

Reflections from the Bench: Ohio Sentencing Law

Jennifer Muench-McElfresh*

INTRODUCTION

Before taking the Ohio Common Pleas bench in 2013, I served as an Assistant Prosecuting Attorney in Butler County, Ohio for more than fifteen years. I spent the majority of my time prosecuting felony crimes against children. Child abuse cases present unique issues for the trial court. One of those issues is a child's delayed disclosure of abuse, particularly in sexual abuse cases. It is not uncommon for a child victim to come forward with allegations of abuse many years after the abuse occurred. Reasons for delayed disclosure may include waiting until the child is safe from the perpetrator, fear of not being believed, and the need to be relieved of the burden that carrying such a secret may place upon a victim. Many times, children delay disclosure of abuse into adulthood.

That being said, my experience as an Assistant Prosecuting Attorney required me to have knowledge of Ohio's past and present sentencing laws. Indeed, there were cases that required me to research Ohio's sentencing laws from more than twenty years ago. In my position as a trial judge, I continue to research and apply a range of sentencing statutes.

Notably, Ohio's sentencing laws have significantly changed over the years. In fact, an argument can be made that they have come full circle. These changes as well as my professional experiences have affected both my perspective on and approach to sentencing as a trial judge.

I. OHIO SENTENCING LAW THROUGH THE YEARS

Ohio law requires judges to consider "the overriding purposes of felony sentencing."¹ Said purposes include: (1) the need "to protect the public from future crime by the offender and others," (2) the need "to punish the offender," and (3) the need "to promote the effective rehabilitation of the offender using the minimum sanctions that the court determines accomplish those purposes without imposing an unnecessary burden on state or local government resources."² Over the years, these purposes have been supplemented by various statutes, rules, and even a constitutional amendment, all of which have informed Ohio's sentencing scheme.

* Jennifer Muench-McElfresh is a judge in the Butler County Common Pleas Court, General Division.

¹ OHIO REV. CODE ANN. § 2929.11(A) (West 2023).

² *Id.*

On December 6, 1972, the Ohio General Assembly passed what is commonly known as H.B. 511.³ This legislation, which was effective on January 1, 1974, used the Model Penal Code as a foundation.⁴ It was the culmination of five years of work “by legislators, prosecutors, defense attorneys, judges, and academicians supported by qualified professional staff.”⁵ H.B. 511 was an indeterminate sentencing scheme that established four felony levels.⁶ Judges were required to set a minimum prison term from a range authorized by the statute.⁷ The parole board then determined an offender’s release date from a fixed maximum range.⁸

In 1983, the Ohio General Assembly enacted S.B. 199.⁹ S.B. 199 added eight new sentencing ranges to the four ranges contained in H.B. 511.¹⁰ S.B. 199 also developed “aggravated felonies,” which were punishable by longer, mandatory terms.¹¹ The bill changed Ohio’s sentencing laws to a “hybrid system of indeterminate and determinate sentences.”¹² Instead of the indeterminate sentences enacted by H.B. 511, low-level, nonviolent felons now faced determinate sentences under S.B. 199.¹³

Nineteen ninety-six saw a drastic change to sentencing in Ohio. The indeterminate sentencing statute which governed Ohio sentencing for more than two decades was replaced with a definite sentencing statute. The new sentencing statute, known as S.B. 2, became effective on July 1, 1996.¹⁴ S.B. 2 aimed for “truth-in-sentencing” in Ohio’s sentencing statutes.¹⁵ In other words, the prison term imposed by the judge was to be the actual sentence served by the offender.¹⁶ S.B. 2 provided

³ Harry J. Lehman & Alan E. Norris, *Some Legislative History and Comments on Ohio’s New Criminal Code*, 23 CLEV. ST. L. REV. 8, 10 (1974) (citing 134 Ohio Sen. Jour. 1865-76 (1972)).

⁴ OHIO CRIM. SENT’G COMM’N, CRIMINAL JUSTICE REFORM IN OHIO 1 (2019), <http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/general/CJReformOhioCupp2019.pdf> [https://perma.cc/6L3P-RTWN]; JUDGE SEAN C. GALLAGHER, BACK TO THE FUTURE 4 (2019), <http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/SB201/backtofutureSCG.pdf> [https://perma.cc/H4CV-DCPC].

⁵ *Supra* note 3, at 30.

⁶ OHIO CRIM. SENT’G COMM’N, *supra* note 4, at 1; GALLAGHER, *supra* note 4, at 4.

⁷ GALLAGHER, *supra* note 4, at 4.

⁸ *Supra* note 3, at 11; GALLAGHER, *supra* note 4, at 4.

⁹ GALLAGHER, *supra* note 4, at 4.

¹⁰ OHIO CRIM. SENT’G COMM’N, *supra* note 4, at 1 (citing Fritz Rauschenberg, *Sentencing Reform Proposals in Ohio*, FED. SENT’G REPORTER, Vol. 6, Nov.–Dec. 1993, at 166, 166-168); GALLAGHER, *supra* note 4, at 4.

¹¹ OHIO CRIM. SENT’G COMM’N, *supra* note 4, at 1; GALLAGHER, *supra* note 4, at 4.

¹² DAVID J. DIROLL, OHIO CRIM. SENT’G COMM’N, A DECADE OF SENTENCING REFORM 11 (2007), <http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/monitorRpts/sentencingReform.pdf> [https://perma.cc/23WV-3GXU].

¹³ GALLAGHER, *supra* note 4, at 4; DIROLL, *supra* note 12, at 11.

¹⁴ OHIO CRIM. SENT’G COMM’N, *supra* note 4, at 2; GALLAGHER, *supra* note 4, at 4; DIROLL, *supra* note 12, at 11.

¹⁵ OHIO CRIM. SENT’G COMM’N, *supra* note 4, at 2; GALLAGHER, *supra* note 4, at 4; DIROLL, *supra* note 12, at 7 and 11.

¹⁶ Under S.B. 2, murder remained a subject to an indeterminate sentence. DIROLL, *supra* note 12, at 11.

judges with a range of terms to choose from when imposing a sentence.¹⁷ Other than in murder cases, S.B. 2 took away the parole board's power to release offenders without a court order.¹⁸

Over the years, various statutory enactments began to erode "truth-in-sentencing." Concerns about an increasing prison population and the State's budget gave way to legislation that returned discretion to the parole board to release offenders without a court order.¹⁹ As such, indeterminate sentences became the penalty for child rape offenses, and some offenders became eligible for early release by participating in prison programming.²⁰

In 2013, the Ohio Supreme Court adopted rules for the creation of a Commission on Specialized Dockets.²¹ Specialized dockets offer "a therapeutically oriented judicial approach to providing court supervision and appropriate treatment to individuals . . ."²² These dockets focus on the treatment needs of the offender, rather than the punishment of the offender, with the hope that doing so will sufficiently rehabilitate the offender so that prison is not necessary. Ohio presently has 259 specialized dockets which primarily focus on the treatment of substance abuse and/or mental health issues.²³

While Ohio's statutes had long provided for the rights of victims,²⁴ Ohioans passed a constitutional amendment commonly referred to as Marsy's Law in 2017.²⁵ Marsy's Law aimed "[t]o secure for victims justice and due process."²⁶ The Ohio Constitution now specifically requires that the rights of victims "be protected in a manner no less vigorous than the rights afforded to the accused."²⁷ Marsy's Law "established additional constitutional due-process rights for victims and reiterated their right to be present at all public criminal proceedings for the accused."²⁸ Among other things, Marsy's Law emphasized a victim's right (upon request) to receive

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ OHIO CRIM. SENT'G COMM'N, *supra* note 4, at 4 (reporting that in 2011, Ohio's prison population was 6.5 times greater than in 1974 and that Ohio's prisons were 31% over their "rated capacity") (citing DAVID J. DIROLL, OHIO CRIM. SENT'G COMM'N, PRISON CROWDING: THE LONG VIEW, WITH SUGGESTIONS (2011), <http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/sentencingRecs/MonitoringReport2011.pdf> [<https://perma.cc/BQ4R-FWPP>]).

²⁰ OHIO CRIM. SENT'G COMM'N, *supra* note 4, at 5.

²¹ OHIO SUP. R. 36.02.

²² OHIO SUP. R. 36.20(A).

²³ *Ohio Specialized Dockets*, SUP. CT. OF OHIO (May 2, 2023), https://analytics.das.ohio.gov/t/SCPUB/views/SD-Map_16389898841230/SpecializedDocketMap?%3Adisplay_count=n&%3Aembed=y&%3AisGuestRedirectFromVizportal=y&%3Aorigin=viz_share_link&%3AshowAppBanner=false&%3AshowVizHome=n [<https://perma.cc/Q83Q-TVM9>].

²⁴ OHIO REV. CODE ANN. § 2930 (West 2023); *State v. Montgomery*, 169 Ohio St. 3d 84, 88 (2022).

²⁵ OHIO CONST., art. I, § 10(a).

²⁶ OHIO CONST., art. I, § 10(a)(A).

²⁷ *Id.*

²⁸ *Montgomery*, 169 Ohio St. 3d at 88 (2022) (citing OHIO CONST., art. I, § 10(a)(A)(2)).

notice of hearings and the right to be present and be heard at said hearings.²⁹ Moreover, Marsy's Law gave victims the right to petition an appellate court "if the relief sought is denied."³⁰ In 2023, Marsy's Law was codified by H.B. 343. It can be argued that Marsy's Law is a response to the return of indefinite sentences and the modern emphasis on treatment for offenders.

That being said, effective March 22, 2019, all first and second degree felonies in Ohio became subject to indefinite sentencing.³¹ The legislation, known as the Reagan Tokes Act or S.B. 201, requires judges who impose prison terms on felonies of the first and second degrees that do not carry a life tail (such as murder and child rape) to select a minimum prison term from the existing statutory range of penalties. The maximum term is automatically calculated as the minimum term plus 50% of the minimum term.³² The end of the minimum term is presumed to be the offender's release date.³³ However, the Department of Rehabilitation and Corrections has the discretion to extend the release date up to the maximum term with little input from the sentencing judge.³⁴ Essentially, Ohio has returned to the sentencing law contained in H.B. 511. Power has been returned to the prison and/or parole board and judicial discretion has been restricted.

II. PHILOSOPHY AND PERSPECTIVE

Judicial discretion is important to the administration of justice. While judges must strive to be fair and consistent, it must be understood that no two sets of facts are the same, no two offenders have the same personal background, and no two victims have the same experience. There is no mathematical calculation that can determine what a sentence should be. Indeed, sentences in two cases, which may appear to be similar on their faces, may warrant different sentences to achieve a just result.

Judges must consider the purposes of sentencing and the statutory penalties as they relate to each individual case. Both offenders and victims deserve that consideration. Criminal sentencing is one of a judge's most important duties. It potentially affects the offender's freedom, and it affects the victim's need to be made whole. It cannot be taken lightly. Both sides need to feel that they are being heard and that the judge is considering all points of view.

Certainly, judges must follow the law and must make objective decisions without public influence. However, judges should be accountable to the public for their sentencing decisions. Indeed, Ohio judges are elected every six years. Ohio

²⁹ OHIO CONST., art. I, § 10(a)(A).

³⁰ OHIO CONST., art. I, § 10(a)(B); *but see* State *ex rel.* Thomas v. McGinty, 164 Ohio St. 3d 167, 180 (2020).

³¹ GALLAGHER, *supra* note 4, at 6; OHIO REV. CODE ANN. § 2929.144 (West 2023).

³² GALLAGHER, *supra* note 4, at 8.

³³ *Id.* at 23.

³⁴ *Id.*

voters determine if judges have properly exercised their discretion. When unelected bureaucrats, such as prison personnel and/or parole boards, decide when offenders should be released instead of the judges that are elected to determine how best to protect the public, punish the offender, and rehabilitate the offender, no one is accountable for the protection of the public, punishing the offender, or rehabilitating the offender. Simply put, the public loses its ability to hold the criminal justice system accountable.

As mentioned above, when I took the bench in 2013, I was coming from a background of serving as an Assistant Prosecuting Attorney for fifteen years. As one might expect, I worked directly with victims during those years. In fact, for thirteen of those years I worked with the most vulnerable of victims—children. I worked with those child victims in the most horrific of circumstances such as rape and physical assault. I heard their stories and did my best to get justice for them. Quite naturally, I felt that sentences should punish the offender and protect the public from future crime by the offender. Rehabilitating the offender, in my prosecutorial eyes, was often unlikely or too great of a risk to the public safety to take.

Because I had that mindset, I felt it important to make sure that I was being fair and objective in my sentencing decisions. I needed to “gut check” myself before I imposed sentences. I needed to make sure that my experience as a prosecutor was not clouding my judicial duty to follow *all* of the law. As a judge, I was required to consider all of the purposes of sentencing—even the rehabilitation of offenders. I needed to be accountable not only to the public, but to myself.

I kept lists of cases with similar offenses and would relentlessly review those lists in conjunction with potential sentences that I intended to impose. I challenged myself by asking myself what the differences were between the cases. I weighed all of the purposes of sentencing in each case. I endeavored to be consistent to the degree possible while recognizing the uniqueness of each case.

In addition to reviewing my lists, I would review case files days before the sentencing hearing and go back later to review them again to make sure that I still felt the sentence I intended to impose was the right one. I still do these things. I do these things to ensure that I am following the law, being fair, and holding myself accountable.

In 2014, I accepted the additional responsibility of presiding over a specialized docket. Specialized dockets are treatment courts. The docket that I began presiding over was a “child support enforcement” court. It was created to address behavioral issues of offenders that were convicted of felonies for not paying their child support. The goal of the docket was to focus on rehabilitation rather than punishment.

The “child support enforcement” docket has since been reclassified by the Ohio Supreme Court as a “drug court.” It is still limited to offenders that are convicted of felonies for not paying child support. However, participating offenders must now have a substance abuse and/or mental health issue to qualify for the court.

Offenders who participate in this specialized docket must come in front of me on a regular basis. The docket is supported by a treatment team consisting of a probation officer, substance abuse and mental health treatment providers,

employment specialists, a prosecuting attorney, and a defense attorney. The participating offender is required to complete four phases of goal-oriented tasks in order to graduate from the program.

Presiding over this specialized docket has caused me to take a new look at the purposes of sentencing—particularly rehabilitating offenders. Again, all criminal cases are not the same. A judge should consider protection of the public, punishment of the offender, and potential rehabilitation of the offender in every case. However, these purposes should be weighed differently in child abuse cases than in nonsupport of dependents cases.

In some cases, such as a nonsupport of a dependent case, rehabilitating the offender is the best way to protect the public. It makes little sense to send someone to prison without trying to get them to first pay their child support by addressing substance abuse or mental health issues and offering employment services which may rectify the criminal behavior. Sending someone to prison without first making these attempts at rehabilitation does not correct the behavior which led to the criminal charge—getting the child support paid. As such, prison may best be used as a last resort in those cases. However, in a child rape case, protection of the public demands a mandatory prison sentence and the offender must be punished.

That being said, the purposes of sentencing must be placed in perspective and applied to each individual case with the judge exercising the discretion entrusted to him or her by the voters.

CONCLUSION

Sentencing is one of the most important duties of a trial judge. Judges must be devoted to the law. They must possess expertise in ever changing sentencing statutes. They must be committed to applying those statutes fairly and impartially.

During my time on the bench, I have endeavored to possess that expertise and to be fair and impartial. Without a doubt, my perspective on sentencing has evolved to what I hope is a more well-rounded approach to sentencing offenders.

That being said, I believe it is critical to recall the experiences which led me to the bench. It is necessary to consider sentencing not only as it impacts the offender, but equally how it impacts the victim. It is my life experience in conjunction with my knowledge of the law and sworn duty to be fair and impartial that must shape my judicial philosophy. That judicial philosophy is the foundation for exercising my judicial discretion. That judicial discretion is what the public will use to hold me (and the criminal justice system) accountable.