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 the
CRIMINAL SENTENCING ADVISORY COMMITTEE

February 21, 2013

MEMBERS PRESENT
Municipal Judge David Gormley, Vice Chair
OSBA Representative Paula Brown
Robert DeLamatre, Juvenile Court Judge
Paul Dobson, Prosecuting Attorney
Kort Gatterdam, Defense Attorney
Kathleen Hamm, Public Defender
Jay Macke, representing State Public Defender Tim Young
Thomas Marcelain, Common Pleas Judge
Steve McIntosh, Common Pleas Judge
Gary Mohr, Director, Rehabilitation and Correction
Albert Rodenberg, Sheriff

ADVISORY COMMITTEE
Jhan Corzine, Retired Common Pleas Judge
Eugene Gallo, Eastern Ohio Correction Center
Lora Manon, Attorney, Bureau of Motor Vehicles
Joanna Saul, Director, Correctional Institution Inspection Committee
Gary Yates, Ohio Chief Probation Officers' Association

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

GUESTS PRESENT
Joseph Adkins, intern, OCCA
Sara Andrews, Rehabilitation and Correction
Jessica Boebel, student, Ohio State University
Amy Borror, Ohio Public Defender's Office
JoEllen Cline, Legislative Counsel, Supreme Court of Ohio
Scott Criss, Ohio Attorney General's Office
Monda DeWeese, SEPTS Correctional Facility
Ryan Dolan, Counsel, Rehabilitation and Correction
Lusanne Green, OCCA
Linda Janes, Chief of Staff, Rehabilitation and Correction
Irene Lyons, Rehabilitation and Correction
Joshua Muckerman, intern, Supreme Court of Ohio
Scott Neely, Rehabilitation and Correction
Mark Schweikert, Director, Ohio Judicial Conference
Kris Steele, Supreme Court of Ohio
Steve VanDine, Rehabilitation and Correction

Barry Wilford, Ohio Association of Criminal Defense Lawyers

The February 21, 2013, meeting of the Ohio Criminal Sentencing Commission and Advisory committee was opened by the Vice-Chair Municipal Judge David Gormley at 9:45 a.m.

Executive Director David Diroll announced that Judge Gormley was recently reappointed to the Commission and reappointed as Vice-Chair.

INDETERMINATE SENTENCING

Over the past few months, the Commission has examined DRC's request to reconsider indeterminate sentencing in order to allow additional prison time to be used for disciplinary purposes to address serious misconduct.

DRC Director Gary Mohr noted that his first appearance with the Commission was in early 2011. One of his key concerns at that time was the number of low level 4th and 5th degree felons who were spending a year or less in prison and being released with no supervision. Another key concern was violence within the prison system.

He had retired in 2002 then came back in 2011. Upon his return, he was surprised at the number of reports of serious violence taking place in Ohio prisons. He learned that most of the violence was by inmates in their 20's serving short to moderate sentences on flat time and were STG affiliated (Security Threat Groups, including gangs).

In 2007 or 2008 DRC eliminated its unit management approach and relied on correctional officers to meet both law enforcement and counseling needs. With institutional violence increasing, Dir. Mohr said he decided to reintroduce unit management and a return to basic reviews with an eye toward identifying the primary drivers of violence at each facility. An internal and individualized review of three targeted areas helped in formulating a road map for reintegrated units and a 3-tier system of control. This would allow the staff to utilize a behavioral continuum to manage the inmates in the manner in which they present themselves.

In January, 2012, he sent a letter to every inmate stating that he would not tolerate violence. He then redesigned the classification instrument so that inmates could be controlled in a facility that matched their level of behavior. The 3 tier system allows for better unit management and swifter response to incidents.

The Marysville integrated facility makes sure that every inmate has 8 to 10 hours of productive activity each day, including community service and drug and therapeutic programs, he noted.

Overall, the rate of violence has started to drop (by 7.2%). However, harassment offenses and hurling bodily fluids on staff have increased by 5%, particularly in Level III facilities. It is in Levels I, II, IV, and V facilities where the violent behavior started to decrease.

While they are attempting to deal with the issues of violence, he stressed that it is essential that they keep in mind the ultimate mission to reduce recidivism. He noted that the national rate of recidivism is 43%, whereas Ohio's rate of recidivism is now 28.7%.

He visited staff in intensive care units due to injuries resulting from assaults by inmates. This reinforced the intensive need to maintain control within the prisons. Inmates found if they assault another inmate they often stay at that prison, but if they assault a staff member they usually get to leave that prison. DRC attempted to move violent inmates to facilities with higher security levels, but it has not made a difference to this population. He noticed that inmates show more respect in front of the Parole Board than to prison staff. After surveying both staff and inmates, it was found that sanctions that affect the inmate's release date have the greatest impact on their behavior.

He remarked that, when S.B. 2 went into effect, it was appropriate at the time. However, at that time all of Ohio's prisons were operated identically. There was no 3-tier system and no evidence-based programming. He refuses to allow a few inmates to disrupt the efforts of others who want to achieve a successful level of rehabilitation to better their chances for productive lives upon release.

DRC asked retired Justice Evelyn Stratton to examine the proposal to advise if it might follow the demise of bad time and be struck down. The intent is much like truth-in-sentencing. Each felony level would have a narrow sentence range from minimum to maximum. The inmate will be released when expected, at the minimum date, unless specific rule violations are committed.

He noted that the act of fighting has been removed from the list of infractions that would warrant extending the inmate's sentence beyond the minimum and instead will be handled internally.

Layers have been created in the process of this structured sentencing plan to offer opportunities to address the behavior before reaching the ultimate option of extending the release date. The process begins with the conduct report, the possibility of a Rules Infraction Board Hearing, a review by Regional Panels, and the final decision to be made by the Director. He noted that mental health issues are to be taken into account throughout the process.

Although DRC makes a constant effort to get all assaults prosecuted, Dir. Mohr remarked that only 11% of all the assaults on staff in 2010 actually got prosecuted. The highest rate of violence used to be at Level I & II prisons. Now it is at Level III prisons. Transferring violent inmates to prisons with tighter security was not having the desired effect. A quick response works best but prosecution takes time.

Representing the State Public Defender's Office, Jay Macke declared that there tends to be three different populations of inmates related to their types of sentences. Pre-S.B. 2 inmates have indeterminate sentences, post-S.B. 2 have flat time sentences, and post-H.B. 86 inmates get a few benefits that are not afforded the others. He believes that each population seems to get treated differently by staff and each other. He contends that, in and of itself, creates a problem for purposes of unit discipline.

Inmates who want to do the right thing and improve themselves, said Dir. Mohr, are being blocked and not getting a chance to progress. DRC is creating new therapeutic communities and adding programming but many

inmates are afraid to go for fear of encounters with other inmates. He wants an environment where inmates can improve their lives without fear.

Atty. Macke wondered why the Attorney General's Office hasn't stepped in and provided more assistance with prosecutions.

Dir. Mohr remarked that he had recently met with prosecutors from the Attorney General's Office and myriad issues (such as hesitation of victims to testify in court) were raised regarding hindrances to the prosecution of violent encounters in prison. He believes that this has generated an increase in prosecutions.

On whether the cases should be prosecuted as an alternative to an administrative method, Prosecutor Paul Dobson feels it is not really addressing the issue. Besides the inherent delay in the prosecutorial process there are also additional variables including an elevated prejudice against a conviction in addition to other ongoing difficulties. He added that, if a staff person gets injured and there is no conviction, word quickly gets back to the prison population, making the work atmosphere even more dangerous for the staff person.

Since an inmate cannot be left in the facility where he was involved in a violent incident, it presents logistical issues with transporting defendants, witnesses and victims for the trial, added Dir. Mohr.

DRC Counsel Ryan Dolan stressed that the current proposal allows an inmate who's been given an extension to his minimum sentence the opportunity to redeem himself. Prosecution doesn't allow that.

Voicing concerns about the timing of this proposal, Public Defender Kathleen Hamm declared that the judiciary needs to be better educated on what is available.

Dir. Mohr admitted that he is impatient but feels he cannot allow Level 3 facilities to continue to have an increase in violence or to have inmates living in fear.

Since this proposal would not impact pre-S.B.2 inmates, Atty. Macke asked what else could be done for them. He declared that this appears to be a solution for the future, not the present.

Data shows, Dir. Mohr responded that inmates serving flat sentences (post-S.B. 2 offenders) are the ones causing most of the problems.

Dir. Diroll wondered why the Parole Board wasn't chosen as the determining body instead of Regional Review Panels.

Dir. Mohr feels that the Board can be controversial and he would like to avoid adding another element of contention. He wouldn't mind, however, having some members of the Parole Board serve on the panels.

DRC Deputy Director Sarah Andrews pointed out that the Parole Board's work load has been balanced and shifted from release hearings to other types of proceedings such as clemency cases. She added that part of the reason the cases in question would be handled by Regional Review Panels instead of the Parole Board is because they want these panels to deal only with institutional conduct.

Defense Attorney Kort Gatterdam says he has more faith in the court system than a review panel because inmates have certain rights. He also has concerns about the mechanics for how this would work.

Bad Time was an easier process, Pros. Dobson declared, but the Supreme Court eliminated that possibility.

Under this proposal, Dir. Diroll stated, sentences as we know them today would remain intact. Through this model, a sentence could be extended if an inmate causes a serious disruption to the operations of the institution or causes or attempts serious physical harm to a person.

Defense Attorney Paula Brown does not feel the possibility of extending an inmate's sentence beyond the minimum should be decided at the administrative level. That would mean that the agency that was assaulted is the same agency that decides the inmate's fate. She objects to changing an entire sentencing system to address problems caused by a very small percentage of the prison population.

It had been proposed at one time that these cases go back to a judge, said Atty. Dolan, but judges opposed that suggestion.

If it only involves a few cases, Atty. Gatterdam argued, the judges cannot complain about the potential of being overburdened.

According to Mark Schweikert, Director of the Ohio Judicial Conference, this was discussed with the Common Pleas Judges' Association and most prefer the current proposal. They prefer not to get the cases back.

Retired Common Pleas Judge Jhan Corzine acknowledged that some judges have concerns about the proposal but most feel it is worth a try.

Why can't some of the process or mechanics that are laid out in the Rule also be included in the statute, Atty. Macke asked. He especially thought the establishment of the Regional Release Panels could be included in statute.

Atty. Dolan contended that too much detail in the statutes can create other problems.

Dir. Mohr declared that he aims to insure fairness and consistency in the type of behavior punished and length of extensions, as well as consistency in training to assure that an inmate won't be placed in the pipeline that doesn't belong there.

Contending it is a bad idea to send these cases back to the judge, Common Pleas Judge Steve McIntire noted that DRC has an interest in keeping the prison population down. The judge does not have that interest and might impose more time, perhaps to the maximum.

The goal, Dir. Mohr pointed out, is not to punish but to insure the inmate's behavior is compliant and to protect other inmates' safety.

Atty. Gatterdam raised concern about double jeopardy issues if the case goes to a panel and then to a court for prosecution.

Regarding reviews done late in the inmate's term, Dir. Mohr noted that his concern is the timing and whether it could affect his decision.

Defense Attorney Barry Wilford, a guest, remarked that he opposed bad time when it existed. He feels the proposal being discussed has a shocking lack of due process, insisting there is a need for the right to counsel if there's probable cause.

Since this whole issue is about dealing with a small number of people, Atty. Macke asked what the harm would be in affording more due process.

Atty. Dolan pointed out that there is no representation for cases that go before the Rules Infraction Board unless the inmate has mental health issues and doesn't understand the process. It is assumed, he said, that the panel would not impose the maximum for a first time incident. Immediacy not length, he stressed, is key to making it work.

Dir. Mohr reiterated that the intent behind this proposal is not to punish but to assure the behavior won't happen again and give the inmate a chance to redeem himself.

Atty. Gatterdam stressed once again that he would feel more comfortable with this proposal if the right to counsel was offered.

Atty. Dolan doesn't think that is necessary constitutionally. He noted that Justice Stratton's only concerns were consistency and discretion.

Years ago, said Atty. Wilford, the Ohio Supreme Court ruled that no counsel is needed for cases referred to the Rules Infraction Board because it is administrative in nature, not penal.

PROBATION DATA

When the Council on State Governments submitted recommendations to the General Assembly, it was concerned that there were no statewide data on people placed on probation. As H.B. 86 developed, incorporating numerous recommendations from CSG, it added an uncodified provision asking the Supreme Court to adopt a rule on probation caseload data.

Dir. Diroll noted that in 1996, S.B. 2 had asked the Supreme Court to adopt a rule that would provide data on the race, ethnicity, gender, and religious preference of offenders. Today, Chief Justice O'Connor feels that the information gathered should be richer and more useful.

The ORAS system (Ohio Risk Assessment System) set up by DRC, which is to be more universally used by the courts, could perhaps be used to get some more refined information on certain things, added Dir. Diroll.

In gathering of risk assessment information, JoEllen Cline, counsel for the Supreme Court, reported that the Supreme Court is currently working with DRC to modify the ORAS for gathering this additional information, and establishing a rule for the courts to assist in providing some of the information. The next question, she noted, is what to do with the information once collected.

A lot of this information is in PSIs, said Dir. Diroll, but those are not done universally. They often are not done for prison bound offenders. The ORAS, he reiterated, is supposed to be more universal.

Representing the Chief Probation Officers' Association, Gary Yates explained that PSIs are not required in misdemeanor cases and not all municipal courts conduct an ORAS.

According to Common Pleas Judge Tom Marcelain, some courts thought they were already providing this information and won't want to do it twice.

ADULT PROBATION OFFICER TRAINING STANDARDS

After lunch Dir. Diroll remarked that H.B. 86 also required that probation officers for each level of the court system should receive training and uniform standards should be established for that training.

Kris Steele, representing the Ohio Judicial Conference, reported that the new standards went into effect January 1, 2013. There are now two standards of training for probation officers: the Continuing Education Standard and New Officer Standard.

All adult probation officers are now required to get 20 hours of continuing education per year. The new standard goes into effect January 1, 2014, requiring the completion of 18 modules of education. New officer training is rooted in three areas: criminal justice system and the court, fundamentals of the probation profession, and evidence-based practices, to provide a broad foundation of knowledge. For continuing education/training each probation department will be allowed to determine the required ongoing education for its workforce.

He noted that 12 of the modules for new officers can be done online and the other six have to be done live because they are more skill-based. The live training will be within five regions. They are currently looking for 20 trainers to help conduct these trainings regionally. The cost of training the trainers is covered by a BJA grant so that courts will not be burdened with that expense. The trainers include experts in the fields as well as some chief probation officers.

There are approximately 2,000 probation officers statewide and about 200 new officers to be trained per year. With the online modules, the probation officer can log on anytime and take the test at the end. To protect officers' safety, the training is not available to the general public, but only through court sites.

Dir. Mohr complimented Mr. Steele on the approach used to this training.

Mr. Yates noted that this training is not entirely new. The Chief Probation Officers' Association has coordinated with the Police Officers' Training Academy and Judicial Conference for more than ten years in providing basic training for new officers. They simply were not able to conduct the training on the scale contemplated by H.B. 86.

CULPABLE MENTAL STATES

The Sentencing Commission issued a report on criminal culpability in 2011. Since then Dir. Diroll has been working with Sens. Bill Seitz and

Larry Obhof to offer additional suggestions from the Commission to fine tune the *mens rea* rules and the default statute. A couple of other groups, the Texas Public Policy Foundation and the Buckeye Institute, have an interest in this issue and entered the discussions.

Many offenses in Title 29 do not make a culpable mental state clear and do not plainly indicate that the legislature wanted those to bear strict criminal liability. Dir. Diroll remarked that over the years six Supreme Court cases have gone in different directions in wrestling with the incomplete statutes.

The current default pattern is to recklessly but the proposal instead suggests knowingly. He argued that if the legislature wants a statute to carry strict liability, it should say so. If recklessly is preferred, the definition may need to be changed. It should not be up to the prosecutor, judge, or defendant to guess the standard, he added.

In response to Judge Corzine, Dir. Diroll said, if §2901.22 is adopted, then a new definition of "recklessly" could be included.

Pros. Dobson declared that the OPAA has debated whether to change the definition of recklessly and decided not to because the current definition has already been litigated.

In H.B. 511 in 1972, said Dir. Diroll, Ohio adopted the Model Penal Code definition of purposely, knowingly, and negligently, but not of recklessly. He's not sure as to why.

The proposed basic rule is in §2901.21(A)(1) and (2). Dir. Diroll suggested adding the language "When the language specifies a degree of culpability without specifying the elements of the offense to which that culpability applies, absent clear legislative intent to the contrary, the specified degree of culpability shall apply to all elements of the offense" to §2901.21(A)(2) and adding the language "The inclusion of a degree of culpability in one division of a section does not plainly indicate intent to impose strict criminal liability for other divisions that do not specify a degree of culpability" to §2901.21(B). He believes this would help to bring greater clarity to this problematic area.

According to Atty. Gatterdam, (C) seems to take care of when the situation is not clear.

Pros. Dobson declared that (C) raises the level of *mens rea* from recklessly to knowingly as a consequence of not having a clear *mens rea* otherwise.

Dir. Diroll noted that Senator Seitz has an interest in introducing something in the legislature on this.

FUTURE MEETINGS

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

The meeting adjourned at 2:05 p.m.