



H.B. 38

123rd General Assembly
(As Introduced)

Reps. Jacobson, Jordan, Myers, Lucas, Womer Benjamin, Pringle, Thomas, Tiberi, Buchy, Padgett, Taylor, Young, Terwilleger, Bateman, Grendell, Haines, Roman, Olman, Gardner, Harris, Metzger, Salerno, Krebs, Ford, Coughlin, Clancy, Corbin, Vesper, Willamowski, Mottley, Carey, Householder, Cates, Evans, Bender, Jolivette, Damschroder

BILL SUMMARY

- Establishes procedures to implement a portion of the amendment to Article I, Section 9 of the Ohio Constitution adopted in the November, 1997, general election.
- Requires a judge, on the motion of the prosecuting attorney or on the judge's own motion, to hold a hearing to determine whether to deny bail to a person charged with aggravated murder when it is not a capital offense, murder, a felony of the first or second degree, aggravated vehicular homicide, or a fourth degree felony OMVI offense.
- States that no person so charged shall be denied bail unless the judge finds that the proof is evident or the presumption great that the person committed the offense and that the person poses a substantial risk of serious physical harm to any person or to the community and provides standards for making those findings.
- Requires that, if bail is denied, the accused must be detained and the court or magistrate must require the officer having custody of the person to take a message immediately to an attorney at law within the municipal corporation where the person is detained or to make available immediately to the person a telephone for calling to arrange for legal counsel.

CONTENT AND OPERATION

Existing law

Provision for bail in the Ohio Constitution

Prior to January 1, 1998, Article I, Section 9 of the Ohio Constitution read as follows: "All persons shall be bailable by sufficient sureties, except for capital offences where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."

In the general election of November 4, 1997, as the result of language placed on the ballot by Sub. H.J.R. 5 of the 122nd General Assembly, Ohio electors adopted an amendment to Article I, Section 9 of the Ohio Constitution. On and after January 1, 1998, that section reads as follows:

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, *and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail.* Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(B) of the Constitution of the State of Ohio.

The "Schedule" enacted in Sub. H.J.R. 5 provides that until the General Assembly enacts standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk

of serious physical harm to any person or to the community, bail or the denial of bail must be determined as if the amendment of Section 9 of Article I of the Constitution of the State of Ohio had not been written. (See **COMMENT 1.**)

Statutory bail provisions

Existing law requires that when, after arrest, an accused person is taken before a court or magistrate or when an accused appears pursuant to terms of a summons or notice (an affidavit or complaint previously having been filed), the court or magistrate must inform the accused of the nature of the charge and the identity of the complainant and of various rights of the accused. After that information has been provided, the magistrate, clerk, or prosecutor of the court must arraign the accused, reading the affidavit or complaint, or reading its substance, omitting purely formal parts, to the accused unless the reading is waived. The judge or magistrate must then inquire whether the accused understands the nature of the charge. If the accused does not indicate understanding, the judge or magistrate must give explanation in terms of the statute or ordinance claimed violated. If the accused is not represented by counsel and expresses a desire to consult with an attorney at law, the judge or magistrate must continue the case for a reasonable time to allow the accused to send for or consult with counsel and must set bail for the later appearance if the offense is bailable. If the accused is not able to make bail, or the offense is not bailable, the court or magistrate must require the officer having custody of the accused forthwith to take a message to any attorney at law within the municipal corporation where the accused is detained, or to make available to the accused use of a telephone for calling to arrange legal counsel or bail. (Sec. 2937.02, not in the bill, and 2937.03; see **COMMENT 2.**)

Existing law further requires that, if an offense is not bailable or sufficient bail is not offered, the accused must be committed to the jail of the county in which the accused is to be tried or, in the case of an offense against a municipality, in the jail of that municipality if there is such a jail (sec. 2937.32).

Operation of the bill

Implementation of the amendment to Article I, Section 9 of the Ohio Constitution

The bill establishes procedures to implement the mandate of newly amended Article I, Section 9, of the Ohio Constitution that the General Assembly "fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community." It requires a judge, on

the motion of the prosecuting attorney or on the judge's own motion, to hold a hearing to determine whether to deny bail to an accused person charged with one of the following offenses: aggravated murder when it is not a capital offense, murder, a felony of the first or second degree, aggravated vehicular homicide, or a "fourth degree felony OMVI offense" (see "Definitions," below). The judge must order that the accused be detained until the conclusion of the hearing. Except for good cause, a continuance on the motion of the state cannot exceed three "court days" (see "Definitions," below). Except for good cause, a continuance on the motion of the accused cannot exceed five court days unless the accused's motion waives in writing the five-day limit and states in writing a specific period for which the accused requests the continuance. A continuance granted upon a motion of the accused that waives in writing the five-day limit cannot exceed five court days after the period of continuance requested in the motion.

At the hearing, the accused has the right to be represented by counsel and, if the accused is indigent, to have counsel appointed. The judge must afford the accused an opportunity to testify, to present witnesses and other information, and to cross-examine witnesses who appear at the hearing. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing.

The bill authorizes the judge to reopen the hearing at any time before trial if the judge finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on whether bail should be denied. (Sec. 2937.222(A).)

The bill prohibits the denial of bail to an accused person under its provisions unless the judge finds that the proof is evident or the presumption great that the accused committed the offense with which the accused is charged and that the accused poses a substantial risk of serious physical harm to any person or to the community. Under the bill, the proof is evident or the presumption great that the accused committed the offense with which the accused is charged if the prosecuting attorney shows by clear and convincing evidence that the accused committed the offense charged. (Sec. 2937.222(B).)

The bill requires the judge, in determining whether the accused person poses a substantial risk of serious physical harm to any person or to the community, to consider all available information regarding all of the following (sec. 2937.222(C)):

(1) The nature and circumstances of the offense charged, including whether the offense is an offense of violence or involves alcohol or a drug of abuse;

(2) The weight of the evidence against the accused;

(3) The history and characteristics of the accused, including, but not limited to, both of the following:

(a) The character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, and criminal history of the accused;

(b) Whether, at the time of the current alleged offense or at the time of arrest, the accused was on probation, parole, post-release control, or other release pending trial, sentencing, appeal, or completion of sentence for the commission of an offense under Ohio law, the law of another state or the United States, or a municipal ordinance;

(4) The nature and seriousness of the danger to any person or the community that would be posed by the person's release.

Definitions

For purposes of its provisions described above, the bill incorporates the following definitions set forth in existing law (sec. 2937.222(E)):

(1) "Court day," as defined in existing section 5122.01, means Monday, Tuesday, Wednesday, Thursday, and Friday, except when that day is a holiday.

(2) "Fourth degree felony OMVI offense," as defined in existing section 2929.01, means a violation of the prohibition against operating a vehicle, streetcar, or trackless trolley by a person who (a) is under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, (b) has a concentration of .10 of one per cent or more by weight of alcohol in the person's blood, (c) has a concentration of .10 of one gram or more by weight of alcohol per 210 liters of the person's breath, or (d) has a concentration of .14 of one gram or more by weight of alcohol per 100 milliliters of the person's urine, when the violation is classified as a felony of the fourth degree. The violation is classified as a felony of the fourth degree if, within six years of the offense, the person has been convicted of or pleaded guilty to three or more specified alcohol-related and vehicle-related offenses, or if the person previously has been convicted of a violation of the prohibition under circumstances in which it was a felony of the fourth degree, regardless of when the prior felony violation and conviction occurred.

Changes to existing statutory law with respect to bail

The bill repeals the existing provision that requires that, if the offense with which an accused is charged is not bailable or if sufficient bail is not offered, an accused must be committed to a jail of the county in which the accused will be tried or in the jail of the municipality if the offense is against a municipality, and replaces the repealed provision with a requirement that, if an offense is not bailable, if the court denies bail to the accused, or if the accused does not offer sufficient bail, the court must order the accused to be detained (repeal of existing sec. 2937.32 and enactment of new sec. 2937.32).

The bill modifies the existing provision that requires the officer having custody of the accused, if the accused is not able to make bail or the offense is not bailable, to take a message to an attorney within the municipal corporation where the accused is detained or to make available to the accused use of a telephone for calling to arrange legal counsel or bail. The bill requires the officer to take those actions if the accused is not able to make bail, *bail is denied*, or the offense is not bailable. It also requires the officer to take the message or make the telephone available *immediately*, instead of *forthwith*. (Sec. 2937.03.)

COMMENT

1. The provision of newly amended Article I, Section 9 that requires procedures for establishing the amount and conditions of bail to be established pursuant to Article IV, Section 5(B) of the Ohio Constitution is a mandate to the Supreme Court of Ohio. Article IV, Section 5(B) of the Ohio Constitution requires the Supreme Court to prescribe rules governing practice and procedure in all courts of the state.

2. Criminal Rule 46, which was adopted by the Ohio Supreme Court pursuant to the mandate contained in Article IV, Section 5(B) of the Ohio Constitution (see **COMMENT** 1), generally governs the setting of bail for a person charged with a criminal offense. In relevant part, that Rule provides as follows:

(A) Types and amounts of bail

Any person who is entitled to release shall be released upon one or more of the following types of bail in the amount set by the court:

- (1) The personal recognizance of the accused or an unsecured bail bond;

(2) A bail bond secured by the deposit of ten percent of the amount of the bond in cash. Ninety percent of the deposit shall be returned upon compliance with all conditions of the bond;

(3) A surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the defendant.

(B) Conditions of bail

The court may impose any of the following conditions of bail:

(1) Place the person in the custody of a designated person or organization agreeing to supervise the person;

(2) Place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) Place the person under a house arrest or work release program;

(4) Regulate or prohibit the person's contact with the victim;

(5) Regulate the person's contact with witnesses or others associated with the case upon proof of the likelihood that the person will threaten, harass, cause injury, or seek to intimidate those persons;

(6) Require a person who is charged with an offense that is alcohol or drug related and who appears to need treatment to attend treatment while on bail;

(7) Any other constitutional condition considered reasonably necessary to ensure appearance or public safety.

(C) Factors

In determining the types, amounts, and conditions of bail, the court shall consider all relevant information, including but not limited to:

(1) The nature and circumstances of the crime charged;

(2) The weight of the evidence against the defendant;

(3) The confirmation of the defendant's identity;

(4) The defendant's family ties, employment, financial resources, character, mental condition, length of residence in the community, jurisdiction of residence,

record of convictions, record of appearance at court proceedings or of flight to avoid prosecution;

(5) Whether the defendant is on probation, a community control sanction, parole, post-release control, or bail.

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(E) Amendments

A court, at any time, may order additional or different types, amounts, or conditions of bail.

(F) Information need not be admissible

Information stated in or offered in connection with any order entered pursuant to this rule need not conform to the rules pertaining to the admissibility of evidence in a court of law. Statements or admissions of the defendant made at such a proceeding shall not be received as substantive evidence in the trial of the case.

* * *

(I) Failure to appear; breach of conditions

Any person who fails to appear before any court as required is subject to the punishment provided by the law, and any bail given for the person's release may be forfeited. If there is a breach of condition of bail, the court may amend the bail.

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HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-20-99	p. 91

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