OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor
Chair

David J. Diroll
Executive Director

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

April 18, 2013

MEMBERS PRESENT
Municipal Judge David Gormley, Vice Chair
Chrystal Pound-Alexander, Victim Representative
Paula Brown, OSBA Representative
Robert DeLamatre, Juvenile Court Judge
Laina Fetherolf, Prosecuting Attorney
Kort Gatterdam, Defense Attorney
Jay Macke, representing State Public Defender Tim Young
Thomas Marcelain, Common Pleas Judge
Chad McGinty, Staff Lt., representing State Highway Patrol Superintendent, Col. John Born
Aaron Montz, Mayor, City of Tiffin
Kenneth Spanagel, Municipal Court Judge
Steve VanDine, representing Rehabilitation and Correction Director Gary Mohr

ADVISORY COMMITTEE
Jhan Corzine, Retired Common Pleas Judge
Eugene Gallo, Eastern Ohio Correctional Center
David Landefeld, Ohio Justice Alliance for Community Correction
Lora Manon, Attorney, Bureau of Motor Vehicles

STAFF PRESENT
David Diroll, Executive Director
Nick Fiorilli, Extern
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Monda DeWeese, SEPTA Correctional Facility
Shelbi Franklin, extern, SEPTA Correctional Facility
Irene Lyons, Rehabilitation and Correction
Marta Mudri, Ohio Judicial Conference
John Murphy, Director, Ohio Prosecuting Attorneys' Association
Scott Neeley, Rehabilitation and Correction

The April 18, 2013 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by the Vice-Chair, Municipal Judge David Gormley at 9:50 a.m.

DIRECTOR'S REPORT

Executive Director David Diroll welcomed Aaron Montz, Mayor of the City of Tiffin, as the newest member of the Ohio Criminal Sentencing Commission. He fills the vacated seat of former Mayor Michael O'Brien of Warren. He also welcomed Marta Mudri, who has replaced Christina Madriguera in representing the Ohio Judicial Conference.

LEGISLATIVE UPDATE

Dir. Diroll noted that under S.B. 2 there had been guidance to use community sanctions for most 4th & 5th degree felons rather than sentencing them directly to prison, unless certain things were present, such as a firearm, physical harm, sexual offense, betraying the public trust, acting for hire, *etc*. In 2011, the goal of H.B. 86 was to reduce the prison population. It *prohibited* sending many first time F4's or F5's directly to prison unless there is no local sanction available and DRC cannot find one.

He then explained that, S.B. 160, which passed during the lame duck session at the end of 2012 and took effect in March, allows more F4 and F5 offenders to be sentenced directly to prison, including sexual offenders and persons committing theft in office, on first offense.

DRC Research Director Steve VanDine remarked that DRC doesn't think S.B. 160 will have any serious impact on the prison population because there are relatively few people who would fall into this category and that the Department already assumed sex offenders would come to prison.

SEPTA Director Monda DeWeese raised concerns about how it will impact community-based correctional facilities (CBCFs) because S.B. 160 could change CBCF eligibility criteria, with significant population impact.

According to Retired Common Pleas Judge Jhan Corzine, judges have already voiced concern about another aspect of H.B. 86: sentencing requiring DRC input is unconstitutional.

SIMPLIFYING IMPAIRED DRIVING LAW

Generally, §4511.19 is the most complicated criminal section of the Revised Code, so many people would love to have it streamlined, noted Dir. Diroll. He reported that the latest LSC draft of §4511.19 comes closest to what the Commission proposed and is less cumbersome than earlier drafts.

The draft puts penalties into tabular form. He stressed that there are no substantive changes to the Revised Code as a result of this proposal and certainly no attempt to change penalties. It is simply an attempt to make this section of the Revised Code more readable.

One odd aspect that still needs some attention, he noted, and might need a substantive change at some point, involves the charge of committing a 6th OVI offense in 20 years. If it is just charged as the 6th offense in 20 years, it carries one group of penalties, but if it is charged as a specification, it could carry additional penalties. There is no other place in the Revised Code where the actual elements of the offense are the same as those for the specification. Separately, Dir.

Diroll added that it remains absurd to apply the special penalties for committing six offenses in 20 years to underage drivers.

Before H.B. 86, he noted, the maximum F3 penalty was 5 years. That bill authorized a three year maximum for certain F3s, however. Moreover, F3 penalties are now stated in months. He suggested converting the F3 tables to months and choose OVI belongs in the “up to 60 month” or “up to 36 month” category.

Referencing a recent U.S. Supreme Court decision that a warrant should be obtained for blood draws in OVI cases, Municipal Court Judge David Gormley wondered if that should be addressed in the simplification process.

Judge Corzine suggested asking the legislators to leave out any major changes to statutes and leave this bill as clean and simple as possible or it could easily end up like a DUI Christmas tree. That would include leaving out any substantive changes to DUI law.

Any substantive changes that are needed could be handled later in a clean-up bill, said Jay Macke of the Ohio Public Defender’s Office.

Prosecutor Laina Fetherolf remarked that law enforcement uses tables and charts because they are easier to understand.

Concern was raised by Municipal Judge Kenneth Spanagel regarding line 1513 of the draft, which addresses a driver’s refusal to submit to the substance test. This is related to line 3506, which if the language that is read when a person is arrested for OVI. – there is a need to revise line 3506, the language that is read when you are arrested – As a result of H.B. 337, if a truck driver refuses to take the test or does not blow above .8 there is supposed to be an immediate disqualification. A revision is needed because that consequence is not listed in line 3506. Although it would be a correction, he wonders if it would be considered a substantive change.

As the discussion concluded, Dir. Diroll acknowledged the consensus among the Commission members to let the legislators know they are comfortable with this draft.

CULPABLE MENTAL STATES

Dir. Diroll reported that the Ohio Prosecuting Attorneys’ Association has voiced concerns to Sen. Bill Seitz about the latest draft on culpable mental states.

Judge Corzine offered some background on how the *mens rea* issue evolved before the Commission. Work began with the first *Colon* case in the Ohio Supreme Court, which held that a culpable mental state should be proved for all offenses, unless there was clear intent to impose strict liability. Some prosecutors did not like Ohio’s definition of “recklessly”—the default *mens rea* when a statute is silent—because it can confuse juries with language like “heedless indifference” and “perversely disregarding a known risk.” Many felt that “knowingly” was an easier *mens rea* to understand and could serve as the default. A subcommittee of the Commission examined the definition used for recklessly and settled on two versions – a tweaked version of current

law and the Model Penal Code definition. Everyone agreed that either of those versions was better than what we currently had. The Commission then dug through Title 29 to discern which statutes needed a mental state listed. In the meantime, several other groups suggested to legislators that knowingly should be the default *mens rea*.

According to Dir. Diroll case law in Ohio is settled on the current definition of "recklessly," so many prosecutors suggest avoiding any change. In addition, they are concerned that, although a *mens rea* of "knowingly" would be more clear cut, it would also raise the standard.

Colon, he said, troubled a lot of prosecutors because they generally based their indictment on the actual language of the statute, including when the statute did not clearly stipulate a culpable mental state for each element. The *Colon* case clearly implied that a *mens rea* element should be stated for everything, which caused consternation.

However, the *Johnson* case at the end of 2010 held that, if a *mens rea* was stated *anywhere* in the statute then the statute was effectively complete. This seemed to negate the default statute, he argued, and effectively made the default for other elements into strict liability, if *mens rea* somewhere in the statute. He added that it isn't clear how it affects statutes in which an underlying crime is bootstrapped into the penalty or incorporated by definition.

Executive Director of the Ohio Prosecuting Attorneys Association John Murphy explained that he received a draft of the bill from Senator Bill Seitz and was surprised that "knowingly" was selected as the default *mens rea*, rather than "recklessly".

Atty. Macke declared that this did not come from the Sentencing Commission, but had been encouraged by other outside sources.

Dir. Diroll confessed that he steered the drafters toward "knowingly" and admitted that he misgauged the opposition to the change.

It was prosecutors who raised the issue of the definition of "recklessly," Judge Corzine noted, and "knowingly" had also been discussed among them as a possible default.

Having been a part of the earlier discussions about the definition of recklessly, Pros. Fetherolf argued that she was never okay with using "knowingly" as the default.

Dir. Diroll contended that he does not believe that "recklessly" is the deal breaker here. The Commission could again endorse "recklessly," if redefined. He said that other aspects of the draft that effectively overturn the *Johnson* case are more important. He also reiterated the Commission's longstanding concern that the General Assembly should fill mens rea gaps in existing statutes and be clearer about intent to impose strict liability.

The OPAA will meet next week, said Dir. Murphy, to discuss the issue.

When this was discussed a year ago, prosecutors favored the "tweaked" definition of recklessly, said Judge Corzine, and he did as well.

Dir. Diroll pressed that strict liability should be the exception, not the rule, and the *Johnson* case tends to make it the rule.

The problem, said Judge Corzine, is that *Johnson* does not get at the issue of whether there's a *mens rea* that must be proven and charged that is not listed in the indictment.

There was consensus that statutes should make these things clear.

Atty. Macke agreed that the *Johnson* case turns everything on its head, but they haven't had real problems with it yet.

After all of the work to determine a suitable definition of "recklessly," Pros. Fetherolf questioned why the default should now be switched to "knowingly."

If we already sent a statement to the legislators that we agreed on the definition of "recklessly," Atty. Gatterdam declared, and then we should not be sending a note now that we have changed our minds.

Rather than arguing the issue further, Pros. Fetherolf insisted that we need to reiterate to the legislators that we agreed on a definition of "recklessly" and that the default should not be "knowingly."

The bigger issue, Dir. Diroll contended, is whether we should default to strict liability for the elements that are silent as to *mens rea*, as required by *Johnson*.

OPAA Dir. Murphy agreed but referenced *State v. Wac*.

Sen. Seitz agreed to introduce a bill on this, said Dir. Diroll, but he wants an agreement on the default.

Judge Corzine suggested giving Sen. Seitz something that he can introduce.

Pros. Fetherolf suggested revisiting the minutes of what was voted on before and proceed from there.

The *Johnson* case rewrote the rules after we had already voted, said Dir. Diroll, by stating that, if any mental state is mentioned anywhere in the statute, then there is no need to read a mental state into the remaining issues. He suggested re-evaluating what the *Johnson* case means and what we want the default to be.

According to Atty. Macke, referring to the bill draft, only §2901.21 really impacts the *Johnson* question and division (C) is where the biggest problem will be. He pointed out that the Commission isn't pushing a switch to "knowingly." That came from other interest groups.

The other elements, said Dir. Diroll, were brought about to address the *Johnson* case in ways that the *Johnson* case did not contemplate.

At the May meeting of the Sentencing Commission, said Dir. Diroll, we will meet at the Ohio Reformatory for Women in Marysville so we probably won't get back to this topic until we meet again in June.

INDETERMINATE SENTENCING

After lunch the Sentencing Commission's attention turned to DRC's latest draft on indeterminate sentencing. The premise behind the urge to offer indeterminate sentencing for some offenses is the need for alternatives to address prisoner misconduct, Dir. Diroll noted.

The proposal, he explained, focuses on §2929.14, the section of the Revised Code establishing the basic felony prison terms. In the draft, the current ranges by degree of offense would establish the minimum time to be served. This would be coupled with a sliding scale of additional time possible. The latest draft simplifies the language under (A)(6)(a) regarding how the additional time is stated. It acknowledges that DRC may delay the offender's release date beyond the minimum term if the offender fails to adhere to the rules and regulations of DRC or commits an act in violation of such rules.

He noted that a holdover provision for infractions committed late in an inmate's term was pulled from this version of the draft.

On proposed §2929.14(A)(6)(a), Dir. Diroll pointed out that the current draft does not specify that the added time is only for *serious* misconduct, which leaves the proposal open to misuse.

Judge Corzine agreed that it needs to clarify that it's for serious misconduct in order to prevent future abuse of the option.

Regional Release Panels. The proposed rule would establish Regional Release Panels to review the institutional conduct of inmates referred to the panel by an institution's warden and make a determination whether delayed release is appropriate. The draft includes a list of rule violations that can trigger consideration for delayed release.

Raising concern about Rule #7 "throwing any other liquid or material on or at another person", Atty. David Landefeld declared that this seems overly generic and broad. He suggested that perhaps it should say "a harmful liquid or material."

Raising concern about Rule #18 which involves encouraging or creating a disturbance, Judge Corzine argued that this also is vague. He argued that a person could easily cause a disturbance without intending to.

Any action must involve at least three people to qualify as a disturbance, said Mr. VanDine. He pointed out that DRC also has other sanctions available for use. Adding extra time is only for the more extreme situations.

Division (D), said Dir. Diroll, sets out the tiers of the disciplinary process. Section (D)(1)(vii) has been added to allow a mental health staff member to make a recommendation. He noted that the warden is the gatekeeper to the regional panel and the Director of DRC would review the decision of the regional release panel to ensure that all procedures were properly followed. The Director would also have authority to rescind the decision of the Regional Release Panel or reduce the length of delayed release.

If an inmate's release is conditionally delayed by a regional release panel, it will be reviewed periodically and if the inmate exhibits positive change and good institutional the release delay can be rescinded.

According to Judge Corzine, the Ohio Judicial Conference received an email stating that the Governor's Office wants to remove the Director of DRC from this process and have it go back to the sentencing judge. The Judicial Conference is to have a conference call on this issue next week. If there are expected to be only 100 to 150 cases of this per year, it might not be so bad, but if it's much more than that it won't fly with the judges.

Whether the decision is appealable, said Judge Tom Marcelain, will also be a factor in how judges respond to the suggestion.

Proposed Penalty Increase. Atty. Macke reported that within the last couple of days the House version of the budget bill has an amendment that increases the penalty for assault of a corrections officer from a fifth degree felony to a third degree felony. One of the main thrusts/factors behind the motivation for this change, said Atty. Macke, was because of prosecutors who wouldn't pursue prosecution of these cases.

According to Judge DeLamatre, the version he saw relates only to assault of any officer in DYS.

There continually seem to be certain offenses where penalties are heightened because of who the victim was, said Dir. Diroll. Still, it seems odd to elevate the penalty for assaulting a corrections officer above that for assaulting a police officer.

Dir. Diroll noted that a lot or prosecutors don't want to take the time to prosecute misdemeanors or low-level felons that won't result in much more prison time. This changes that dynamic by bumping an F5 up to an F3.

Dir. Diroll reminded members that the May meeting will be held at the Ohio Reformatory for Women in Marysville and Gene Gallo has offered to help transport people from here to the Marysville if anyone prefers not to drive there on their own.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission are tentatively scheduled for May 16, June 20, July 18, and August 15, 2013.

The meeting adjourned at 1:30 p.m.