OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor
Chair

David J. Diroll
Executive Director

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

November 21, 2013

MEMBERS PRESENT
Municipal Judge David Gormley, Vice Chair
Chrystal Pound Alexander, Victim Representative
Paula Brown, OSBA Representative
Ron Burkitt, Police Officer
Ryan Dolan, representing Rehabilitation and Correction Director Gay Mohr
Laina Fetherolf, Prosecuting Attorney
Kort Gatterdam, Defense Attorney
Theresa G. Haire, representing State Public Defender Tim Young
Sylvia Sieve Hendon, Appellate Judge
Thomas Marcelain, Common Pleas Judge
Steve McIntosh, Common Pleas Judge
Dorothy Pelanda, State Representative
Kenneth Spanagel, Municipal Judge

ADVISORY COMMITTEE
Eugene Gallo, Eastern Ohio Correctional Center
Gary Yates, Ohio Chief Probation Officers' Association

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

GUESTS PRESENT
Scott Anderson, Professor, Capital University Law School
Sara Andrews, Rehabilitation and Correction
JoEllen Cline, Counsel, Supreme Court of Ohio
Garrett Crane, Legislative Service Commission
Monda DeWeese, Community Alternative Program
Sean Gallagher, Appellate Judge
Lusanne Green, Ohio Community Corrections Association
Scott Lundregan, Speaker Batchelder's Office
Irene Lyons, Rehabilitation and Correction
Miller, Elizabeth, State Public Defender's Office
Marta Mudri, Ohio Judicial Conference
Scott Neeley, Rehabilitation and Correction
Paul Teasley, Hanna News Network
Maggie Wolniewicz, Legislative Service Commission

The November 21, 2013 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by Executive Director, David Diroll at 9:50 a.m.

Judge Sylvia Sieve Hendon was welcomed, who is returning to the Sentencing Commission as an appellate court Judge. She had previously served on the Commission as a juvenile court Judge.

Director Diroll remarked that there really is nothing new to report on the *mens rea* issue.

RECLAIM APPROACH TO ADULT SENTENCING

Sara Andrews, Deputy Director for Parole and Community Corrections for the Department of Rehabilitation and Correction, reported that a pilot fiscal incentive program is being set up that grew out of the debate on having a RECLAIM-like format for the adult criminal justice system.

The working group suggested having four incentive tracks for counties to choose the best option for them. DRC is looking at the offenders entering DRC as probation violators from the county, examining their TCU score, and comparing those with counties for which there are already community corrections dollars available. The Department is trying to target the high need/low resource counties in treatment services and encouraging them to apply for the grant to develop more alternatives locally. One track will emphasize probation's successful termination and encourage counties to keep offenders in the community and get them to successfully complete probation, defined as not returning to prison. Another track will target an increased number of people on probation, emphasizing putting more people on probation rather than sending them to prison. The 4th alternative is more of the Reclaim model, targeting the credit/debit theory.

The four proposed models will focus on: Violence; High need/low resource counties – advising them to apply for grants; Increasing the number of people on probation rather than sending them to prison; and a model similar to the juvenile RECLAIM system.

Drafts of those four working models were sent to the working group for feedback to try to fully develop each model within the next two weeks. DRC intends to talk with the Ohio Justice Alliance for Community Corrections Group and are trying to get time on the December agenda of the Common Pleas Judges' Association. They have developed an aggressive schedule due to the goal of reallocating some FY14 & FY15 dollars (which expire next July) for the grants. She reported that there are currently about 5,000 probation violators in Ohio prisons.

Gary Yates, representing the Chief Probation Officers' Association, expressed relief that the proposal has evolved beyond the juvenile system's RECLAIM model. He expressed concern, however, about how some counties will be able to produce the numbers to qualify for future money. The smaller counties look forward to getting more resources and the opportunity to offer a wider variety of options as well as the opportunity to decide variations on funding. If the pilot program works, it should alleviate some of the judges' concerns about mandates.

It is an evolution of DRC's community corrections' funding, said Dep. Dep. Dir. Andrews, and will provide an opportunity to find what works. Hopefully it will offer less bureaucracy and more clarity.

Director of the Eastern Ohio Correctional Center, Eugene Gallo remarked that we do a disservice when we say that crowded prisons are basically an economic issue. He contended that the legislators brought in the Council of State Governments proposals three years ago because Ohio's prisons were getting overcrowded and overly expensive. It was time to see what improvements could be made. That made corrections an economic issue. He contended that we make decisions on economic issues every day. He likes that these options are discretionary for the counties and not mandated.

There are 47 counties in which DRC's Adult Parole Authority provides probation services, covering 12,500 people under supervision. Dep. Dir. Andrews remarked that DRC is attempting to directly contract or fund with those boards or service providers. They are also attempting to connect with local programs and treatment providers and broaden the options and funding.

Judge Tom Marcelain encouraged her to make sure that communication about these options reaches both the judges and sheriffs because many judges are unaware of all the options that are available.

Dir. Diroll referenced an article in the day's newspaper which included a comment by DRC Director Gary Mohr regarding this program and the attempt to reduce the number of offenders who get reverted back to prison for technical violations of community control.

Another spin-off of H.B. 86 and S.B. 337 (the collateral sanctions bill), said Dir. Diroll, was S.B. 143, which recently passed the Senate regarding additional background checks for felons upon release from prison. It also provides immunity in some cases for public officials who mistakenly release information from an expunged or sealed record. He noted that, with the extent of today's digital world and the numerous entities that provide background information, the act of sealing a record is no guarantee of anonymity for ex-offenders.

COLD PURSUIT

Dir. Diroll mentioned that Kort Gatterdam had notified him of a case regarding an interpretation of the statute that allows an off-duty law enforcement officer to make an arrest outside of his jurisdiction under certain circumstances. If the officer violates that statute, however, there is no particular penalty specified.

In the case, said Atty. Gatterdam, none of the allowable arrest circumstances listed in the statute was present. The 10th Appellate Court stated that since no penalty is listed, jurisdictional boundaries no longer matter so long as the officer declares there was probable cause at some point. In the past, Atty. Gatterdam declared, it was based on the totality of the circumstances, as in *State v Weideman*. He doesn't believe that is what the legislators intended, considering all the circumstances that they included in the statute.

He contended that a remedy is needed and the fix could be relatively easy. He urged going back to allowing the trial courts to do the balancing test. In most cases the officer has a valid reason for being there. If not, the case gets suppressed. He acknowledged that many cases start in one jurisdiction and move into another with the officer in hot pursuit. In those cases suppression is probably not appropriate. But in this case, he argued, everything occurred outside the arresting officer's jurisdiction. He believes that the statute should allow trial courts the discretion to determine if there is a violation of the statute that could lead to implication of the inclusionary rule and suppression of the evidence. It needs to include a penalty for violation of the statute.

Judge Sean Gallagher agreed that the statute has no teeth. He believes it would not require a huge fix and, in fact, could probably be addressed within one or two sentences to allow trial courts to do a balancing test.

APPELLATE ISSUES

Before S.B. 2 there was no formal appellate review of sentencing authorized by the Revised Code, said Dir. Diroll. S.B. 2 included presumptions and guidance to be followed, and, in some cases, the defendant or the State had an appeal of right if those were not followed. Some of those findings on which these appeals were based were eliminated by the Ohio Supreme Court in the *State v Foster* case. H.B. 86 attempted to restate those findings and make some other changes, but did so imperfectly. Since H.B. 86 went into effect, the number of appeals related to sentencing has greatly increased.

Eighth District Court of Appeals Judge Sean Gallagher referred to the ongoing challenge for appellate courts as "Ohio's 'Quiet' Sentencing Crisis," reflecting on the fact that most people don't see these results of sentencing reforms.

He referenced the pre-S.B. 2 case of *State v Shelton*, in which Ryan Shelton was convicted of 219 counts in the rapes of 21 or 22 women and was sentenced to 1,586 years. Shelton appealed his conviction, and lost, but did not appeal his sentence for cruel and unusual punishment (or anything else). In fact, Judge Gallagher reports that a survey that he conducted found that, prior to S.B. 2 (July, 1996), less than 10% of all criminal appeals in the 8th District had a sentencing issue on appeal. Now over 80% raise a sentencing issue and most involve *only* sentencing.

He noted that we sometimes punish crimes (child rape, child porn, murder, and crimes against the elderly) and sometimes punish people (the offender, theft, drugs, certain violent crimes and most non-violent crimes).

S.B. 2 included §2953.08 which formally created grounds for certain types of sentence appeals. It was designed to provide a narrow review process for those offenders falling into a certain category where the court was expected to make certain findings. Unfortunately, it did not contain a method for quantitatively reviewing what findings or reasons were expected, he noted.

Appellate courts were left to review sentencing decisions based on the "clear and convincingly" standard, including determining such issues as the "worst form of the offense" and "contrary to law." As a result, inconsistent decisions were made by the courts because there were no real quantitative standards, parameters or specific definitions to measure these "findings" or "reasons." Applying such broad generic legal concepts subject them to varying interpretations. "Contrary to law" seems to open a wide door for appeals. Judge Gallagher proposed developing standards or definitions in §2953.08 to aid in review.

He quickly reviewed the differences between the longstanding standard of "abuse of discretion" and the new "clear and convincing" standard for appeals. The former, he noted, connotes more than an error of law or judgment. It entails a decision that is unreasonable, arbitrary or unconscionable.

"Clear and convincing," according to *State v. Williams*, does not mean clear and unequivocal. Rather, it refers to "the measure or degree of proof that will produce in the mind … a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases."

According to Griffin and Katz, in *Ohio Felony Sentencing Law*, "contrary to law" means that a sentencing decision *manifestly ignores* an issue or factor which a statute requires a court to consider. But §2953.08 does not include such a definition.

Separately, *State v. Foster* (2006) held that the statutory requirement (under S.B. 2) that a trial court must make certain "findings" before imposing consecutive sentences violated the United States Constitution. The Court thus severed that requirement and certain other fact-finding requirements from the statute.

Subsequently, the U.S. Supreme Court later held, in *Oregon v Ice*, in 2009, that judicial fact-finding as a prerequisite for imposing consecutive sentences was constitutional, thereby declaring that there was nothing wrong with Ohio's law in the first place. In 2010, the Supreme Court of Ohio ruled in *State v. Hodge* that *Oregon v. Ice* did not revive the Ohio statutory requirement of judicial fact-finding, but that the Ohio General Assembly was free to enact new legislation requiring findings. All of this resulted in H.B. 86 and S.B. 160, which restored required "findings" for consecutive sentencing, but left out why, and revived the struck aspects of §2953.08, in part. This made matters more confusing. Rather than limiting appeals to specific types of sentencing issues, the net effect seems to have opened the door to appeal all aspects of all sentences, he claimed.

Dir. Diroll noted that DRC reported that the *Foster* decision resulted in an average of 5 additional months being imposed per sentence. This started having quite an impact on the prison population, which, in turn, influenced the enactment of H.B. 86.

Since H.B.86 seems to have brought the issue full circle, and defendants now tend to appeal all aspects of all sentences, Judge Gallagher questioned whether all felony statutes should be reviewable

as a matter of right. He noted that permission to challenge a statute that is “contrary to law” presents the most problems.

A felony sentence is appealable under 2953.08(A)(4) if it is “contrary to law,” but, absent a clear definition, “contrary to law” has become a catch-all section for most felony appeals, he contended.

Since §2953.08 is the default sentence review statute, Judge Gallagher believes that it is the best statute to address the problem. He suggests rewording §2953.08 to define the parameters of appeals and provide a detailed review process that is not subject to multiple interpretations.

This, he believes, would tighten the review process and could ultimately keep the worst offenders in prison and the lower level offenders in community sanctions. He personally feels there is too much judicial discretion. He claimed that, in some areas, the only thing that matters is who you get assigned to in the arraignment room.

He believes sentencing reforms have been a good thing but there now is a need to look at how to tighten the review of these sentences to assure that the judicial system is getting the benefits that were intended by the reforms.

Judge Marcelain raised concern about the lack of appeal for consecutive sentences.

§2953.08(A)(1), said Dir. Diroll, provides for a discretionary appeal, but not an appeal of right.

Judge Gallagher pointed out that, for consecutive sentences, the judge must give the maximum term on the most serious offenses in order for it to be appealable.

According to Appellate Judge Sylvia Sieve Hendon, it seems that any effort to address this will butt up against judicial discretion.

Judge Gallagher agreed there will probably be a huge blow-back but insisted that clarity and a better set of parameters are needed.

Dir. Diroll reported that Judge Sheila Farmer in the 5th Appellate District, as co-chair of the Judicial Conference’s Appellate Law and Procedures Committee, has appointed a three person group, consisting of Judges Gary Tyack, Michael Walsh, and Sylvia Hendon, to work with the Sentencing Commission to work on this issue and bring greater clarity to the statute.

Believing this issue is something the Commission should pursue, Judge Marcelain claimed that it could even help ease prison crowding.

Believing that feedback is needed from the common pleas judges around the state, Judge Hendon suggested a joint committee that would include some of them.

Since the Judicial Conference’s Criminal Law Committee includes municipal, county, and common pleas court judges, municipal Judge

Kenneth Spanagel suggested having some of them take a look at the statute in anticipation of getting input from some of them as well.

As Vice-Chair of the House Judiciary Committee, State Representative Dorothy Pelanda noted that legislators are continually working on bills and it is virtually impossible to know what the next bill with great impact will be. She noted, however, that there is nothing on these issues before the House Judiciary Committee at this time.

Dir. Diroll agreed to schedule a subcommittee meeting on the appellate issue in February with the Sentencing Commission's common pleas judges, prosecutors, and defense attorneys, along with the other individuals that had been suggested.

Judge Hendon recommended including Judge Gallagher as part of this committee.

Appreciating Dir. Diroll's response to the Appellate Judges in the Eighth District on this issue, Judge Gallagher offered to provide him with a synopsis of some of the cases involved.

Judge Hendon expressed a desire for someone to tell attorneys that they sometimes do their clients more harm than good by appealing everything. Sometimes it exposes their client to resentencing.

MANDATORY PRISON TERMS

At the previous meeting of the Sentencing Commission, recalled Dir. Diroll, several ideas were discussed that might help to ease prison crowding. Among those was the possibility of reconsidering some of the mandatory prison terms.

Mandatory prison terms began in Ohio in the 1970's with drug offenses. They gathered steam with S.B. 199, introduced by then-State Senator Mike DeWine, which laid out mandatory sentences for several specific aggravated felonies. This also brought mandatory gun specs into law. With a lot of those statutes, particular amounts of time were required. Under S.B. 2, in 1996, the mandatories were retained, but most were placed within the range for the felony level, rather than call for specific amounts of time. Some mandatory prison terms are stated as specifications added to the crime. As such, they often become part of a plea negotiation and the specification might get dropped, but a longer sentence on the underlying offense gets imposed.

Many mandatories would be very difficult, politically, to undo. Dir. Diroll proposed sorting out which mandatories might be open for debate.

Drug Offenses. Aside from homicide and rape, the mandatories tend to come in for repeat conduct or conduct with firearms, or certain additional elements beyond the underlying offense. Most F-1 and F-2 offenses have a presumption in favor of prison but not mandatory prison sentences. All F-1 and F-2 drug offenses, however, have mandatory prison. This level often involves someone involved in the drug trade, not personal users.

Dir. Diroll remarked that drug offenses are treated by the Code as a super category at each felony level. He noted that the drug mandatories

came about during the “War on Drugs.” He wondered if some of these might be worth considering for changes.

Noting that many offenders charged with drug manufacturing and cultivation are first time offenders, Judge Marcelain wondered if some of them might not benefit from having the mandatory aspect removed so that more discretion would be allowed. With a mandatory, the judge’s hands are tied, preventing any later judicial release.

Over the last 20-25 years, drug offenders have consistently made up 25-30% of the prison intake, said Dir. Diroll. Since H.B. 86 diverted some of the F-4 and F-5 drug offenders to local sanctions, that number has been reduced a bit.

He noted that, under H.B. 86, some changes have taken place for the offenses of drug manufacturing and cultivation. The specific mandatory terms have been changed to choosing a mandatory from within a range.

Atty. Gatterdam agreed with Judge Marcelain that most drug offenders are users and by giving them a mandatory sentence it allows no option to get them directly into treatment. He believes that the judge should be allowed to consider a nonmandatory penalty for a first offender.

Even though the sentences to prison are mandatory, said Dir. Diroll, most judges now tend to sentence them to the lower part of the range. According to sentencing patterns the judges are not treating them as harshly as other offenses within the same felony level.

Judge Gormley suggested determining which other offenses with mandatory sentences are getting the minimum imposed by judges. That might help to see which other offenses might be open for removal of the mandate.

It is easy to slap a mandatory onto a drug offense, said Judge Hendon, because it is an objective offense.

Asst. Public Defender Theresa Haire suggested a back door way of doing this by reevaluating the predicates.

Looking at other mandatory terms, Dir. Diroll noted that many offenses of violence do not carry a mandatory on the first offense, but do on the second offense. Robbery always involves an encounter with a person, but burglary does not. Yet both are regarded as crimes of violence.

Sometimes it is simply the amount of grams that determines whether or not a mandatory term is imposed, said Atty. Gatterdam. He feels that might need a second look. If the offender has several priors, he agreed that a mandatory sentence is logical.

SORN Reporting Offenses. Under SORN law, the offense of failure to register carries a mandatory on the second offense.

It is hard to use ignorance as an excuse, said Pros. Fetherolf, if the offender has already used that as a defense once in violating the SORN requirements, and appeared before a judge who once again explains the registration requirements. She admitted, however, that some offenders simply report to the wrong person.

The question, said Judge McIntosh, is whether the judge should be allowed to take that into account rather than mandating a prison term.

It is rare to have a felony for arguably negligent conduct, said Dir. Diroll, and even rarer to have a mandatory felony for negligent conduct, which is what the SORN mandate does.

According to Mr. Gallo, some communities don't have places available for these offenders to live, and some judges refuse to send them to prison for simply failing to register.

Most prosecutors assume the offender knows that he has repeat violations, said Pros. Fetherolf. Since many of these offenders pay no attention to what they are told to do, she has grown weary about pining over what else could be done for these offenders.

Noting that there are different grades of noncompliance, Judge McIntosh remarked that the judge can give the offender an opportunity to tell why he keeps failing to register.

The offender might fail to register because he's reoffending, but Atty. Gatterdam argued that you cannot just assume that.

Judge Marcelain argued that they could be sent to jail if it wasn't mandatory to send them to prison. He believes that, in many cases, a few months in jail might be enough to do the trick.

After lunch, Dir. Diroll agreed to take a double look at the definition of offense of violence and mandatories for first time manufacturing and cultivation drug offenses, and the SORN requirements.

For SORN mandatories, Judge Gormley pointed out that it may be necessary to check if any federal funding is tied to the mandatory requirement.

Judge Hendon asked if the atmosphere has changed enough for a legislator to be willing to take a chance and present a bill to reduce mandatories for drug offenders and SORN offenders.

Under the original Megan's Law, said Dir. Diroll, a judicial hearing was conducted to determine whether to put an offender on the SORN list. The Adam Walsh Act now puts them on the list automatically, with no hearing. He noted that even sheriffs don't like SORN law because it offers a false promise to people. The public tends to think the sheriff's department is monitoring these offenders.

Judge Spanagel suggested changing some of the mandatories to presumptions toward prison.

FUTURE MEETINGS

The Sentencing Commission will not meet in December. The next meeting will be January 16, 2014, with additional meetings tentatively scheduled for February 20, March 20, April 17, May 15, June 19, July 17, and August 21 in 2014.

The meeting adjourned at 1:40 p.m.