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

August 16, 2012

MEMBERS PRESENT
Municipal Judge David Gormley, Vice Chair
OSBA Representative Paula Brown
Chad McGinty, Staff Lt., representing State Highway Patrol Superintendent, Col. John Born
Steve McIntosh, Common Pleas Judge
Jay Macke, representing State Public Defender Tim Young
Thomas Marcelain, Common Pleas Judge
Senator Larry Obhof
Steve VanDine, representing Rehabilitation and Correction Director Gary Mohr

ADVISORY COMMITTEE
Eugene Gallo, Director, Eastern Ohio Correctional Center
Lora Manon, Attorney, Bureau of Motor Vehicles
Gary Yates, Chief Probation Officers' Association

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

GUESTS PRESENT
Sara Andrews, Rehabilitation and Correction
Erich Bittner, legislative aide to Sen. Obhof
JoEllen Cline, Supreme Court of Ohio
Monda DeWeese, Community Alternative Programs
Irene Lyons, Rehabilitation and Correction
Scott Neely, Rehabilitation and Correction
Phil Nunes, Ohio Justice Alliance for Community Corrections
Marjorie Yano, LSC Fellow, Speaker Batchelder's Office

The August 16, 2012 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by the Vice-Chair, Municipal Judge David Gormley at 9:40 a.m.

DIRECTOR'S REPORT

80% Judicial Release. Executive Director David Diroll reported that H.B. 86, which took effect September 30, 2011, authorized a judicial release mechanism instituted by the Department of Rehabilitation and Correction (DRC) after an inmate serves 80% of the stated prison term.

To date, the mechanism hasn't been used, he said. He asked Sara Andrews of DRC for an update.

Deputy Director Andrews reported that the DRC has drafted rules for this provision and hopes to have them approved and in place by the end of the year.

Simplifying OVI. The impaired driving statute, said Dir. Diroll, is being viewed by several other groups for refinements. The Ohio Prosecuting Attorneys' Association feels that one aspect of the testing provision still needs a little work. The hope is to get it introduced next year, together with other refinements suggested by the Commission.

DRC's STRUCTURED SENTENCING COMMITTEE

Background. DRC Research Director Steve VanDine explained that DRC has established a "Structured Sentencing Committee" to find alternatives that will allow DRC to have more control over the time people spend in the prison system. The beginning focus has been to establish why this is needed and what has been tried in the past.

Upon Director Gary Mohr's return to DRC, he had noticed that 1,900 inmates were willing to go into disciplinary cells rather than be in the general population due to a fear of violence. He also noticed an increase in the number of disturbances.

Research. This led to research into inmate misconduct patterns, with the garnered information used for security classification tools, a revised security threat group (STG) profile, identifying correlates of prison level violence, and state-level comparisons in PBMs.

Mr. VanDine offered data from 2007 to 2011 involving inmate cases brought before the Rules and Infractions Board (RIB) and found guilty by that board. This information shows an increase in the number of infractions from 972.41 in 2007 to 1,174.67 in 2011. There has also been about a 50% increase in the number of violent infractions, with 156.7 per 1,000 inmates in 2007 compared to 229.72 per 1,000 inmates in 2011.

Serious and Violent Disturbances in CY 2010. In 2010, there were a total of 89 serious violent disturbances with four or more offender participants. Most included at least one offender with an STG (gangs and some religious affiliations) affiliation, a growing problem.

The average age of participants is 25.14, with the most common age group being under 25 (61.9%). The largest group of participants has sentences of 1 to 3 years (30.8%) while the smallest group of participants has sentences of less than one year. The majority of participants have served one year or less on their sentences at the time of the serious or violent disturbance.

9.9% of the offenders in serious or violent disturbances have a prior DYS commitment (N=75). These are usually young offenders serving their first term in the adult prison system. 6.1% of the offenders involved are parole eligible. The majority of participants (61.4%) do not have a prior Ohio prison commitment.

Research and Violence Reduction. More flexible DRC institutional misbehavior data have afforded the opportunity to examine prison misconduct for entire institutions and the entire incarcerated population over time.

There was been a moderate increase in general inmate on inmate (IOI) and inmate on staff (IOS) tickets over the years from 2007 to 2011, said Mr. VanDine. These involve mostly tickets for harassment, but with no contact involved. In comparison, there has been a greater increase in the serious tickets (from 11.8 per 1,000 in 2007 to 19.9 per 1,000 in 2011) and incidences involving the use of force (4.01 per 1,000 in 2007 to 7.82 per 1,000 in 2011).

DRC is now able to get more specific details on the types of incidents involved, noted Mr. VanDine, since a special incident reporting process has improved. Records now show a great improvement in the detail of reporting including what happened and who was involved.

There has been an increase in all areas from 2007 to 2011, but a reduction is already being seen in most areas in 2012.

When asked about the impact of crowding on these violent incidences, Mr. VanDine noted that available resources and good management make a bigger difference than just crowding.

The single biggest factor indicating trouble in prison, said Mr. VanDine, is an inmate's mental health.

Phil Nunes of the Ohio Alliance for Community Corrections wondered about the impact of indeterminate sentencing prior to S.B. 2 in 1996 versus determinate sentencing after that date. He noted that the attitude among offenders has changed since they have little or no chance of an early release under the determinate sentencing of S.B. 2.

Mr. VanDine explained how the recidivism rate increased after 1996 when more people were released on post-release control instead of released with no supervision.

They are seeing the same type of increase in the rate of incidences at the Halfway Houses, said Mr. Nunes. Again, he contended that the biggest difference tends to be attitude.

Dir. Diroll asked whether the gang related associations are cyclical.

Mr. VanDine admitted that was possible, particularly given that DRC's African American population has dropped approximately 14% over the last 15 to 17 years. Some offenders who used to be "top dog" want to reassert authority. That needs to be factored into the dynamics.

According to Mr. Nunes it is getting harder to delineate who's really associated with whom regarding gangs.

Judge Marcelain wondered if any of these disturbances result in new criminal charges.

It depends, responded Mr. VanDine, on if there is enough evidence and if the behavior is at the level of a felony. He noted that there are

about 300 inmates per year referred for felony charges but only about 11% get convicted.

As DRC works to reduce crowding, it will make more space available for disciplinary purposes.

Parole Hearing Release Rates from 1977 to 2011. There have always been complaints about the Parole Board and its decisions regarding release, noted Mr. VanDine. In the late 1970's Ohio's prisons became seriously crowded. To help address this problem, the concept of "good time" was adapted to reduce sentences by 30% and the crowding gradually decreased. Initially, good time was supposed to be revoked for violation of rules, but this policy was sporadically imposed. The use of good time increased into the mid 1990's, but was then eliminated and "bad time" was used in its place to add time if the inmate exhibited behavior tantamount to a crime.

Before S.B. 2, most of the violent offenders would go before the Parole Board. The lower level offenders didn't have to. Those with indeterminate sentences who appeared before the Parole Board were often given a long continuance, which would affect the inmate's behavior more than the denial of good time.

During the mid-1990's, the Parole Board tended to become more conservative and started "flopping" more of the offenders, holding them over for longer periods. Eventually, changes were made to the Parole guidelines in 1998.

During the 1970's and early 1980's, the majority were released under some type of discretionary release. By 2011, there was a huge drop in releases by the Parole Board. Some, however, were being released by judicial release, similar to the earlier shock probation mechanism. Otherwise they were placed on post-release control.

Denial of Good Time and Assessed Bad Time. The use of good time was fairly automatic in the 1970's and early 1980's. Its use peaked in 1994 before it was taken away in 1996 by the enactment of S.B. 2. Bad time was imposed in its place under S.B. 2 and its impact was starting to be seen in 1998, but the Supreme Court of Ohio soon forced its end.

Mr. VanDine provided a 1995 memo reflecting the impact of the loss of good time. The institutions with a higher proportion of determinate sentence offenders were more likely to deny good time. Also, maximum and close security institutions contained a high proportion of parole-eligible inmates, but most had already passed their first Parole Board hearings, making them no longer eligible for good time. The possibility of a long continuance at a parole hearing affected the behavior of those offenders more than the possibility of a month or two denial of good time, he elaborated.

Dir. Diroll pointed out that S.B. 2 eliminated most of DRC's and the Parole Board's control over sentencing. Parole was effectively abolished for most offenders and shock parole and general good time were eliminated. Post-release control (PRC) was then established as an administrative tool, with the intention that the whole range of sentencing options would be allowed as conditions of PRC. The offender's behavior while in prison would guide the level of

supervision needed under PRC. The legislature mandated PRC for certain classes but left it discretionary for others. Bad time, on the other hand, was intended to be used for behavior tantamount to a crime. The Supreme Court claimed that bad time effectively allowed DRC to change the judges' orders so it ended up ruling against bad time but in favor of post-release control. When bad time was taken away, it took away a vital tool for DRC to use as a deterrent, he added.

Discussion. The Structured Sentencing Group brainstormed on a mechanism, said Mr. VanDine, to deal with the bad behavior of offenders. One suggestion was to reinstitute bad time. Another was to grant statutory authority to judges to sentence to both determinate and indeterminate sentences in the same case, allowing the sentence, upon bad conduct, to be converted to indeterminate. This might be an alternative to prosecuting for a new crime. He noted that they are open to input from others.

Mr. Nunes noticed that there tended to be a shift of focus from reward to punishment. He argued that an incentive is needed for good behavior. He suggested that there should be an allowance for reducing the time of supervision under post-release control.

That is what H.B. 86 had hoped to do with the three tier proposal, said Mr. VanDine.

DRC is attempting to get those inmates with good behavior out sooner, said Deputy Dir. Andrews. On the other hand, violent people in the system need to be held accountable. This group is focusing on a smaller group of offenders who exhibit violent assaultive behavior.

Judge Steve McIntosh asked what has proven to be effective in changing behavior. He wondered which, if any, sanctions, really work to that effect. He also asked what type of behavior warrants a move to a higher level of security.

Since one's behavior reflects one's mindset, behavior reviews are conducted, Mr. VanDine responded, and an effort is made to have the offender's imminent behavior reflected in the classification level given. Sometimes, due to the frequency of certain types of behavior, it becomes necessary to isolate some offenders. The sanctions work for most offenders, although it sometimes takes a bit longer for some to acknowledge the consequences of their actions.

Irene Lyons, a DRC legislative liaison, remarked that the wardens at the Chillicothe Correctional Institution have seen a difference in the behavior among inmates and a reduction in violence among inmates who want to get into programs. Scott Neely, another DRC legislative liaison, added that DRC hopes to influence their behavior with the option of the 80% release provision.

Dir. Diroll wondered how the earned credit option correlates with inmate behavior.

There has not been a big impact yet, said Mr. VanDine, because few are eligible yet. They must exhibit good behavior to be eligible, which will help.

Atty. Jay Macke, from the State Public Defender's Office, declared that his office will fight any effort to reinstate the use of bad time.

The Legislature could probably mandate, Dir. Diroll said, that any time imposed for a conviction for misconduct in prison would be mandatory consecutive time to the prison term, including misdemeanors. This would be similar to how it is done for escape.

Part of the problem, Mr. Nunes argued, is that when they have an incident at a halfway house, the facility's staff are shrugged off by police and told to handle it internally.

Dir. Diroll asked if it was time to consider introducing some form of indeterminate sentencing into the Revised Code.

Judge Marcelain suggested allowing release after serving 80% of the sentence if good conduct has been shown, but mandating that the full term be served if poor conduct is exhibited. This would structure the option as a reward kind of thing for good behavior instead of punishment for bad behavior.

Dir. Diroll noted that the federal definition of truth-in-sentencing requires that the offender serve 85% of his sentence. He asked whether a lesser minimum would jeopardize any federal funding.

According to Mr. VanDine there is no longer a large amount of federal money at risk.

On another note, Ms. Andrews complained that offenders come before the Parole Board unprepared. They are trying to work with those offenders more to help them get better prepared. They are trying to teach them what is important at the hearing. She noted that most Parole Board hearings are now done by video conference. She added that there are plans to start tracking Parole Board voting habits.

According to Mr. Nunes, Ohio is the only state that allows a judge to have any say in programs the offender participates in while in the prison system. He believes that a philosophical discussion is needed as to how much we trust DRC and the Parole Board to make decisions regarding the offender's time.

Dir. Diroll reported that the Ohio Prosecuting Attorneys' Association has discussed encouraging indeterminate sentencing for some offenses at the upper levels.

As Director of the Eastern Ohio Correctional Center, Eugene Gallo remarked that they are constantly trying to teach inmates how to make good decisions. Most of them make decisions against their own best interest and will continue to do so until taught how to do otherwise.

For those inmates who will never get out, said Mr. Nunes, there is no known incentive to encourage them.

There is no perfect solution, Dir. Diroll acknowledged, noting that there will always be some who misbehave, regardless of whether it means serving more time.

CULPABLE MENTAL STATES

Over the past two years the Sentencing Commission has worked on *mens rea* issues by attempting to fill the gaps in criminal statutes that did not state a culpable mental state. A couple of other groups, including the Texas Public Policy Foundation and the Buckeye Institute, have been looking at these issues as well. He has been in contact with these groups for several months.

Where a clear culpable mental state isn't included in a criminal statute, the Texas group's position evolved toward "knowing" conduct, at our suggestion, said Dir. Diroll. After all, the legislature probably did not intend that all offenses missing a culpable mental state were truly meant to carry strict criminal liability, irrespective of what was in the defendant's mind. The Texas group and Buckeye Institute are also concerned about reading these as strict liability offenses. However, Dir. Diroll added that some statutes are clearly meant to be strict liability, particularly traffic offenses. Other participants agreed. He believes the groups are worried about how it might affect some white collar offenses.

He noted that the Commission worked over the past couple of years to redefine "reckless", the current default standard, with a slight majority favoring the definition in the Model Penal Code. When first contacted by the Texas group, he suggested defaulting to something already in the Revised Code, rather than create a new default term.

OSBA Representative Paula Brown agrees that we should avoid defaulting to strict liability. She would be more comfortable with "recklessly" along the lines the Commission suggested last year.

Atty. Brown noted that Chief Justice Moyer had said, if the mental state wasn't listed in the indictment, how could one know the jury had been instructed on the mental state.

Senators Bill Seitz and Larry Obhof would like to resolve these issues and the Heritage Foundation is interested as well, added Dir. Diroll.

Dir. Diroll pointed out that if we fill the voids in the statutes, we won't have to use the default statute much at all.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for September 20, October 18, November 15, and December 20, 2012.

The meeting adjourned at 1:30 p.m.