

OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Thomas J. Moyer
Chairman

David J. Diroll
Executive Director

Minutes of the CRIMINAL SENTENCING COMMISSION and CRIMINAL SENTENCING ADVISORY COMMITTEE

May 22, 2008

MEMBERS PRESENT

Chief Justice Thomas Moyer, Chair
Common Pleas Court Judge Reginald Routson, Vice-Chair
Paula Brown, OSBA Representative
Common Pleas Court Judge W. Jhan Corzine
Staff Lt. Shawn Davis, representing State Highway Patrol Superintendent
Col. Richard H. Collins
Juvenile Court Judge Robert DeLamatre
Defense Attorney Bill Gallagher
Bob Lane, representing State Public Defender Timothy Young
Common Pleas Court Judge Andrew Nastoff
Mayor Michael O'Brien, City of Warren
Appellate court Judge Colleen O'Toole
Jason Pappas, Fraternal Order of Police
Municipal Court Judge Kenneth Spanagel
Steve VanDine, representing Rehabilitation and Corrections
Director Terry Collins
Public Defender Yeura Venters
Sheriff Dave Westrick

ADVISORY COMMITTEE MEMBERS PRESENT

Eugene Gallo, Executive Director, Eastern Ohio Correctional Center
Steve McIntosh, Common Pleas Court Judge

STAFF PRESENT

David Diroll, Executive Director
Myra Enos, Extern
Shawn Welch, Intern
Cynthia Ward, Administrative Assistant

GUESTS PRESENT

Scott Anderson, Professor, Capital Law University
John Barron, Legal Counsel, Senate Republican Caucus
Monda DeWeese, SEPTA Correctional Facility
Jim Guy, Rehabilitation and Correction
Phil Nunes, Ohio Justice Alliance for Community Corrections
Erin Rosen, Attorney General's Office
Paul Scarsella, Attorney General's Office
Parvinder Singh, legislative aide to House Speaker Jon Husted
Bob Swisher, Office of Criminal Justice Services

Common Pleas Court Judge Reginald Routson, Vice-Chair, called the May 22, 2008 meeting of the Ohio Criminal Sentencing Commission to order at 9:40 a.m.

DIRECTOR'S REPORT

Executive Director David Diroll reviewed the contents of the meeting packet which included a summary of SORN Law after S.B. 10; a proposal for simplifying misdemeanor sentencing statutes; and a legislative update for the 127th General Assembly.

Dir. Diroll reported that the Commission's report on simplifying felony sentencing was delivered to legislators last week. He said that Speaker Husted's Office has asked the Legislative Service Commission to take a look at it as a summer project.

STATE v. COLON: CULPABLE MENTAL STATES

Concerns have been raised by prosecutors and victims' groups regarding the recent Ohio Supreme Court decision in *State v. Colon*. The decision found aspects of the robbery statute deficient in not stating a culpable mental state (*mens rea*) and overturned a conviction because the defendant was not found guilty of all the necessary elements of the offense. The Court indicated that the state needs to charge the defendant with reckless conduct when the statute is silent as to *mens rea* and there isn't a clear intent to make the offender strictly liable for the crime, irrespective of mental state.

Dir. Diroll noted that the staff received many calls from practitioners and crime victims who are anxious that the decision will affect many cases and possibly result in the release of numerous offenders followed by law suits against the state for false imprisonment. Prosecutors have filed a motion to reconsider the ruling with the Supreme Court.

Dir. Diroll said the Criminal Code contains numerous sections that don't specify a culpable mental state. He asked—irrespective of the scope of the decision and whether it will be reconsidered—whether the Commission has an interest in reviewing the statutes and suggesting revisions to fill the *mens rea* gaps.

Common Pleas Court Judge Jhan Corzine recommends waiting until the motion to reconsider is decided before the Commission takes action.

While waiting on the motion to reconsider, Common Pleas Court Judge Andrew Nastoff remarked that it wouldn't hurt to at least identify the offenses or cases that are problematic, particularly in the interest of simplification.

The Ohio Prosecuting Attorneys' Association already has two lists circulating regarding some statutes affected by this ruling, said Judge Corzine.

If the Commission takes up this issue, said Dir. Diroll, it would be best handled in a subcommittee.

Chief Justice Thomas Moyer explained that, in the *Colon* case, the structural error was not just a coding error; it pervaded the entire

trial. There was no mention of *mens rea* at any time throughout the proceedings. He said that the Court sees this as a very limited situation.

Appellate Court Judge Colleen O'Toole was puzzled about whether the concern was just that the trial jury didn't hear that the standard defaults to reckless or that the Grand Jury needed to hear it as well.

According to Chief Justice Moyer, it is the court's decision on whether to reconsider a case. Motions for reconsiderations do not automatically result in oral arguments, he noted.

Dir. Diroll remarked that he had spoken to John Murphy, Executive Director of the Prosecuting Attorneys' Association, who remarked that prosecutors agree they need to make clear that an offense is "reckless" or strict liability.

Judge Routson recommended developing some language or options to recommend to prosecutors, to ease their burden.

Some statutes are complicated and cry out for simplification, said Dir. Diroll. The *mens rea* aspect may help in that context. Some are fine in *mens rea* but some are not. He added that the process will be easy for many statutes, but tricky for others.

Later in the day, discussion returned to *State v. Colon*. Previous Supreme Court cases said that as long as the prosecutor was tracking the language of the Revised Code, there was no problem, said Judge Nastoff. Therefore, people felt blindsided by *Colon*.

It was agreed that further discussion is needed to address the absence of language specifying a culpable mental state (*mens rea*) in many criminal statutes.

STATE v. HAIRSTON: MULTIPLE CHARGES & CONSECUTIVE TERMS

Dir. Diroll turned the group's attention to another recent case decided by the Ohio Supreme Court. In *State v. Hairston*, involving a series of robberies where the elderly victims were stripped and tied up, the Supreme Court ruled unanimously that the stacked consecutive 134 year sentence was constitutional under an 8th Amendment, cruel and unusual punishment challenge. The key was that none of the individual sentences constituted cruel and unusual punishment.

Judge Routson remarked that Justice Judith Lanzinger's concurring opinion cautiously suggested that the General Assembly should consider guidelines regarding the use of consecutive sentences and constitutional standards.

This was a very uncomfortable case for all the Justices, said Chief Justice Moyer.

S.B. 2 removed the cap on consecutive sentences that existed in prior law, said Dir. Diroll. The bill instead required judges to make certain findings to justify consecutive terms. The *Apprendi* line of U.S. Supreme Court said that certain post-conviction findings aren't valid.

The Ohio Supreme Court echoed this in *Foster*. Judges no longer have to make findings subject to appellate review.

Judges O'Toole and Nastoff concurred that the Commission should develop some suggestions for how to address this problem.

Defense Attorney Bill Gallagher insisted that the Commission needs to reconsider the lack of a cap on consecutive sentences and the loss of guidelines or findings as a result of the federal cases and *Foster*.

According to DRC Research Director Steve VanDine, the *Foster* case has resulted in an average of five additional months for the lower felony levels and six months for F-1 and F-2 felonies.

The cumulative impact on the prison system is significant, given over 20,000 new admissions annually, said Dir. Diroll.

If the goal is consistency in sentencing, said Judge O'Toole, then the Revised Code needs to be clear and easy to use. She remarked that some judges find it difficult to determine the worst form of the offense. She urged some form of guidance that is not onerous.

Atty. Gallagher claimed that there is a slight increase in post-*Booker* sentencing in federal courts, but nothing massive. He remarked that, at the federal level the Supreme Court rulings did not cause the federal guidelines to disappear. But *Booker* and *Foster* caused a lot of structural loss to the Ohio sentencing guidelines. He fears it will result in abuses since judges are no longer required to justify a decision to veer outside the sentencing ranges.

Judge Nastoff declared that it will be a real challenge to fill all the gaps created by *Foster*. He feels it will require more than just the expertise of Commission members. He recommended seeking out additional resources.

Rather than short term fixes, Judge O'Toole believes a longer term project of restructuring might be needed.

If we start now, said municipal court Judge Kenneth Spanagel, we might be able to have something completed in time by the next legislative session.

Judge Nastoff contended that it would be a challenge to get it done in a year.

Judge Corzine recommended first working on the narrow issue presented by the *Hairston* case regarding proportionality of large sentences. That, he feels, should be separated from the post-*Foster* revisions of the sentencing statutes.

Public Defender Yeura Venters expressed concern about the current landscape, stressing that something needs to be done to prevent further exorbitant sentences.

The *Hairston* case, Judge Routson noted, included 26 counts involving multiple robberies and kidnappings.

The question on caps, said Judge Corzine, is where to draw the line. He believes that a cap proposal could be moved through the legislature quicker than the other issues. He feels certain that few judges will maximize consecutive sentences.

Atty. Gallagher claimed that since *Foster*, more judges are sentencing low level first offenders directly to prison instead of community control.

Judge O'Toole said this is because, without the guidelines, judges don't feel compelled to send the offender to community control first.

Having watched the system develop into two systems - determinate versus indeterminate sentencing - Phil Nunes, representing the Ohio Justice Alliance for Community Corrections, declared that we are preaching to the choir if we don't have the support of the legislators. He reported that pending S.B. 17 will require a DUI registry. He feels it is essential to find out where the majority and minority caucuses stand on this and other issues.

Dir. Diroll reported that Chief Justice Moyer talked with legislative leadership and is expected to speak to the Commission about this today. Dir. Diroll added that he met with Senator Tim Grendell, who indicated the Senate leadership's reluctance to act on any bill that reduces sentences. The Commission will only be able to get a package through legislative committees if it includes some tougher sentences because the legislators will want a tougher trade-off. He noted that Sen. Grendell is one of the few legislators who is an attorney who has dealt with criminal issues.

Eugene Gallo, Executive Director of the Eastern Ohio Correctional Center, declared that the biggest trade-off we need to offer is safer communities. He insisted that there is a dire need for policy change and it is up to us to educate the legislators about that need and how best to accomplish it. We have a choice to be a part of that policy change or just ride on the tail of it.

Stronger emphasis, Mr. Nunes insisted, should be on what to do about nonviolent offenders.

Judge Nastoff stressed a need to focus on nonviolent offenders who keep violating community control sanctions because these are the ones who constantly return to the courts.

There also is a need, said Atty. Gallagher, to look at the increase in racial disparity in Ohio.

According to Mr. Gallo the number of blacks in the juvenile system has been cut in half. If that can be done in the juvenile system, he declared, why can't it be done in the adult system?

Atty. Venters argued that this requires system reform, not piecemeal legislation. He agreed that these are legitimate concerns, but we need a system reform.

Because one of every 32 people is either in prison, jail, or on parole, Mr. Nunes remarked that there is a national movement to loosen the standards.

Judge O'Toole asked if anyone was in favor of the concept of one act/one crime.

Judge Corzine argued that it was not a workable concept.

Judge Nastoff asked what kind of cap would be satisfactory.

The Commission cannot just send a recommendation regarding a cap on consecutive sentences and expect the legislature to accept it, Atty. Venters contended. It needs to be part of a bigger package, which the Commission should develop.

When asked how many or how often exceptionally long sentences occur, Mr. VanDine replied that there are some every year.

Judge Routson pointed out that an offender does not receive consecutive sentences without having committed consecutive crimes.

Dir. Diroll noted that the penalties step up based on the presence of certain factors for child sex offenders. Perhaps something similar should be developed for other offenses. Or perhaps specifications could be used to stack conduct.

The goal, Atty. Venters stressed, is to be fair while promoting and providing public safety.

Another option, said Judge Routson, might be the method used during a merger analysis, when the judge considers allied offenses of similar import.

Judge O'Toole asked how the jury is to be expected to determine whether the crime is the worst form of the offense.

Judge Nastoff remarked that the jury cannot be expected to determine if a criminal act is the worst form of the offense because it is their first case. Perhaps it can be reduced to factual findings that can be specified.

The most predictable factor, said Judge Corzine, is the number of prior felony convictions listed as a spec to the current crime. Judge Corzine pointed out that it would be hard to translate apples to apples if comparing sentencing standards with other states.

Mr. VanDine cautioned that prosecutors would not be in favor of anything that requires more specs.

The federal sentencing system now uses advisory guidelines, said Atty. Gallagher, regarding the defendant's role in the offense, harm done, priors, what the priors were for, general findings of fact, etc. It offers the judge suggestions on how to look at offenders but still allows the judge discretion to determine where the offender fits within the guidelines.

There is no recourse, Atty. Venters declared, if the judge goes widely outside the guidelines.

To compare sentencing results, said Mr. VanDine, data will need to be more consistently available and collected. He hopes that the Supreme Court's new Court Reporting System will make this possible.

Recommending a buffet of ideas, Judge Nastoff urged getting information from other sources of expertise and boiling the choices down to the most feasible.

It might help, said Dir. Diroll, to determine whether we should work through the caps or elements or advisory guidelines, etc. as a jumping off point.

Judge O'Toole recommended getting leadership from the House and Senate involved.

MISDEMEANOR SIMPLIFICATION

After lunch, the Commission turned its attention to Dir. Diroll's new draft for simplifying misdemeanor sentencing. Dir. Diroll noted that the misdemeanor statutes have not been amended as often as the felony code, so they aren't as cumbersome. The draft for discussion applies the same rules and format for streamlining as that used for the felony statutes. It also covers organizational penalties (felony and misdemeanor) and the "pay-for-stay" statutes.

Purposes & Restitution. Dir. Diroll began the discussion by noting an odd exception to the basic purposes of sentencing. §2929.21(D) exempts minor traffic and minor misdemeanor cases from the purposes and principles. He noted that the exception was an attempt to avoid having full-blown sentencing/restitution hearings for minor offenses. The new draft should clarify the provision so that certain traffic cases and other minor misdemeanors are not exempt from basic principles such as proportionality and fairness.

According to Judge Spanagel, there was a language change on this after H.B. 490.

Some of that, said Dir. Diroll, is back in §2929.28. He explained that all sentencing is supposed to default back to Title 29. The ultimate question, he noted, is whether (D) is actually needed at all.

Judge Routson asked how you can get to the issue of restitution for a minor misdemeanor without some evidence or information. It seems that a hearing would be needed to determine the evidence for restitution.

According to Common Pleas Court Judge Steve McIntosh, it could be a reduced judgment.

Instead of a judgment of restitution, said Dir. Diroll, restitution is styled under §2929.28(A)(1) as an "order" that the victim can seek to enforce through various collection methods.

Judge O'Toole asked about the victim who seeks restitution and gets paid from a claim he filed with the insurance company. Often the

insurance company will pay the victim then pursue or sue for restitution from the defendant. The insurance company then often receives more than they had paid the victim. There doesn't seem to be any retribution accountability.

Dir. Diroll pointed out that the statute includes an offset provision.

Juvenile Court Judge DeLamatre remarked that his court is deciding whether to turn restitution collection over to a third agency. He urges keeping that provision.

The third paragraph of §2929.28(1) says that if the court decides to impose restitution, the court shall hold an "evidentiary hearing" on restitution. Dir. Diroll noted that felony law only calls for a "hearing". It also includes a second sentence which is not in felony law, stating that if a hearing is held, the victim must prove, by a preponderance of the evidence, the amount of restitution sought from the offender. Dir. Diroll doubts that the sentence is necessary.

Judge Corzine remarked that he holds a sentencing hearing and if restitution is ordered, he leaves the amount to be decided later at a restitution hearing, allowing the victim time to gather evidence of the amount of damages.

Representing the State Public Defender's Office, Bob Lane remarked that if a victim shows evidence of exorbitant damage at a restitution hearing, it must not allow reconsideration of the original sentence.

If the victim disputes the amount the judge orders in restitution, said Judge Spanagel, then the judge must hold a hearing, but not necessarily an evidentiary hearing. He recommended not allowing an order of restitution in excess of that court's civil jurisdictional limit.

Judge Corzine remarked that he holds the restitution hearing at a later date and holds the entry until afterwards. He contended that it should not be necessary to go through all the rules of evidence for a restitution hearing.

Dir. Diroll asked if it should be a standard of preponderance of the evidence and whether the second sentence of that paragraph should be removed.

Judge O'Toole contended that the court needs a way to challenge what that victim is claiming for restitution.

General Misdemeanor Sentencing Guidance. §2929.22 states that a court must consider the appropriateness of community control sanctions before imposing a jail term for a misdemeanor. The second sentence states that the court may impose the longest jail term on offenders who commit the worst form of the offense. Dir. Diroll noted that there is concern about the possible *Foster* implications of that sentence.

Judge Nastoff pointed out that there is no right to a jury trial on misdemeanor offenses unless there is a demand.

According to Atty. Bob Lane the sentence violates *Blakely/Foster* because someone would have to make a finding that the defendant committed the worst form of the offense.

Eventually, there was consensus that the second sentence should either be removed or a statement added that it may no longer be valid under *Foster*.

Atty. Lane added he's not speaking definitively because his office doesn't do misdemeanor work

Installment Payments of Financial Sanctions. In the misdemeanor bill, said Dir. Diroll, installment payments were formally authorized (§2929.28(F)(2)). He wondered if this should be added to felony law.

This works well, said Judge Spanagel, as a way to pay the processing fee and is also an improvement in procedure.

Asking if there is an expiration date on these payments, Judge O'Toole wondered if they could be retired or suspended. She noted that Legislature is sending these uncollectibles to the courts, which is causing an accounting nightmare because no one can get rid of them.

Court costs cannot be suspended, said Judge Spanagel, but they can be waived if the defendant is indigent. It seems that if the offender meets all other conditions of community control the court should be allowed to drop the financial sanctions or write it off as a bad debt.

The Commission reached consensus that some kind of court cost forgiveness should be worked out.

Optional Million Dollar Fine. An optional fine of \$1 million may be imposed on an offender if there are three or more victims or if the offense is murder or an aggravated first degree felony (§2929.32). Dir. Diroll noted that, if applied literally, this would allow a \$1 million penalty for aggravated burglary or aggravated robbery, when read alone.

According to Judge Corzine, this applies to a very narrow class of victims but covers several offenses.

Dir. Diroll sees a need to harmonize all the collection provisions, here and elsewhere, for misdemeanor and felonies. He added that the section says the court cannot collect from a person convicted of a felony. Dir. Diroll questioned whether this makes sense, since it negates the impact of the section.

FELONY SIMPLIFICATION REPORT

Dir. Diroll reported that the Commission's Felony Simplification Report has been sent out to legislators, judges, etc. Speaker Husted said they will work on it as a summer project.

Judge Spanagel offered to distribute the Misdemeanor Simplification Draft to municipal judges at the July meeting.

Judge Corzine complimented Dir. Diroll on the explanation on pages 3-7 of the Felony Simplification Report about how to simplify the Revised Code in an understandable way.

Other than the misdemeanors, Dir. Diroll asked what topic should be next in the simplification effort.

At future meetings, Judge O'Toole suggested working on substantive issues in the mornings and simplification issues in the afternoon. She also emphasized a need to develop a procedure for getting these proposals moving.

The simplification proposals will make things easier for LSC, said Dir. Diroll. He noted that legislators are trying to finish things this week for the summer break, so simplification will wait for summer at the earliest.

Judge Spanagel suggested getting rid of dead weight on the Commission and getting more active members.

In hopes of getting better legislative participation, Dir. Diroll asked if it would be better to meet on Friday instead of Thursday, since the House Criminal Justice Committee now meets on Thursday. The suggestion was not enthusiastically received.

FUTURE MEETINGS

The June 19 meeting of the Sentencing Commission has been rescheduled for June 26. Other meetings of the Sentencing Commission are tentatively scheduled for July 17, August 21, September 18, October 16, November 20, and December 18, 2008.

The meeting adjourned at 2:43 p.m.