OHIO CRIMINAL SENTENCING COMMISSION

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Chief Justice Maureen O'Connor
Chair

David J. Diroll
Executive Director

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

May 17, 2012

MEMBERS PRESENT
Municipal Judge David Gormley, Vice Chair
Victim Representative Chrystal Alexander
OSBA Representative Paula Brown
Defense Attorney Kort Gatterdam
Public Defender Kathleen Hamm
Municipal Court Judge Fritz Hany
Jay Macke, representing State Public Defender Tim Young
Common Pleas Judge Thomas Marcelain
State Senator Larry Obhof
Municipal Judge Kenneth Spanagel
Steve VanDine, representing Rehabilitation and Correction Director Gary Mohr

ADVISORY COMMITTEE
Eugene Gallo, Director, Eastern Ohio Correctional Center
Lora Manon, Bureau of Motor Vehicles
Joanna Saul, Director Correctional Institution Inspection Committee

STAFF PRESENT
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant
Luke Wells, Extern

GUESTS PRESENT
Erich Bittner, legislative aide to Sen. Obhof
Lusanne Green, Ohio Community Corrections Association
Irene Lyons, Rehabilitation and Correction
Scott Neeley, Rehabilitation and Correction
Mark Schweikert, Director, Ohio Judicial Conference
Paul Teasley, Hannah News Network

The May 17, 2012 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by Vice-Chair Municipal Judge David Gormley at 9:50 a.m.

DIRECTOR'S REPORT

Executive Director David Diroll reviewed contents of the meeting packets, which included: A copy of his response to the letter mailed to

Commission members from Fairfield County Common Pleas Judge Richard Berens regarding issues related to the H.B. 86 prohibition against sentencing certain F-4 and F-5 offenders directly to prison; a letter from Common Pleas Judge Judy Harper of Summit County raising concerns about the Ninth District Court of Appeals' literal reading of §2947.23 which requires the court, in all cases, to order that the defendant pay the costs of prosecution; a summary of sentencing patterns, presented by DRC Research Director Steve VanDine; a section by section summary of H.B. 524 & S.B. 337 addressing collateral sanctions and expungement; and a summary of the latest LSC Draft of the Commission's OVI (operating a vehicle under the influence) streamlining proposal.

He reported that the clean-up bill on H.B. 86 is currently before the Legislature. They are attempting to discern which portion should go into the budget review bill and which portion should stand alone. Beyond that, there has not been much controversy over the particulars of the bill.

OVI Simplification. Dir. Diroll distilled the latest LSC draft of the impaired driving statute and distilled it as it would read if enacted. He also listed a couple of things that, from the LSC perspective involves a few policy changes. Generally, the Legislature would prefer to clean up the language without getting into policy debates. Regardless, there are a few substantive oddities that need to be refined, he noted. One oddity is that, although unintended, when read a certain way, it is possible that a multiple offender can get a free OVI, when looking at the statute regarding the 4th and 5th offense.

There is also an odd specification where five prior OVIs within 20 years can cause a new OVI to kick up to a higher penalty category, yet the specification adds nothing new to the basic 6 in 20 charge, although it carries an enhanced penalty. Dir. Diroll declared that it is very rare in the Revised Code for the specification adding incarceration time to be identical to the underlying charge.

Another oddity, said Dir. Diroll, is the application of the penalty to underage drivers for 6 offenses in 20 years. It would be quite unlikely, he argued, for a teen to be able to get that many charges by the age of 18.

IMPACT OF *FOSTER* LANGUAGE AND H.B. 86

DRC Research Director Steve VanDine reported that parts of H.B. 86 emerged from the federally funded Justice Reinvestment process which generated a study and report with recommendations for changing the sentencing structure in Ohio. This, in turn, generated some money for follow-up projects and DRC received some of that.

DRC was the lead agency for five symposia around the state. Three of these have been completed and two more are coming. The symposium includes a presentation on the Ohio Risk Assessment System (ORAS) by Brian Lovins from the University of Cincinnati. DRC Counsel Andre Imbrogno then explains many of the provisions in H.B. 86 while Mr. VanDine offers data on the impact of H.B. 86. There is also a section on the development of new probation officer standards and training. Finally, an update is provided on collateral consequences legislation and the concepts behind that. The core, he noted, is on H.B. 86.

Mr. VanDine then offered an overview of the impact of the *Foster* language and the impact of H.B. 86. This reflects a first effort to look at the sentencing ranges since the implementation of the H.B. 86 language designed to address Senate Bill 2 (1996) guidelines removed by the *Foster* case. The basic data base includes people admitted to DRC between January 1, 2011 and April 29, 2012. That offers 16 months of admissions for comparison, for a sum of 27,700.

Group I, during the first 4 months of 2011, reflects 7,022 admissions before the passage or influence of H.B. 86. The first 4 months of 2012 had 6,585 admissions (a reduction of 7.5%), which does reflect some influence of H.B. 86.

September 30, 2011 saw the admittance of hybrids that have both an old S.B. 2 sentence and an H.B. 86 sentence. Those admissions were left out of the deliberations. 1,559 have been admitted under pure H.B. 86 sentences. Mr. VanDine emphasized that since the Group II numbers are early H.B. 86 admissions, they may be reflecting some of the easiest cases under H.B. 86, since they tend to get processed the fastest. If that is indeed the case, it would explain why they are lighter sentences than had been expected.

There are 12 different provisions, he noted, that effect sentencing under H.B. 86 and most of them overlap. Most of them go after the lightweight lower felony level property and drug offenders by allowing risk reduction sentences, judicial release, or a shift to community sanctions.

Single Offenses. Some people may have only one kind of crime, although it may include several counts. Aggregate sentences tend to have higher sentences because they may include more than one type of crime and multiple counts, which might be running consecutively.

There was language in H.B. 86 that reinstituted one of the three presumptions that *Foster* invalidated. There is additional language that encourages judges to reapply some of the other two presumptions, which would encourage them to avoid the maximum sentence and shift closer toward the minimum range for certain types of cases.

Of the offenders admitted to DRC for single F-1 offenses, 31.7% of the Group I offenders (all pre-H.B. 86) were admitted with 3-year sentences. In comparison, 35.5% of the Pure H.B. 86 offenders were given 3-year sentences. That reflects a 3.8% shift to the bottom of the range. If you combine the admissions with 3, 4, and 5 year sentences, there was a 13.5% shift toward the bottom of the range.

Mr. VanDine pointed out that H.B. 86 added an 11 year sentence for F-1 offenses, which then resulted in a .5% shift from the top of the range. Overall, those changes fit within the pattern anticipated by reinstating some of the pre-*Foster* guidance language. If the pattern continues, it should continue to impact the prison population. The same patterns, he declared, exist for F-2, F-4, and F-5 admissions.

For single offense F-2 offenders, the bottom level went up 2.2% and the top level dropped 2%. For F-4s, the bottom level went up 7.6% and the

top dropped 4.5%. For F-5s, the bottom level went up 11.3% and the top dropped 7.9%.

He noted that there is a new 9-month sentence at the bottom of the range for F-3s, which helped to result in a 5.4% shift in the bottom 9-12 month ranges. Most crimes at the F-3 level lost their 4 and 5 year options, resulting in a 14% downward shift for anything beyond 3 years. The most common offense falling with the 9-12 month range is OVI.

For aggregate sentences, every felony range exhibits a noticeable increase in admissions at the bottom of the range and a noticeable decrease at the top.

There were significant changes in the drug possession and trafficking laws, said Mr. VanDine (some suggested by the Sentencing Commission). The main change involved a restructuring of the sentencing ranges for crack and powder cocaine. There's been a noticeable increase of possession crimes shifting toward the F-5 level.

Pure H.B 86 admissions show a 3.6% drop in drug possession offenders. He believes it is because they are getting transferred or diverted out. There is also a noticeable drop in drug traffickers at the lower level as many are getting shifted to local treatment programs.

Property Crimes Sentencing. At the low level, some offenses are now misdemeanors rather than felonies. In addition, property theft offenses within the $500 to $1,000 range are now misdemeanors, rather than felonies. Ultimately, those two shifts have resulted in almost a 4% reduction in property crimes at the F5 level.

Non-Support of Dependents. 4 or 5 years ago there began an influx of offenders being admitting to DRC for nonsupport. Judges were encouraged to use more community sanctioned nonsupport programs, which DRC helped to establish. Mr. VanDine reported that judges are apparently making greater use of these programs as the data shows a 26.5% decrease in the non-support admissions to DRC, with 122 commitments in 2012 as compared to 166 commitments in 2011.

New Escape Definition. Some judges were applying the definition of "escape" to parole violators at large. H.B. 86 offered a new definition, resulting in a 15.2% increase from 66 commitments in 2011 to 76 commitments in 2012.

Intervention in Lieu. This is conducted at the local court level and precludes a felony conviction. DRC does not get as much information on this category. The Department only has APA supervision numbers.

Risk Reduction Sentences. The Justice Reinvestment group strongly encouraged risk reduction sentences after seeing its success in Wisconsin. By implementing it in H.B. 86, DRC had estimated that 35% of the admissions with 9 month sentences would be admitted with risk reduction sentences. Seven months after implementation, there have only been 141 risk reductions sentences, which is far less than the 35% expected. To date, there has only been one release under this option.

Under the risk reduction option, the judge orders a needs assessment and programs to address those needs. If the offender completes those

programs and behaves, then DRC can release them after completion of 80% of the sentence. A key component of the option is that it must be authorized by the sentencing judge in the original sentence and many judges don't understand that. Many judges also get it confused with the other 80% judicial release, which is initiated by DRC.

Mr. VanDine noted that DRC is starting to get risk reduction sentences for a variety of crimes, including burglary, drug and alcohol offenses, and for all felony levels. While Montgomery County is sending the most offenders with risk reductions sanctions, the other large counties are not using the option much yet. They are focusing on offenders with sentences of 12 months or more. He noted that risk reduction on a 12 month sentence can reduce it by 2½ months. For any sentence less than 6 months, risk reduction will not even be considered.

Felony Proportions. Intake data shows an increase in F-1 and F-2 offenders but a notable decrease in F-5 offenders being admitted to DRC. This is apparently due to the increased shift of F-4 and F-5 offenders to community sanctions. The 4.1% increase might be attributed to the argument by prosecutors that lower penalties for F-3, F-4, and F-5 offenders result in different plea bargains and judges are likely to keep more offenders at the F-3 level.

80% Judicial Release Provision. This provision is not yet in use.

Earned Credit. This was the most heavily contested provision of H.B. 86. DRC estimated that about 25% of the new admissions (approximately 2,500 since the effective date of September 30, 2011) would be eligible for the new earned credit rate. As of the end of April 2012, only 33 people had received the new earned credit rate, resulting in only 185 days total granted at the 5-day rate. Hence, this provision is not yet having the impact DRC hoped. Since it takes time for an inmate to get through the various programs, it will be easier to determine the results after at least a year passes.

Diversion of Certain First Felony F-4s & F-5s. 36.5% of the Group I offenders came in for property, possession, and trafficking offenses, while 24.1% of the Pure H.B. 86 offenders came in for the same offenses, showing a 12% shift reduction. F-1 sentencing patterns show a 9% to 13% point shift away from the top. F-3 patterns show a significant 10% shift, which can save more than 1,000 beds.

This relates, said Dir. Diroll, to the letter from Judge Richard Berans. Rather that offering guidance against sentencing F-4 and F-5 offenders to prison (as in S.B. 2 in 1996), H.B. 86 states that a judge cannot sentence certain F-4s and F-5s to prison unless certain other factors are present or the court does not have an appropriate community sanction available. If a local sanction is not available, DRC has 45 days to recommend a sanction. This raises some constitutional issues among judges, said Dir. Diroll, regarding the role of an administrative branch to determine the sanction rather than the judicial branch.

There are few provisions of any bill that have as much legislative history as this provision, said Mr. VanDine. It originated from the Justice Reinvestment Group and carried through the House and Senate. The exception was added at the last minute and DRC would be glad to see that exception disappear.

Atty. Macke believes the separation of powers argument is a weak one.

COLLATERAL SANCTIONS AND EXPUNGEMENT

Shifting gears to what happens when people come out of prison, Dir. Diroll offered a summary of the highlights of H.B. 524 and S.B. 337 addressing collateral sanctions and expungement. It creates a 3 step process – involving DRC, courts, and licensing entries – for granting limited relief from many collateral sanctions, relating to employment, education, housing, public benefits, or occupational licensing, incurred after a criminal conviction.

The collateral sanctions, §2953.25, portion of the bill addresses penalties that felony offenders face upon release, including restrictions on employment, education, occupational licensing, etc. It also addresses how nonsupport charges and ongoing obligations affect those who serve prison time.

Under current law, the portion addressing occupational licensing includes vague language about the moral qualities of an applicant. Instead, it should make clear that person cannot be admitted to an occupation if the person commits an offense of moral turpitude, which the bill defines, or certain other specific serious crimes, so that the person is not generally rejected because of a prior offense. In some cases the burden is triggered by a prior misdemeanor, not felony.

The bill also attempts to minimize the effect of certain driver’s license suspensions, based on offenses which are not necessarily related to driving. These include §2907.24 soliciting sexual activity, §2913.02 gasoline theft, and §2923.122 weapons in school safety zones. Instead, the judge would have the option of imposing community service.

Drug offense suspensions are the most common and carry a lifetime suspension, although they may be unrelated to a violation of a moving vehicle. Those offenses were not addressed by the bill, noted Dir. Diroll, most likely because of related federal funding.

As a way to facilitate driving privileges for drug offenders, Judge Marcelain suggested requiring drug tests.

Judge Spanagel suggests mandatory suspensions for felony drug offenses and optional suspensions for misdemeanor drug offenses.

When Dir. Diroll asked if the issue should be revisited, Scott Neely, legislative liaison for Rehabilitation and Correction, reported that a substitute bill has already been introduced which may get voted out of committee within the next week.

One of the key components of the bill, he noted is the certificate of employability. It allows a three step process whereby the offender can apply through a Justice Reinvestment Officer for this certificate, after completing any required programs. The offender must wait 6 months after completion of his sentence for a misdemeanor and one year after completion of his sentence for a felony.

The bill also expands eligibility for having criminal records sealed, said Dir. Diroll, beyond first offenders to persons with two misdemeanors or one felony and one misdemeanor conviction and allows sealing eligible nonsupport convictions.

Mr. Neely believes the next step should be to determine which offenses should be considered for expungement.

According to Atty. Macke, there are also databases outside of BCI&I and existing arrest records that should be discussed and investigated. He noted that some states already mandate periodical updating of records by all agencies and any private agencies that get their information from government entities.

The biggest problem, said Judge Spanagel, involves private databases that are not updated as often and cannot be mandated to do so.

Atty. Hamm remarked that, for expungement, her clerk of courts attaches to the court record a copy of the motion where the sealing is granted. With the judgment entry, she includes a list of all private companies that routinely contact the court and advises the defendant to notify them of the expungement so that their records can be deleted from the database.

She raised concern about §2953.60 which addresses inquiry of sealed records. Some employers, she claimed, require a potential employee to divulge sealed records as a condition of employment. Since an employer is not supposed to **ask** to divulge sealed records, this statute makes it a criminal offense to do so, but there are no teeth to make it effective.

According to Judge Spanagel federal immigration law allows it.

Atty. Hamm insisted that these gaps need to be checked. If someone goes to the effort of sealing a record they shouldn’t have to wonder later if it is really sealed. Guidelines need to be better established as to who has the right to open those records.

PROSECUTION COSTS

Dir. Diroll referred to a letter from Judge Judy Hunter, Administrative Judge from Summit County. Judge Hunter reported that the Ninth District Court of Appeals ordered under §2947.23 that, in all criminal cases, a sentence must include the cost of prosecution and failure to pay those costs shall result in a hearing to determine whether community service must be performed for failure to pay the costs.

Dir. Diroll wondered how often judges actually include the cost of prosecution as part of a sentence.

Judge Marcelain declared that he includes it every time.

Judge Gormley remarked that court costs are often much higher than the fines imposed, especially in traffic cases.

The judges in her jurisdiction, said Atty. Hamm, tend to impose the first part and ignore the second part. In fact, she has had ongoing

issues with court costs for indigent clients. None of their judges impose court costs on indigent clients.

Judge Spanagel contended that court costs and prosecution costs can be quite different. A prosecutor might need to call in a psychiatrist to testify for the state or an accident investigator. The judge cannot suspend costs after the fact but can only suspend them on the day of sentencing. Once he finds the defendant indigent, he can suspend everything or can suspend the local costs but still impose state costs.

Dir. Diroll explained that Judge Hunter was not specific as to which costs are in question. He asked if there is enough flexibility in current law to avoid this problem.

According to Atty. Macke, the problem appears to be including the suspension in the judgment entry but not imposing it at the sentencing hearing.

Apparently, said Atty. Hamm, Judge Hunter understands that the defendant's inability to pay and inability to do the community service needs to be cleared up at the time of sentencing. It is not so much an issue of notifying the defendant as it is one of being able to suspend the cost. Just inserting "may" into the statute does not fix it. She declared that there is another statute that addresses suspending court costs based on indigence. She suggested cross-referencing that section.

We need to confirm that this is what Judge Hunter is talking about, said Atty. Macke, and if so, explain that her suggestion won't solve it. The court needs to have an "ability to pay" hearing at the time of sentencing.

According to Atty. Hamm, their courts have a lot of "failures to pay". They are currently looking at whether a warrant can be issued for failure to pay.

Dir. Diroll wondered if this bill will change the rebuttable presumption of indigence as indexed to the federal poverty standards and if that will shorten some of the debate.

Currently, Atty. Macke responded, reimbursement of the appointment of counsel is indexed to the poverty guidelines. It varies, however, from county to county.

Being indigent for appointment of counsel, Atty. Hamm argued, does not automatically qualify a person for indigence regarding ability to pay. It is a different standard.

OVI STREAMLINING

After lunch Dir. Diroll direcedt the discussion to the latest LSC Draft of the Sentencing Commission's OVI Streamlining Proposal.

Sen. Larry Obhof reported that the goal is to get something introduced in the next few months so that it can go through hearings in the fall months.

The draft included in the meeting packets, said Dir. Diroll, offers an overview of how it would look if the current LSC draft became law. He highlighted a few areas for further streamlining.

In the table on page 2 on “prohibited controlled substance/metabolite concentrations”, Judge Spanagel remarked that the levels of Salvia Divinorum and Salvinorin A may not have been established yet by the Medical Board.

This table, said Dir. Diroll, sets the per se levels for street drugs. There is no per se level for prescription drugs.

On pages 18-19 and section (I)(1) and (2) regarding the periodic reports of intervention program progress, if the court orders an offender to enter a treatment or education program based on a DIP recommendation, the program operator has to make periodic reports to the court. Dir. Diroll noted that the Ohio Judicial Conference would like these reporting requirements to be discretionary.

Judge Spanagel contended that those are already discretionary.

Dir. Diroll believes there must be some way to combine the sections on the use of ignition interlock devices.

Judge Spanagel argued that they need to remain separate because on some occasions it is discretionary and mandatory on others.

For community control sanctions it is optional, Dir. Diroll explained, but mandated on subsequent offenses if the offense is alcohol related.

The trickier situation, said Dir. Diroll, may be a mistake in current law. On page 11 it refers to a 4th felony offense in 6 years. It states, however, the 4th or 5th offense in 6 years. If charged with a second felony in 6 years under (d) on page 11, the penalty is less severe than if charged as a second felony in 20 years. So, depending on how it is charged (page 11 or (e) on page 13), the offender could get a free prior offense. The 6th offense in 20 years carries a heavier mandatory prison term.

Judge Hany agreed that it should be a 4th felony in 6 years or 5th and subsequent felony within 20 years.

Atty. Hamm thinks it would have to be an element of the sentencing charge.

Another issue about the 6th offense in 20 years involves §2941.1413, and whether it carries a specification. Hence, the same conduct can carry two different penalties, depending on whether a spec was added.

As long as elements are reflected in the indictment, Atty. Hamm contended, you don’t have to include the specification.

Another oddity with 6th offense in 20 years, said Dir. Diroll, is the age application on page 18, regarding the 6 OVI convictions under the age of 20. It is the only automatic jail status offense. It is hard to imagine how someone could accomplish this feat within the time limit.

Judge Spanagel suggested listing the optional sanctions somewhere in one of the charts. He suggested that the order of the community control sanctions should be 1) jail, 2) fine, 3) license suspensions, 4) limited driving options, 5) & 6) interlock, 7) restricted plates, 8) forfeiture & impoundment, 9) points on license, and 10) treatment & community control.

For future consideration, Judge Spanagel suggested adding a table to address commercial driver's license ramifications.

Judge Hany expressed appreciation for the efforts to simplify the language in OVI law.

FUTURE MEETINGS

By acclamation, the Commission agreed to cancel the meeting that had been scheduled for July 19th. Future meetings are tentatively scheduled for June 21, August 16, September 20, October 18, November 15, and December 20, 2012.

The meeting adjourned at 2:20 p.m.