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
January 19, 2012

MEMBERS PRESENT

Municipal Judge David Gormley, Vice Chair
Capt. Shawn Davis, representing State Highway Patrol Superintendent Col. John Born
Kort Gatterdam, Defense Attorney
Municipal Judge Fritz Hany
Jay Macke, representing State Public Defender Tim Young
Common Pleas Judge Thomas Marcelain
State Senator Larry Obhof
Jason Pappas, Fraternal Order of Police
Sheriff Alan Rodenberg
State Representative Lynn Slaby
Municipal Judge Kenneth Spanagel
Steve VanDine, representing Rehabilitation and Correction Director Gary Mohr
State Representative Roland Winburn

ADVISORY COMMITTEE
Eugene Gallo, Executive Director Eastern Ohio Correctional Center
John Guldin, counsel, Bureau of Motor Vehicles
Gary Yates, Chief Probation Officers' Association

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

GUESTS PRESENT
JoEllen Cline, legislative counsel, Supreme Court of Ohio
Erich Bittner, legislative aide to Sen. Obhof
Jim Brady, interested citizen
Monda DeWeese, SEPTA Correctional Facility
Chad McGinty, Staff Lt., State Highway Patrol
Christine Madriguera, Ohio Judicial Conference
Lora Manon, Bureau of Motor Vehicles
Alan Ohman, legislative aide to Sen. Shirley Smith
Paul Teasley, Hannah News Network
Lisa Valentine, policy aide to Speaker William Batchelder
Marjorie Yano, LSC Fellow

The January 19, 2012 meeting of the Ohio Criminal Sentencing Commission and Advisory Committee was called to order at 9:50 a.m. by Vice-Chair Municipal Judge David Gormley.

OVI SIMPLIFICATION DRAFT

Executive Director David Diroll reported that the LSC draft of the Sentencing Commission's impaired driving simplification proposal was received recently. The main statute governing operating a vehicle under the influence of alcohol and other drugs (OVI) §4511.19 is the most complicated criminal statute in the Revised Code, he opined. It is long, complex, and ever changing. The desire is to simplify the section was to make it easier to use without substantive changes.

In 2008, the Commission proposed changes in drafting conventions that might then be applied throughout the Revised Code but LSC was hesitant to attempt many of those. Applied to the entire Revised Code, the suggestions would save about a half million words (the equivalent of *War and Peace*) without changing any meanings. Some of those suggestions were applied in this LSC draft, but largely in the tables only.

Dir. Diroll explained that §4511.19(A)(1)(a) is the basic OVI "don't drink and drive" statute. (A)(1)(b) gets into the prohibitive concentrations of alcohol, while(A)(1)(c) deals with the prohibited controlled substances.

In the LSC draft (A)(1) is the basic prohibition, while (A)(2) becomes the prohibited alcohol concentration and (A)(3) becomes the table of prohibited controlled substances. Dir. Diroll wondered if that might cause any problems with citing offenses on the uniform traffic ticket.

Municipal Judge Fritz Hany assumes that two subsections would be easier to remember than the multiple sections and tiers that currently exist. He certainly feels it should make it easier for law enforcement.

Representing the State Highway Patrol, Capt. Shawn Davis remarked that officers currently need to use a "cheat sheet" because of the many sections. He agreed that fewer sections would ease the burden.

If this draft were enacted, said Dir. Diroll, then all alcohol related blood/breath/urine/serum test types would be listed in (A)(2) and all controlled substance and metabolites would be in (A)(3).

Municipal Judge Kenneth Spanagel noted that if a breath test is conducted, the officer puts in a number. But if a blood or urine test is used, they have to wait for the test results before issuing a second citation with the appropriate number inserted.

Representing the State Public Defender's Office, Atty. Jay Macke acknowledged that there are boxes on the ticket to indicate the use of blood, breath, or urine tests or refusal of a test, and the BAC concentration. He wondered, however, how it is specified for the type of controlled substance or metabolite in the urine.

Once the test results are received, said Judge Spanagel, the officer needs to identify the subsection, the particular substance and testing method, and the resulting number can be written in the secondary box.

Since the ticket format was last changed January, 2010, Dir. Diroll doesn't see any major need for further change at this time.

Judge Gormley noted that, by the time the results come back, 3 to 4 weeks have passed since the arrest and the offender has likely already hired an attorney. The type of substance revealed probably won't be much of a surprise to anyone by this time.

According to Capt. Davis, some courts have the officer go ahead and write a citation for dirty urine even before the results are back. The test results are added later.

Judge Spanagel raised concern about plea negotiations where a high tier offense gets pled to a low tier penalty. Since the BAC numbers get reported to the Bureau of Motor Vehicles, the records might show it as the higher tier offense, rather than the offense in plea.

Judge Hany suggested directing the clerk on how to send the information.

Atty. Macke asked whether the BMV records it by the amount or by Code division.

Representing the Bureau of Motor Vehicles, Atty. John Guldin responded that it depends on how the court clerk reports it to BMV.

Judge Gormley remarked that he would prefer to leave the true number on the record to prevent the perception of false information.

Acknowledging that Judge Hany had assuaged his concerns, Judge Spanagel remarked that it would be necessary to make a finding of fact on what the number is, which would then lead to the charge and sentence.

Rehabilitation and Correction Research Director Steve VanDine raised concern about possible *Blakely/Booker* issues if there is ambiguity and the judge decides on the higher tier, even if there seems to be evidence in that regard.

It could be resolved, said Atty. Macke, so long as the jury instructions and verdict forms always say "as charged to the complaint". Otherwise, he agreed with Mr. Vandine that it could present a potential *Blakely/Booker* issue.

Dir. Diroll believes it is a solvable problem.

Judge Hany remarked that the jury could make a finding of whether the amount was at or above or below the tier level. He contended that it does not involve increasing the degree of the offense with the high and low tiers. In fact, it is a range of penalties where the high end involves misdemeanors with a 6 month maximum. Any fact finding would actually affect the *minimum* sentence.

Since the Criminal Law Procedure Committee of the Ohio Judicial Conference meets in February, Judge Spanagel suggested that this might be a good issue for them to sort out.

The problem here, said Dir. Diroll, is not substantive, but an effort to show how the citations and mechanics would work.

For alcohol abuse, it may be as simple, suggested Judge Spanagel, as making §4511.19(A)(2)(a) the low penalty and §4511.19(A)(2)(b) the high penalty. That offers two options to charge by division. A jury charge would be to state that "If you find beyond a reasonable doubt that the defendant tested at over .07 for blood or over .204 for blood serum, then you will find him guilty." If he is found guilty of (A)(2)(b), then check out the right column. He feels that it would also be a simple add-on to the sentencing chart, if needed.

He suggested putting (A)(2)(a) above "Low Penalty Level Concentration" on the chart and (A)(2)(b) above "High Penalty Level Concentration". Then the specific crime to be charged with will either be an (A)(2)(a) of .08 to .16 or an (A)(2)(b) of .17 and up. There then would be two choices instead of 10. When tried, there will be the same jury charge. When convicted, there is no need to file a finding of fact. That leads to the sentencing chart. He believes it would eliminate the finding of fact issue and plea bargaining.

Judge Gormley remarked that in the first sentence of §4511.19(A), LSC changed "any" to "either". He believes that it should be "any". He also noted that §4511.19(A)(4) seems to go in a different direction than the previous 3 sections (1),(2), and (3).

Dir. Diroll agreed that the "either" should be "any". He further explained that §4511.19(A)(4) addresses penalties based on refusing to submit to a chemical test, so is different from (A)(1)-(3).

Another option, said Atty. Macke, would make (A)(4) into division (B).

Dir. Diroll noted that the Commission suggested putting captions in the code and LSC applied that periodically, starting with line 5. He believes that the draft embraces the recommendation half-heartedly; captions are needed at §4511.19(A)(4) and elsewhere, for consistency.

Judge Gormley raised concern about the time limit listed in lines 262 to 267. It explains that if a driver does not consent to a chemical test within two hours, the officer can charge him with refusal. If the driver consents to the test within the next hour, the evidence is admissible in court. Some defense attorneys, he said, have tried to argue that it is inadmissible if conducted after the two hours. He recommends clarification.

Turning attention to the penalties tables which begin on page 18, Dir. Diroll remarked that the Commission recommended setting up the chart a different way. The first column of the Commission's chart was the offense level. For some reason, the LSC draft keeps that off the tables. He also noted that the first column in this draft tends to be rather cumbersome, partially defeating the simplification purpose, he feels there must be a more succinct approach. In the second box of the chart, Dir. Diroll again noted that the language seems too wordy.

Judge Spanagel said that it would suffice to simply state that "per R.C. 4511.19(I), alcohol or other drug treatment or education is optional".

In agreement, Atty. Guldin suggested offering LSC the notion that extensive detail isn't needed when the reference is obvious.

Dir. Diroll admitted that one of the challenges of the Commission's table was how to distinguish between sentence type penalties and administrative penalties. LSC addressed that by splitting the tables.

Judge Spanagel suggested having the peace officer list the specific section of the crime so that there is no confusion.

He pointed out an omission where line 537 of the LSC draft fails to include the optional additional high-test jail term of 177 more days. A related point, he added, is the language in lines 543 and 656. They each list a mandatory fine with an "optional additional up to" a certain amount. In one section the two amounts add up to the maximum amount while the other section does not work that way. It is confusing and inaccurate. He recommended stating "up to the maximum of X amount".

Judge Hany facetiously remarked that he liked the simple way that Judge John Adkins explained to the defendant, "If you're guilty of this, bad things are going to happen."

Directing attention to division (I) on page 57 regarding assessments and treatment, Judge Spanagel pointed out that line 1340 refers to an assessment being conducted by an alcohol and drug treatment program, but the rest of the section refers mostly to alcohol treatment. Since many assessments reveal both alcohol and drug use and the need for treatment of both, he feels the language should be harmonized to refer to both throughout the section.

Concern was next expressed by Atty. Guldin about the definition of "license suspension" on page 60. He feels that it could be misinterpreted. You cannot suspend the operator's license of a person who has no operator's license to begin with, so something needs to be added about suspending the "right to operate."

It needs to parallel the suspension law of S.B. 123, said Dir. Diroll, which addressed someone suspended from the right to operate a vehicle.

Judge Spanagel suggested adding the language ", or right to operate a motor vehicle", to the last sentence.

Dir. Diroll read current law, §4510.01(H), which includes "suspend or suspension means the permanent or temporary withdrawal by action of the court or Bureau of Motor Vehicles of a driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident privilege, for the period of this suspension or the permanent or temporary withdrawal of the privilege to obtain a license, permit, or privilege of that type for the period of this suspension". The LSC draft needs to refer to that definition so that it will include suspending the privilege of obtaining a driver's license.

The next area of concern was raised by Judge Hany regarding page 59, lines 1396-1406, regarding the appropriate use of the Criminal Rules and the Traffic Rules in OVI cases. He reported that, years ago, the Traffic Rules Committee modified and amended the Traffic Rules so that

they do not apply to cases of post indictment, when the Criminal Rules control. He suggested striking both of these paragraphs.

In effect, said Dir. Diroll, it would not be a substantive change to strike that language.

Continuing this thought, Judge Spanagel noted a similar situation on page 60, involving lines 1424 through 1453. Since this section defines low concentration, high concentration, low test, no test, and controlled substance, lines 1424 through 1453 could probably be eliminated by putting those sub letters on the chart and taking out the words "low concentration", "high concentration", "no test, low test, or listed controlled substance". In turn, by listing, on the chart, the numbers of the particular crimes instead of the text, the long description could be eliminated from the chart.

Dir. Diroll offered to go through the draft more thoroughly and forward the list of recommended corrections to Sen. Obhof.

H.B. 86

After lunch, Dir. Diroll reported that the work group that has been working on clean-up issues of H.B. 86, is close to reaching accord. That group is chaired by Supreme Court of Ohio Counsel, JoEllen Cline. He noted that when the legislature was working on this bill, much of it carried over from a bill sponsored by Sen. Seitz during the previous legislative session. Some of it came from the Justice Reinvestment Initiative and the Council of State Governments. A few other things were merged into the bill, including some juvenile issues recommended by Rep. Tracy Heard and the issue of juvenile competency, originally been suggested more than ten years ago by the Sentencing Commission.

The work group agrees that the provision in H.B. 86 to address competency in the juvenile court system needs a few refinements. The bill also contains a new kind of reverse bindover, by allowing the juvenile court to retain jurisdiction so that the juvenile can go back to the juvenile court after disposition by the adult felony court. The work group also has some recommendations regarding expungement and the sealing of records for juveniles.

The non-juvenile issues include remaining "*Foster*" issues. The House of Representatives, said Dir. Diroll, had it fixed one way and the Senate changed it. He explained that the three areas affected by "*Foster*" were minimum, maximum, and consecutive sentences. Originally, a first commitment to prison was to default to the minimum, all things equal, in the sentencing range. The maximum was to be reserved for the worst kind of offender. When imposing discretionary consecutive sentences, reasons were to be given and those reasons could be appealed. The Ohio Supreme Court followed the U.S. Supreme Court's *Apprendi*/*Blakely*/*Booker* ruling that some of those findings were invalid, and in response line of cases to declare all similar findings invalid.

The impact of *Foster's* cumulative effect, said DRC Research Director, will be 8,000 to 9,000 beds.

The House attempted to correct the problem by offering some guidance, said Dir. Diroll. In the Senate version, however, language was added to

the basic purposes of sentencing stating "To protect the public, punish the offender using the minimum sanctions that the court determines accomplishes those purposes without imposing an unnecessary burden on state or local government resources." This implies the need to make a finding of sorts in its aim toward minimum sentencing to community sanctions. It sounds like the "*Foster"* problem again.

Some concerns have been raised, said Dir. Diroll, that this might allow an imbalance of sanctions, whereas a wealthy offender might offer to "reduce the burden on government resources" by paying for the costs of a minimum sanction, whereas another offender could not afford to do so, so the court chooses a tougher sanction because it is cheaper.

He suggested, as a matter of state policy, returning to the default policy of sentencing a defendant who has never been to prison to the minimum of the range without mandating any findings or appellate review. On maximum sentences, he suggested that the court imposing a prison sentence should impose the longest term authorized under the relevant division, so long as that term is consistent with the purposes and principles of sentencing.

He noted that after "*Foster*", subsequent cases again allow findings for imposing consecutive sentences. To offer some clarification, however, he suggested stating that the court may require the offender to serve the prison terms consecutively only if the court finds in language specific to the offender and the offenses that consecutive terms are necessary because they are proportionate to the seriousness of the offender's conduct and the danger of future crime posed by the offender. He feels that would offer better consecutive sentence guidance without getting into all of the "magic" words.

Defense counsel opposes that language, Atty. Macke declared, believing that it is too toothless in light of appellate review.

If something is made a policy of the State, said Dir. Diroll, then most judges will follow it. He admitted that it will never quite be like it was before. Defense opposition will keep it out of the "agreed" cleanup from the Cline workgroup.

Another issue to be addressed under H.B. 86, said Dir. Diroll, involves the application of risk assessment tools, in particular ORAS. Some questions being raised are how ORAS applies in municipal and county courts or even in specialized dockets courts. He noted that H.B. 86 stipulates that ORAS must be used when a risk assessment is ordered.

Judge Marcelain declared that he thought it only applied to felons, not misdemeanants.

Judge Hany remarked that his jurisdiction just received a grant and, under the Community Corrections Act, a condition of that grant is that the ORAS must be used.

Gary Yates of the Chief Probation Officers'' Association acknowledged that any program using CCA funding has to use ORAS, but he reminded all that an assessment does not need to be ordered in every case. Some courts do only a PSI, while others do both a PSI and an assessment.

When he orders a PSI, asked Judge Spanagel, what does assessment mean?

Arguing an issue of resources, Judge Hany asked when and why municipal judges are required to do this and who pays for it. The greatest cost involves staff time to administer the assessment.

Mr. VanDine pointed out that initial mandate came out of the Justice Reinvestment Proposal and is broader than DRC would have requested.

Acknowledging the advantages of offering statewide accessibility, Judge Marcelain noted that the major cost is staff time.

It would help to educate judges on the mechanics involved, said Judge Gormley.

A lot depends not just on the questions, said Mr. Yates, but on how the questions are asked. His officers find that it saves time to do the ORAS at the same time as the PSI.

Judge Marcelain remarked that his court does not do it with a PSI, but they use it mostly to qualify for jail reduction grants.

Many misdemeanor judges use their volume of cases as an excuse for not doing PSIs or assessments. Judge Spanagel argued that he does not need an assessment for everyone he sentences.

Mr. Yates remarked that his department uses a variety of forms and assessments, depending on the type of case and need. Some of these include a pretrial form, ORAS, a domestic violence assessment, *etc*. For the domestic violence diversion program, the latter assessment provides the most useful information. However, because that program is funding through CCA grant funding, they are also required to do an ORAS.

Representing the Ohio Judicial Conference, Christine Madriguera stressed that all municipal courts are mandated to use the ORAS if an assessment is ordered by the court. Specialized docket courts, however, are not included in that mandate.

Dir. Diroll understood that ORAS is designed to assess risk, not other things. The assessments for other needs, said Mr. Yates, are usually done in conjunction with ORAS. He added that the Ohio Chief Probation Officers' Association has asked the Supreme Court to develop a list of assessment tools for other areas, such as sex offender assessment, sexual abuse assessment, mental health assessment, and others.

Judge Hany reiterated that if the court does not want to do the ORAS then it simply doesn't order a risk assessment.

It might help to know, said Mr. VanDine, that there's both a short version and long version available of the ORAS and the PSST.

Dir. Diroll asked what happens if a judge orders an ORAS assessment, which must be done by a trained person, and there's no one trained to do it?

According to Mr. Yates, all CBCFs have certified ORAS trainers. It takes about 1 hour, he said, to do an ORAS. With more experience it can be done in 45 minutes.

Some courts don't even have probation departments or anyone else available to do assessments, declared Judge Spanagel.

On another note, Atty. Macke reported that Judge Pepple has opined on the separation of powers argument regarding the mandate to defer to DRC on imposing community sanctions versus prison.

Another judge has issued a separation of powers ruling regarding the mandating of ORAS, said Monda DeWeese.

FUTURE SENTENCING COMMISSION MEETINGS

Future Sentencing Commission meetings have been tentatively scheduled in 2012 for February 16, March 15, April 12, May 17, and June 21.

The meeting adjourned at 2:20 pm.