OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor
Chair

David J. Diroll
Executive Director

Minutes
of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE

April 12, 2012

MEMBERS PRESENT
Municipal Judge David Gormley, Vice Chair
OSBA Representative Paula Brown
Common Pleas Judge Janet Burnside
Juvenile Judge Robert DeLamatre
Defense Attorney Kort Gatterdam
Public Defender Kathleen Hamm
Staff Lt. Chad McGinty, representing State Highway Patrol Superintendent, Col. John Born
Common Pleas Judge Thomas Marcelain
Director Gary Mohr, Rehabilitation and Correction
State Senator Larry Obhof
State Representative Roland Winburn
State Public Defender Tim Young

ADVISORY COMMITTEE
Jhan Corzine, Retired Common Pleas Judge
Eugene Gallo, Director, Eastern Ohio Correctional Center; CORJUS
Lora Manon, Bureau of Motor Vehicles
Joanna Saul, Director, Correctional Institution Inspection Committee
Gary Yates, Chief Probation Officers' Association

STAFF PRESENT
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Sara Andrews, Rehabilitation and Correction
JoEllen Cline, legislative counsel, Supreme court of Ohio
Mike Davis, Rehabilitation and Correction
Monda DeWeese, SEPTA Correctional Facility
Lisa Dodge, CORJUS
Darin Furderer, Correctional Institution Inspection Committee
Gloria Hampton, Ohio Community Corrections Association
Tom Hancock, legislative aide to Sen. Obhof
Jamie Hooks, Correctional Institution Inspection Committee
Andre Imbrogno, Counsel, Rehabilitation and Correction
Tom Ishee, Rehabilitation and Correction
Adam Jackson, Correctional Institution Inspection Committee
Irene Lyons, Rehabilitation and Correction
Jay Macke, State Public Defender's Office

Christine Madriguera, Ohio Judicial Conference
Scott Neeley, Rehabilitation and Correction
Alan Ohman, legislative aide to Sen. Shirley Smith
Ed Rhine, Rehabilitation and Correction
Matt Stiffler, Legislative Service Commission
Paul Teasley, Hannah News Network
Steve VanDine, Rehabilitation and Correction
Marjorie Yano, LSC Fellow

The April 12, 2012 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by Vice-Chair Municipal Judge David Gormley at 9:40 a.m.

DIRECTOR'S REPORT

Executive Director David Diroll reported that the problematic federal SORN law has taken another hit. This time the issue involves the law's application to juvenile offenders. When the law was first put in effect, the Sentencing Commission raised several concerns about the mechanics of the law and whether Ohio should take the gamble of embracing it fully. One of the key concerns at that time was the retroactive application of the statutes. While the SORN law is intended to be civil in nature to provide the public with certain assurances, the requirements within the law are indexed to the offense itself, without a separate finding of dangerousness. As such, the law tends to be less remedial and more of a penalty. That issue hasn't been finally resolved. In the recent case, the lifetime registration for juvenile Tier III offenders was struck by the Ohio Supreme Court as cruel and unusual punishment and a violation of due process.

Reporting on the progress of the changes recommended by the H.B. 86 work group, Supreme Court of Ohio Counsel JoEllen Cline noted that there have been a few changes made to the correction bill draft. They hope to shop it to some sponsors within the next week. It includes some of the Sentencing Commission's suggestions for cleaning up some of the jail time credit issues.

COLLATERAL SANCTIONS

A bill has been proposed by Reps. Ross McGregor and Tracy Heard, which Sens. Bill Seitz and Shirley Smith expressed interest in sponsoring as a bill in the Senate, on collateral sanctions issues, noted Director Diroll. The administration has had a group looking at sanctions related to employment, driver's license issues, and nonsupport issues.

Director of Rehabilitation and Correction Gary Mohr reported that in December they started meeting with people about reducing recidivism. DRC also is reviewing its mission statement. The overall mission, he noted, is to reduce crime in Ohio. With the number of people on parole supervision, in community sanctions, and in prison, DRC influences the future of approximately 120,000 people. In the process of evaluating the rate of recidivism over the past three years, it found a 10% reduction in the recidivism rate over one year.

With a focus on reducing recidivism, said Dir. Mohr, it becomes necessary to reconsider who gets hired, how to train those people, what

programs are offered and who gets in them. This process involves a look at the collateral consequences of felony convictions. Many returning inmates say that a major barrier for them is the inability to get jobs.

He started holding collateral consequence meetings in Cincinnati, Columbus, Dayton, and Cleveland, with an average of 250 in attendance. Testimony at those meetings revealed several situations where something as simple as more judicial discretion would be helpful.

These meetings resulted in six collateral consequence workgroups being established to address the more than 800 collateral consequences facing inmates when they return to the community. According to Dir. Mohr, 17%, or 1.9 million, Ohioans have been convicted of misdemeanors or felonies which have collateral consequences related to employment, housing and other matters. He feels that a functional data base is needed that deals with these collateral consequences.

The workgroups are focusing on several key areas: drivers' license suspension; indigent defense; an order of limited relief; fair hiring practices and expungement; child support; and juvenile justice.

The Workgroups recommend removal of barriers to employment for: construction trades, optical dispensing and cosmetology, unarmed security guards and services, casino workers, hearing aid dealers and fitters, licensed salvage yard dealers, elevator repair persons, underground storage tank inspectors, motor vehicles salespersons, and voluntary action programs.

Often there is no nexus between driving and the offenses that result in a loss of driving privileges. There are 17 ways for a person to lose a driver's license for an offense that has no attachment to moving violations.

The workgroups recommend a modification of child support orders of those incarcerated, and making first time non-support offenses "expugnable" if all payments are caught up.

H.B. 86 included a provision that offers an offender a Certificate of Achievement and Employability, issued by DRC, on complete compliance with certain evidence based programs. A second certificate is being considered for offenders showing compliance with the law and good conduct within the community. The hope is that these certificates would facilitate opportunities for the offender within the job market.

Dir. Mohr reported that the latest draft of the collateral sanction proposal for legislation should be delivered to legislators by next week. He noted that among the cornerstones of this proposed legislation, foremost should be a nexus between the offense and the sanctions or consequences placed on the offender.

In one nonsupport case, a man served five years probation and caught up on child support. He lost his job, however, because of the felony on his record. A judge wanted to expunge the offender's child support record but couldn't because when the victim is a minor, records cannot be expunged. The man was unable to pass background checks for employment elsewhere. It took more than seven years to get his record cleared. Dir. Mohr favors more judicial discretion in these cases.

DRC SYSTEM REFORM

Safety. Security and safety have been greater concerns in the prisons, said Dir. Mohr. The prison system went from one disturbance every 28 days in 2007 to one disturbance every seven days in 2010. That rate is declining, but there is a need for improvement. Some inmates have refused assignments because they are afraid to walk out of their cells.

DRC started moving anyone who harms another inmate or staff person into units with more control and enrolling them in cognitive based programs to deal with anger and impulse control issues.

A 1996 study had said there was no correlation between the level of offender and violence. He questioned that and had the staff do a more focused study. Looking at every incidence of violence in 2002, it was found that security threat group inmates were involved in violent incidences at a rate of 3½ times more than other inmates. As a result, DRC moved some of these inmates into units with greater control.

The service delivery system in 2008 and 2009 was comprised of unit management that was eliminated for budget reasons and so that inmates only had to deal with officers. The result proved to be a model of incapacitation, said Dir. Mohr.

The current three tier system offers a hierarchy of reform, he noted. It includes an improvement in the quality and availability of mental health unit teams. It also allows for self development and cognitive based programs that make a difference in people’s lives.

The unit management system was a proactive decentralized way of management. The new system is cognitive based. This will involve an increase in the number of evidence based programs available and an assurance, thanks to the ORAS, of getting the high risk offenders into those programs.

Reintegration. This piece of the system is intended to bridge the gap between prisons and the community, said Dir. Mohr. He noted that data show that inmates who receive visits are less likely to return to prison. Encouraging more people from the community to visit those inmates not otherwise receiving visits can help to foster their transition into the community and reduce the chance of recidivism.

Reintegration centers are being established where the offenders will have to work eight hours a day, linking with various employment opportunities. He noted that inmates in the industry program have shown that they are less likely to return to prison. A company expressed an interest in shutting down a factory in China with intent to bring the jobs to the U.S. and use the offender workforce, which will offer productive activity aimed toward transitioning those work skills back into the community, he added.

The goal is to help every inmate move from control units to reintegration. This will involve tighter unity with reentry coordinators and more integration with the families. The goal includes making sure no one leaves prison without a community contact and an expansion of productive activity.

Dir. Mohr asserted that this is a different look at the prison system, with more of a stair step approach toward reduced control and preparation for transition back into the community. The byproduct should be a reduction in prison violence and recidivism.

Dir. Mohr remarked that DRC is working on a visual map outlining objectives that must be met for an inmate to progress through tiers.

Reentry Approved Programs. Sara Andrews, Deputy Director of Parole and Community Services for DRC, offered a list of the Reentry Approved Programs.

Representing the Chief Probation Officers' Association, Gary Yates remarked that there are over 3,000 offenders under supervision in Butler County. So far this year the success rate increased from 65% to 82%. The revocation rate last year was 30.9%, but only 13.7% for the first quarter 2012. He believes that part of the improvement can be credited to new programs and classifying offenders differently under ORAS. Funding under H.B. 86 helped to provide the additional programs.

Counties that received funding, said Ms. Andrews, are reporting their performance measures quarterly. Since the funding only became available last fall, most counties didn't start reporting until February. DRC plans to send newsletters to let others know about the funding, too.

Discussion. When asked by Juvenile Judge Robert DeLamatre about the budget impact of these changes, Dir. Mohr asserted that thy resulted in a $190 million reduction.

More offenders returning to the community, Judge DeLamatre remarked, can cause budget problems at the county and community level. It basically shifts the investment. Rather than counting it as a budget reduction, the investment up front of increased productivity and reduced recidivism should be expected to pay dividends long term.

To keep this going, Dir. Mohr responded, the prison intake must decrease. One challenge, he noted, is that some misdemeanors became felonies but probably should not have. These have had a major impact on the prison population.

Common Pleas Judge Janet Burnside asked about areas where Dir. Mohr favors giving judges more discretion to ease collateral consequences.

Judges are in a perfect position, Dir. Mohr responded, to help with expungement, which greatly affects a person's chances of employment.

DRC Chief of Staff Linda Janes noted that H.B. 86 includes a provision expanding judicial release allowing DRC to petition a judge, but the details have not yet been worked out. Under collateral sanctions there is an order of certificate release which grants immunity to an employer for hiring an offender upon his return to the community, she added.

A person who gets a Governor's grant of clemency can get his record expunged through trial law, although it is not granted through statutory law, said Judge Burnside. If it is possible that way in those cases, then she can't understand why all others are limited by statute.

There is a misconception, said Senator Larry Obhof, that expungements are restricted in Ohio. S.B. 17 will change that.

According to State Public Defender Tim Young, this has been discussed by several work groups. For reentry purposes, a nonsupport (child support) offender needs to be able to get his record cleared in order to obtain a job.

According to DRC Research Director Steve VanDine, most employers are not going to the government sources for background checks.

In Minnesota, said Atty. Young, any private supplier of databases is required by law to resample the database every 30 days.

For those who have had a record expunged they are legally allowed to state on a job application that they have no record. However, the employer might seek a background check through a private source that was not updated for the expungement. This, said Mr. VanDine, makes the offender look like they are providing false information.

Retired Common Pleas Judge Jhan Corzine remarked that, a couple of years ago, Sen. Smith had a bill regarding expungement and several people fought it.

A greater sense of urgency is needed, Dir. Mohr declared, so that something gets done this year. He insisted that this issue of collateral consequences cannot wait.

Dir. Diroll asked how an offender can catch up on support in prison.

According Ms. Janes, incarceration is considered voluntary unemployment so the collateral sanctions bill will allow a modification to the support order until the offender has a chance to gain employment. There is currently a possibility to adjust the arrearages if they are owed to the state. The collateral sanctions bill will not change that.

Inmates don’t have access to the resources to ask for a modification review, said Judge DeLamatre, so it becomes a matter of depending on the Child Support Enforcement Agency to stay on top of things. If nothing is done, then the current support order continues. It’s only reasonable to reduce the charge while incarcerated, but it does not take the responsibility away.

When asked how the implementation of expanded earned credits under H.B. 86 is progressing, Dir. Mohr responded that DRC is currently in the process of expanding evidence based programs with credit in mind. Under the intensive drug programming, they are looking to use certificated people. He noted that they are also looking at offering expanded earned credit for current inmates (sentenced before H.B. 86’s Sept. 30, 2011 effective date), in separate legislation.

Ms. Andrews reported that DRC hopes to have the 80% judicial release option implemented by the end of the fiscal year.

Dir. Diroll agreed to have the collateral sanctions legislation up for discussion in further detail at the next meeting.

PLEA BARGAINING

In light of two recent U.S. Supreme Court decisions regarding plea bargaining practices centering on affective assistance of counsel, Dir. Diroll asked State Public Defender Tim Young for input on how these decisions might affect plea bargaining practices in Ohio. Generally when a defendant pleads guilty he is making a knowing, intelligent, voluntary waiver of certain rights, he noted.

Defender Tim Young believes that the cases were clear cut examples of ineffectiveness by the attorneys involved. The issue involves the constitutional right to affective assistance of counsel in the plea bargaining stage of representation. In the *Frye* case, an offer was made to the defense lawyer and he failed to convey that offer to the defendant. In the *Lafler* case, the defendant was ill-advised by his attorney. The question becomes whether the decisions will have an impact on other cases.

In crafting a remedy, he said we need to focus on differences between the plea, the offer, and the ultimate outcome. If it is a question of sentence length, but no change in the initial charge or nature of the charge, then a resentencing may suffice. When the outcome is more egregious, involving a different charge or elements, or mandatory time, it may be necessary to undo the verdict and redo the plea bargain.

He noted that in either case, the judge still has the right to reduce the sentence, give the same sentence, or not give any remedy at all if there are reasons he would have disapproved of the plea.

He does not believe there will be any groundswell of litigation to have cases reheard because the *Frye* type of case probably won't happen very often. Since the *Lafler* case involves receiving poor advice, however, it is more likely to be raised.

He pointed out that, municipal courts usually write the offer, but not necessarily so in common pleas court. In common pleas court, they usually just ask if there was an offer.

Defender Young believes that litigation will involve how bad the advice was, with a focus on establishing barriers. This might involve the impact, whether it goes to an element of the charge, or even the sentence potential or collateral consequences. He does not foresee a lot of cases coming back for litigation because it's not an automatic right to do so.

Dir. Diroll remarked that it would help if there were some type of record on which to base one's argument. He asked whether court rules should require that plea offers be made in writing.

Atty. Young noted that many offers are now done by email.

Judge Corzine argued that it is too soon to recommend changes. He believes many offenders won't want to reveal as much information about their cases if the plea bargain is revisited. He also feels the U.S. Supreme Court could have come up with better remedies in the cases.

In accord, Atty. Young doesn't believe the offenders will want some of the information to be a matter of record.

Many offenders, said Jay Macke, from the State Public Defender's Office, claim the attorney misled them, but investigation shows that isn't true. He noted that the week prior to the *Frye* and *Lafler* cases, the *Martinez* case came down which has implications about which claims can be brought without prejudice. That is much more likely to be a source of litigation.

Tying the day's two main topics together, Judge Corzine expressed concern over the extensive list of collateral consequences and whether a judge can be expected to cover it all in taking a plea.

It is even more challenging to advise a defendant if immigration consequences are involved, said Atty. Young.

TAMPERING WITH EVIDENCE

Judge Corzine suggested breaking the offense of tampering with evidence (§2921.12) into misdemeanor and felony aspects. The offense is a third degree felony. In some cases, he feels the penalty is unjust. He noted a case involving a traffic stop where an officer noticed a fleck of marijuana, but no "roaches" in the car. The prosecutor refused to reduce the charge, so Judge Corzine took a plea and treated it as a misdemeanor and imposed a fine and community control.

He drafted proposed language in conjunction with his prosecutor's office. The proposal would keep the F-3 if tampering involves an official proceeding or any type of investigation other than a criminal investigation of a misdemeanor offense. If the offense involves a criminal investigation of a misdemeanor, it would be an M-1.

The goal is to bring the penalty in line with the offense being investigated. He argued that for the criminal investigations of a misdemeanor there needs to be a sense of proportion so that the penalty fits the crime. The effort is to prevent the escalation of a misdemeanor situation into a felony.

Regarding tampering with evidence, Staff Lt. Chad McGinty from the State Highway Patrol remarked that they often see cases where a driver is stopped for speeding and either eats or throws drugs out a window.

Judge Corzine believes that the hardest case will be one involving residue in a crack pipe. It will then depend on whether the prosecutor wants to investigate it as a misdemeanor or felony.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission are tentatively scheduled for May 17, June 14, July 19, August 16, September 20, October 18, November 15, and December 20, 2012.

The meeting adjourned at 1:05 p.m.