SMU | Dedman School of Law

SMU Law Review

Volume 22 | Issue 5 Article 9

1968

Competency To Stand Trial - Pre-Trial Procedures

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NOTES

Competency To Stand Trial — Pre-Trial Procedures

Mental unsoundness raises two distinct problems in criminal law: (1) non-responsibility for the alleged offense by reason of insanity, and (2) competency to stand trial. "Insanity" is related to the accused's mental status at the time of the crime; on the other hand, "incompetency" relates to his mental status at the time of trial. Although the rule against trying an incompetent person is well established, the procedure for its implementation is not. The revised Texas Code of Criminal Procedure includes a new attempt to remedy previous procedural difficulties. However, the shortcomings of the new statute are illustrated by the first case[1] arising under its provisions. This Note will attempt to depict these inadequacies, as well as analyze possible statutory modifications available to future revisors of the Code of Criminal Procedure and the Penal Code.

I. Development of the Preliminary Hearing on Competency To Stand Trial

The competency rule was rooted in the common law as a by-product of the ban against trials *in absentia*—the mentally incompetent defendant, though physically present in the courtroom, was in reality afforded no opportunity to defend himself.[2] Accordingly, when a defendant was found to be incompetent,[3] trial on the merits,[4] punishment,[5] or execution[6] was barred until such time as he had regained mental competency. Although the early cases considered it inhuman[7] and unconstitutional[8] to bring the incompetent defendant to trial, the procedure for dealing with incompetency pleas was uncertain. When the question of competency was raised *before* the trial, the trial court, in the absence of statutes, had wide discretion in calling and conducting a competency examination.[9] Engaging

[1] Townsend v. State, 427 S.W.2d 55 (Tex. Crim. App. 1968).

[2] For a history of the rule, *see, e.g.*, Youtsey v. United States, 97 F. 937, 940-46 (6th Cir. 1899). Under this rule it was irrelevant that the accused might have been sane at the time of commission of the offense. Commonwealth v. Endrukat, 231 Pa. 529, 80 A. 1049 (1911).

[3] The generally accepted test of incompetency was: Has the defendant capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense? Guagando v. State, 41 Tex. 626 (1874). *See* H. Weihofen, Insanity As a Defense in Criminal Law 335 (1933).

[4] Moss v. Hunter, 167 F.2d 683, 685 (10th Cir. 1948), *cert. denied*, 334 U.S. 860 (1948); Guagando v. State, 41 Tex. 626 (1874). *See also* Annot., 3 A.L.R. 94 (1918).

[5] Duncan v. State, 110 Ark. 523, 162 S.W. 573 (1913); State v. Helm, 69 Ark. 167, 61 S.W. 915 (1901); People v. Lawson, 178 Cal. 722, 174 P. 885 (1918); People v. Wolfe, 198 Misc. 695, 103 N.Y.S.2d 479 (Kings County Ct. 1950).

[6] *Ex parte* Chesser, 93 Fla. 590, 112 So. 87 (1927); People v. Geary, 298 Ill. 236, 131 N.E. 652 (1921); State v. Genna, 163 La. 701, 112 So. 655 (1927).

[7] Nobles v. Georgia, 168 U.S. 398 (1897); People v. Perry, 14 Cal. 2d 387, 94 P.2d 559 (1939), Annot., 124 A.L.R. 1123 (1939); People v. Jackson, 105 Cal. App. 2d 811, 234 P.2d 261 (1951); Jordan v. State, 124 Tenn. 81, 135 S.W. 327 (1911).

[8] United States *ex rel.* Mazy v. Ragen, 149 F.2d 948 (7th Cir.), *cert. denied*, 326 U.S. 791 (1945); United States v. Chisolm, 149 F. 284 (C.C.S.D. Ala. 1906); Youtsey v. United States, 97 F. 937 (6th Cir. 1899); Martin v. Settle, 192 F. Supp. 156 (W.D. Mo. 1961); United States v. Gundelfinger, 98 F. Supp. 630 (W.D. Pa. 1951).

[9] H. Weihofen, *supra* note 3, at 346.

a jury for the competency determination was within the trial judge's discretion, for he was free to use any method which was discreet and convenient.[10] The pre-trial determination of the judge generally was sustained unless it was clearly arbitrary.[11]

Statutes now have codified rules concerning the determination of competency in all states.[12] In addition, the United States Supreme Court recently declared in *Pate v. Robinson*[13] that trial and conviction of an incompetent defendant constitutes a denial of due process and that state procedures must be adequate to protect this right. Although the *Pate* Court held that the defendant is entitled to a "special hearing" to determine his competency to stand trial, it did not formulate specific due process requirements.[14]

II. Texas Developments

Pre-1966 Development. The various pre-1966 Texas cases and legislative enactments reflect considerable confusion between the concepts of competency to stand trial and insanity.[15] Both statutes and cases referred to incompetency and insanity[16] as though the only distinguishing feature was the time element.[17]

In *Guagando v. State*[18] the Texas Supreme Court permitted the defendant to litigate the issue of incompetency prior to the trial on the criminal charge. Because there were no existing statutes on this procedure, the *Guagando* holding was later described by a Texas court as a "judicial invention of a procedural device for assertion of the right not to be tried while insane . . . ."[19] Subsequent cases held that the submission of the issue of competency along with the issue of guilt to the same jury at the end of the trial on the merits constituted reversible error.[20] In *Ramirez v. State*[21] the court recognized the necessity of bifurcation to determine the

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[10] Hess, Pearsall, Slichter, Thomas, *Criminal Law—Insane Persons—Competency To Stand Trial*, 59 MICH. L. REV. 1078, 1079 (1961).

[11] People v. Aparicio, 38 Cal. 2d 565, 241 P.2d 221 (1952); People v. Rosner, 78 Cal. App. 497, 248 P. 683 (1926).

[12] *See, e.g.*, ILL. REV. STAT. ch. 38, § 104-2 (1963), which the United States Supreme Court examined in Pate v. Robinson, 383 U.S. 375 (1966).

[13] 383 U.S. 375 (1966).

[14] If the hearing must take place before a jury, must it be a jury other than the convicting jury? In an analogous situation, the United States Supreme Court determined that due process would be satisfied only with a bifurcated trial. Jackson v. Denno, 378 U.S. 368 (1964). The Court disapproved of the same jury determining the voluntariness of a confession and then determining its probative value in establishing guilt or innocence. The Court emphasized the necessity for two separate juries to determine the two issues.

[15] *Ex parte* Hodges, 166 Tex. Crim. 433, 314 S.W.2d 581 (1958); Freeman v. State, 166 Tex. Crim. 636, 317 S.W.2d 726 (1958), where the court held, in effect, that there was no significant distinction to be drawn between incompetency to stand trial and insanity as a defense to an alleged crime.

[16] Insanity is a defense under a plea of not guilty and is properly presented at the trial on the merits. King v. State, 9 Tex. Ct. App. R. 515, 544 (1880).

[17] Tex. Laws 1937, ch. 466, art. 932a, at 1172; Tex. Laws 1957, ch. 486, art. 932b, at 143.

[18] 41 Tex. 626 (1874).

[19] State v. Olsen, 360 S.W.2d 398 (Tex.), *rehearing denied*, 163 Tex. 449, 360 S.W.2d 402 (1962). *See also* Woodley, *Insanity as a Bar to Criminal Prosecution*, 3 So. TEX. L.J. 204 (1958).

[20] Soderman v. State, 97 Tex. Crim. 23, 260 S.W. 607 (1924); Ramirez v. State, 92 Tex. Crim. 38, 241 S.W. 1020 (1922).

[21] 92 Tex. Crim. 38, 241 S.W. 1020 (1922).

issue of incompetency and the issue of insanity, noting that much confusion would arise if both issues were submitted at the same trial. The court also observed that the defendant likely would be prejudiced if he attempted to present incompetency issues to the same jury which heard the inflammatory details of the corpus delicti.[23]

The first Texas statute delineating the procedure for determining incompetency, article 932a, was enacted in 1937.[23] The statute not only was ineffective in describing the circumstances under which a preliminary hearing was available;[24] it also was imprecise in separating incompetency and insanity.[25] Article 932a provided for the submission of the issues of incompetency and insanity at the preliminary hearing and at the trial on the merits.

In 1957 article 932a was repealed by article 932b[26] which, unfortunately, was a procedural regression. Article 932b also permitted the issue of insanity to be submitted as a "second issue"[27] at the preliminary competency hearing. The difference between article 932a and article 932b was the effect of the submission of the issue of insanity at the preliminary hearing. Under article 932b, a finding of insanity at the preliminary hearing resulted in acquittal, the same as if the insanity finding were made by the jury at the trial on the merits.[28] Thus, under article 932b it was possible for an accused to be found not guilty of an alleged offense even though the indictment was not read, the plea was not entered, and the trial on the merits for the criminal charge never held.[29] As a result, the courts were jammed with requests for preliminary hearings,[30] thereby undermining the purpose of the preliminary competency hearing. The unavoidable delays of the trial on the merits and dissatisfaction with multiple trials and multiple juries led to the recent change in the Code of Criminal Procedure.[31]

Interpreting the New Code Provisions—The Townsend Decision. Article 46.02 of the new Code does not merely amend or revise the provisions of article 932b. It attempts to establish new and better rules for dealing with the issue of mental unsoundness.[32] To avoid a multiplicity of juries, com-

[23] "If he be now insane, the fair decision of the issue should not be clouded and prejudiced by the introduction of the facts involving a bloodcurdling murder—facts which alone might so stir the minds of the jury as to make difficult the exercise of calm judgment upon the question of present insanity." *Id.* at 38, 241 S.W. at 1021.

[23] Tex. Laws 1937, ch. 466, art. 932a, at 1172.

[24] State v. Olsen, 360 S.W.2d 398 (Tex.), *rehearing denied*, 163 Tex. 449, 360 S.W.2d 402 (1962).

[25] Morgan v. State, 135 Tex. Crim. 76, 117 S.W.2d 76 (1938).

[26] Tex. Laws 1957, ch. 486, art. 932b, at 143.

[27] Insanity could not be the sole issue at the preliminary hearing.

[28] *See* Woodley, *supra* note 19.

[29] *In re* Hillyer, 372 S.W.2d 342 (Tex. Crim. App. 1963).

[30] *See* Woodley, *supra* note 19.

[31] *Id.*

[32] However, TEX. CODE CRIM. PROC. ANN. art. 46.02, § 1 (1965) does not clarify the distinction between incompetency and insanity. The article places incompetency under the rubric "insanity."

petency can be tried in advance of trial on the merits only with consent of the state's attorney and approval of the judge.[33] Thus, if the accused requests an advance determination of competency and presents a reasonable basis for such request,[34] the prosecutor can nevertheless withhold his consent and compel the defendant to litigate incompetency along with the merits of the case.

Townsend v. State[35] is the first case interpreting the incompetency issue under the provisions of the new Code. In *Townsend* the trial judge appointed a psychiatrist who examined the defendant and reported him incompetent. The defendant's attorney then moved for a preliminary hearing solely on the issue of competency to stand trial. The prosecutor refused to consent to such proceeding and relied on the wording of section 1 of article 46.02[36] to prevent the trial judge from granting the motion.

On appeal, the court of criminal appeals was faced with the problem of reconciling the conflicting provisions of section 1 of article 46.02, article 34 of the Penal Code (which prohibits the trial of one who is "insane"),[37] and the holding of the United States Supreme Court in *Pate v. Robinson*.[38] The court of criminal appeals held that where the prosecutor's consent and approval to a preliminary hearing are not given, the trial judge is under the duty, after selection of the jury for trial on the merits and preferably before reading of the indictment,[39] to give the accused a hearing before the jury on the sole issue of his competency to stand trial. In this way, the court reasoned, the jury can determine competency uncluttered by evidence of the offense itself. Further, the court felt that this holding afforded the defendant a procedure for the preservation of his rights under article 34 of the Penal Code as well as satisfying the due process requirements of *Pate*.

In view of the statutory conflicts, the *Townsend* decision was a remarkable attempt to produce sound, working procedural rules for trying the issue of competency. However, *Townsend*, in addition to specifically declining to answer numerous procedural questions,[40] implicitly raises se-

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[33] TEX. CODE CRIM. PROC. ANN. art. 46.02, § 1 (1965).

[34] *E.g.*, a psychiatrist's certification of defendant's incompetency. *But see* Morales v. State, 427 S.W.2d 51 (Tex. Crim. App. 1968).

[35] 427 S.W.2d 55 (Tex. Crim. App. 1968). Morales v. State, 427 S.W.2d 51 (Tex. Crim. App. 1968), relied on the *Townsend* decision concerning incompetency proceedings. *Morales* clarifies a point left dangling in the *Townsend* decision. The written motion asserting the defendant is of "unsound mind" need not be supported by a doctor's affidavit. The reasoning is that since the issue has been raised, it is the duty of the trial judge to inquire into the matter in the manner provided in *Townsend*.

[36] *See* note 33 *supra*, and accompanying text.

[37] TEX. PEN. CODE ANN. art. 34 (1958).

[38] *See* note 13 *supra*, and accompanying text.

[39] According to *Morales* the hearing could take place after the reading of the indictment.

[40] 427 S.W.2d at 61 n.5. The court observed that they were not deciding the question of whether, if a preliminary hearing is had, insanity as a defense may be submitted as a second issue. *See* TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2(b)(3) (1965). Neither does the opinion pass upon whether the defendant would be entitled to resubmission of the issue of incompetency at the trial on the merits after losing a preliminary hearing before a different jury on that issue. Further, the procedure does not specify conditions for securing medical observation and testimony on behalf of the accused in the event the same has not been secured prior to the trial.

mantic[41] and constitutional problems.[42] Major considerations left unresolved are (1) the distinctions between incompetency and insanity, (2) whether a jury is necessary to determine incompetency, (3) whether the same jury should decide the separate issues of incompetency and insanity, and (4) the practical application of any incompetency procedure. All of these problems could and should be resolved in future revisions of the Penal Code and Code of Criminal Procedure.[43]

III. Alternate Proceedings To Determine Incompetency

At least two methods for the administration of incompetency procedures are available to future Texas code revisors. The first method reflects the present trend away from jury involvement;[44] the second maintains the role of the jury in determining incompetency. The first approach is to adopt the provisions of the Model Penal Code.[45] Where proper and timely demand for a preliminary hearing on incompetency is made by a defendant, the Model Code requires that the defendant be examined by at least

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[41] Townsend v. State, 427 S.W.2d 55, 62-63 (Tex. Crim. App. 1968): "If such consent and approval are not given, he is not entitled to such a preliminary hearing before a jury" and "the trial judge is nevertheless under the duty . . . to forthwith afford the accused a hearing on his competency to stand trial" appear contradictory. To construe these statements otherwise is to expand and contract the meaning of a "preliminary hearing" as the situation warrants.

[42] The optional consent of the prosecutor, provided in Tex. Code Crim. Proc. Ann. art. 46.02, § 1 (1965), and approved by *Townsend*, may run afoul of the equal protection clause of the fourteenth amendment. The prosecution may opt to allow bifurcation in the case of one man who claims incompetency, and not in the case of another. The article sets out no classification criteria to substantiate the option. The Constitution requires, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated. By exercising his option of consent, the prosecutor thus "classifies" the defendant into one of two available slots. In one slot the defendant, by virtue of the prosecutor's consent, is accorded a preliminary hearing before a jury other than the jury determining guilt or innocence. In the other slot, by virtue of withheld consent, the defendant presents his incompetency plea before the same jury hearing the trial on the merits. The classification, then, rests upon the arbitrary exercise of option by the prosecutor, unsubstantiated by any criteria, unreviewable by an appellate court, for reasons unknown to anyone other than the prosecutor himself.

[43] The new Code sought to abolish the preliminary trial on the issue of insanity. In March 1966, the U.S. Supreme Court in *Pate v. Robinson*, held that as [a] matter of constitutional right an accused is entitled to 'a special hearing' on the question of his competence to stand trial when the question is raised.

The State Bar Committee is presently working on a re-draft of our insanity statutes to meet the requirements of this case.

Morrison & Bowmer, *Recommended Changes Code of Criminal Procedure*, 29 Tex. B.J. 1003, 1056 (1966). "We are making clear distinctions between 'insanity,' which refers to a defendant's mental state at the time of the offense, and 'competency,' which refers to the question of the defendant's ability to stand trial, to be convicted, or to be sentenced. We have developed a separate test and procedure for the determination of the competency issues." *Penal Code Revision*, 31 Tex. B.J. 622, 626 (1968) (report by Page Keeton). It has even been suggested that the entire process be completely revamped. *See* Cohen, *Insanity and Incompetency, Federal and Texas*, University of Texas School of Law, Criminal Procedure Institute (paper No. 4, delivered Oct. 13-15, 1966).

[44] While most jurisdictions do not require a jury determination of incompetency to stand trial, the *Townsend* decision stated that "it would appear that Texas law would." 427 S.W.2d at 58. This reasoning is based on Tex. Const. art. I, § 15, which provides that the right of a trial by jury shall remain inviolate. But incompetency is determined at a "hearing" while insanity is litigated at a "trial." Thus, an incompetency hearing could be determined without a jury and not run contra to the Texas constitutional requirements. If the assertion is made that the incompetency proceeding is a "trial," then the provisions of Tex. Pen. Code Ann. art. 34 (1958) become complete nonsense.

[45] Model Penal Code §§ 4.01-.09 (Tent. Draft. No. 4, 1955).

one court-appointed psychiatrist.[46] If either party contests the findings of the psychiatrist, the psychiatrist who made the determination is summoned and cross-examined, and further evidence of the issue may be offered before the court.[47] This procedure avoids the multiplicity-of-juries problem while entitling all defendants to the same procedure. Also, the psychiatrist, unhampered by the problem of communicating his findings in terms meaningful to a jury, can give a technical diagnosis of the defendant's condition.

The second method involves the combination of the Model Penal Code and the requirement of a jury determination.[48] By this method the defendant, supported by a written motion asserting that he is of "unsound mind," would have a right to a preliminary hearing on incompetency before a jury other than the convicting jury. The jury should be instructed thoroughly on the test for incompetency,[49] and the hearing should be confined solely to the incompetency issue.[50] No statement made by the accused in the course of prior examinations or during the incompetency hearing should be admitted as evidence on the issue of guilt in any later proceedings.[51] This second method would return Texas procedure to the path suggested long ago in *Ramirez v. State*.[52] Although the bifurcated trial technique may be costly and time-consuming,[53] it seems that cost and time should not be determinative when defendant's constitutional rights are at stake. Indeed, the United States Supreme Court's decisions requiring that indigents be provided counsel in criminal cases[54] and that trials with many complex issues be bifurcated[55] do not give determinative weight to the cost or time factors.

IV. CONCLUSION

Most of the problems of the Texas competency procedures stem from deviation from the original purpose of such proceedings, which was to afford the incompetent defendant protection from trial.[56] The Penal Code

[46] *Id.* § 4.05(1). Further, the court may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.

[47] *Id.* § 4.06(1). In this respect the Model Penal Code is an improvement of the federal statute concerning incompetency, 18 U.S.C. § 4244 (1964).

[48] The legislature clearly intended the jury determination of incompetency under TEX. CODE CRIM. PROC. ANN. art. 46.02, § 2 (1965). However, it is questionable whether the legislators ever considered a determination by the judge as being constitutional. *See* note 44 *supra*.

[49] The jury should likewise be instructed that a determination of incompetency results in defendant's commitment, while a determination of competency results in the defendant proceeding to the trial on the merits.

[50] Insanity is a complete defense under a plea of not guilty and is properly presented at the trial on the merits. *See* note 16 *supra*. Any determination of insanity prior to the trial on the merits is premature and improper. *See* note 19 *supra*.

[51] *See* Dalton, *Pretrial Mental Examinations in Maine: Are They Mechanisms for Compelling Self-Incrimination?*, 18 ME. L. REV. 96 (1966). Dalton notes that problems of self-incrimination arise when the accused makes statements of guilt during an examination, and concluded that the California method of post-trial determination of insanity is better.

[52] *See* note 21 *supra*, and accompanying text.

[53] Comment, *Compulsory Mental Examinations and the Privilege Against Self-Incrimination*, 1964 WIS. L. REV. 671, 681.

[54] Gideon v. Wainwright, 372 U.S. 335 (1963).

[55] Jackson v. Denno, 378 U.S. 368 (1964).

[56] *E.g.*, Tex. Laws 1937, ch. 466, art. 932a, at 1172; Tex. Laws 1957, ch. 486, art. 932b, at 143; and TEX. CODE CRIM. PROC. ANN. art. 46.02, §§ 1-2 (1965).

and Code of Criminal Procedure Revision Committees have undertaken the formidable task of developing precise distinctions between insanity and incompetency for presentation to the 1971 Texas Legislature.[57] One may expect to see (1) terminological changes that reflect the different problems presented by mental unsoundness, (2) a mandatory preliminary hearing on incompetency, (3) specific guidelines on jury involvement in determining incompetency, and (4) the articulation of the various criteria to be used in making each decision.

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The Doctrine of Most Significant Contacts in Texas: Marmon v. Mustang Aviation, Inc.

In November 1964, an airplane owned by Mustang Aviation crashed in Colorado, killing the four persons aboard. Three of the passengers were Texas residents. All were employed by and on a business trip for a Texas corporation. The aircraft was rented in Texas and had been hangared, maintained, and licensed in Texas. The only contact the decedents had with Colorado other than the accident was a one-hour stopover for refueling and weather information.[1]

Nevertheless, in the ensuing wrongful death action brought in Texas, the defendant airline contended that the law of Colorado was applicable since the accident occurred there and Texas traditionally followed the rule of lex loci delicti.[2] The Colorado statute, however, allows a maximum recovery of only $25,000 for wrongful death. To avoid this limitation the plaintiffs argued that the lex loci delicti rule should be abandoned in favor of the emerging doctrine of "most significant contacts."[3] Under the "most significant contacts" rationale, the law of the jurisdiction with the most significant relationship with the parties is applied. Thus the doctrine, if adopted, would make Texas law applicable to the case.[4]

Refusing to follow plaintiff's suggestion, the trial court applied the Colorado limitation on recovery. The court of civil appeals, affirming the trial court, refused to adopt the "most significant contacts doctrine," and held that the substantive law of the place of the tort governed,[5] that the amount of damages was substantive, and that Colorado limitation on recovery must therefore be applied. In reaching this decision, the court reasoned that article 4678,[6] giving Texas citizens the right to maintain an action in Texas courts for wrongful death occurring in another state or foreign country, made Colorado law applicable to determine the extent of

[57] *See* note 43 *supra.*

[1] Marmon v. Mustang Aviation, Inc., 416 S.W.2d 58 (Tex. Civ. App. 1967).

[2] RESTATEMENT OF CONFLICT OF LAWS § 379 (1934). The lex loci delicti doctrine provides for the application of the laws of the state where the injury occurred; J. BEALE, A TREATISE ON THE CONFLICT OF LAW 1933-34 (1935).

[3] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1965), which advocates the application of the "local law of the state which has the most significant relationship with the occurrence and with the parties."

[4] TEX. REV. CIV. STAT. ANN. arts. 4671-78 (1952). This would allow the plaintiffs to avoid the Colorado limitation and have an unlimited recovery as provided by Texas Law.

[5] Marmon v. Mustang Aviation, Inc., 416 S.W.2d 58 (Tex. Civ. App. 1967).

[6] TEX. REV. CIV. STAT. ANN. art. 4678 (1952).