



BillBoard

JUNE 16, 2016
LEGISLATIVE NEWS



Part of the Judicial Conference’s statutory charge is “to consider the business and problems pertaining to the administration of justice and to make recommendations for its improvement.” To this end, the Judicial Conference publishes a biennial Legislative Platform that lists problems impacting the administration of justice in Ohio and identifies solutions to those problems. The month of May was a busy one for the Ohio General Assembly. The flurry of activity included the enactment of two bills that were part of the Ohio Judicial Conference Legislative Platform, House Bill 123 and Senate Bill 204.

House Bill 123, sponsored by Representatives Robert R. Cupp and Greta Johnson, authorizes a sentencing court to waive a presentence investigation report prior to placing a felony offender on community control as long as the prosecutor and offender also agree to waive the report. While presentence investigation reports are helpful and often vital to informing a sentencing court about an offender’s history, they can also be a burden on local resources and lead to delays in sentencing in cases where the judge, prosecution, and offender agree that the person should be placed on community control. The Act removes this costly and time consuming step under these circumstances.

Senate Bill 204, sponsored by Senator Bill Seitz, eliminates the mandatory driver’s license suspension for specified drug-related offenses, giving judges full discretion to decide whether the individual circumstances of a case warrant such a suspension. The Act is the second step in a two-step process that required the State to first pass resolutions opting out of a federal mandate tying federal highway transportation dollars to the enactment of mandatory license suspension laws. The Judicial Conference recommended this change because we believe that judicial discretion to fashion a sentence that is appropriate to each offender based on the individual circumstances of each case improves the administration of justice and public confidence in the law.

Over the summer, we will begin work on our Legislative Platform for 2017-2018. We encourage judges to contact us with any ideas that you may have for improvements to the administration of justice and encourage legislators to review our platform and contact us if you are interested in sponsoring any of our proposals.

Sincerely,

Ohio Judicial Conference Staff

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THE OJC IS AN INTEGRAL PART OF THE JUDICIAL BRANCH OF GOVERNMENT.

With every sitting judge in Ohio in its membership, the Ohio Judicial Conference is *the* voice of Ohio's judges. The Conference is organized into 20 working committees that review statutes, legislation, and court rules, and make recommendations aimed at improving the administration of justice. The Conference provides critical analysis of legislative initiatives and makes suggestions for reform and modernization through its legislative platform. The Conference publishes reports, impact statements, enactment news, policy statements, model rules, bench books, resource guides, and newsletters, and writes the Ohio Jury Instructions. The Conference advances judicial and legal education through continuing legal education events in collaboration with the Ohio Judicial College and Ohio State Bar Association.

THE OJC GIVES YOUR LOCAL JUDGES A FORUM, A RESOURCE, AND A VOICE.

The members of the Judicial Conference are kept apprised of legislative developments that impact court administration, criminal, civil, traffic, probate, domestic relations, and juvenile law. The Conference enables judges, who often have divergent opinions individually, to build consensus and speak with one voice. It acts as a forum for them to review and render opinions on the construction and effect of legislation, rules proposals, and other initiatives, and to suggest statutory and rule changes to address problems plaguing the administration of justice. It provides a meaningful way for judges to maintain effective communications with their colleagues, learn about changes in the law, and share ideas for implementation in Ohio's diverse communities.

THE OJC PROVIDES LEGISLATORS INSIGHT, INFORMATION, AND ANALYSIS.

Judges solemnly respect the distinct and separate roles of the legislature, judiciary, and executive branches of government. The Ohio Judicial Conference was statutorily created to serve the Ohio Legislature by providing insight into proposed legislation that could impact courts. The Conference strives to be a resource to the members of the General Assembly. All legislators have access to the Ohio Judicial Conference as a source of judicial feedback, research, and recommendations. Judges are in a unique position to provide early insight and perspectives on the practical impact of changes in the law that will help to avoid unintended consequences and protracted litigation. The combined experience of the Conference's judges give legislators insight that otherwise might be overlooked, to the detriment of the legislative process and the uniform administration of justice.

THE OJC HELPS TO INSTILL PUBLIC CONFIDENCE IN THE JUDICIARY.

Public confidence in the judiciary is one of the priorities of the Ohio Judicial Conference. When the Conference reviews bills, a significant and practical focus is how that bill will impact the public's access to the courts, their ability to obtain justice, and their right to be treated fairly under the law. Another of the Conference's priorities is to provide the General Assembly with insight on how legislation impacts court caseload and workload, insight that helps control the costs to the public of operating Ohio's courts.

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ELEMENTS OF A CRIME AND AFFIRMATIVE DEFENSE

In 2004, a Clark County grand jury indicted Dr. William Nucklos on ten counts of drug trafficking and ten counts of illegal processing of drug documents. The indictment alleged that Dr. Nucklos, in violation of R.C. 2925.03, prescribed painkilling drugs to his patients. RC. 2925.03 contains a licensed-health-professional exception, under which the prohibition against drug-trafficking “does not apply” to “licensed health professionals authorized to prescribe drugs.” At trial, Dr. Nucklos claimed this exception applied to him but a jury found him guilty on all counts. Dr. Nucklos appealed, citing the court’s instruction to the jury about, and the jury’s application of, the licensed-health-professional exception.

Eventually, in *State v. Nucklos*, 121 Ohio St.3d 332, 2009-Ohio-792, the Ohio Supreme Court held that the “this section does not apply” language in the drug trafficking statute is an exception to criminal liability with the burden on the state to show the exception does not apply. Previous appellate court decisions (*State v. Hassell* in 1993, *State v. Carras* in 1992, and *State v. Little* in 1991) had characterized the “does not apply” language as an affirmative defense.

The difference is legally significant, because it determines who bears the burden of proof in court: does the state bear the burden to show the existence (and possible non-existence) of all the elements of the crime or does the defendant bear the burden to show that, although he committed the crime, a statutory exception gives him a defense? The judge and the jury need to know.

There have been several cases after *Nucklos*, including *State v. Durbin* and *City of Brook Park v. Basham*, both in 2012. Case law has extended the *Nucklos* rationale so that arguably unintended consequences emerge because *Nucklos* permits different statutory provisions that fall within the same “does not apply” subsection to be construed independently, with some subsections constituting an affirmative defense and other subsections not.

As the Criminal Recodification Committee wraps up its work, it has an opportunity to craft a uniform application of Code sections that create an exception or “does not apply” in certain circumstances. This would clear up some of the confusion created with cases post-*Nucklos*. The Ohio Judicial Conference has identified a “Nucklos fix” as one of its legislative platform items and wholly supports any change to the Code that would result in a uniform approach to affirmative defenses and instructions to a jury regarding them.

Court Funding and Fiscal Emergency

The Ohio Judicial Conference's Executive Committee recently adopted a statement regarding courts in counties or municipalities that have been determined, by the Auditor of State, to be in a state of fiscal emergency. Some background may be useful to understanding the statement that was adopted.

Article IV of the Ohio Constitution vests judicial power "in a supreme court, court of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be established by law." The judiciary is a separate and co-equal branch of government, with separate and distinct powers and responsibilities. When the Ohio Constitution vests judicial power in the courts, it is granting certain inherent powers to the courts that enable them to safeguard their capacity to perform constitutionally and statutorily mandated judicial functions. One such power is the inherent power of the judge to determine what funding is "reasonable and necessary" for the operation of the court and to properly administer justice.

Even in the best of circumstances, judges and their funding authorities occasionally encounter conflicts over the amount of funding which is "reasonable and necessary" for the courts to operate effectively. These conflicts can be exacerbated if a funding authority has been determined to be in fiscal emergency. The statement adopted by the Judicial Conference's Executive Committee encourages a court, whose funding authority is in fiscal emergency, to cooperate with the Auditor of State's Financial Planning and Supervision Commission, where possible, without sacrificing the ability to perform constitutionally and statutorily mandated judicial functions. It also encourages the court and the Auditor to utilize dispute resolution services provided by the Supreme Court if a budget agreement cannot be reached through the standard budget process. The statement is as follows:

- 1) The Judicial Conference recognizes that fiscal emergency is detrimental to the court, the funding authority, and their mutual constituents, and that all affected parties need to work cooperatively to achieve the best possible outcome for all concerned.
- 2) When a funding authority is found by the Auditor to be in Fiscal Emergency the court will cooperate with the Auditor of State's Financial Planning and Supervision Commission, the Supreme Court of Ohio, or other consultants designated by the Supreme Court to identify areas where the court can assist the funding authority with cost savings.
- 3) The Judicial Conference recognizes that the Supreme Court of Ohio should be notified regarding the existence of a fiscal emergency and that the court and auditor should go to mediation provided through the Supreme Court of Ohio Commission on Dispute Resolution should such mediation become necessary.
- 4) The court will consider all recommendations and balance the need for the efficient administration of justice with the need to assist the funding authority in fiscal emergency.

The Judicial Conference is part of a collaborative project on the local budget process that exists to improve understanding among the branches of government and clarify procedures for participants in the local budget process. The Judicial Conference plans to include the above statement in the next edition of the Budget Resource Handbook, a tool developed through this collaborative project.

*blue text denotes a bill that impacts the courts

Referred to House Judiciary Committee:

Referred to House Government Accountability and Oversight Committee:

Referred to House State Government Committee:

Referred to House Local Government Committee:

Referred to House Financial Institutions and Family Advancement Committee:

Referred to Special House Medical Marijuana Committee:

Referred to Senate Civil Justice Committee:

- SB 323, **Child Abuse-Neglect Reporting**, introduced 5.2.16 *THIS BILL IS NOT EXPECTED TO HAVE A SIGNIFICANT IMPACT ON THE COURTS.*
- SB 328, **Host Family Affidavits**, introduced 5-10-16 *THIS BILL IS BEING REVIEWED BY JUVENILE LAW AND PROCEDURE COMMITTEE*

Referred to Senate Criminal Justice Committee:

Referred to Senate Government Oversight Committee

- SB 321, **Public Records**, introduced 5.2.16 *THIS BILL IS NOT EXPECTED TO HAVE A SIGNIFICANT IMPACT ON THE COURTS.*
- SB 329, **Sunset Review Committee-Abolish**, introduced 5-12-16 *THIS BILL IS NOT EXPECTED TO HAVE A SIGNIFICANT IMPACT ON THE COURTS.*
- SB 330, **Dental Therapists License**, introduced 5-17-16 *THIS BILL IS NOT EXPECTED TO HAVE A SIGNIFICANT IMPACT ON THE COURTS.*

Referred to Senate State and Local Government Committee:

- SB 322, **Chief of Police Training Course**, introduced 5.2.16 *THIS BILL IS NOT EXPECTED TO HAVE A SIGNIFICANT IMPACT ON THE COURTS.*
- SB 327, **Oil-Gas Law Revision**, introduced 5.5.16 *THIS BILL IS NOT EXPECTED TO HAVE A SIGNIFICANT IMPACT ON THE COURTS.*