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

June 19, 2014

MEMBERS PRESENT

Municipal Judge David Gormley, Vice Chair
OSBA representative Paula Brown
DeVine, Derek, Prosecuting Attorney
Sylvia Sieve-Hendon, Appellate Judge
Craig Jaquith, representing State Public Defender Tim Young
Chad McGinty, Capt., representing State Highway Patrol Superintendent, Col. Paul Pride
Aaron Montz, Mayor, City of Tiffin
Dorothy Pelanda, State Representative
Robert Proud, County Commission
Albert Rodenberg, Sheriff
Steve VanDine, representing Rehabilitation and Correction Director Gary Mohr
Roland Winburn, State Representative

ADVISORY COMMITTEE

Gary Yates, Ohio Chief Probation Officers' Association

STAFF PRESENT

David Diroll, Executive Director
Cynthia Ward, Administrative Assistant

GUESTS PRESENT

Sara Andrews, Rehabilitation and Correction
Noah Blundo, Hannah News Network
Garrett Crane, Legislative Service Commission
Monda DeWeese, SEPTA Correctional Facility
Sean Gallagher, Appellate Court Judge
Lusanne Green, Ohio Community Corrections Association
Scott Lundgren, Speaker Batchelder's Office
Marta Mudri, Ohio Judicial Conference
Maria Ruckel, SEPTA Correctional Facility
Mark Schweikert, Director, Ohio Judicial Conference
Sgt. Wes Stought, State Highway Patrol
Gary Tyack, Appellate Court Judge
Maggie Wolniewicz, Legislative Service Commission

The June 19, 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

Members. Executive Director David Diroll welcomed Prosecuting Attorney Derek DeVine who was recently appointed by Gov. Kasich to fill the expired term on the Sentencing Commission of Prosecuting Attorney Laina Fetherolf. He was also pleased to announce that Sheriff Rodenberg, and Judges DeLamatre, Hany, and Spanagel have been reappointed to the Commission.

Recodification. He announced that H.B. 483 established a Criminal Code Recodification Committee. The language echoes aspects of the Sentencing Commission's enabling statutes and duplicates several of its functions, but would be under legislative control. Meanwhile, Chief Justice O'Connor wants to evolve the Sentencing Commission into a new Criminal Justice Commission and we should hear more about that soon.

IMPAIRMENT LAW AND DRUGGED DRIVING

Initially, the statute on impaired driving (§4511.19) did not contain *per se* impairment levels for drugged driving, noted Director Diroll. In time, the General Assembly added levels for common street drugs. He asked the State Highway Patrol to update the Commission on patterns in the impaired driving laws.

Captain Chad McGinty, of the Patrol reported that drug impaired drivers are more recognized now by law enforcement. Although there were a total of 39,643 OVI arrests in 2013, it was the safest year in Ohio's recent history, with 990 traffic deaths. The highest annual death toll was in 1969, with 2,778 deaths. Historically, 3 in 10 fatal traffic crashes involve an impaired driver.

Increased enforcement, awareness and education, he said, are keys to controlling this dangerous behavior. The ages of 21 to 25 tend to have the highest level of offenders, and male offenders outnumber females in every age category by a 3 to 1 margin.

Capt. McGinty noted that 20 years ago, law enforcement would take in someone they suspected of impairment and, if drugs caused the condition, rather than alcohol, they would not register on the standard test. There were no tools available to accurately determine drug induced impairment. The State Highway Patrol now has a special division of officers who are specially trained for making accurate determinations of drug use that impedes someone's driving ability. These officers are referred to as Drug Recognition Experts (DREs).

In response to Dir. Diroll's query about the percentage of repeat offenders, Capt. McGinty responded that there are a significant number of repeat offenders but he did not have that specific data on hand.

As the Highway Patrol's DRE Coordinator, Sgt. Wes Stought reported that all officers get training through a field sobriety test program, which is very alcohol centered. Drugs, however, sometimes impair people differently than alcohol. Alcohol impairment is easy to detect but

drugs are more complicated, he added. The DRE program initially started in the early 1980's in California and is now managed by the National Organization of Chiefs of Police. Ohio started a DRE division in 2010.

Prescription abuse is one of the biggest problems, as there are now thousands of different drugs that cause impairment. When an officer suspects a driving impairment, the officer must first determine if the driver is, in fact, impaired, and then determine if it is caused by alcohol, drugs, or a medical condition. Once alcohol is ruled out, a DRE is called on to make a determination. The DRE can determine the category of drug suspected but cannot determine the exact drug at that time. A blood test is needed. The explicit training of the DRE has fostered understanding of why certain drugs have impaired a driver.

Sgt. Stought said that DRE training is extensive. Beyond the usual DUI and toxicology training, all State Highway Patrolmen are now required to complete an intermediate program, the Advanced Roadside Impaired Driving Enforcement (ARIDE) program, a two-day course is more drug specific. Prosecutors and judges are now offered this training as well, to help them understand how the ARIDE and DRE programs can help in drug impairment cases.

Currently, DREs are seeing more impairment as a result of prescription abuse than from illicit drugs. Ohio now has 94 DREs, with 47 from the State Highway Patrol and the rest from other law enforcement agencies.

The statutory definition of drug abuse, he claimed, is the biggest hurdle. It is chemically based, but does not include harmful intoxicants such as those ingested through "huffing" (inhaling) spray cans, and the like. He declared that it is important to focus on impairment and tying it to a substance instead of a compound.

OSBA Representative Paula Brown expressed an interest in learning more about the policies and procedures of the DRE training process.

Noting that these are listed in the manual, Sgt. Stought remarked that it involves a very intense 12-step process with high standards that are more restrictive than PSI standards. The applicants are carefully selected for the 3-week training. Each DRE is required to complete the training again every two years. He noted that the DRC standards are more restrictive than ICP standards

Noting the increase in State Highway Patrol impaired driving cases in the courts, Appellate Court Judge Sylvia Sieve-Hendon asked if they were ramping up patrol coverage in southwest Ohio. She also wondered if they were satisfied with the testing quality by local facilities, considering the number of technical errors that are made.

Sgt. Stought noted that very few DREs have needed to testify in the region and no cases have been appealed that involved a DRE agent.

In regards to alcohol impaired cases, Capt. McGinty acclaimed that the numbers have dropped by working with local law enforcement to focus on the areas with the largest problems.

He explained that every officer has four days of ADAPT training, which involves advanced detection, apprehension, and prosecution of OVIs.

This program specifically addresses alcohol impairment. The officers now get an additional two days of training in ARIDE which addresses drug impairment. The DRE program involves extensive specialized training beyond that.

Part of the training the DRE must complete is to learn how to do twelve separate screens with 100% accuracy. They are given exams that include conducting medical measurements. Interpretation of the data, he noted, is the complicated part but they have an excellent success rate.

In the field, the DREs make determinations on impairment, not toxicology, nor are making any form of diagnoses. If they determine that the impairment is prescribed medication, they then recommend that the person go to a doctor so that the medical problem can be determined by a physician, rather than criminalize the situation. Every evaluation is carefully logged.

The real challenge, said Capt. McGinty, is to keep up with all the compounds being used. A chemist only needs to tweak one element in a compound to change it.

Synthetic drugs are a huge problem in Ohio, added Sgt Stought, but it goes beyond that. DSM in cough syrup is highly abused but there is no detoxification test available to articulate it. Heroin transforms into morphine in about 10 minutes after it is used so it will rarely show up as heroin on a test. All of this puts more pressure on the officer to articulate the substance used which caused the impairment. The goal is to give the judge and jury as much information as possible to make a good determination.

Since there are per se levels established on street drugs, Dir. Diroll asked if per se levels should be considered for prescription opiates.

That could be problematic, said Sgt. Stought. He noted that opiates, narcotics, and depressants are currently the biggest problems in Ohio. Narcotics tend to build tolerance levels quickly. Tolerance, age, girth, and level of resistance are only a few of the variables that have to be taken into consideration to determine the level of impairment.

Capt. McGinty agreed that it would be easier to be able to say “you’re at this level so you’re guilty”, but it is very difficult to establish standard levels.

It is easier to determine that with illicit drugs, Sgt. Stought explained, but much different with prescription drugs. That is why the focus must be more on whether they are impaired.

Mr. VanDine asked if there should be a law that strictly addresses impairment.

With medical impairments, said Sgt. Stought, it can sometimes hit instantaneously, so that the driver doesn’t know what caused the problem. A doctor needs to be involved when a medical impairment is suspected.

Atty. Brown asked how “substance” is defined. She assumed that insulin and blood pressure medication would need to be defined.

A DRE can narrow down the suspected cause, said Sgt. Stought, but he assured her that insulin and blood pressure medication do not cause impairment.

Judge Hendon asked about the possibility of requesting a driver to submit to a drug test to renew a driver’s license. Capt. McGinty responded that it was a good concept but someone could pass the test at that time then change a month later as the result of heroin.

Many alcoholics who cause a wreck and get arrested for OVI are willing to recognize their problem and seek rehabilitation. On the other hand, those who are medically impaired and prescription abusers don’t think about needing rehabilitation, he claimed.

The number of heroin cases have increased by five times the amount in 2010, said Capt. McGinty. Part of that is because the heroin is cheaper than the prescription pain killers that first started the addiction.

It is not just a matter of willpower, Sgt. Stought noted, because opiates actually change the brain chemistry. He added that some users are high 24/7, not just occasionally.

Proposed H.B. 469, said State Representative Dorothy Pelanda, is recommending the use of ignition interlocks for first time OVI offenders. She asked if this use might also help in cases of drug impairment.

The ignition interlocks work on the basis of a breath test, said Capt. McGinty. There is no breath test available to determine opiate levels.

Gary Yates, representing the Chief Probation Officers’ Association, remarked that, with more states considering the decriminalization of medical marijuana, many are also looking at devices that are capable of detecting recent marijuana use.

Because THC from marijuana stores in the fat cells for a lengthy period, Capt. McGinty said that a person can test positive for THC a significant time after use. He noted that states that have decriminalized marijuana are seeing a rise in theft and other crimes. He added that THC has no medical value but CBD (cannibidiol) does. For this reason, chemists are trying to find a way to reduce the THC and increase CBD.

When questioned by Dir. Diroll about whether there has been any difference since the recent speed limit change on highways, Capt. McGinty remarked that it usually takes 2 to 3 years to see enough difference to expand the data set.

OPIOID BRAINSTORMING

At the previous meeting the Sentencing Commission discussed Hawaii’s HOPE program which focuses on short, certain jail terms rather than prison time when a person violates a community sanction by testing positive for drug use.

Deputy Director Sara Andrews of the Department of Rehabilitation and Correction (DRC) reported that DRC applied for federal funding for a pilot project in conjunction with three courts to apply some of the HOPE principles in Ohio. DRC might reallocate DRC funding for this project if they don't get the grant, she added.

Dir. Diroll raised the question of whether there are any problems with current penalty ranges for opioid offenses.

It would be a real uphill battle to increase penalties, said Judge Hendon, when the focus now is on treatment. She admitted that she didn't realize until recently how much emphasis law enforcement is putting on the heroin problem, even in suburbs.

Rep. Pelanda reported that the Speaker of the House has appointed a specific committee this summer to address the opioid issue and there is a judicial symposium on June 30 regarding the opioid problem.

Atty. Brown declared that she has a client who was told to wait until the end of the month to call back and then get on a waiting list for treatment. She has found that, in reality, there doesn't seem to be any intensive outpatient treatment slots available, especially for someone who cannot afford it.

Sheriff Albert Rodenberg agreed that there are too few extensive treatment programs available; so many offenders end up in jail, where treatment is rare. He asserted that if the judicial system fails to get a grip on the problem, it could cause the system to collapse.

According to Atty. Brown some offenders even get turned away by emergency rooms.

County Commissioner Bob Proud contended that Children Services is getting more and more heroin babies.

Noting that a kilo of heroin equals 10,000 unit dosages, Capt. McGinty reported that teens are not starting out on heroin. They start on painkillers from their parent's medicine cabinets then work up to heroin.

Working with community behavioral health people and the former ODADAS, who believe medically assisted treatment is best, Mr. VanDine said that they generally use one drug to take away the high. He pointed out that medically assisted treatment is very expensive. He noted that DRC is getting more commitments from rural counties and they recently received additional money to help. Drug dependent indigent programs are now covered by Medicaid, which was never available before. He added that communities are responding differently than before, probably because the epidemic is mostly rural and suburban. Courts in five counties are now testing the use of more medically assisted treatment.

The program used in Butler County, said Mr. Yates, is working but it's very expensive. Sometimes Medicaid will cover the medication but not treatment. Sometimes Medicaid will pay for the treatment but not if it is residential. The program usually runs at least 12 months and the medication costs $600 to $700 per shot, with a shot needed each month.

CULPABLE MENTAL STATES UPDATE

Turning attention to the *mens rea* issues that the Sentencing Commission had discussed and reported on in the past, Dir. Diroll noted that the Buckeye Institute, American Legislative Exchange Council, Texas Public Policy Council, and other interest groups found our *mens rea* recommendations appealing. He noted that, from 2008 through 2010, the Ohio Supreme Court issued six different decisions dealing with *mens rea* and each is remarkably different. Yet, there are still statutes that do not include a clear mental state.

He reported that Senator Bill Seitz has had a new bill drafted, LSC 1300763-2, which he intends to introduce soon to address this lingering problem. The default mental element (for statutes that do not specify one) in the earlier version of the bill was set at "knowingly," which is higher than Ohio's traditional default of "recklessly." This would increase the culpability that had to be proved, but in some ways make it easier to do so, since "knowingly" is more readily understood than the current definition of "recklessly." Prosecutors objected, so the current draft returns to "recklessly."

A more interesting dynamic, Dir. Diroll noted, includes a provision stating that any new offense is void if it does not include a culpable mental state.

Dir. Diroll went on to explain that §2901.21(B) of the bill specifies that if the definition of an offense states a degree of culpability without specifying the elements to which that culpability applies, the standard applies to each element unless the section clearly expresses a legislative intent to the contrary. Proposed §2901.21(C) states that if it does not specify a mental element, it defaults to recklessly, with some exceptions.

Sen. Seitz is seeking additional input.

Mr. VanDine noted that this is also one of the main themes for the proposed Recodification Committee.

APPELLATE SENTENCING ISSUES

After lunch, the discussion turned to the application of R.C. §2953.08, which created and governs the appellate review of criminal sentences. After the *Foster* case in 2006 and the legislative reaction in 2011, the statute's application is uncertain and inconsistent, opined Dir. Diroll. In some ways the statute doesn't mean what it says. In other ways it doesn't say what it means, he claimed. Thus, the committee is wrestling with how to best make the statute work, he added.

Taking one of the statute's least ambiguous provisions, Dir. Diroll cited language that says a party can't appeal a sentence that they agreed upon.

Appellate Judge Gary Tyack remarked that his district (Franklin County) generally dismisses the appeal if it was an agreed sentence, in accordance with the statute. But this works differently in Cuyahoga County, for instance, where the review proceeds.

Judge Hendon expressed concern over appeals based on non-prejudicial mistakes. She noted a case in which the judge stated that five years of post-release control was due, when it was actually only three years.

She suggested adding language that the mistake must adversely prejudice the person. She also suggested not setting the standard of review at "clear and convincing" because it opens another argument for review and that the Supreme Court says that the court does not have to maintain a record for that standard.

Representing the State Public Defender's Office, Craig Jaquith asked how there could be an appeal of abuse of discretion if the sentence was within the maximum consecutive range.

Referencing the *Hairston* case which resulted in a sentence of 134 years for a combination of burglaries and robberies, Dir. Diroll noted that even that length of sentence was not ruled as cruel and unusual.

Everything was thrown against the wall on that one, Judge Tyack declared.

Dir. Diroll wondered if it would help to craft something for proportionality review. The original intent of the statute was to narrow maximum sentences to the worst offenders and those most likely to recidivate. The U.S. Supreme Court decisions that led to *Foster* referred to findings but they were a different kind of findings than what we had in Ohio. Ours were mostly jurisprudential, he contended, not jury-type questions.

When some of these suggestions were circulated among judges at the Appellate Judges' Association, said Judge Hendon, they said they couldn't imagine any sentence that wasn't prejudicial to the defendant.

Judge Tyack declared that this statute really only impacts the practicing bar. He favors Dir. Diroll's interpretation of "contrary to law."

Appellate Court Judge Sean Gallagher questioned how you can apply contrary to law to deal with different divergent benches in the same district. On the issue of whether a judge has considered the factors, he remarked that some judges will either put it in the journal entry or state on the record that they have done so. He wondered if that should be required to reach the level of rebuttable presumption. Perhaps something could be added to §2929.14 to address it.

Judge Hendon declared that the problem occurs mostly with new common pleas judges.

If the judge states something on the record, it is presumed that he followed the statute, Judge Tyack declared.

Judge Gallagher asked how you can determine if a judge has "failed to consider…."

Dir. Diroll contended that there somehow needs to be proportionality review. He explained that the "contrary to law" proposal is meant to be

narrower but not preclude. He feels there should be some meaningful review without precluding legitimate claims.

According to Atty. Jacquith, federal review uses “manifestly unreasonable” as the standard.

Wondering how many appeals of sentences are actually won, Judge Hendon pointed out that we might be spending a lot of time on something that’s not a real problem.

Atty. Jacquith admitted that there are very few sentencing appeals won.

The increase in the prison population, Judge Tyack claimed, encourages more offenders to appeal their sentence.

Dir. Diroll pointed out that during the decade from the enactment of S.B. 2 to the ruling on the *Foster* case the prison population remained relatively steady. It grew significantly in the decades before S.B. 2 and in the time since the *Foster*.

Under §2929.13 Judge Gallagher noticed that the language always seems to go back to findings, such as recidivism factors, *etc*. Since it says that the court ‘shall review the record’, he wondered if that means the appellate court will be looking for reasons that the court gives.

Judge Tyack declared that there will never be unanimity among judges.

In the overriding purposes of §2929.11, one of the purposes is consistency. Dir Diroll asked if any of the appellate courts have weighed in on what that means.

As far as consistency for a first degree felony, Judge Gallagher considered that to be anywhere within the 3 to 11 year window. As long as a judge stays within the sentencing range, he believes there is no way to measure consistency without violating the judge’s discretion.

When consecutive sentences start getting stacked there tends to be broader ranges, and that is where Dir. Diroll wondered what criteria is used at the appellate level to determine consistency.

It would help, said Judge Gallagher, if we had the sentencing package doctrine in Ohio.

How do you review a sentence, Dir. Diroll asked, for an offense that has no similar offenses to compare?

Judge Hendon contended that there will always be variations unless the system goes to computerized sentencing. If a sentence is truly obviously contrary to the law, Judge Hendon, argued, then it should have been addressed immediately in the trial court.

Expressing appreciation for the proposed revisions offered by Dir. Diroll, Judge Tyack offered agreement with the concept of making a sentence reviewable if it is outside of a chosen range of time. Noting that some cases of robbery or burglary are getting longer sentences than murder and aggravated murder, he would like to see the range for murder and aggravated murder changed. He contends that murder penalties

no longer seem to correspond to the seriousness of the crime, thus creating an imbalance between homicides and non-homicides.

According to Judge Gallagher the *Bonnell* case, which was heard by the Supreme Court in January, should provide some clarity. He noted that the agreed sentencing exception would get rid of a lot of unnecessary appeals.

If there is an agreed sentence, said Judge Tyack, the offender is often sentenced on the spot. He noted that most appellate judges believe that if the prosecutor, defense, and judge have all agreed on the sentence then there is little reason for anyone to mess with it.

Sometimes, said Judge Hendon, it is hard to tell a truly “agreed sentence.”

According to Mr. VanDine, both sides usually have to sign off on an agreed sentence.

Judge Hendon agreed that it won’t let the court get rid of appeals but will certainly let the court deal with them more quickly.

Dir. Diroll noted that §2953.08 is the only statute to address sentencing appeals. He proposes beginning the section with introductory language designed to focus the scope of the statute.

Judge Gallagher agrees that if the defense delineates exactly what it is they are alleging, it will make the appeal more focused. He added that most sentences are going to fall within the range and the judge can give individual consecutive sentences as long as he makes the findings. Feeling some limitation is needed, he suggested making some offenses ineligible for consecutive sentences.

FUTURE MEETINGS

Future meetings of the Ohio Criminal Sentencing Commission have been tentatively scheduled for July 17, September 18, October 23, November 20, and December 18. There is no meeting scheduled for August.

The meeting adjourned at 2:55 p.m.