

OHIO CRIMINAL SENTENCING COMMISSION

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

Chief Justice Maureen O'Connor
Chair

David J. Diroll
Executive Director

**MINUTES
of the
OHIO CRIMINAL SENTENCING COMMISSION
and the
CRIMINAL SENTENCING ADVISORY COMMITTEE
September 15, 2011**

MEMBERS PRESENT

Municipal Judge David Gormley, Vice-Chair
Victim Representative Chrystal Alexander
Paula Brown, OSBA Representative
Laina Fetherolf, Prosecuting Attorney
Kort Gatterdam, Defense Attorney
Municipal Judge Fritz Hany
Bob Lane, representing State Public Defender Tim Young
Municipal Judge Steve McIntosh
Common Pleas Judge Thomas Marcelain
Senator Larry Obhof
Mayor Michael O'Brien
Sheriff Albert Rodenberg
Representative Lynn Slaby
Municipal Judge Kenneth Spanagel
Steve VanDine, representing Rehabilitation and Correction
Director Gary Mohr

ADVISORY COMMITTEE MEMBERS PRESENT

Retired Common Pleas Judge Jhan Corzine
Eugene Gallo, Executive Director Eastern Ohio Correctional Center
Joanna Saul, Correctional Institution Inspection Committee
Attorney Colleen O'Toole

STAFF

David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT

David Bartleson, Supreme Court of Ohio
Erich Bittner, legislative aide to Sen. Larry Obhof
Monda DeWeese, SEPTA Correctional Facility
Lusanne Green, OCCA/OJAC
Jessica Lagarce, extern, Supreme Court of Ohio
Alan Ohman, legislative aide to Sen. Shirley Smith
Bill Stephenson, Wood County Public Defender's Office
Matt Stiffler, Legislative Service Commission
Paul Teasley, Hannah News Network
Lisa Valentine, Speaker Batchelder's office
Marjorie Yano, Legislative Service Commission Fellow

The September 15, 2011 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was called to order at 9:52 a.m. by Vice-Chair Municipal Court Judge David Gormley.

DIRECTOR'S REPORT

H.B. 86. Executive Director David Diroll reported that H.B. 86, which addresses numerous criminal issues, takes effect September 30 and applies to crimes committed on or after that date. Crimes committed before that date are covered under the old law. The only exceptions are offenses committed before that date that aren't sentenced until after September 30. §1.58(B) applies to those cases, giving the defendant the benefit of any reduced penalty.

He added that he will post an updated summary of the bill on the Commission's webpage. In addition, the Commission's Drug Card has also been updated to reflect changes in H.B. 86 and was sent out to Commission members for review. Dir. Diroll noted that the latest version of the card contains methamphetamine precursor materials.

Dir. Diroll also noted that, in response to *Foster*, the surpenalty of an additional 1 to 10 years beyond the maximum range for major drug offenders was eliminated. The mandatory term at the top of the appropriate sentencing level remains, however.

Retired Common Pleas Judge Jhan Corzine pointed out that the bill includes a 3-strikes provision in the drug offenses at the F-3 level, noting that if the offender has two or more offenses, the penalty increases. Clarification, he said, is needed on whether it counts as one or multiple offenses if a plea was made involving multiple charges.

Dir. Diroll responded that mandatory prison terms for F-3 drug offenses were removed by the bill and the "3 strikes" provision was chosen by legislators as a substitute. The bill also includes an effort to treat drug and nondrug offenders alike at the F-4 and F-5 levels regarding presumptions toward or against prison.

"Foster Fix". In May, the Sentencing Commission worked on a possible solution to address the concerns raised by results of the *Foster* case. Dir. Diroll explained that the provisions that were declared as unconstitutional by *Foster* all involved the length of prison stay and findings to be made for determining that length. The Commission's suggested language was adopted by the House of Representatives but was then changed in the Senate Criminal Justice Committee. Part of the Senate language states that, in every case, the court is to use "the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources." That section (§2929.11(A)), Dir. Diroll declared, implies that the judge must consider the minimum sanction in every case and "that the court determines" sounds like the court must make a finding. He believes that this may reopen the issues raised by *Foster*.

Part of the Commission's proposal had also suggested that the court make findings that give reason for consecutive sentences. Sen. Grendell preferred to repeal the old language then revive it verbatim. Dir. Diroll believes that this, too, raises questions.

The bill also removed the related consecutive sentence provisions from the sentencing hearing language. So, the law now requires the judge to make findings, but not to enunciate them to the defendant. It is not clear in practice as to how all of that will work.

When Common Pleas Judge Thomas Marcelain remarked that judges are asking when drug and felony "cheat sheets" will be available, Dir. Diroll responded that the goal is to get them out by September 30. The challenge, he noted, is getting all of the information condensed enough to fit within the current format.

Representing the State Public Defender's Office, Bob Lane asked if there is a timetable for the clean-up bill to H.B. 86.

State Representative Lynn Slaby responded that the intent is to get it to Committee by December but he can't guarantee getting it beyond that point by the end of the year.

DRC Research Director Steve VanDine remarked that DRC is in the process of making its own list of corrections needed. He noted that DRC Director Gary Mohr believes there has been an increase of violence within the prison system over the past four years and claims that it is because of a loss of positive incentives and disincentives to control behavior. As a result, DRC is developing some proposals that might be included in that corrective bill or introduced separately.

On a related note, Dir. Diroll pointed out that, under H.B. 86, current inmates are not eligible for the expanded 5 days of earned credit for participation in classes and treatment. This might instill some additional tension between current and future inmates. On the other hand, the changes to the judicial release provision will be available to current inmates. It includes the elimination of the 10 year cap. He pointed out that the new 80% Judicial Release provision is triggered by a petition by DRC, not the inmate.

IMPAIRED DRIVING – SIMPLIFIED OVI STATUTE

The Commission has been working to simplify the OVI statute, beginning with §4511.19. Dir. Diroll reported that Senators Larry Obhof and Bill Seitz have offered to introduce this as a bill, noting that the Commission's draft would make impaired driving law more readable without changing substantive penalties. The question is whether it should be sent as part of a larger package.

Dir. Diroll noted that, to adopt these simplification proposals, legislators will need to consider whether they want to change some drafting protocols. By using tables and various shorter phrases, the draft involves a significant change in drafting protocol for the Legislative Service Commission, but not without precedent.

According to Erich Bittner, legislative aide to Sen. Obhof, there is no reason not to go ahead and get started with introducing the simplified version of §4511.19. That would allow LSC time to start addressing drafting issues.

Defense Attorney Kort Gatterdam asked whether it would be easier to approach the task in bite size or one big package.

The general sense, said Dir. Diroll, is that most legislators would just like to get it streamlined.

Considering the current political climate and timeline with elections approaching, Attorney Colleen O'Toole doubted the chance of getting anything major passed. It might be easier to do in sections.

Municipal Judge Kenneth Spanagel pointed out that traffic bills go to the Transportation Committee rather than the Criminal Justice Committee. He has heard rumors that some legislators have considered revamping the sentencing structure of the Revised Code every 10 years.

According to Dir. Diroll, OVI law is usually handled by the Criminal Justice Committee.

Judge Marcelain favored Judge Spanagel's recommendation to forward the §4511.19 simplification proposal to Senator Obhof for consideration to get the process started. Judge Spanagel suggested, however, keeping §4511.191 and other provisions in mind for similar modifications.

Noting that the ultimate task of rewriting the Revised Code falls on the LSC, Atty. Lane asked where they stand on this suggestion. Dir. Diroll responded that, in the past there was some opposition because LSC sees it as a pretty monumental task. They feel that revising the entire Code would require a decision by the legislators on the Commission.

Judge O'Toole asked if it would mean developing new rules of construction.

According to Matt Stiffler, of LSC fiscal, when gender neutral revisions were made several years ago, it involved changes to the master copy of the Code. Then changes can be handled in bills that affect those sections for other purposes.

By consensus, the Commission approved victim representative Chrystal Alexander's motion, seconded by Sheriff Rodenberg, to:

Forward the §4511.19 (OVI) simplification proposal to Sen. Obhof for consideration by the General Assembly.

Municipal court judges tend to like the concept of simplifying the OVI code, said Judge Spanagel, but there is concern about whether it would require changes to the uniform traffic ticket.

As a member of the Rules and Procedure Committee, Municipal Judge Fritz Hany remarked that it could be costly to change the traffic ticket.

Prosecutor Laina Fetherolf opposes changing the tickets, declaring that it will take forever to get law enforcement officers retrained on how to do them.

The biggest problem, said Judge Hany, is in listing controlled substances. He noted that the municipal judge rarely sees those cases anyway. He pointed out that the Code cited drives a lot of things such as fines, etc.

A suggestion offered by Judge Spanagel was to add sub-identifiers to the draft.

Dir. Diroll agrees that the problem can be solved mechanically.

Judge Hany suggested working from an actual ticket.

INDIGENT ALCOHOL TREATMENT FUNDS

Separately, Judge Hany raised concern about §4511.197, which requires courts to set up indigent alcohol treatment funds. The statute specifies that the funds may only be used for assessment or treatment of alcohol abuse. It does not allow the funds to be used for intervention, administrative costs, staff costs, or anything else. He noted that his jurisdiction has a surplus of these funds and would like to be allowed to use some of the surplus for specialized dockets and other mental health needs besides just alcohol.

Judge Corzine declared that if alcohol is listed as a factor in the person's behavior then, technically, using the funds should be allowed.

VETERANS AND THE JUSTICE SYSTEM

Dir. Diroll reported that Ohio has another new veterans' court in Cleveland. The Ohio Supreme Court has adopted a new rule that allows local courts to receive Supreme Court certification for a specialized docket, which will simplify the process for establishing more veterans' and other special docket courts.

In response to issues raised at the June Sentencing Commission meeting, he has perused the statutes to find where changes might be needed to address the mental health and other issues of military veterans. He noted that Ohio's sentencing statutes are pretty neutral regarding veterans. Since no obvious barriers were found, he decided to give closer focus to the areas of pre-sentence investigations (PSIs), risk assessment, intervention-in-lieu of conviction, and sentencing factors.

There doesn't appear to be any change needed, he said, in the statute addressing intervention in lieu of a conviction, since mental illness was included under H.B. 86. He also examined sentencing factors under §2929.12 to see if changes are needed, and found no cause to do so.

A non-statutory change that might be needed involves the application of the Risk Assessment tool. It should include scrutiny specific to veterans.

Regarding PSIs, the person making the report must consider the defendant's criminal and social history and present condition. He suggested adding "military service" to this requirement. He also suggested requiring the PSI investigator to inquire about the impact of that service so as to include PSD concerns. He proposed adding the following language to §2951.03(A)(1):

"An examination may include an evaluation of the defendant's mental condition, family mental health history, and exposure to

psychological trauma, including the occurrence of post-traumatic stress disorder and similar conditions.”

This language, said Dir. Diroll, would address both military and non-military disorders.

Any competent examiner should automatically examine those things without adding the new phrase, Judge Corzine declared.

Atty. O’Toole suggested including something to allow collateral resources for release of information and to allow collaboration with veterans’ services.

Eugene Gallo, Executive Director of the Eastern Ohio Correction Center, remarked that most PSIs already include information on military service, but not information on the impact of that service. The impact, he said, may not be a recorded diagnosed disorder. He suggested that it might be helpful to gain information on the impact resulting from where they served, what they saw, and how it has affected them upon their return home.

Since the team that initiated the development of veterans’ courts in Ohio gained insight from the one in Buffalo, N.Y., Mayor Michael O’Brien, of the City of Warren, asked if the Buffalo court has made any substantial changes since then.

David Bartleson and Jessica Lagarce are working with that team and responded that Buffalo wants to allow a little more time to let the veterans’ court function before making any major changes. It takes a while to work out the kinks. They noted that only nine states have made any statutory changes specific to veterans.

When asked for a straw vote, about half of the members believed that the statute as listed is adequate, while the other half believed that it needs to be fleshed out a bit.

Mr. Gallo sees PSIs as something to give the court valuable information but he has concerns about the quality of the product. Some are well written while others seriously lack information.

As Director of SEPTA Correctional Facility Monda DeWeese explained that the Adult Parole Authority no longer does PSIs, which results in one person having to do as many as 300 of them per year. Because of this, it would be impractical to expect a thorough and detailed report. She cautioned against expecting too much from a PSI investigator.

The second part of the recommended language, which relates to the examination itself, said Judge Corzine, would be done by a clinician, not the PSI investigator.

He suggested inserting within §2951.03(A) (1) the language “impact of military service on the defendant” rather than merely “military service”. This would cover the psychological impact, not just whether he has military service.

Between the legal structure that orders the PSI and the act of actually processing the PSI, said Mr. VanDine, policy exists on how to conduct

PSIs. The additional training required for probation officers under H.B. 86 should help to address this.

Once you put something in the Revised Code, it is hard to change when it no longer applies, said Lusanne Green, representing OCCA and OJAC.

Gallo emphasized that everyone has a social history, but not everyone has military service. Since military service plays a significant part in a person's life and has effects, he believes that its notation should definitely be included in the PSI.

It would be consistent with the Supreme Court's initiative on specialized dockets, said Atty. O'Toole, to incorporate military service into statute for the purposes of sentencing. It might also help with the issue of allocating funds.

With little dissent, there was a consensus to:

Recommend that the General Assembly add the proposed language on military service to §2951.03 in some form.

Atty. Lane raised concern about those who have served their country and were court-martialed, and are now in civilian court. This raises additional issues to consider.

Common Pleas Judge Steve McIntosh pointed out that it is not just a matter of using the PSI information to determine the most appropriate sentence, but also the most appropriate treatment.

FUTURE MEETINGS

Future meetings of the Sentencing Commission have been tentatively scheduled for October 13, November 17, and December 15, 2011.

The meeting adjourned at 12:35 p.m.