

OHIO CRIMINAL SENTENCING COMMISSION

65 South Front Street • Second Floor • Columbus • 43215 • Telephone: (614) 387-9305 • Fax: (614) 387-9309

Chief Justice Thomas J. Moyer
Chairman



David J. Diroll
Executive Director

Minutes of the OHIO CRIMINAL SENTENCING COMMISSION and the CRIMINAL SENTENCING ADVISORY COMMITTEE March 25, 2004

SENTENCING COMMISSION MEMBERS PRESENT

Chief Justice Thomas Moyer, Chair
Common Pleas Court Judge H.J. Bressler, Co-Chair
Capt. John Born, representing State Highway Patrol
Superintendent, Col. Paul McClellan
Prosecuting Attorney James Cole
Juvenile Court Judge Robert DeLamatre
County Commissioner John Dowlin
Defense Attorney Bill Gallagher
Municipal Court Judge Fritz Hany
OSBA Delegate Max Kravitz
Bob Land, representing State Public Defender David Bodiker
Municipal Prosecutor Steve McIntosh
County Court Judge John D. Schmitt
Public Defender Yeura Venters
Appellate Court Judge Cheryl Waite
Sheriff David Westrick
Prosecuting Attorney Don White

ADVISORY COMMITTEE MEMBERS PRESENT

Karen Huey, Director, Office of Criminal Justice Services
John Madigan, Toledo Senior Attorney
Gary Yates, Chief Probation Officers' Association

GUESTS PRESENT

Lisa Bagdonas, Senate Republic Caucus
Lusanne Green, Ohio Community Corrections Association
Greg Lewis, Ohio Commission on African-American Males
Sarkis Mahdasian, Legislative Service Commission
John Murphy, Exec. Director, Ohio Prosecuting Attorneys' Association
Phil Nunes, Ohio Community Corrections Association
Candy Peters, Office of Criminal Justice Services
Ed Rhine, Department of Rehabilitation and Correction

STAFF PRESENT

David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

The Commission Chairman, Chief Justice Thomas Moyer, called the March 25, 2004, meeting of the Ohio Criminal Sentencing Commission to order at 9:47 a.m. He welcomed the members to their first meeting in the Ohio Judicial Center.

DIRECTOR'S REPORT

Meeting Packets. Executive Director David Diroll reviewed the meeting packets, which included: A Report by the Governor's Task Force on Impaired Driving; the Commission's Enabling Legislation; compromise language for the forfeiture proposals; and the Reentry Committee's proposal regarding a certificate of good conduct for released offenders to ease their difficulty in obtaining jobs.

OVI Proposals. Since DUI offenses comprise Ohio's most complicated Criminal Code section, RCS4511.19, Mr. Diroll noted that the Report from the Governor's Task Force on Impaired Driving includes a recommendation asking the Commission to simplify the law related to drinking and driving and drug use and driving.

H.B. 324--Traffic Refinements. Director Diroll reported that H.B. 324, based on the Commission's suggested refinements to S.B. 123 (traffic law reforms), is dormant in the Senate. Majority legislators seem to be split on the restricted license plate issue for first OVI offenses.

Hamilton County Commissioner John Dowlin wondered if restricted plates apply under municipal ordinances.

According to Bureau of Motor Vehicles Counsel John Guldin, municipal ordinances related to limited driving privileges or restrictive plates would have to track State law because they run through OBMV.

Comm. Dowlin assumes that most officers will file under State Code to alleviate additional costs to counties.

According to John Madigan, Senior Attorney for the City of Toledo, the officers in Toledo use the local Municipal Code which tracks State law.

Columbus City Prosecutor Steve McIntosh remarked that Columbus has done the same by adjusting the City Code to track State law.

Mr. Diroll remarked that he remains guardedly pessimistic that these and other technical concerns will be worked out.

Pros. McIntosh recommended making the use of vanity plates discretionary for all first DUI offenses and mandatory for subsequent offenses. Another option might be to make the restricted plate mandatory for the high-end first offenders, said Mr. Diroll.

H.B. 52 - Misdemeanor Refinements. The key controversy with H.B. 490 (misdemeanor reforms) swirls around using restitution for minor offenses. Some judges, said Mr. Diroll, see the restitution provisions as mandatory. Some have ordered court appearances in many more cases than anticipated. The insurance defense bar fears large judgments ordered as restitution without the ability to cross-examine witnesses and call experts. None of this was anticipated. Mr. Diroll said that the problem should be corrected soon in H.B. 52.

Mental Health Issues. Noting that inquiries have been made regarding the mental health of older drivers and the high accident rates of teenage drivers, Comm. Dowlin suggested that the legislature might want to address those concerns as well.

OHIO JUDICIAL CENTER TOUR

Chief Justice Moyer reported that, for the first time, the third branch of government has its own building. The Chief informed the Commission that the restored State Departments Building, now dubbed the Ohio Judicial Center, was built during a time when architecture was created to reflect a citizen's impression of government. To reflect the greatness and intellect of Ohio's people, the building contains quality materials including bronze, nickel, copper, and marble. Before it was completed in the early 1930s, a gas explosion blew out the west side. Total cost of constructing the building was \$6.5 million. At today's prices, it would cost \$84 million to build the same building.

Chief Justice Moyer pointed out it was not a Works Projects Administration (WPA) project. No Federal funds were used, yet the building was completed during the Great Depression. In 1996, Governor George Voinovich approved the funding to renovate and restore the building for use as a new Ohio Judicial Center.

The only new items in the courtroom are the bench and podium. The room contains 15 murals reflecting Ohio history. Along the walls of the grand concourse there are 16 bas relief sculptures depicting the first eight U.S. Supreme Court Justices and U.S. Presidents from Ohio.

The North and South Hearing Rooms boast murals depicting the Ohio's industry and manufacturing and commerce, respectively. Murals in the Reading Room of the Supreme Court Library reflect the history of the written word. The ground floor has numerous mosaics along the ceiling and walls reflecting the contributions of the various native tribes.

Chief Justice Moyer announced that the Ohio Bar Foundation commissioned two sculptures for the pools at the North and South ends of the building. One will be a large steel gavel and the other will involve words of justice. The Ohio Bar Association has commissioned additional artwork for the Supreme Court Library (11th Floor) and elsewhere.

At the conclusion of the tour, Chief Justice Moyer announced that U.S. Supreme Court Chief Justice William Rehnquist will help dedicate the building on May 15th, 2004.

FORFEITURE

Mr. Diroll thanked Ohio Prosecuting Attorneys Association Director John Murphy, Public Defenders Bob Lane and Yeura Venters, defense attorneys Max Kravitz and Bill Gallagher, and Prosecutor Don White for their work toward the consensus in the draft presented to the Commission. He said the remaining issues covered are the final "important hairs" to split.

The first debate, said Mr. Diroll, is the connection between the crime and misconduct, particularly as it relates to instrumentality forfeiture. The "used in" standard was preferred by prosecutors, but

defense representatives feared it would be open to abuse. The committee found harmony by retaining the "used in" standard but refining it with a list of factors for guidance.

The second issue concerns assuring that the forfeited property is proportionate to the crime. Originally, the proposal left the burden on the prosecutor to prove that the forfeiture was not disproportionate. The committee shifted that burden of proof to the defendant. The defendant would bear the burden of proof and the burden of persuasion.

The final key issue is the burden of proof in criminal forfeitures, which today use varying standards. The committee concluded that the State should have the burden of proof in a criminal forfeiture case by a preponderance of the evidence. This would make the standard more consistent throughout criminal forfeiture laws.

Chief Justice Moyer asked if the Commission was ready to offer a final vote on these recommendations.

Before voting, Atty. Kravitz asked if the OPAA was in agreement with the draft and would support it before the General Assembly.

Prosecutor Don White quickly responded in the affirmative.

Judge Bressler recognized the report as an excellent piece of work that will help the trial courts immensely. He noted that the longer it took to make this workable only emphasized its importance.

The Commission unanimously approved Atty. Kravitz's motion, seconded by Pros. White:

To refine the Commission's earlier forfeiture report by: reverting to the "used in" standard, but tempering it with guidance for judges; shifting the burden to show disproportionality to the defendant, and by requiring the State to prevail in a criminal or civil forfeiture case by a preponderance of the evidence.

Mr. Diroll commended the Commission on the final product which will greatly simplify the forfeiture law for all practitioners.

ENABLING LEGISLATION

Mr. Diroll reported that the Sunset Review Committee reviews all commission, boards, and advisory panels that make recommendations to the General Assembly, to make sure that none of them are duplicating the work of others. This Committee feels that the Commission's Advisory Committee is no longer necessary on a regular basis. It conceded, however, that such experts could individually be called by the Chairman as needed by the Commission.

Mr. Diroll suggested these possibilities: remove the Advisory Committee language from the Commission's enabling statutes; streamline the Commission's statutory duties; and repeal language on the development of the Juvenile Plan, while retaining monitoring functions.

He also noted that reducing the Commission's membership may be necessary since it is sometimes difficult to get a quorum when votes are needed on narrower issues. The voting membership has changed significantly, he noted, growing from 17 to 31.

Judge Bressler questioned whether it would be necessary to change the makeup of the Commission. He feels it might be possible to formulate a reduction without losing diversity.

Mr. Diroll noted that the Sunset Review Committee exists to clean out obsolete provisions in an effort to save State money.

For the Commission's purposes, it might be possible, said Comm. Dowlin, to set a definition of a quorum by statute.

According to Mr. Diroll, that definition is currently set in statute as half the Commission's membership. The Juvenile Committee, when added, was given its own quorum, but its addition to the full Commission also increased the number needed for a quorum as a whole. Since the Juvenile Committee members seldom attend the full Commission when juvenile issues are not on the agenda, it tends to upset the balance for attaining the necessary quorum to vote through other issues.

Prosecutor Steve McIntosh argues that the larger membership serves has the benefit to achieving a broad range of expertise and views as the Commission addresses issues.

Chief Justice Moyer asked whether the substantive work of the Commission was being questioned by the Sunset Review Committee.

Not at this time, Mr. Diroll responded, noting that the Commission is still monitoring the results of its Felony and Juvenile Plans. He added that the Commission might be given the assignment of simplifying the DUI laws soon. He pointed out that the Commission currently has a few vacancies, including the victim representative, two law enforcement positions, and the municipal league representative.

As a representative of the Chief Probation Officers' Association, Gary Yates expressed appreciation for the opportunity to have input on the wide variety of issues addressed by the Commission. This has allowed him to voice concerns regarding how statutory and procedural changes affect probation officers. It also offered the chance to prepare and retrain the officers before enacted changes went into effect.

John Madigan, Senior Attorney for Toledo, noted that it has been most helpful to alert local agencies of Commission issues which could affect their communities. He noted that the recommendations of this Commission have a tremendous impact on city budgets, so municipalities desperately need continued input.

Recognizing the continued challenge of sorting through statutory changes and legalese, Atty. Kravitz stressed the need to make continued efforts to simplify these laws and make them more readable.

According to Chief Justice Moyer, Representative Robert Latta has been hoping to have the Commission continue in that direction, for the sake of the Legislature. He warned, however, that Governor Taft has

announced that the 2006 budget will be moved up to July, 2004. The last time a similarly dramatic move was made, the Administration came close to recommending the elimination of many commissions. He assumes they will consider the same move this time. In light of this dilemma, he recommended that, if the Commission does not need the same range of members now, then it should admit it.

Judge Bressler reported that the Chair of the Senate Judiciary Committee has mentioned a desire to have the Commission work on simplifying the sex offender registration law.

The concealed carry bill needs some simplification as well, said Sheriff Dave Westrick.

Office of Criminal Justice Services Director Karen Huey suggested a review to see where reductions could be justified and duties redefined.

Atty. Kravitz feels that the Ohio Legislative Service Commission sometimes complicates matters by misunderstanding the intent of some legislative changes which result in lengthening statutory language.

Sometimes the attempt at absolute accuracy tends to come at the price of extreme wordiness, admitted Mr. Diroll.

Comm. Dowlin wondered if it would help to gain better attendance from legislative members if the Commission changed its meeting days.

Chief Justice Moyer encouraged offering some suggestions to the Review Committee.

Mr. Diroll noted that the Advisory Committee members who have been attending faithfully generally offer valuable input. Those who have not been attending probably aren't needed as much at this time.

Representing the Ohio Community Corrections Association, Phil Nunes stressed the need to emphasize to the legislature how much money has been saved for the State as a result of the Commission's proposals.

Chief Justice Moyer assured him that the legislature would gladly acknowledge the great work accomplished by the Commission, but it will still be hard to justify keeping the Commission's membership large. Since the major part of the Commission's statutory work appears to be complete, it is difficult to justify why such a large group is needed for the Commission to continue.

Comm. Dowlin fears the result will be more unfunded mandates forced upon municipalities.

It has apparently become necessary for the Commission to justify its continued existence, said County Court Judge John Schmitt. If it is unable to do that, then the argument before the legislature and Sunset Review Committee will become even more difficult.

Although the Commission has obviously saved millions of dollars for the State by controlling the prison population, providing free training, and by other means, the county benefits are not quite as clear cut, said Mr. Diroll. He noted that, although the Commission made efforts to

reduce some local jail costs, crowding continues due to new domestic violence and OVI laws, separate from the Commission's proposals.

Municipal Court Judge Fritz Hany asked if there are any other issues on which the Commission needs to be more proactive. It may be time for the Commission to determine a new path and set new goals. In addition, he noted, it might be logical to reduce the representation from common pleas and municipal courts.

DRC Research Director Steve VanDine noted that there are two generally types of commissions. One type oversees practitioners, such as cosmetology, etc. The other type takes time to work through issues that cannot be accomplished by legislation, such as this Commission. Meeting less often, he noted, reduces the Commission's effectiveness to address legislative concerns in a quick and timely manner. Because the Commission is still needed to negotiate tough issues, it has a purpose. In fact, he remarked, in another 5 to 10 years, the Commission will need to do another major restructuring of the Criminal Code.

Communities still need a mechanism, such as the Commission, through which they can have input that will help legislators stay apprised of how statutory changes will affect them, said Comm. Dowlin.

REENTRY PROPOSAL: CERTIFICATE OF GOOD CONDUCT

After lunch, the Commission turned its attention to the latest proposal offered by the Reentry Committee.

Representing the Department of Alcohol and Drug Addiction Services, Fritz Rauschenberg reported that the Reentry Committee has been looking at the impact a felony conviction has on employment and occupational licenses. The Committee sought a way to allow an offender to show good conduct once a prison term is served and to verify this to potential employers. The goal is to counter the blemish of the felony record. One option, practiced in New York, is a post-conviction certificate of good conduct. The Committee proposes a similar option for Ohio felons: the Certificate of Good Conduct (COGC).

The Application. Under the Committee proposal, the offender would wait 3 years after final discharge from any post-prison supervision. He or she then could apply to the court to have this period of time reviewed for good conduct. The offender would have to document the convictions so that the court could assess time eligibility. Any costs associated with compiling information and filing the application would be borne by the offender. If denied, the offender may re-apply two years later.

Mandatory Showings. The applicant would have the burden to provide evidence of good conduct by satisfying the following conditions:

- He or she has paid all fines, court costs, and supervision fees;
- He or she has not engaged in criminal conduct (other than minor misdemeanor traffic offenses) during the period;
- The applicant's driver license has not been suspended;
- The applicant can show proof of financial responsibility for any motor vehicle;
- All child and spousal support obligations have been met; and
- All taxes have been paid.

Optional Showings. There are additional factors that the court may consider, if relevant, whether the applicant:

- Maintained a residence for a substantial period of time;
- Maintained gainful employment or other acceptable means of support;
- Showed evidence of addressing drug or alcohol problems, if any;
- Provided letters of reference; and
- Documented service to the community or individuals in need.

Process. The process will include an investigation and notification to the prosecutor and victim if a hearing is granted. If the application is denied, the court must give a reason in writing.

Mr. Rauschenberg pointed out that the Certificate of Good Conduct would not seal the applicant's criminal records, nor relieves the applicant of their duty to inform others of their criminal past. Record of the Certificate of Good Conduct, if granted, would be forwarded to the courts of common pleas, Supreme Court of Ohio, Bureau of Criminal Identification and Investigation, Ohio Attorney General, and Department of Rehabilitation and Correction.

Discussion. Judge Schmitt commented that this would mostly apply to the offender who cannot get his records expunged.

According to the proposal, said Judge Bressler, if the six factors are met, the COGC must be granted or it becomes an appealable order. If that is the case, he asked, why get the prosecutor and victim involved?

Conversely, Judge Robert DeLamatre asked if the applicant would be out of the running for the COGC if he does not meet all six factors.

The intention, said Mr. Rauschenberg, was to set the bar high, so the application would certainly be denied if any of the six mandatory criteria were not met.

Bob Lane, representing State Public Defender David Bodiker, assured the Commission that the applicant would be responsible for all costs associated with the application process, including the burden of presenting all necessary documentation.

Judge Bressler pointed out that the proposal appears to give only the applicant a right to appeal, and not the prosecutor. He wondered what criteria are used for appeal, noting that granting of this certificate will impact more than just the defendant.

The intention, said Defender Lane, was not to merely have a checklist but to allow judicial discretion, which is why the list of discretionary criteria was included. He contended that this is not to be treated as a resentencing. He pointed out that the prosecutor and victim are given the opportunity to express opposition to the offender's application.

Chief Justice Moyer noted that the court seems to have discretion under many parts of the proposal.

When asked about a person on post release control, Mr. Rauschenberg responded that the offender has to be off all supervision for 3 years before applying for the COGC.

According to Defender Lane, in anyplace where someone can find the defendant's record, there should be a notation of the person gaining a good conduct certificate.

For budget reasons, Chief Justice Moyer wondered why a report of this certificate needs to go to the Supreme Court, particularly since it only keeps case management data.

Office of Criminal Justice Services Director Karen Huey asked if the certificate could be revoked if the offender commits another offense.

Representing the Department of Rehabilitation and Correction, Ed Rhine explained that the Reentry Committee did not consider a revocation clause. The reason: it is not a certificate of rehabilitation, but a certificate verifying and affirming good conduct for a set period.

Mr. Yates asked whether this would include only felons.

Much of the language, said Mr. Rauschenberg, comes from expungement law. He noted that misdemeanants don't face the same stigma as felons.

Judge Bressler opposes the fact that the certificate is not revocable. He argued that the certificate implies that the common pleas judge approves this offender for employment.

Defender Lane responded that the certificate does not eliminate the employer's ability to see the rest of the defendant's record.

Candy Peters of OCJS declared that the certificate is similar to receiving a diploma or driver's license, noting that receiving a driver's license does not imply that the driver will never have an accident or receive a traffic ticket.

Pros. White questioned why the employer couldn't just get the information they need from a background check without requiring the judge to put his signature on this certificate.

It does not do away with the employer's obligation to do a background check, Defender Lane cautioned.

Pros. White insisted that people who commit some offenses, such as sexual predators, should be ineligible for this certificate. The option, he felt, should be limited to less serious offenders. He also argued that the burden should not be placed on the judge to testify that the offender is reliable or rehabilitated.

Mr. Nunes stressed that the certificate is not a predictor of future behavior. It only reflects the offender's recent past law-abiding behavior. He argued that this challenge to employment is one of the life-long barriers that falls upon a felon. They must be addressed so the offender has a chance to become a productive member of society.

The mandatory conditions do not require consideration of the optional ones, said Judge Schmitt. Rather, it implies that if the offender meets the mandatory aspects, the certificate must be granted.

Mr. Diroll said the language may need to allow the judge to use the optional factor to deny the application. In addition, it might be worth checking to see if a card-type document could be issued to verify this privilege, rather than only use a large certificate.

Mrs. Peters suggested requiring a periodic renewal, similar to the renewal required every four years for a driver's license. This would allow updates of the offender's record of good conduct.

Ohio Bureau of Motor Vehicles Counsel John Guldin asked how this would affect licenses that are otherwise forbidden to those who have committed certain felony offenses.

Those licenses can still be refused, answered Mr. Rauschenberg.

The proposal was intended to address employment barriers and nothing more, said Mr. Rhine. A license can be denied because of moral turpitude, which follows an offender forever.

By acclamation:

The Commission suggested that the Reentry Committee's further refine the Certificate of Good Conduct proposal.

Pros. White acknowledged the merits of a COGC, but feels it will be necessary to make the potential employer aware of the offense committed and that the certificate only verifies conduct for a 3-year period.

Members of the Reentry Committee had been asked to find barriers that hinder an offender's Reentry into the community. Defender Venters commended the Committee's efforts in developing a creative means to assist the offender in tearing down the barriers to employment.

If the Committee includes misdemeanors, said Judge Bressler, the chance of getting common pleas judges to endorse the concept is slim.

The Reentry Committee, said Mr. VanDine, debated whether DRC should handle this process or, if instead, it should be handled by the local venue. He asked Commission for thoughts on that question.

Mr. Rhine asked for additional input to the Committee's recommendations to be forwarded to Scott Anderson.

FUTURE MEETINGS

Future Commission meetings were tentatively scheduled for May 20 and July 15. The meeting adjourned at 2:30 p.m.