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
SENTENCING ADVISORY COMMITTEE

October 23, 2014

MEMBERS PRESENT

David Gormley, Vice-Chair, Municipal Judge
Paula Brown, OSBA Representative
Derek DeVine, Prosecuting Attorney
Paul Dobson, Prosecuting Attorney
Kathy Hamm, Public Defender
Craig Jaquith, representing State Public Defender Tim Young
Chad McGinty, Captain, representing State Highway Patrol Superintendent, Col. Paul Pride
Thomas Marcelain, Common Pleas Judge
Aaron Montz, Mayor, City of Tiffin
Dorothy Pelanda, State Representative
Bob Proud, County Commissioner
Albert Rodenberg, Sheriff
Kenneth Spanagel, Municipal Judge
Steve VanDine, representing Rehabilitation and Correction Director Gary Mohr

ADVISORY COMMITTEE
Eugene Gallo, Eastern Ohio Correctional Center
Joanna Saul, Correctional Institution Inspection Committee
Gary Yates, Ohio Chief Probation Officers' Association

STAFF PRESENT
David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT
Alexandra Adams, Legislative Aide to Rep. Gary Scherer
Sara Andrews, Deputy Director, Rehabilitation and Correction
JoEllen Cline, Counsel, Supreme Court of Ohio
Garrett Crane, Legislative Service Commission
Ryan Dolan, Rehabilitation and Correction
Elizabeth Fink, Mothers Against Drunk Driving
Lusanne Green, Ohio Community Corrections Association
Cleve Johnson, Defense Attorney
Scott Lundregan, Speaker Batchelder's Office
Marta Mudri, Ohio Judicial Conference
Whitney Pesek, Correctional Institution Inspection Committee
Doug Scoles, Director, Mothers Against Drunk Driving

Mindy Wells, Interim Administrative Director, Supreme Court of Ohio
Maggie Wolniewicz, Legislative Service Commission

The October 23, 2014 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was opened by Vice-Chair Municipal Judge David Gormley at 9:40 a.m.

DIRECTOR'S REPORT

Executive Director David Diroll reported that JoEllen Cline has been appointed as the Criminal Justice Policy & Research Counsel for the Supreme Court of Ohio. Her new role will include assisting the Sentencing Commission in its work.

The bill on culpable mental states (mens rea), which the Commission's staff was involved in drafting, is still being debated, he reported, adding that it is unclear as to what will happen before the end of the legislative session in December.

He noted that there was a meeting yesterday at DRC where DRC Director Gary Mohr expressed an interest in expanding drug courts to more rural counties.

Deputy Director Sara Andrews explained that the department is attempting to focus on the local resource deficit by recognizing other funding resources besides DRC to help address needs as well as the statewide opiate/heroin addiction increase.

The Sentencing Commission, said Dir. Diroll, had discussed five or six years ago whether drug addiction should be treated more as a health issue. He noted that the state's treatment-based response to the opioid trend is considerably different than the legislative reaction to earlier drug epidemics.

UPDATE ON SEARCH FOR NEW DIRECTOR

Offering an update on the Sentencing Commission and Supreme Court's search for a new Executive Director, Judge Gormley reported that the list of candidates was paired to 48, then again to six candidates who were selected to be interviewed that afternoon. He noted that the Commission will make the final choice, as stated by statute.

As one of the Commission members serving on the interview committee, Municipal Judge Ken Spanagel asked the Commission members to submit any questions that they felt should be asked.

IGNITION INTERLOCK ON FIRST OVI

Dir. Diroll reported that pending H.B. 469, sponsored by Rep. Scherer and Rep. Johnson, would mandate that the use of an ignition interlock device would be required anytime a court grants limited driving privileges during a license suspension to a person convicted of a first time, alcohol related violation of the prohibition against operating a vehicle under the influence of alcohol (OVI). The device would prevent the vehicle's engine to start if alcohol is detected on the breath of the driver.

As an aside, Dir. Diroll mentioned the Commission's earlier attempt to streamline the main OVI statute, §4511.19, which, if laid in a straight line in 10 point type, is longer than a football field. At the time, legislators feared that more ornaments would be hung on the tree of any value neutral, streamlining bill. So the effort fell aside. He suggests reviving it. The simplification proposal would place the penalties for each offense on a table, greatly enhancing readability.

H.B. 469 is deadlocked in the House Judiciary Committee, said State Representative Dorothy Pelanda, Vice Chair of the Committee. Currently, the bill would require an interlock system to be installed on the vehicle of a person who refuses a breathalyzer test at the time of arrest. She feels in good conscience that she cannot approve this bill because it tends to sentence a person before they have been tried for a crime. She also believes that defense attorneys will counsel their clients not to take the breathalyzer test because, under current law, they can still obtain driving privileges. From a fiscal standpoint, the bill would require local governments to pick up the cost of the interlock system for the duration of the sentence, if the defendant is found indigent. She added that the proposal also would cause problems for the defendant's family if they only have one vehicle, thus punishing people other than the offender. In addition, the purpose of the interlock device would be defeated by simply persuading a different person to blow into the device.

It's a difficult bill, she declared, which is driven, in part, by a family who suffered the loss of a child by a first-time drunken driver. Unfortunately, the provisions in this bill, she noted, would not have prevented the loss of their child.

The bill has already been opposed by the Ohio Bar Association and the Ohio Judicial Conference, Rep. Pelanda noted.

Sheriff Albert Rodenberg agreed with Rep. Pelanda's concern about costs and declared that the bill would create more problems than it solves.

When asked about the cost of the devices, Rep. Pelanda said that the machine costs $70 per month plus the cost of installation. She noted that judges already have discretion to order installation of the device. Her objection is the issue of mandating it.

An invited guest, Alexandra Adams, legislative aide to Rep. Gary Scherer, announced that there is a revised version of the bill that has not yet been presented to the Committee, which might address the issues being discussed. One of the key changes is that the ignition interlock device would not be mandatory, but left to the discretion of the judge.

Representing Mothers Against Drunk Driving (MADD), another guest, Doug Scoles explained that MADD members feel this bill is important because there were 6,000 injuries nationwide last year from drunk driving and 46% reoffend within six months. MADD wishes to eliminate drunk driving by 2016. He declared that the best current technology for deterring drunk driving is the ignition interlock and 24 states have passed a law like this one. He further declared that Arizona has seen a 43% reduction in OVI fatalities from this law alone. He insisted that use of an ignition interlock does not set the driver up for failure.

Currently, many offenders continue to drive with a license suspension but this device would at least prevent them from driving while intoxicated.

Defense Attorney Cleve Johnson, also a guest, disputed the claim that 46% offenders reoffend within six months. He asserted that some cases get listed as an OVI offense on questionable circumstances. Even if a drunk driver gets rear-ended at a stoplight, due to no fault of his own, it gets listed as a drunken driving incident.

Judge Spanagel remarked that he knew of two cases involving OVI offenders who have reoffended within six months. For one of the individuals, this was his third or fourth OVI offense.

MADD has pushed as many effective laws as it can, Mr. Scoles insisted, and is not trying to get tougher, but smarter on how to prevent drunken driving. It is necessary to use the technology that’s available and he feels that if nothing is done then it is reinforcing bad behavior.

Dir. Diroll noted that ignition interlock devices have been available for many years for repeat offenders.

Public Defender Kathleen Hamm remarked that she has surveyed attorneys on this issue and one major complaint is that mechanical problems with a car can show up on the devices and cause false positives. She also determined that the number of first offenders likely to reoffend in six months is small.

Representing the Ohio Judicial Conference, Marta Mudri, emphasized the extremely low percentage of first time OVI offenders who reoffend. An additional mandatory deterrent is not needed.

A key issue to be considered, said Atty. Johnson, is the large number of false positives that occur with these devices. The best machines can be too bulky to attach, so a cheaper version gets used, which causes false positives.

Rep. Pelanda asked Ms. Adams if the second version of the bill still mandates use of an ignition interlock for a first time OVI offense.

The judge would have the option to exert his discretion in determining whether that was necessary, responded Ms. Adams.

Mr. Scoles clarified that the ignition interlock device would be mandatory only if the offender wants driving privileges. If the driver does not seek driving privileges, the ignition interlock is not necessary. Several members reacted that the approach effectively mandates interlock use because most drivers will seek privileges.

Elizabeth Fink, another guest representing MADD, remarked that she is employed by an interlock company. There are safeguards to make sure that the right person blows into the device, she maintained, by using camera technology to photograph the person taking the test. Regarding installation, it generally takes 1½ half hours and costs about $50, followed by a fee of $2.50 per day. Some courts subsidize the entire cost, and some subsidize part of it. Approximately 25% of OVI offenders are indigent, she added.

Judge Spanagel remarked that some counties have funds available through fines and reinstatement fees that can be used for ignition interlock devices. A lot of counties, however, do not even have enough funds to cover the cost for indigents. In reference to other contents of the bill, he generally supports using interlocks, but disagrees with the concept of allowing unlimited driving for OVI offenders, noting that a sanction needs to hurt. He believes that the bill should include something that addresses whether the driver should be granted permission to use his employer's vehicle.

Prosecuting Attorney Paul Dobson asked about the number of fatalities caused by people who would be affected by this law.

According to Mr. Scoles, Ohio has an average of 400 OVI fatalities per year. Arizona has seen a 40% reduction in OVI fatalities since enacting this law. Nationally, for those states that have enacted this type of law, there has been a 23% reduction in the number of OVI fatalities.

The target group for this bill, said Judge Spanagel, involves first time OVI offenders who are given a mandatory suspension and driving privileges. The bill is an effort to reduce their recidivism. He declared that a small percentage of drivers would be involved.

Mr. Scoles argued that two-thirds of all drunken driving fatalities are caused by first offenders. He couldn't understand why people would oppose an optional interlock.

Speaking as a researcher (rather than DRC representative), DRC Research Director Steve VanDine remarked that some states have done reliable, independent studies (without a hand in the pocket of the interlock companies) and the results of using ignition interlock devices show a significant reduction in fatalities.

Dir. Diroll recognizes that the interlock device has a deterrent value since it prevents an intoxicated driver from starting a car, but he wondered if it had any general deterrent value beyond that. That is, since the bill targets first OVI offenders, does it deter the population at large from committing that first offense? He admitted that general success is hard to measure, because it is difficult to prove the reasons why certain things do *not* occur. He then asked MADD if the goal is to make interlocks more universal in OVI cases.

Continuing his argument for interlock devices on first offense, Mr. Scoles declared that the renewed focus is because they are used so sparingly by Ohio courts today.

The courts have more flexibility with first time OVI offenders, noted Dir. Diroll, such as allowing participation in a driver intervention program rather than serving jail time, or the option of fines or suspensions, rather than mandated sanctions.

Representing the Chief Probation Officers' Association, Gary Yates pointed out that all interlock systems require someone to monitor them and that task comes back to the probation officer. When there's a violation, someone has to take it to the court and again it comes through the probation department. He added that most first time DUI

offenders are not placed on supervision. If they are, it can give the public a false sense of security. He has an issue with that.

Addressing potential recidivism, Judge Spanagel remarked that if a driver is arrested for an OVI violation during probation he will be required to submit to chemical testing. If he doesn't, it is an automatic suspension. If a driver is convicted of registering 1.7 blood-alcohol content or more on a first OVI offense, then it might make sense to require an interlock.

The proposed language discusses sanctions for circumventing the interlock device, noted Pros. Dobson. He wondered if this echoes the language already in place for tampering with evidence, which can result in a felony charge. If not, it should be removed or it could reduce the existing penalty.

Under current law, Dir. Diroll asked if there is a penalty for when someone blows into the device and the car doesn't start because alcohol is detected. That is, does the device keep a record of someone attempting to drive while intoxicated?

There is no such thing as unsupervised probation, Mr. Yates explained. If someone is on probation, they're supervised. If a driver is on probation with an interlock device installed on his car and it detects alcohol, that is a violation of probation.

According to Ms. Fink, after three tests that are suspicious, the driver must report for testing.

When Dir. Diroll asked about other issues that Rep. Pelanda could take back to the committee, concerns raised included how the bill would apply to test refusals, the cost of increasing the use of ignition interlock devices, available funding, procedural issues, and how many people would truly be affected by the legislation.

Commissioner Bob Proud raised concern about cases where neither the defendant nor the court has money to cover the expense. Where do they go at that point? He sees it as another unfunded mandate.

Sheriff Rodenberg asked if there is a chance that the bill will pass by the end of 2014; Rep. Pelanda responded that it is likely to be reintroduced in 2015, so it helps to get issues addressed now.

One option, said Judge Gormley, might be to require the ignition interlock for those who refuse to be tested. He pointed out that, although the newer version of the bill removes the mandatory provision and makes it discretionary, it still comes across to judges as a mandate, especially if the offender is only allowed driving privileges on condition that the device is installed on their vehicle.

The goal, said Mr. Scoles, is to reduce the number of people who continue to drive under the influence regardless of license suspensions. If they request driving privileges, they must be willing to accept some constraints.

Part of the challenge, said Pros. Dobson, will be to assure that an offender who refused the test or blew a higher number does not end up

with more privileges that someone who took the test and blew a lower number, but cannot afford the cost of the interlock device.

OSBA Representative Paula Brown contended that since there are no statistics available, it is difficult to know how many people will actually be affected by the bill.

Mr. Scoles argued that data from other states that have passed similar laws show reductions in fatalities that are attributed to the use of interlock devices.

More than attempting to prevent people from getting into vehicles while under supervision, Common Pleas Judge Thomas Marcelain contended that the effort seems to be more about changing their behavior and reducing their overall alcohol consumption.

Dir. Diroll thanked those working on this effort for presenting the information to the Commission and to Rep. Pelanda.

APPELLATE REVIEW OF SENTENCING

Dir. Diroll offered a summary of the work of the Appellate Review Work Group. The group reached tentative consensus on a number of issues, starting with the recommended addition of language that will focus the scope of criminal sentence appeals in §2953.08. The new language (division (A)) would ask the appellant to precisely delineate specific errors that the trial court made, as shown in the sentencing transcript or judgment entry that forms the basis for the appeal. It also would explain that an error by the trial court that does not adversely prejudice the appellant is not sufficient to sustain an appeal. This would allow the appellate courts to deal with the more serious issues rather than broad-based contrary to law appeals.

The *Foster* case, said Dir. Diroll, threw a wrench into sentences that went above the minimum for a first commitment to prison and sentences that went to the maximum. The Work Group reached consensus on allowing an appeal for a prison term longer than the minimum in the range based on the court’s failure to state the seriousness and recidivism factors (under existing §2929.12) that are “present and persuasive” in imposing a sentence over the minimum. This would also entail an amendment to the sentencing hearing statute, §2929.19(B) (2). The appeal would be limited to failing to consider those factors, or considering them improperly.

Judge Marcelain suggested stating any specific factors considered in open court or on the record so that it can be found in the transcripts.

He added that, even if the court gives a minimum sentence but doesn’t state the seriousness and recidivism factors, it should not be grounds for appeal and reversal. That is, he interprets it to mean that anything above the minimum would be appealable, which would mean many sentences.

H.B. 86 retained the appeal of maximum terms, which had been severed by the *Foster* decision, recalled Dir. Diroll, and the Work Group recommended eliminating it in favor of an appeal based on inconsistent

and fiscally burdensome sentences, while adding clarity as to what those terms mean (proposed §2953.08(B)(2)).

The group also proposed a review of lengthy sentences in a new provision (proposed §2929.202). Adults with a sentence of life without parole would not be eligible for this review, but someone with a prison term totaling at least fifteen years would be allowed to petition for review after serving fifteen years of the term. Someone sentenced to mandatory consecutive terms that exceed fifteen years would be permitted petition for review at the expiration of the mandatory consecutive terms. A 20 year review would be available for juvenile3 offenders who were given life by an adult court.

Dir. Diroll added that, at the request of appellate judges, the group attempted to define "contrary to law" to better focus appeals brought by the defendant or state under those grounds. He reiterated that the Sentencing Commission, in framing what became S.B. 2 (1996), intended this to be a limited appeal. The proposed definition would state that "the trial court failed to consider the purposes and principles of sentencing under section §2929.11 of the Revised Code, relevant seriousness and recidivism factors under section §2929.12 of the Revised Code, relevant guidance by degree of offense under section §2929.13 of the Revised Code, or relevant guidance and limits on the length of prison terms under section §2929.14 of the Revised Code, or imposed a sentence plainly not authorized by statute for the offense. An appeal based on this provision shall specify the precise aspects of the statute or statutes that the trial court failed to consider or otherwise violated in imposing the sentence."

Expressing concern about this definition, Atty. Hamm wondered where due process-based appeals would fit.

The intent, said Prosecuting Attorney Derek DeVine, is to narrow the appeal to the sentence versus appealing the procedure.

Pros. Dobson explained that the attempt by the group was to draw the broad ends of the spectrum and try to create some framework in an effort to prevent "contrary to law" from being a catch-all. He sees value in requiring judges to identify reasons for the sentences they impose and believes that the effort being made by the group is to provide a better roadmap for the appellate process.

Judge Marcelain reiterated his fear of creating an opportunity for every sentence beyond the minimum to be open to appeal.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission are tentatively scheduled for November 20 and December 18, 2014, and January 15, February 19, March 19, April 23, and June 18, 2015. Due to conflicts, a date has not yet been selected for May 2015.

The meeting adjourned at 1:30 p.m.