OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Thomas J. Moyer
Chairman

David Diroll
Executive Director

Minutes of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE
March 20, 2003

SENTENCING COMMISSION MEMBERS PRESENT

Chief Justice Thomas Moyer, Chair
Common pleas Court Judge H.J. Bressler, Vice-Chair
Capt. John Born, representing State Highway Patrol Supt., Col. Paul McClellan
Victim Representative Sharon Boyer
Assistant Prosecuting Attorney James Cole
County Commissioner John Dowlin
Defense Attorney William Gallagher
Common Pleas Judge Burt Griffin
Bob Lane, representing State Public Defender David Bodiker
Municipal Prosecutor Steve McIntosh
Steve VanDine, representing Rehabilitation and Correction Director Reggie Wilkinson
Public Defender Yeura Venters
Prosecuting Attorney Don White

ADVISORY COMMITTEE MEMBERS PRESENT

Jim Lawrence, Ohio Halfway House Association
John Madigan, Senior Attorney, City of Toledo
Gary Yates, Ohio Chief Probation Officers Association

GUESTS PRESENT

Jill Beler, Assistant State Public Defender
Mark DeZarn, Montgomery County Assistant Prosecutor
Lusanne Green, Ohio Community Corrections Association

STAFF PRESENT

Scott Anderson, Staff Attorney
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

Chief Justice Thomas Moyer, Chairman, called the March 20, 2003 meeting of the Ohio Criminal Sentencing Commission to order at 9:45 a.m.

DIRECTOR'S REPORT

Meeting Packets. Executive Director David Diroll reviewed the meeting packets which included: a memo to Rep. Latta regarding his request to have the Sentencing Commission simplify the criminal laws in the Revised Code; the latest Monitoring Report; a copy of the recently published Forfeiture Report, which is being delivered to the General Assembly, and minutes from the January meeting.

Legislation. Rep. Bob Latta's bill based on the Commission's misdemeanor recommendations, H.B. 490, takes effect January 1, 2004. Mr. Diroll reported that the staff has begun training judges, attorneys, and court personnel on these changes and on the changes made by S.B. 123, Rep. Scott Oelslager's bill based on the Commission's traffic proposals. Mr. Diroll said that the staff will soon finish comprehensive primers on the two bills.

STATE BUDGET

County Commissioner John Dowlin asked how the state budget will affect the Sentencing Commission.

Chief Justice Moyer responded that the Commission is part of the Judiciary budget of the Supreme Court. He noted that the Speaker of the House was not inclined to cut any of the judiciary budget at this time, so it has safely passed the first level of concern.

Comm. Dowlin had heard rumors of 30 to 50% cuts for some things at the county court level. He also heard that more court cost fees would be going to the State instead of the county.

Every attempt is being made to protect court costs, said Chief Justice Moyer. He noted, however, that discretionary funds are limited.

Comm. Dowlin noted that 11 counties are now in court over the reduced budgets of sheriff departments, etc.

CONSISTENCY IN ADULT FELONY SENTENCES

The issue of consistency in adult felony sentences was raised again by Judges Christiansen and Knepper at the last meeting, said Mr. Diroll. Under S.B. 2, §2929.11 included a statement that sentences must be consistent with those imposed on similar offenders for similar offenses. The issue being raised involves how to determine consistency. Is it to be applied district-wide or state-wide? He noted that, in Northwest Ohio, one case has already been reversed on this consistency issue. The Commission has been asked for help in applying the standard.

Common Pleas Court Judge Burt Griffin remarked that he doesn't see it as a problem. He feels it can be handled on a case-by-case basis.

Common Pleas Court Judge H.J. Bressler agreed. He says it comes up when one judge sentences far differently than other judges.

According to Chief Justice Moyer, Judge Christianson's decision is the one that resulted in a reversal.

Judge Bressler remarked that he has seen the consistency issue raised only once in 6½ years.

The issue is more likely to get raised in a large county, said defense attorney Bill Gallagher, but he agrees that it is usually triggered by one judge who imposes extreme sentences.

Comm. Dowlin acknowledged that he sees some lack of consistency as being based on ethnicity.

Chief Justice Moyer offered to send a letter to Judges Christiansen and Knepper and the judges associations stating that the Sentencing Commission heard from the judges, examined the issue, and feels the matter does not warrant a request for legislative change. He asked Mr. Diroll to draft a diplomatic letter to this effect.

Judge Griffin suggested responding that this issue is coming up infrequently in the appellate courts and that the justice system appears to be handling it well. The Sentencing Commission, he said, intended that the issue of consistency be handled on an ad hoc basis.

VIOLATION OF POST RELEASE CONTROL

Another issue which had been raised recently, said Mr. Diroll, involves concerns voiced by Judge Bressler and Judge Schweikert regarding sentencing for violation of post release control. When sentencing an offender to community control sanctions, the judge must state what the consequences will be if he/she violates the conditions of those sanctions, under §2929.19(B)(5), including a "specific prison term" that may be imposed on violators. The statute allows the judge to impose a longer time on the same sanction, a stricter sanction, or prison time.

Judge Griffin remarked that the word "specific" should have been "maximum" or "up to the maximum". Mr. Diroll remembered that "specific" was added by former Sen. Jeff Johnson because of concerns about arbitrariness.

According to Atty. Gallagher, the language "up to the maximum" would move away from truth-in-sentencing. In addition, it confuses people later as to whether the judge meant the maximum or somewhere below the maximum. He agreed that the language needs to be modified.

Some judges are told that if they state the maximum, then they have to show the findings to justify the possible maximum, said Mr. Diroll. He opined that that could lead to absurd results—you've decided that community sanctions are warranted, but must then tell why the person's bad enough to deserve the maximum prison term. He suggests making clear that *warning* of the maximum does not—at that point—require such findings. The findings come when the maximum is *imposed*.

Public Defender Yeura Venters favors specificity at the time of sentencing because it is based on the facts presented right then.

Judge Bressler declared that he will do the same type of analysis at the time of resentencing for the violation as he would at the original sentencing.

While stating, at the original sentencing, what the consequences will be for violation of post release control, said Atty. Gallagher, most judges seem to be choosing something near the top of the range in order to allow room later for choosing a lower sentence if the offender comes back to court on a violation.

Judge Griffin suggested changing the language to read "and shall state the maximum sentence that may be imposed *from the range of prison terms available* for the offenses".

That would be offering no guidance as to the sentence that the sentencing judge feels *should* be imposed for violation of a community sanction, Atty. Venters argued. He believes that the sentencing judge should state his/her intention, particularly so that that intention can be known if that judge is unavailable when the offender returns to court for the violation.

Prosecuting Attorney Don White pointed out that it is still part of the record.

Atty. Gallagher would prefer no specific term so that the judge deciding the penalty for the violation has the freedom to impose something less than the original sentence the judge might have imposed.

Judge Bressler argued that the type and degree of violation should be taken into consideration.

Judge Griffin contended that the judge cannot predict what is going to happen between the time of sentencing and the post release control violation hearing.

Eventually, the Commission unanimously approved the motion offered by Judge Griffin and seconded by Judge Bressler.

> **To propose an amendment to the warning given to persons sentenced to community control under §2929.19(B)(5). The amendment would remove the requirement that the judge state a "specific" prison term for any violations, instead authorizing the judge to impose up to the "maximum" term.**

Judge Bressler then raised concerns about the offender charged with escape for not reporting to post-release control. He referred to a case where the sentencing judge had not stated the possibility of PRC to the offender. The defense attorney argued that the offender could not be charged with escape if he had never been "sentenced" to PRC. He noted that DRC decides who gets post release control and/or the conditions of supervision, not the sentencing judge.

The judge should have the authority to decide whether PRC is imposed if a Reentry Court is involved, said Atty. Gallagher. He feels it is only fair to let the offender know up front if there is some additional time to be supervised.

Some offenders face mandatory PRC supervision, noted Mr. Diroll.

Currently, an offender who violates parole gets additional time for the sentence imposed by someone other than the judge, said Atty. Gallagher. This disturbs him.

Mr. Diroll pointed out the statute allows the Parole Board to punish PRC violations with a prison term of up to half the original sentence.

It needs to be clarified that, at the time of sentencing, the court must state the possibility of PRC time, said Judge Bressler.

Representing the Halfway House Association, Jim Lawrence contended that the Parole Board has started putting a lot of people on PRC whether they need it or not.

Addressing a question raised regarding §2929.141 involving a violation of PRC versus a parole violation, Mr. Diroll explained that LSC often equates parole with post release control and even drafted language as such that allows an administrative tail for both. Because it is a complicated issue and is creating problems for the Adult Parole Authority, attempts are being made to correct the problem.

If the judge takes jurisdiction of parole violations, as with PRC, Judge Griffin asked if that would usurp the power of the Adult Parole Authority to take action on the violation. He thinks it does. Does the judge have authority to lift a PRC hold that has been imposed by the Adult Parole Authority? He feels it needs to be resolved.

According to Comm. Dowlin, there are some offenders being held in jail who could be bonded out, yet there is a hold on them. He feels that DRC Director Reggie Wilkinson needs to appear to address these concerns.

Mr. Diroll said that it might help to have an Adult Parole Authority representative present at the next meeting to discuss the matter.

Atty. Venters thought a subcommittee (perhaps the Reentry Committee) was supposed to be addressing some of these issues.

Judge Bressler reported that he does not see a lot of common pleas judges ready to take on new reentry courts.

The nascent proposal would make it optional, Mr. Diroll explained.

COURT OF APPEALS CONCERNS

Mr. Diroll reported that a letter from Judge Robert Gorman raised concerns about S.B. 2 appeal issues. It addresses remands for findings for most S.B. 2 appeals, but not maximum sentence cases.

Judge Griffin agrees that some portions in the appellate review section could benefit from review. He noted that clear and convincing should not be the standard of review by the appellate level. He noted that abuse of discretion is not the standard now.

As written, he said, the statute does not limit a finding to factual matters. He noted that Professor Lew Katz suggests that, in a motion to suppress, the appellate judge can determine whether there was

legitimate search and seizure. He added that Prof. Katz feels that should be the standard of guidance.

JUVENILE DISPOSITIONS UNDER S.B. 179

Staff Attorney Scott Anderson reported that the Commission staff has sought input as to how S.B. 179 is working. One of those who responded was Judge Robert DeLamatre.

Judge DeLamatre reported that S.B. 179 served as a safety net for one case that otherwise would have fallen through the cracks. It allowed him to use the SYO designation and exercise more control over the offender. He would like more discussion with prosecutors on filing SYOs. Overall, he finds S.B. 179 to be working.

Assistant Prosecutor James Cole remarked that many people in the juvenile justice system ignore the purpose clause in S.B. 179 and still use "best interest of the child" as the purpose for the juvenile system. He feels that accountability needs to be addressed and enforced more. Regarding blended sentencing, he noted that Montgomery County has had no SYOs yet. Bindovers tend to work best for their jurisdiction. He pointed out that, when extended juvenile jurisdiction was removed from the bill, it made the bill less attractive and less effective. He added that the SYO category may serve as a safety net in limited cases.

According to Judge Bressler, the SYO classification is used on a limited basis in Hamilton and Butler Counties. He agrees that the elimination of EJJ weakened the bill. In addition, he feels that retaining mandatory bindovers, at the request of the Attorney General's Office, seriously limited the use of SYOs.

Pros. Cole contended that the courts in Montgomery County ignore the option to keep supervision of juveniles to the age of 21 because they would rather use the resources for the younger offenders. They prefer to let the adult system contend with the 17 and 18 year olds. Therefore, a 17 or 18 year old offender often gets a "get out of jail free" card. Regarding the controversial issue of permitting 10 and 11 year old offenders to be committed to DYS, he noted that Montgomery County has not had any of those cases.

Atty. Venters reported that juvenile judges in Franklin County have been reluctant to embrace S.B. 179 because they feel the statutes on the book already are adequate to address today's cases and prefer to continue with indeterminate sentencing. Noting the limited exposure to SYOs, he said that Franklin County prosecutors have not persuaded any pleas to SYO because most would prefer using bindovers.

Initially the Sentencing Commission proposed a range of graduated minimums based on the degree of offense, said Pros. Cole. He feels that option needs to be reconsidered. He noted that many judges do not want to transfer juveniles to the adult system for marginal F-4 and F-5 offenses, such as auto theft.

Atty. Venters stressed a need for caution about revisiting those issues. He feels that if the Commission decides to revisit certain issues, then it certainly needs to address competency again.

Pros. Cole noted that S.B. 179 did not add to the problem created by *State v Hanning*. If a juvenile brandishes a weapon in a robbery, he receives a mandatory bindover. But a co-conspirator faces only a discretionary bindover. This, too, should be revisited, he stated.

Representing the State Public Defender's Office, Attorney Bob Lane reminded him that the judge still has discretion to bind them over.

Judge Bressler pointed out that the Commission sent the juvenile package over to the General Assembly without the mandatory bindover, but the legislature reinserted it.

SIMPLIFY CRIMINAL LAWS

Mr. Diroll reported that Rep. Bob Latta met with Chief Justice Moyer and him to suggest that the Commission work to simplify the Criminal Code, making them easier to read and apply.

Rep. Latta read statutes from other states that achieved his goal and hoped that we could do the same, said Chief Justice Moyer.

A group did a study of the readability of statutes, said Mr. Diroll, and said that most tend to read like insurance policies. Ohio was in the lower-middle range among readability of state's statutes.

By acclamation, the Commission agreed:

> **To work to simplify Ohio's criminal statutes if so requested by the General Assembly.**

FORFEITURE FOOTNOTES

Mr. Diroll reported that the final draft of The Forfeiture Proposal includes an explanation and history, as well as two appendices.

Page 63, he noted, provides a list of provisions that do not fit into the new forfeiture statute, i.e. cigarette tax, corrupt activities, and civil remedies peculiar to RICO such as triple damages and fines. A chart on page 64 shows where things from the old law are covered in the proposed new law. The draft also shows section by section how it all fits together.

Regarding the section addressing forfeiture related to wild animals and trademarks, Mr. Diroll asked if instrumentality rules should apply to these. Should they use the standard of being substantially connected to the offense?

City Attorney John Madigan suggested getting input from the Department of Natural Resources, since they are the most aggressive in using forfeiture laws. He suggested going for consistency.

Mr. Diroll suggested getting more information on this before drafting any further changes. He expects the bill to be drafted and introduced within the next few months.

FUTURE MEETINGS

The Commission cancelled the April 17 meeting and scheduled future meetings tentatively for May 15 and July 17.

The meeting adjourned at 1 p.m.