House
Legislative
Analysis
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COMPUTING CONCURRENT AND CONSECUTIVE SENTENCES

House Bills 4238 and 4239 as enrolled
Public Acts 220 and 221 of 2000
Third Analysis (7-21-00)

Sponsor: Rep. Tony Stamas
House Committee: Criminal Law and Corrections
Senate Committee: Judiciary

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 a judgment of sentence indicate whether the sentence is to run consecutively or concurrently to any other sentence that prisoner might be facing. 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. The bills would take effect October 1, 2000.

House Bill 4238 would amend the Code of Criminal Procedure (MCL 769.27) to require that any judgment of sentence that would commit a prisoner to the jurisdiction of the Department of Corrections must specify whether the sentence is to run consecutively to or concurrently with any other sentence the defendant is or will be serving.
Copies of the judgment of sentence would have to be provided to the prosecuting attorney, the defendant, and the defendant's counsel at the time of sentencing. Any of these individuals could file an objection to a judgment of sentence on the issue of whether the sentence should run consecutively or concurrently. If such an objection was raised, the court would be required to promptly hold a hearing. This review of a judgment of sentence would be in addition to any other review procedure authorized by statute or court rule.

The bill would also change the notice requirements for cases where the court changed an individual's sentence. Under current law, when such a change occurs, only the prosecuting attorney is notified by the court. The prosecuting attorney, once notified, then has five days to object to the court's changes. Under the bill, the notice requirement would be expanded to require the court to provide written notice to the defendant and the defendant's counsel, as well. Further, the defendant or his or her counsel would also be allowed to object to the court's changes and, if this occurred, the court would be required promptly to hold a hearing on the objection.

Finally, the bill would make changes to the reporting provisions that require the clerk of a court to report the

final disposition of certain crimes to the state police. Current law requires the reporting of crimes that are punishable by imprisonment for more than 92 days. The bill would also require the reporting of violations of local ordinances that have a maximum possible penalty of imprisonment for 93 days and that substantially correspond to state law misdemeanors with a maximum possible penalty of 93 days imprisonment. The bill would also specify that the reporting of these crimes would have to be done in manner that was consistent with the fingerprinting requirements of Public Act 289 of 1925, the act that created the Bureau of Criminal Identification and Records within the Department of State Police. Other misdemeanors and local ordinances would only have to be reported if the court ordered the clerk to do so. Currently, except for crimes dealt with under the Sex Offender Registration Act, the clerk of a court is not required, unless ordered by the court, to report a misdemeanor conviction for either: 1) violations of the Michigan Vehicle Code or substantially similar local ordinances unless the offense is punishable by imprisonment for more than 92 days or would be punishable by more than 92 days imprisonment on a second conviction; or 2) where no sentence of imprisonment was imposed, except as an alternative sentence, and any fine or costs ordered totaled less than $100. Under the bill, instead of limiting reporting for violations of the vehicle code or similar ordinances, a clerk would not be required to report a first offense of operating a vehicle on a revoked or suspended license, or allowing someone else to operate a vehicle with a revoked or suspended license.

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 failed to 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, unless the judgment of sentence stated otherwise, a sentence for any of the following crimes would be computed consecutively: 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 or if a judgment of sentence ordered a concurrent sentence for one of the crimes listed above that would be computed as consecutive if the judgment did not state otherwise, the department would be required to notify the sentencing judge, the prosecuting attorney, and the affected prisoner of how the sentence was to computed no later than seven days after the sentence was computed.

Whenever the department received an amended judgment of sentence indicating that the sentence should be computed differently than the original judgment of sentence, the sentence would have to be re-computed in accordance with the amended judgment.

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 may 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 seven days if his or her sentence has been re-computed. In those instances where a defendant had requested counsel for an appeal, such notice would allow the defendant to request a re-sentencing 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 re-sentencing 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.

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.