House
Legislative
Analysis
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COMPUTING CONCURRENT AND CONSECUTIVE SENTENCES

House Bills 4238 and 4239 as passed by the House
Second Analysis (7-2-99)

Sponsor: Rep. Tony Stamas
Committee: Criminal Law and Corrections

THE APPARENT PROBLEM:

Under Michigan court rule 6.427, a trial court must prepare a criminal's judgment of sentence within seven days after sentencing. The length of a criminal's sentence is recorded on the judgment of sentence. That document accompanies the criminal to prison, and based on that document the Department of Corrections calculates the prisoner's sentence.

Sometimes prisoners are found guilty of more than one crime. Normally the sentences for the two crimes will run concurrently. Occasionally, judges do not indicate on a prisoner's judgment of sentence whether a prisoner's sentence is to be served concurrently with another sentence, or consecutively to that sentence. When a prisoner's judgment of sentence is unclear, the Department of Corrections writes to the judge to request clarification; however, the department reports that some judges do not respond to their written inquiries. Absent clarification from the judge, the department usually calculates the sentences concurrently, unless there is a statute describing the crime and its penalty that specifies a consecutive sentence. In these instances the department calculates the sentences consecutively. Occasionally, prisoners are not notified that their prison terms have been changed from concurrent to consecutive sentences.

Some have argued that legislation is needed in order to clarify judicial and executive responsibilities when the courts sentence prisoners, and to ensure that prisoners are notified when their sentences are changed.

THE CONTENT OF THE BILLS:

The bills, which are tie-barred together, would require that each judgment of sentence that commits an individual to a term of prison indicate whether the sentence is to run consecutively or concurrently. If the judgment of sentence does not indicate whether the sentence is to run concurrently or consecutively, the bills would provide guidelines for how the sentence should be treated.

House Bill 4238 would amend the Code of Criminal Procedure (MCL 769.27) to require that a judgment of sentence committing a prisoner to the jurisdiction of the Department of Corrections specify whether the sentence is to run consecutively to or concurrently with any other sentence the defendant is or will be serving. At the time of sentencing, the court would be required to provide a copy of the judgment of sentence to the prosecuting attorney, the defendant, and the defendant's counsel. Any of these individuals could file an objection to the judgment of sentence within 14 days after receiving it, and the court would be required to promptly hold a hearing on any objection filed. Under the bill, this procedure for reviewing a judgment of sentence would be in addition to any other review procedure authorized by statute or court rule.

In addition, the bill would change the notice requirements for those instances where the court changed an individual's sentence. Under current law, when this occurs, only the prosecuting attorney receives notice from the court. The prosecuting attorney, once notified, then has five days to object to the changes made by the court. The bill would expand the notice requirement for such cases and require the court to provide written notice to the defendant and the defendant's counsel, in addition to the prosecutor. Further, any of these individuals, including the defendant if he or she were not represented, would have 14 days to file any objections with the court and the court would be required promptly to hold a hearing on any objection filed. Finally, the bill would specify that an individual's waiver of his or her right to counsel at trial, plea-taking, or a prior sentencing hearing would not be a waiver of counsel for the purpose of a hearing on his or her objections to a change in his or her sentence.

House Bill 4239 would amend the Department of Corrections act (MCL 791.264) to clarify the method of computing prisoners' sentences where the judgment of sentence fails to specify whether the sentence is concurrent or consecutive. The bill would require the record office of the prison to compute the length of a prisoner's sentence, based on a certified copy of the court's judgment of sentence. When a judgment does not indicate whether the sentence is to run concurrently or consecutively with other sentences, then the bill would generally require the sentence to be computed concurrently. However, the sentence would be computed consecutively if the prisoner was convicted of any of the following crimes: prison or jail escape; escape while awaiting examination, trial, or arraignment for a felony, or escape while being transferred after receiving a felony sentence; possessing a firearm during a felony; or, taking another person hostage while a prisoner. In addition, if a judgment of sentence failed to state how the sentence should be computed and, under the bill, the record office was required to treat the sentence as consecutive, the department would be required to notify the affected prisoner that his or her sentence was being treated as a consecutive sentence no later than three days after the sentence was computed.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, House Bill 4238 would have no fiscal impact on state costs or revenues. It would, however, have an indeterminate impact on local costs and revenues, depending upon how many objections to judgments of sentences were filed. Additionally, minimal costs would occur due to the bill's requirement that the defendant's counsel be provided a copy of the judgment. (7-1-99)

The House Fiscal Agency reports that House Bill 4239 would have an indeterminate fiscal impact on the Department of Corrections. To the extent that the bill codified existing practice, it would have no fiscal impact. (7-1-99)

ARGUMENTS:

For:

Taken together, the bills would establish a way for trial courts and the Department of Corrections to better communicate about prisoners' sentences. They clarify the functions of the judicial and executive branches of government with regard to judgments of sentence, and they allow the respective parties to make decisions that are more fully informed. These bills are intended to fix a localized and particular problem that has arisen at the interface of two large and complicated systems: courts and prisons. The legislation has been carefully negotiated in a workgroup comprising stakeholders, and deserves support.

For:

House Bill 4238 requires the trial court to make three copies of the judgment of sentence and to give them to the defendant's trial attorney, the defendant, and the prosecutor. If either of the trial attorneys or the defendant notes a clerical error that everyone can agree to correct, the error can be fixed immediately without involving the Department of Corrections. If errors exist that are not clerical and cannot be corrected simply, the aggrieved party can appeal. In the meantime, the Department of Corrections can rely on the judgment of sentence it receives. House Bill 4238 places the responsibility for identifying errors in sentencing on lawyers for the parties involved, and not on Department of Corrections clerks as has been the past practice. The bills will have the effect of both reducing the number of incorrect judgments that will reach the department and also providing specific guidelines for dealing with the few inaccurate judgments that might still reach the department.

For:

House Bill 4239 requires the Department of Corrections to notify a prisoner within three days if his or her sentence has been recomputed from concurrent to consecutive. In those instances where a defendant had requested counsel for an appeal, such notice would allow the defendant to request a resentencing hearing.

Against:

Several concerns were raised with regard to similar legislation that passed the House in the 1997-98 session. It is not clear whether the current bills address these issues. For instance, it has been noted that sentencing is a trial court function, and that correcting trial court errors is the function of the appellate courts. In this regard, there are a number of critical errors that can occur under the legislation and that caution against its enactment: error in factual determinations; error in misconstruing the plea agreement reached by the prosecutor and the defense counsel and accepted by the judge; and, error in failing to carry out the judge's intent in sentencing the defendant. Consecutive sentence provisions in laws have changed repeatedly over the years and are very complicated. In order to avoid these errors, MCL

771.14(2)(d) requires the probation officer (a DOC employee) to include in the presentence report "a statement prepared by the prosecuting attorney as to whether consecutive sentencing is required or authorized by law."

In addition, the question of what procedures must be followed before a sentence can be "corrected" has been extensively litigated. Two important published opinions have been released within the last year [*People* v *Miles*, 454 Mich 90 (1997) and *People* v *Thomas*, 223 Mich App 9 (1997)], as well as a number of unpublished decisions. Together, *Miles* and *Thomas* make it clear that it is error even for the judge who imposed a sentence to "correct" that sentence by simply amending the judgment if the result will be to lengthen the defendant's incarceration. A formal resentencing must be conducted by the judge.

Response:

The legislation doesn't interfere with the discretion or independence of the judiciary -- it merely allows the Department of Corrections to follow the laws of this state even where the sentencing judge may not have paid attention to them at sentencing. First, it should be noted that Department of Corrections would only make changes where, in spite of requirements to the contrary, the judge has not specified how the prisoner's sentence should be applied. These crimes are crimes that almost anyone would agree require consecutive sentences -- for example, a concurrent sentence for an escape attempt would be ineffective as a deterrent against escape attempts. Thus, the department is not substituting its will for that of the judge because the judge was required by law to come to the same conclusion. There is no more interference with the judicial branch of government in the provisions of this bill than there are in any other mandatory sentencing provisions.

POSITIONS:

The Prosecuting Attorneys Association of Michigan supports the bills. (6-28-99)

The Department of Corrections supports the bills. (6-30-99)

The State Appellate Defender Office supports the bills. (6-30-99)

The American Civil Liberties Association supports the bills. (7-1-99)

The Michigan Appellate Assigned Counsel System supports the bills. (7-1-99)

Analyst: W. Flory

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.