Ohio Judicial Conference

The Voice of Ohio Judges

Senate Finance
General Government and Agency Review Subcommittee
Judge Jerry R. McBride
Clermont County Common Pleas Court
House Bill 49 – Felony Five Sentencing Proposal
May 23, 2017

Good morning, Chairman Jordan, Vice-Chair O'Brien and members of the Senate Finance – General Government and Agency Review Subcommittee. I am Judge Jerry McBride from the Clermont County Common Pleas Court and a member of the Ohio Judicial Conference Community Corrections Committee. I want to thank you for the opportunity to provide testimony today on the provisions in House Bill 49 that would limit judges' sentencing authority over certain non-violent felony five offenders, a program that ODRC is calling Targeted Community Alternatives to Prison (TCAP).

The proposal before you is a moderate improvement over the As-Introduced version of the bill that would have completely prohibited the sending of non-violent felony five offenders to prison. We have concerns with the current version of the bill that I will address shortly. I understand, however, that the Administration has encouraged the Senate to return to the As-Introduced version of the bill. I would like to spend a few minutes discussing our concerns with that proposal.

First, and foremost, we are concerned that the original proposal undermines court-ordered opioid treatment. Judges are on the front lines of the opioid problem. We strive to find solutions that will prevent relapse, reduce recidivism, and improve public safety. The change proposed in HB 49 will make our work significantly more difficult. By and large, judges send low level felony offenders to prison only as a last resort because these offenders are typically better served through treatment and community sanctions. However, offenders must be motivated to successfully complete treatment and supervision. The ability to look an offender in the eye and say prison is a possibility is a powerful, and is sometimes the only available, motivator.

Second, we are concerned that the proposal undermines public confidence in our courts. The original proposal removes a basic defining characteristic of a felony offense – imprisonment in a state penal institution. This undermines a judge's ability to protect the public from future crime by the offender and others, one of the two overriding purposes of felony sentencing. Offenders will recognize that, when they commit a non-violent felony drug offense or violate community control on that offense, they will face only a short term in a local facility or additional time on community control. At some point, (after five non-violent felony fives or five community control violations, for example) judges are out of options locally. Additionally, an offender may avoid going to prison but will not avoid the collateral consequences of having a felony record, such as difficulty obtaining employment.

Third, the original proposal is an extension of the limitations on felony four and felony five sentencing that were enacted in House Bill 86 in 2012. Those changes merely resulted in prosecutors bringing more serious charges and being less willing to accept plea agreements at felony four/felony five levels. This has resulted in more serious convictions with short prison stints combined with judicial release and is one reason the prison population reduction goal of House Bill 86 has not been realized. House Bill 86 has also resulted in longer

terms in local jails displacing misdemeanants with felons in already overcrowded facilities. The proposed change to RC 2929.34 will exacerbate these problems. I have heard from municipal judges, for example, that this change will make any mandatory jail time for an OVI a statutory myth because there simply will not be enough jail space.

Finally, the original proposal creates a one-size-fits-all approach to sentencing non-violent felony five offenders – no prison regardless of the circumstances. The punishment is the same regardless of how many felony fives the individual commits or how many times the individual violates community control. Furthermore, the one-size-fits-all approach applies regardless of an offender's Ohio Risk Assessment System (ORAS) score, an assessment that ODRC stresses as important in every other situation. In this way, House Bill 49 contradicts ODRC's own philosophy with regard to data driven sentencing. Judges need the discretion to determine who presents a high risk to the community and to sentence appropriately.

The House Passed version of the bill is a moderate improvement and we appreciate the House's efforts to maintain some judicial discretion over this category of offenders. However, the proposal presents problems of equal protection, and undue complexity. On the issue of equal protection, by granting each county a limited number of prison beds for F5 offenders, the bill creates a situation where some offenders will go to prison while others will be kept in the community even when they have the same criminal history. On the issue of complexity, the proposal creates a "jail release" and "TCAP waiver" mechanism to deal with jail overcrowding. The proposals allow the Judge or the Sheriff to release an offender from jail in order to create space for a new offender and to use prison when the jail is at one-hundred ten percent of capacity. The process currently in the bill is too complex to describe in testimony and amounts to state level management of what should be a local issue.

The Judicial Conference believes that there are clearer, more effective, ways to accomplish the goals of increased community treatment and prison population management that maintain judicial discretion. In 2012, the legislature created a presumption in favor of prison for F-4 and F-5 offenders but allowed prison terms to be imposed under specified circumstances. One alternative is to make the TCAP program voluntary. The Department of Rehabilitation and Correction has indicated that around 40 counties have already made the decision that participation in TCAP is what is most appropriate for their communities. The Department could base the grant funding pot on the savings that they would receive from these volunteers and continue to allow other counties to sentence in a manner that they feel is most appropriate for their communities. A second alternative is to limit TCAP to a narrower category of Felony 5 offenses and perhaps reduce some other Felony 5's to misdemeanors so that those offenses are no longer prison eligible. House Bill 49 paints with too broad a brush, placing individuals convicted of Felony 5 drug possession – individuals who are likely in need of treatment – in the same group as individuals convicted of Felony 5 drug trafficking – individuals who pose a danger to the community.

A final option would be for the legislature to further restrict the circumstances under which judges are permitted to impose prison sentences on F-5 offenders while still preserving their ability to impose prison sentences on the most egregious offenders. Thus, judges presumably would retain the right to impose prison sentences on violent offenders and sex offenders as ODRC proposes, but also to impose prison sentences on multiple community control violators, repeat drug trafficking offenders, offenders committing multiple felony offenses, and high risk offenders. This would allow for justice to be served while at the same time helping to reduce the number of F-5 offenders sentenced to prison.

The Judicial Conference is committed to working with you and the Administration toward something that all will find acceptable. I thank you for your time. I am happy to answer any questions.