that the trial court must notify both the defendant and the surety by ordinary mail of the order forfeiting the bond. *Id.* at ¶ 32. The appellate court found that the trial court did not follow the statutory procedure in R.C. 2937.36(C) because there was no evidence that the surety and agent received a show cause hearing. *Id.* at ¶ 33-34.

In *Kinser* the court reversed a judgment on a bond forfeiture due to defective notice under R.C. 2937.36(C). In *Kinser*, the trial court set the show cause hearing for 20 days after the order of forfeiture, in contravention of R.C. 2937.36(C), a fact that the State conceded. For this reason alone, the Fifth District found that the judgment entry of forfeiture of the bond must be reversed.

Other appellate districts have required a surety to show prejudice to prevent judgment against the surety for the courts' failures to comply with the notice requirements of R.C. 2937.36(C). *See Dept. of Liquor Control v. Calvert*, 195 Ohio App.3d 627, 2011-Ohio-4735, 961 N.E.2d 247 (6th Dist.); *City of Univ. Heights v. Allen*, 8th Dist. Cuyahoga No. 107211, 2019-Ohio-2908, ¶ 23, appeal not allowed sub nom. *Univ. Hts. v. Allen*, 158 Ohio St. 3d 1421, 2020-Ohio-647, 140 N.E.3d 740, reconsideration denied, 158 Ohio St. 3d 1507, 2020-Ohio-2819, 144 N.E.3d 457; *State v. C.L.*; *Wane*. However, for example, the Twelfth District found that the impossibility of producing the accused at a hearing due to her incarceration in another jurisdiction was sufficient to show prejudice. *See Wane* at ¶ 25. Here, Appellant showed prejudice based on Jackson being incarcerated at the time of the show cause hearing. The First District did not consider this impossibility of performance to meet the requirement of prejudice. Further, the appellate court provided no guidance as to what must be shown by a surety to establish prejudice.

As stated by the Ninth District, "[w]hen compliance with the statutory notice provisions is at issue, [ ] courts have also accounted for the surety's due process interest in receiving notice. Thus, in those circumstances, courts consider whether the surety 'could have demonstrated good cause * * * had [it] received the statutory notice[.]'" *See State of Ohio v. C.L.* at ¶ 8.

This Court has explained the concept of procedural due process as follows:

> The right to procedural due process is required by the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502, ¶ 6. "[A]t its core, procedural due process under both the Ohio and United States Constitutions requires, at a minimum, an opportunity to be heard when the state seeks to infringe a protected liberty or property right. *Boddie v. Connecticut* (1971), 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113. Further, the opportunity to be heard must occur at a meaningful time and in a meaningful manner. *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777, 814 N.E.2d 846, ¶ 8.

State ex rel. Plain Dealer Publ'g Co. v. Floyd, 111 Ohio St. 3d 56, 2006-Ohio-4437, 855 N.E.2d 35, ¶ 45.

Procedural due process rights apply to a surety's property interest in recognizance bonds. *See State v. Hardin*, 6th Dist. Lucas Nos. L–03–1131, L–03–1132, L–03–1133, 2003-Ohio-7263, ¶ 17 (finding due process rights apply to the initial taking not a subsequent request for remission.) With respect to due process, R.C. 2937.36(C) serves to provide a surety with time to locate the defendant before the show cause hearing and avoid a judgment. *See State of Ohio v. C.L.*; *Allen* at ¶ 17, quoting *Lott* at ¶ 15. "'The sweep of R.C. 2937.36(C) is broad enough to cover those situations where the surety is unaware of the non-appearance of the defendant-principal until the bond is forfeited. In those situations, the surety has a due process expectation of the notice and opportunity to show good cause provided for in R.C. 2937.36(C).'" *Allen* at ¶ 18, quoting *State v. Martin*, 2d Dist. Montgomery No. 21716, 2007-Ohio-3813, ¶ 22.

The lack of procedural due process started here when no notice was provided relative to the continuance of the sentencing hearing from April 17 to May 21, 2019. The bond was forfeited for Jackson's failure to appear at a hearing for which there is no evidence that notice was ever provided. By failing to abide by the mandates of R.C. 2937.36(C), the lower court further undermined Appellant's opportunity to show cause after the forfeiture of the bond at a meaningful time or in a meaningful manner. Thus, due process was denied to Appellant.

In affirming the denial of Appellant's motion to set aside the judgment on the bond forfeiture, the First District reasoned that Appellant was not entitled to relief from liability on the forfeited bond because "Jackson voluntarily fled from Hamilton County to another state without the trial court's permission" and that this was a foreseeable event. *See Jackson* at ¶ 16. However, as this Court has stated, "simply because a condition of release may be imposed upon a defendant

does not mean that the breach of such a condition requires the forfeiture of a bail bond. The procedure for the forfeiture of bail is not governed by the breach of a condition of release but, rather, *is governed by the procedures set forth in R.C. 2937.36*." (Emphasis added.) *Holmes*, 57 Ohio St. 3d at 14 (reversing judgment against the surety due to the timely production of the body of the defendant on the date specified in the notice of default and adjudication of forfeiture.)

Appellant asks this Court to hold that the procedural requirements of R.C. 2937.36(C) are mandatory and that a failure to follow the statutory notice requirements alone, without a showing of prejudice, is a denial of a surety's due process rights.

Proposition of Law No. 2: Impossibility of Performance Should Not Be Limited to In-State Police Action; to Hold Otherwise is Discriminatory to Businesses Writing Bonds in the State of Ohio.

A surety bond is a contract in which the surety promises the court that it will pay a monetary penalty if the accused who is released on the bond posted by the surety fails to appear in court when ordered. *Scherer*, 108 Ohio App.3d at 591. The nonappearance operates as a condition precedent to the surety's duty to perform. *Id.* The surety may be excused from its duty to pay the penalty by demonstrating good cause why judgment should not be entered against the surety in the amount of its bond. *Id.* As stated above, that showing may consist of producing the "body" of the accused, or "otherwise." R.C. 2937.36(C).

A surety may be exonerated from liability where performance of the conditions in the bond is rendered impossible by an act of law. *State v. Hughes*, 27 Ohio St.3d at 21-22, citing *Taylor v. Taintor*, 83 U.S. 366, 21 L.Ed. 287 (1872).

The Second and Twelfth appellate districts have found that one way to show good cause is to present evidence of the accused's incarceration in another jurisdiction in Ohio. In *Yount*, the defendant was jailed in Miami County, Ohio at the time he was to appear in Montgomery County,

Ohio. The appellate court held that the surety presented a meritorious defense to the judgment entered against it because of the defendant's incarceration in another Ohio county made his appearance legally impossible.

In *Wane*, two judgments on two forfeited bonds in two different criminal matters were at issue. As to the first case against Wane, the 12th District rejected the surety's motion to set aside the judgment on the forfeited bond for the express reason that Wane was not incarcerated at the time that the municipal court held a show cause hearing. However, as to the second criminal case, the appellate court found that the surety was not provided with notice of the show cause hearing and that Wane was incarcerated in Hamilton County on the day of the hearing held in Fairfield Municipal Court. If "the municipal court provided [surety] with notice, thereby giving [surety] the opportunity to be heard, [surety] would have been able to show good cause for why the judgment of forfeiture should not have been entered. That is to say, [surety] can demonstrate that it was prejudiced by the municipal court's failure to provide it with notice of that show cause hearing given the impossibility for [surety] to produce Wane at that hearing" due to her incarceration in another jurisdiction. *See State v. Wane*, 2020-Ohio-4874, ¶ 25.

Like *Yount* and *Wane*, Jackson's appearance was legally impossible due to police action. While located in Kentucky, Jackson was incarcerated a mere 19 miles[1] from Hamilton County. Jackson's incarceration prevented Appellant from ensuring his appearance in court. It did not matter that the jurisdiction of incarceration was Ohio or Kentucky. Moreover, Appellant had no duty to supervise defendant, it did not undertake the role of "the defendant's guardian angel." *See Scherer* at 594. As stated by the Second District, "[t]he surety has not promised the defendant's

[1] Comparatively, the jurisdictions in *Yount*, the Miami County Court of Common Pleas and the Montgomery County Court of Common Pleas, are located approximately 20 miles away from each other.

good behavior, his bad acts, though possibly foreseeable to the surety, do not themselves trigger the surety's duty to pay a penalty in the amount of its bond." *Id*. The Second District continued, "We believe the better view on the facts presented in this case is that [defendant's] imprisonment in Kentucky and the refusal of Kentucky authorities to return him to Ohio at this time constitutes 'good cause.' …. This prevents forfeiture of [defendant's] bond and the entry of judgment against the surety." *Id*. at 594-595. This should be the law in Ohio.

Appellant asks the Court to adopt the reasoning of *Yount* and *Wane* and find that incarceration in another state is also one of the ways good cause can be shown to set aside a judgment on a forfeiture of a bond.

The fact-based *Hughes* decision does not prevent a finding that incarceration in another state could be a way to show good cause to set aside forfeiture of a bond. *See Hughes* at 20 ("The question to be resolved is whether appellants should be discharged from liability on this bail bond *under the circumstances of the instant case*.") *Hughes* rejected the impossibility by act-of-law defense under similar but distinguishable facts.

In *Hughes*, the defendant was arrested in Ohio, posted bond, and later became incarcerated in Illinois. The defendant posted the Illinois bond and again fled. The surety on the bond asserted the defense of impossibility of performance as good cause for being excused from its obligation on the bond. The Court held that the *escape* of a defendant is a "business risk of the bail surety," and it is precisely the type of situation that a surety guarantees against. *See id.* at 22.

The First District echoes this sentiment, stating:

> Sureties make calculated business judgments in determining to insure a defendant's appearance. As a part of this evaluation of risk, it is foreseeable that a person would "flee," voluntarily leaving the state. It is also foreseeable that the fleeing defendant would commit a crime in another jurisdiction and be unable to return.

Jackson at ¶ 22. The Fourth District Court of Appeals recently applied such reasoning in denying a surety relief due to impossibility of performance when the accused at issue was incarcerated in Michigan. *See McKinney*, 2021-Ohio-3108, ¶ 14.

In applying such reasoning the First District ignores an important distinction between the facts of this case and the facts at issue in *Hughes*. Here, Jackson was arrested the very next day after pleading to the charges in this case. The impossibility of performance was not because he fled, but because he was incarcerated at the time of the April 17, 2019 hearing. Further, Campbell County Kentucky refused to allow him to be transported back to the Hamilton County Court of Common Pleas while he was awaiting the disposition of the case in Kentucky.

In *Hughes*, the defendant was jailed out of state, but then posted bond in that jurisdiction and fled. His whereabouts were unknown at the time of his failure to appear in court as ordered. Comparatively, in this case Jackson's inability to appear in Hamilton County Court of Common Pleas was temporary and finite, and could be rectified once the detention by authorities in Kentucky concluded. As stated by this Court in relation to a former version of R.C. 2937.36(C), "the good cause contemplated goes to the presentation of good and sufficient reasons for the nonappearance, not to good and sufficient reasons why the surety could not locate the accused." *State v. Ward*, 53 Ohio St. 2d 40, 372 N.E.2d 586 (1978).

While *Ward* rejected the surety's argument that the judgment on the forfeited bond should be vacated due the failure of the court to provide the mandatory notice requirements of former R.C. 2937.36(C), the same procedural due process rights at issue here were not at issue in *Ward.* In *Ward* the trial court notified the surety of hearing pursuant to the statute, but the notice itself did not expressly advise the surety that it could show good cause by the production of the body 'or otherwise'. The Court noted that the surety had that right as set forth in the statute.

In *Scherer*, the defendant was incarcerated in Kentucky, which refused to release him for return to Ohio. The Fifth District relied on the rules governing performance of contracts, noting "[w]here the performance promised is only temporarily prohibited, the contract remains in force, though dormant, and when the legal impediment is removed the surety must perform on its undertaking." *Scherer*, 108 Ohio App. 3d at 594. The court of appeals applied these general contract principles to find that the surety's liability on the bond should be suspended until such time as the defendant was released from his imprisonment in Kentucky:

> The surety's liability on Scherer's bond should be suspended until such time as Scherer is released from his present imprisonment in Kentucky. In this regard, we note that an Ohio detainer has been lodged against Scherer at the penal institution in Kentucky where Scherer is imprisoned, and it therefore seems likely that at some future time there will be ample opportunity to return Scherer to Ohio and produce him before the Greene County Common Pleas Court.

Id. at 595. In this case, the First District found that Scherer did not apply because "as a condition of his bond Scherer was ordered to maintain his residence in Kentucky". See *Jackson* at ¶ 13. Despite this factual difference, the basic contract principles as addressed in Scherer are still applicable to surety bonds.

Although not a part of the record, an Ohio detainer was lodged against Jackson. He was in fact returned to Hamilton, Ohio while this appeal was pending. While Appellant could take further procedural action such as filing a motion to remit, there is no guarantee that it would be exonerated from the judgment on the bond forfeiture rendered against it. As stated by the Third Appellate District in *State v. Jackson*, 153 Ohio App.3d 520, 2003–Ohio–2213, with respect to the remission statute, R.C. 2937.39, there are "no obligatory factors for a trial court to consider but rather [the statute] grants the court discretion, as indicated by the use of the phrase, 'may remit.'" *Id. at* ¶ 6. In fact, courts are not even required to hold a hearing relative to such a motion. *See Hardin* at ¶ 12.

As outlined in *Scherer*, the correct pronouncement of law should be that a surety's liability on a bond should be suspended until such time as the accused is released from his imprisonment, whether that imprisonment is in the state of Ohio or another jurisdiction of the United States. Seeking remission after the fact is not a cure for due process violations and the inequitable application of the impossibility of performance standard.

The First District decision puts Ohio out of step with the majority of other states that have determined that a surety may be entitled to exoneration or at least partial relief from liability where a defendant's appearance is prevented by incarceration in another jurisdiction. *See* Ariz. R. Crim. P. 7.6(d)(2) (eff. Jan. 1, 2022) (A court must exonerate a bond when the defendant was prevented from attending due to being in custody of another government agency and the surety establishes that it did not know nor reasonably could have known of the release or transfer.); Ark. Code Ann. 16-84-203(a) (Bail bond will not be forfeit where a sworn affidavit of a jailer, warden, or other officer is presented to court that the principal on the bond is being prevented from attending due to the fact of being detained.); Section 1305 of Ann. Cal. Penal Code (The court shall vacate the forfeiture if within 180 days of the forfeiture, proof is presented to the court that the defendant is temporarily disabled by reason of detention by civil authorities beyond the custody of that jurisdiction.); Colo. Rev. Stat. 16-4-110 (Surety shall be exonerated if surety provides evidence that defendant is unable to appear due to incarceration in a foreign jurisdiction. If the other jurisdiction agrees to extradition, cost of extradition shall be borne by surety.); Fla. Stat. Ann. 903.26(5)(b) (The court shall discharge a forfeiture upon determination that at the time of the required appearance or within 60 days thereof the defendant was confined in any county, state, federal, or immigration detention facility.); Ga. Code Ann. 17-6-72(b) (No judgment shall be entered on a forfeiture of any appearance bond if proof is presented to the court that the

principal on the bond was prevented from attending because of arrest in another jurisdiction.); Ind. Code. Ann. 27-10-2-12(b)(2)(A)(ii) (To be excused from a bond a surety has one year to prove that the appearance of the defendant was prevented because at the scheduled time of appearance the defendant was in the custody of the United States, or a state or political subdivision of the United States.); Kan. Stat. Ann. 22-2807(3) (The court may set aside a forfeiture if the surety can prove that the defendant was incarcerated prior to the judgment of default by providing a sworn statement providing details of same.); Md. Rule 4-217(i)(7) (Where the surety can produce evidence that the defendant was incarcerated outside the state and that state's attorney is unwilling to issue a detainer and extradite, the court shall strike out the forfeiture and return the bond to the surety.); Miss. Code. Ann. 83-39-7 (Entry of judgment on bond forfeiture shall be stayed if proof is made of incarceration of the defendant in another jurisdiction.); Mont. Code Ann. 46-9-503(4) (Surety must be exonerated if surety provides proof of the defendant's incarceration in a foreign jurisdiction.); Okla. Stat. Ann. Tit. 59, § 1332(C)(5)(b) (A bond shall be exonerated by operation of law where the defendant was arrested outside the state and the court record shows the prosecuting attorney declined extradition.); Tex. Code Crim. Proc. Ann. Art. 22.13(a)(5) (A surety shall be exonerated from the forfeiture if the principal is incarcerated in any jurisdiction in the United States.); Utah Code Ann. 77-20b-104(4) (If the defendant is in the custody of another jurisdiction and the state extradites or intends to extradite the defendant, the court may reduce the amount forfeited to the actual or estimated costs of returning the defendant to the court's jurisdiction.); Va. Code Ann. 19.2-143 (The court is required to remit any bond previously ordered forfeited, less the cost of returning the defendant to Virginia if the surety, within two years, shows the court that the defendant is incarcerated in another state or country thereby preventing his appearance.) *See also, State v. Diaz*, 286 P.3d 824, 834-36 (Haw. 2012)

(surety showed good cause for defendant's failure to appear for hearing due to incarceration in another state.); *State v. Amador*, 648 P.2d 309, 313 (N.M. 1982) (Trial court abused its discretion by ordering total forfeiture of bond where bondsman located defendant in Texas jail and offered to pay reasonable extradition and transportation costs.); *Commonwealth v. Roeschetz*, 2 Pa. D. & C.2d 168, 170-71 (Pa. Quar. Sess. 1955), 1955 WL 6775 (Forfeiture reduced due to fact that defendant could not appear for hearing because of incarceration in Illinois. Court retained only the amount needed to cover possible costs, including extradition.); *State v. Boatwright*, 423 S.E.2d 139, 140-41 (S.C. 1992) ("the surety should be released from liability when estreatment is ordered for non-appearance after defendant has been extradited" to another state); *State v. Mottolese*, 2015-VT-81, 124 A.3d 809 (Supreme Court of Vermont held surety was entitled to reduction in forfeiture after it could not produce defendant for court appearance due to out-of-state incarceration.); *State v. Heslin*, 389 P.2d 892, 895 (Wash. 1964) (Trial court abused its discretion in forfeiting the bond given by a defendant who was later incarcerated in the state of Utah, where the sureties located the defendant, notified the trial court of the Utah detention, and offered to keep the bail bond in full force and effect until the defendant could be brought back to the state of Washington for trial.)

As stated above, once Jackson was incarcerated, Appellant was powerless to ensure his appearance in court. Other states have recognized that the power to extradite defendants from one jurisdiction to another is in the hands of the State and not sureties. Thus, the law should be that when a defendant is in custody beyond the jurisdiction of the court that ordered the bail forfeited, and the prosecuting agency elects not to seek extradition after being informed of the location of the defendant, the court should vacate the forfeiture and exonerate the surety from liability on the bond. To protect the prosecuting agencies, as held by the Supreme Court of

Vermont, if the state extradites a defendant, the surety should be responsible for the costs associated with such extradition up to the amount of the bond. *See Mottolese*. *See also, e.g*. Cal. Penal Code 1305(f); Colo. Rev. Stat. 16-4-110; Fla. Stat. Ann. 903.26(5)(d); Md. Rule 4-217(i)(7); Okla. Stat. Ann. Tit. 59, § 1332(C)(5)(b); Tex. Code Crim. Proc. Ann. Art. 22.13(a)(5); Utah Code Ann. 77-20b-104(4).

In *Mottolese,* the Supreme Court of Vermont determined that the trial court abused its discretion in declining to reduce the amount of bail forfeiture when the surety could not produce defendant due to his out-of-state incarceration. In limiting the amount of forfeiture to costs and expenses associated with extradition and delayed trial, the Vermont Court noted that the trend among the majority of states is to find that a bail-bond surety is, or at least may be, entitled to relief from liability where a defendant's appearance is prevented by incarceration in another jurisdiction. *Id.* at ¶ 13. *Mottolese* further noted, "while defendant may have knowingly or intentionally committed a criminal act, the consequences of which placed him in a New York jail, the record contains nothing to indicate that his actions in New York were intended to avoid his appearance in the Vermont court." *Id.* at ¶ 17. Similarly, while Jackson's actions resulted in his arrest in Kentucky one day after pleading guilty in Ohio, there is no evidence to indicate that his actions in Kentucky were for the purpose of avoiding his appearance at the sentencing hearing in Hamilton County on April 17, 2019.

Here, Appellant showed good cause for failure to produce defendant because of his incarceration in Kentucky at the time of the hearings held in Hamilton County. The jail in Kentucky would not release defendant to process his Hamilton County charges. Police action does not change by virtue of its being exercised in a neighboring state (a mere 19 miles away from Hamilton County).

The law in Ohio should be that a surety should be exonerated from liability on a forfeited bond based on impossibility of performance if the surety cannot produce an accused when ordered to do so because the accused is incarcerated in any jurisdiction in the United States. Impossibility of performance should apply as good cause for failure of the surety to perform regardless of whether the incarceration is due to an in state or out-of-state police action.

CONCLUSION

For the reasons discussed above, Appellant, Allegheny Casualty Company, asks the Court to find that a court's violations of the mandates of R.C. 2937.36(C) are a denial of a surety's due process rights. Appellant also asks the Court to find that the defense of impossibility of performance applies when the accused who is released on a bond fails to appear in court due to incarceration, regardless of whether the incarceration is due to an in-state or out-of-state police action. Appellant respectfully requests the Court to adopt the propositions of law of Appellant, Allegheny Casualty Company and reverse the decision of the First District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing Merit Brief of Appellant Allegheny Casualty Company was served by E-Mail pursuant to S.Ct.Prac.R. 3.11(C)(1) this 29th day of November, 2021, upon the following:

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APPENDIX

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-200153 TRIAL NO. B-1806214-B
Plaintiff-Appellee,	:	*OPINION.*
vs.	:	
JAQUAN JACKSON,	:	PRESENTED TO THE CLERK OF COURTS FOR FILING
Defendant,	:	
and	:	MAY 12 2021
ALLEGHENY CASUALTY COMPANY,	:	COURT OF APPEALS
Surety-Appellant,	:	
and	:	
DANIEL SEIFU,		ENTERED MAY 12 2021
Surety.		

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 12, 2021

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *James S. Sayre,* Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Ray Robinson Law Co., L.P.A., and *Sandra M. Kelly,* for Defendant-Appellant.

MYERS, Presiding Judge.

{¶1} Surety-appellant Allegheny Casualty Company ("Allegheny") appeals from the trial court's entry denying its motion to set aside a bond-forfeiture judgment and to release it from liability.

{¶2} In a single assignment of error, Allegheny argues that the trial court erred in denying its motion because it was legally impossible for it to fulfill its duty as a surety to produce defendant Jaquan Jackson in court in Hamilton County when Jackson was incarcerated in Kentucky, that it was entitled to relief from forfeiture under R.C. 2937.40, and that the trial court erred in failing to comply with the time frame set forth in R.C. 2937.36 prior to ordering the bond forfeited. Finding that the trial court correctly ordered the bond forfeited, we affirm its judgment.

Factual and Procedural Background

{¶3} Jaquan Jackson was indicted for aggravated possession of drugs and aggravated trafficking in drugs in November of 2018. Allegheny and Daniel Seifu, as an agent for Allegheny, posted a $50,000 surety bond for Jackson. Jackson pled guilty to aggravated possession of drugs on March 22, 2019, and sentencing was scheduled for April 17, 2019. The trial court allowed Jackson to remain on bond pending sentencing. Jackson failed to appear on the sentencing date, and the sentencing hearing was continued to May 21, 2019. No capias was issued. Jackson again failed to appear for sentencing, and the trial court issued a capias for his arrest and ordered the bond forfeited.

{¶4} On July 3, 2019, the trial court issued a "Notice to Surety," stating that the bond had been forfeited and giving Allegheny and Seifu notice to produce

Jackson's body or show cause why judgment should not be entered against them pursuant to R.C. 2937.36. The court set a hearing for September 4, 2019. This notice was sent to Allegheny and Seifu by regular mail on July 8, and again on July 18. Both notices sent to Seifu were returned undelivered. The regular mail to Allegheny was not returned, raising the presumption that the notices were delivered. The show-cause hearing was held as scheduled on September 4. Neither Allegheny nor Seifu appeared. Following the hearing, a magistrate issued a decision granting judgment to the state in the amount of $50,000.

{¶5} Allegheny subsequently filed a "motion for reconsideration and to set aside bond forfeiture judgment and release surety from liability." It argued that it was not timely served with notice of the bond forfeiture in accordance with the time frame set forth in R.C. 2937.36, that it was legally impossible to produce Jackson's body because he had been incarcerated in Kentucky since March 23, 2019, (the day after he pled guilty in Hamilton County), and that it was entitled to relief from forfeiture under R.C. 2937.40. The trial court denied Allegheny's motion.

Bond Forfeiture

{¶6} In a single assignment of error, Allegheny argues that the trial court erred in denying its motion to set aside the bond-forfeiture judgment and to release it from liability. We review the trial court's ruling on Allegheny's motion for an abuse of discretion. *State v. Wane*, 12th Dist. Butler Nos. CA2020-01-010, CA2020-01-011, CA2020-01-014 and CA2020-01-015, 2020-Ohio-4874, ¶ 22. An abuse of discretion is more than a mere error of judgment; rather, "it implies that the court's attitude is arbitrary, unreasonable, or unconscionable." *Boolchand v. Boolchand*, 1st Dist. Hamilton No. C-200111, 2020-Ohio-6951, ¶ 9.

{¶7} A bail bond is a contract between a surety and the state, in which the state agrees to release a defendant into the surety's custody in exchange for the surety ensuring the defendant's appearance in court. *State v. Lott*, 2014-Ohio-3404, 17 N.E.3d 1167, ¶ 8 (1st Dist.). "If the defendant fails to appear, there is a breach of the condition of bond and the court may declare a forfeiture of the bond unless the surety can be exonerated as provided by law." *Id.*

{¶8} Forfeiture proceedings are governed by R.C. 2937.36. Forfeiture of bonds is set forth in R.C. 2937.36(C), which provides in relevant part that after a declaration of forfeiture, a surety may be exonerated "[i]f good cause by production of the body of the accused or otherwise" is shown. We have held that under certain circumstances, impossibility may satisfy that good cause is "otherwise" shown. "A surety may also be exonerated where performance of the conditions in the bond is rendered impossible by an act of law." *Lott* at ¶ 9. The act of law rendering performance impossible must have been unforeseeable at the time that the surety and the state entered into the contract. *Id.*

{¶9} Allegheny argues that it established good cause for its failure to produce Jackson because Jackson's incarceration in Kentucky rendered its performance legally impossible.

{¶10} This court considered a similar argument in *Lott*. Lott was released on bond after being arrested on various charges in Hamilton County, and he subsequently left Hamilton County to report to a probation officer in Indiana. *Lott*, 2014-Ohio-3404, 17 N.E.3d 1167, at ¶ 2-3. While in Indiana, he was arrested for a probation violation on a prior Indiana charge. Due to his incarceration in Indiana, Lott failed to appear for his arraignment in Hamilton County and his bond was

ordered forfeited. Following a show-cause hearing, judgment was entered against the surety. *Id.* at ¶ 5. On appeal, this court rejected the surety's argument that Lott's incarceration in Indiana rendered its performance legally impossible. *Id.* at 13. We reasoned that because Lott's bond contract provided that he "shall not depart without leave," Lott violated a condition of his bond by leaving Ohio to go to Indiana. We further found that it was foreseeable that Lott would be required to report to his Indiana probation officer and that his pending Ohio charges would have violated the terms of his Indiana probation. *Id.*

{¶11} In *State v. Sexton*, 132 Ohio App.3d 791, 726 N.E.2d 554 (4th Dist. 1999), the court similarly held that a defendant's incarceration in South Carolina did not render a surety's performance in Ohio legally impossible. In *Sexton*, the defendant was released on bond in Lawrence County after arraignment. Sexton failed to appear for a preliminary hearing in Lawrence County because he was incarcerated in West Virginia. Sexton was subsequently released from jail in West Virginia, but was arrested and incarcerated in South Carolina before being returned to Ohio. *Id.* at 792. The trial court conducted a bond-forfeiture hearing and entered judgment against the surety. *Id.* On appeal, the surety argued that Sexton's incarceration in South Carolina was unforeseeable and that it was legally impossible to produce Sexton's body. The Fourth District rejected the surety's argument, finding that Sexton had voluntarily fled the jurisdiction of Lawrence County, that his recognizance specifically provided that he shall "not depart without leave," and that "[t]he flight of a defendant is a business risk that a surety assumes." *Id.* at 794.

{¶12} Allegheny relies on *State v. Scherer*, 108 Ohio App.3d 586, 671 N.E.2d 545 (2d Dist.1995), *State v. Yount*, 175 Ohio App.3d 733, 2008-Ohio-1155, 889

N.E.2d 162 (2d Dist.), and *State v. Wane*, 12th Dist. Butler Nos. CA2020-01-010, CA2020-01-011, CA2020-01-014 and CA2020-01-015, 2020-Ohio-4874, in support of its argument that Jackson's incarceration in another jurisdiction rendered its performance under the bond contract legally impossible.

{¶13} In *Scherer*, the defendant was released on bond after being indicted for passing bad checks in Greene County. As a condition of his bond, Scherer was ordered to maintain his residence in Kentucky and was prohibited from moving without giving the court notice. *Scherer* at 589. The surety subsequently discovered that Scherer had moved and his whereabouts were unknown. After receiving this information, the Greene County court issued a warrant for Scherer's arrest. Scherer was arrested on the warrant in Kentucky, where he was detained to face probation-revocation charges. Because of his arrest in Kentucky, Scherer failed to appear in Greene County for sentencing. His bond was forfeited, and following a show-cause hearing, the trial court entered judgment against the surety. *Id.* at 589. The surety argued on appeal that Scherer's incarceration in Kentucky made its performance under the bond contract legally impossible. The Second District recognized that a defendant's incarceration in another jurisdiction following an illegal flight from the jurisdiction in which she or he had been released on bond was a reasonably foreseeable event. *Id.* at 594. But because Scherer had not voluntarily fled to Kentucky, but rather had departed from Ohio after being ordered by the trial court to do so, the court found that "his subsequent incarceration in Kentucky did not proximately result from any negligence of the sureties in failing to prevent his leaving Ohio" and that the surety had established good cause for being excused from performing. *Id.* at 594.

{¶14} In *State v. Yount*, the defendant was released on bond in Montgomery County after being indicted for possession of crack cocaine. *Yount* at ¶ 1. A capias was issued for Yount and his bond was forfeited after he failed to appear for a scheduling conference. A show-cause hearing was scheduled, at which the surety did not appear, and the trial court entered judgment against the surety in the amount of the bond. *Id.* at ¶ 2. The surety filed a motion for relief from judgment, arguing that Yount had been incarcerated in Miami County, and that his incarceration in the other county constituted good cause for its failure to produce him in Montgomery County. *Id.* at ¶ 3. The trial court denied the motion and the surety appealed. On appeal, the Second District held that the trial court erred in denying the surety's motion for relief from judgment because "Yount was incarcerated in Miami County, and it was legally impossible for [surety] to produce him in Montgomery County." *Id.* at ¶ 14.

{¶15} In *State v. Wane*, 12th Dist. Butler Nos. CA2020-01-010, CA2020-01-011, CA2020-01-014 and CA2020-01-015, 2020-Ohio-4874, the court tangentially considered the issue of impossibility of a surety's performance due to a defendant's incarceration in another jurisdiction. In *Wane*, the defendant failed to appear in a Butler County court after being released on bond, because he was incarcerated in Hamilton County. The surety was not notified of the show-cause hearing and failed to appear, and the bond was ordered forfeited. The Twelfth District, in considering whether the surety had been prejudiced by the failure to receive notice of the show-cause hearing, held that if the surety had received notice of the hearing, Wane's incarceration in Hamilton County would have served as good cause for why a judgment of forfeiture should not have been entered. *Id.* at ¶ 25.

{¶16} The facts of this case are distinguishable from *Scherer*, *Yount*, and *Wane*. Unlike *Scherer*, where the defendant was ordered by the trial court to go to Kentucky, Jackson voluntarily fled from Hamilton County to another state without the trial court's permission. Such an event, as recognized in *Scherer*, is reasonably foreseeable. *Scherer*, 108 Ohio App.3d 586 at 594, 671 N.E.2d 545. And whereas the defendants in *Yount* and *Wane* remained in the custody of the state of Ohio when they were released on bond in one Ohio county and arrested in another Ohio county, Jackson fled across the state line and was arrested in Kentucky.

{¶17} Jackson's recognizance bond, like the bond executed in *Lott* and *Sexton*, provided that he "shall not depart without leave." He nonetheless voluntarily fled the jurisdiction of Hamilton County, which was a reasonably foreseeable event and a risk that Allegheny had assumed. *See id.*; *Sexton*, 132 Ohio App.3d 791 at 794, 726 N.E.2d 554. We therefore hold, following our review of the record and relevant case law, that Allegheny has not shown good cause to relieve it of bond forfeiture.

{¶18} Like our sister district found in *Sexton*, we note that Jackson's failure to appear was a business risk Allegheny undertook. Sureties make calculated business judgments in determining to insure a defendant's appearance. As a part of this evaluation of risk, it is foreseeable that a person would "flee," voluntarily leaving the state. It is also foreseeable that the fleeing defendant would commit a crime in another jurisdiction and be unable to return. Sureties have ways to reduce their risks, and undoubtedly engage in a cost-benefit analysis in deciding what protections to take as to any particular defendant. Here, Allegheny assumed the risk that Jackson, once convicted, would return for sentencing and took no further steps to

assure his appearance. That he was arrested and held elsewhere was a foreseeable risk they assumed.

{¶19} Allegheny additionally argues that it was entitled to relief from forfeiture under R.C. 2937.40(A)(1)(b). This statute concerns the release of bail and sureties, and it provides in relevant part:

> When a surety on a recognizance or the depositor of cash or securities as bail for an accused desires to surrender the accused before the appearance date, the surety is discharged from further responsibility or the deposit is redeemed in either of the following ways:
>
> * * *
>
> When, on the written request of the surety or depositor, the clerk of the court to which recognizance is returnable or in which deposit is made issues to the sheriff a warrant for the arrest of the accused and the sheriff indicates on the return that he holds the accused in his jail.

{¶20} This statute affords no relief to Allegheny. By its own terms, R.C. 2937.40(A)(1) applies when a surety desires to surrender the accused before the appearance date. Here, Allegheny made no attempt to surrender Jackson prior to his appearance date. Rather, it sought to be released from liability only after Jackson failed to appear and only after the bond was forfeited. *See State v. Thomas*, 7th Dist. Mahoning No. 08 MA 79, 2009-Ohio-1032, ¶ 32 ("Once the defendant failed to appear, Appellant could not rely on section (A)(1) of [R.C. 2937.40].").

{¶21} Allegheny further contends that the trial court erred in failing to comply with the time frame set forth in R.C. 2937.36 prior to entering judgment against it. R.C. 2937.36(C) provides in relevant part:

> As to recognizances the magistrate or clerk shall notify the accused and each surety within fifteen days after the declaration of the forfeiture by ordinary mail at the address shown by them in their affidavits of qualification or on the record of the case, of the default of the accused and the adjudication of forfeiture and require each of them to show cause on or before a date certain to be stated in the notice, and which shall be not less than forty-five nor more than sixty days from the date of mailing notice, why judgment should not be entered against each of them for the penalty stated in the recognizance.

{¶22} The statute requires that a surety be notified of a declaration of forfeiture by ordinary mail within 15 days of the forfeiture being declared. Here, forfeiture was declared on May 21, 2019, but notice was not sent to Allegheny until July 8, 2019. This was well past the specified 15-day period. Absent a showing of prejudice, however, reviewing courts generally have not found error in a trial court's failure to comply with the timing requirements in R.C. 2937.36. *Lott*, 2014-Ohio-3404, 17 N.E.3d 1167, at ¶ 21; *City of Univ. Hts. v. Allen*, 8th Dist. Cuyahoga No. 107211, 2019-Ohio-2908, ¶ 23. Here, Allegheny has not established that it was prejudiced by receiving notice of the declaration of forfeiture past the statutorily specified 15-day period. Jackson was incarcerated in Kentucky during this entire period, so there was nothing Allegheny could have done differently. Moreover, the period of time in which Allegheny had to produce Jackson was not shortened, and, despite receiving delayed notice of the show-cause hearing, Allegheny failed to appear at that hearing.

{¶23} On the issue of timing, Allegheny also contends that the trial court failed to comply with R.C. 2937.36(C)'s requirement that the show-cause hearing be held within 45-60 days after the notice of declaration of forfeiture was mailed. Not so. The trial court issued the notice of declaration of forfeiture on July 3, 2019, the notice was sent by ordinary mail to Allegheny on July 8, 2019, and the show-cause hearing was held on September 4, 2019. The hearing was held approximately 58 days after the date the notice was mailed, which was within the statutory time frame. And even if the hearing had been held after the specified period, we have already determined that Allegheny, which failed to appear at the hearing, suffered no prejudice by any failure on the part of the trial court to comply with the time frames set forth in R.C. 2937.36.

{¶24} We hold that the trial court did not abuse its discretion in denying Allegheny's motion to set aside the bond-forfeiture judgment and to release it from liability. Allegheny's assignment of error is overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

BERGERON and **CROUSE, JJ.**, concur.

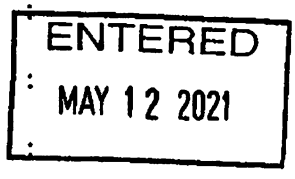
Please note:

The court has recorded its own entry on the date of the release of this opinion.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-200153 TRIAL NO. B-1806214-B
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
JAQUAN JACKSON,	:	
Defendant,	:	
and	:	
ALLEGHENY CASUALTY COMPANY,	:	
Surety-Appellant,	:	
and	:	
DANIEL SEIFU,	:	
Surety.		


D131909165



This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty, and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on May 12, 2021, per Order of the Court.

By: _____
Administrative Judge

D126754161

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

THE STATE OF OHIO	:	Case No. B1806214-B
Plaintiff	:	Judge Thomas Beridon
vs.	:	Magistrate Margaret Rentz
JAQUAN JACKSON 1221 BELLUNE DRIVE CINCINNATI, OH 45231	:	**DECISION OF MAGISTRATE ON JUDGMENT**
DANIEL SEIFU DANNY'S BAIL BONDS P.O. BOX 40604 CINCINNATI, OH 45240	:	
ALLEGHENY CASUALTY CO. ONE NEWARK CENTER, FLOOR 20 NEWARK, NJ 07102		

FILED
2019 SEP 27 A 8:41
CLERK OF COURTS
HAMILTON COUNTY, OH
COMMON PLEAS

Defendants.

This matter came on for **hearing** on **September 4, 2019** and upon the evidence submitted to me and made a part of this action, the undersigned Magistrate finds the following:

1. That proper notification has been made upon the named defendant surety in accordance with **R.C. 2937.36**.

2. That a bond forfeiture has been entered of record.

3. That defendant and surety are no longer in violation of the terms of the bond in this matter.

4. That plaintiff is entitled to a judgment against the defendant, and the defendant surety for Fifty Thousand and 00/100 Dollars ($50,000.00) and costs.

I hereby certify that I have caused the Clerk of Courts to mail a copy of this decision to the defendant surety in this case.

Margaret Rentz, Magistrate
Court of Common Pleas

VERIFY RECORD

NOTICE

TO ALL PARTIES AND COUNSEL OF RECORD:

The above **Decision of Magistrate was filed** with the Clerk of Courts on _____. Objections to the Magistrate's Decision must be filed within fourteen days of the filing date of the Magistrate's Decision. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b).

IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
HAMILTON COUNTY, OHIO

THE STATE OF OHIO	:	Case No. B1806214-B
Plaintiff		
vs.	:	**PRAECIPE**
JAQUAN JACKSON		
	:	
Defendants		
	:	

Pursuant to Civil Rule 53(D)(3)(iii), ". . .file a magistrate's decision with the clerk, who shall serve copies on all parties or their attorneys," copies of this decision are to be mailed by ordinary mail to the following:

PLAINTIFF(S) OR ATTORNEY(S)

James Sayre 0097169P
Assistant Prosecuting Attorney
Hamilton County, Ohio
230 East Ninth Street, Suite 4000
Cincinnati OH 45202-2151

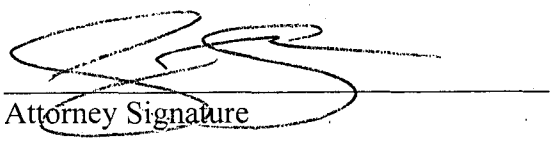
DEFENDANT(S) OR ATTORNEY(S)

JAQUAN JACKSON
1221 BELLUNE DRIVE
CINCINNATI, OH 45231

DANIEL SEIFU
DANNY'S BAIL BONDS
P.O. BOX 40604
CINCINNATI, OH 45240

ALLEGHENY CASUALTY CO.
ONE NEWARK CENTER, FLOOR 20
NEWARK, NJ 07102

James Sayre 0097169P
Attorney Code


Attorney Signature

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT COPIES OF THE FOREGOING DECISION HAVE BEEN SENT BY ORDINARY MAIL TO ALL PARTIES OR THEIR ATTORNEYS AS PROVIDED ABOVE.

Date: 9-27-19 Deputy Clerk: _____

ENTERED
MAR 24 2020

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

State of Ohio,	:	Case No.: B 1806214-B
	:	
Plaintiff,	:	Judge Thomas O. Beridon
	:	
-vs.-	:	Entry Denying Motions
	:	
Jaquan Jackson,	:	
	:	
Defendant.	:	

This matter comes to the Court upon Allegheny Casualty Company's Motion for Reconsideration and to Set Aside Bond Forfeiture Judgment and Release Surety from Liability from Magistrates Decision Dated September 27, 2019. Allegheny's Motions are denied.

Mr. Jackson's arrest in Kentucky the day after his sentencing was foreseeable. He broke a condition of his bond by going to Kentucky; therefore, his bond was properly forfeited after he failed to appear. The impossibility of performance defense does not suffice in this case. Be choosing to leave Ohio, the defendant caused his subsequent arrest in Kentucky.

Further, this Court finds that the surety was given proper notice of the forfeiture hearing regarding Mr. Jackson's bond.

Therefore, Allegheny Casualty Company's Motion is DENIED.

D128497627

So Ordered.

Judge Thomas O. Beridon

PRAECIPE TO THE CLERK: Please provide copies to all counsel and unrepresented parties.

VERIFY RECORD

Ohio Revised Code

Section 2937.36 Forfeiture of bail proceedings.

Effective: September 30, 2011
Legislation: House Bill 86 - 129th General Assembly

Upon declaration of forfeiture, the magistrate or clerk of the court adjudging forfeiture shall proceed as follows:

(A) As to each bail, the magistrate or clerk shall proceed forthwith to deal with the sum deposited as if the same were imposed as a fine for the offense charged and distribute and account for the same accordingly provided that prior to so doing, the magistrate or clerk may satisfy accrued costs in the case out of the fund.

(B) As to any securities deposited, the magistrate or clerk shall proceed to sell the same, either at public sale advertised in the same manner as sale on chattel execution, or through any state or national bank performing such service upon the over the counter securities market and shall apply proceeds of sale, less costs or brokerage thereof as in cases of forfeited cash bail. Prior to such sale, the clerk shall give notices by ordinary mail to the depositor, at the depositor's address listed of record, if any, of the intention so to do, and such sale shall not proceed if the depositor, within ten days of mailing of such notice appears, and redeems said securities by either producing the body of the defendant in open court or posting the amount set in the recognizance in cash, to be dealt with as forfeited cash bail.

(C) As to recognizances the magistrate or clerk shall notify the accused and each surety within fifteen days after the declaration of the forfeiture by ordinary mail at the address shown by them in their affidavits of qualification or on the record of the case, of the default of the accused and the adjudication of forfeiture and require each of them to show cause on or before a date certain to be stated in the notice, and which shall be not less than forty-five nor more than sixty days from the date of mailing notice, why judgment should not be entered against each of them for the penalty stated in the recognizance. If good cause by production of the body of the accused or otherwise is not shown, the court or magistrate shall thereupon enter judgment against the sureties or either of them, so notified, in such amount, not exceeding the penalty of the bond, as has been set in the adjudication of forfeiture, and shall award execution therefor as in civil cases. The proceeds of sale

shall be received by the clerk or magistrate and distributed as on forfeiture of cash bail.