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“Insanity” At Time Of Trial

Rowe v. State

Defendant pleaded not guilty to a charge of murder. He later added a special plea that he was insane at the time of the commission of the act (insane then). On the day of the trial, he filed an additional plea that he was insane at the time of trial (insane now). The jury found that the defendant was sane “then” and insane “now” and returned a verdict of guilty of murder in the “second degree.”

The Maryland Court of Appeals, in a four to three decision, held that the trial court should not have received the verdict on the issue of guilt or innocence when the jury had also found that the defendant was insane at the time of trial. The court, however, went on to sustain the trial court’s instructions that the jury should apply the same test (the M’Naghten test) with respect to the pleas of insanity “then” and insanity “now”, that test being whether the defendant had sufficient capacity and reason to enable him to distinguish right from wrong and to understand the nature and consequences of his act. By accepting this instruction, the Maryland court has established a test for insanity at the time of trial contrary to logic and to the weight of authority.

Most states have codified the common-law rule that an accused person cannot be tried while “insane” or suffering from “insanity.” Some statutes do not use the word

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1 234 Md. 206, 199 A. 2d 785 (1964).
2 The decision was delivered after reargument. Judge Horney wrote the opinion for the majority. Judge Henderson delivered the dissenting opinion in which Chief Judge Brune and Judge Hammond concurred.

The procedure for determining defendant’s capacity to stand trial varies with the jurisdiction. Among these diverse statutory procedures are provisions adopting the common-law approach by which the trial judge has
“insane,” but instead forbid the trial of an accused if he is “mentally ill,” 6 suffering from a “mental disease or defect,” 6 a “lunatic or habitual drunkard,” 7 or “mentally defective.” 8 Those using the word “insane” frequently contain additional terms such as “lunatic,” 9 “mentally defective,” 10 “idiot,” 11 “imbecile,” 12 “feeble-minded,” 13 and “men-

discretionary power either to determine the defendant’s mental capacity to make a rational defense or to impanel a jury to decide the question. KAN. GEN. STAT. ANN. § 62-1531 (1949); MICH. STAT. ANN. § 28.967 (Supp. 1963); OHIO REV. CODE ANN. tit. 29, § 2945.37 (Page 1953); provisions for a hearing by the court which do not specifically state whether the judge may impanel a jury, e.g., CONN. GEN. STAT. ANN. § 54.40 (1960); IND. STAT. ANN. § 9-1706a (Burns Cum. Supp. 1964); N.D. CENT. CODE § 29-02.01 (1960); provisions which seem to indicate that the trial of the issue will be by the judge without a jury; e.g., 15 U.S.C.A. § 4244 (1968); N.Y. CONSOL. LAWS ANN. § 665 (McKinney 1958); UTAH CODE ANN. § 77-48-5 (Supp. 1963); and provisions for a mandatory jury trial, e.g., GA. CODE ANN. § 27-1502 (1953); IDAHO CODE § 19-3302 (1947); OKLA. STAT. ANN. tit. 22, § 1162 (1951). Only about a dozen states and the federal courts exclude the use of a jury to decide the defendant’s mental competency, MODEL PENAL CODE § 4.06, comment (Tent. Draft No. 4, 1955). See also IND. STAT. ANN. § 9-1706a (Burns Supp. 1964), which provides the same basic procedures as those cited by the Code. This procedure, which is recommended by the ALI, MODEL PENAL CODE § 4.06 (Tent. Draft No. 4, 1955), reflects the current trend. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 447 (1964). Similarly, there has been an increased use of experts in the determination of mental competency, LINDMAN & MCLINTYRE, THE MENTALLY DISABLED AND THE LAW 361 (1961); WEIHOFEN, op. cit. supra, at 449; Slough & Wilson, Mental Capacity to Stand Trial, 21 U. PITT. L. REV. 568, 609-11 (1960).

Frequently, the statutes or courts have outlined the test of insanity “now,” and have stated who will make the determination, without actually requiring that the trier of the fact apply that test. WEIHOFEN, op. cit. supra, at 439. But see COLO. REV. STAT. ANN. § 39-8-6 (8) (1953), which states that “the jury shall be so instructed: The defendant is not to be considered insane if he has sufficient intelligence to understand the nature and object of the proceeding against him and to rightly comprehend his own condition with reference to such proceeding, and has sufficient mind to conduct his defense in a rational and reasonable manner, although on some other subject his mind may be deranged or unsound.” (Emphasis added.) For court decisions which reach the same result, see BROWN v. STATE, 215 GA. 784, 113 S.E. 2d 618 (1960) and Bingham v. State, 82 Okla. Crim. App. 5, 165 P. 2d 646 (1946).

  * N. MEX. STAT. ANN. § 41-13-3 (1953).
  * ARK. STAT. ANN. § 41-110 (1947); MINN. STAT. ANN. § 611.026 (1964); NEB. REV. STAT. § 29-1822 (1956); N.Y. CONSOL. LAWS ANN. 1120 (McKinney 1944).
  * CONN. GEN. STAT. ANN. § 54-40 (1960); N.D. CENT. CODE § 29-20-01 (1960); ORE. REV. STAT. § 136.150 (Supp. 1968).
  * KAN. GEN. STAT. ANN. § 62-1531 (1949); MINN. STAT. ANN. § 611.026 (1964); N.Y. CONSOL. LAWS ANN. § 1120 (McKinney 1944).
  * KAN. GEN. STAT. ANN. § 62-1531 (1949); MINN. STAT. ANN. § 611.026 (1964); N.Y. CONSOL. LAWS ANN. § 1120 (McKinney 1944).
tally incompetent".\(^\text{14}\) In any case, the result is the postponement of the trial until the defendant has recovered.

By themselves, such terms are inadequate in that they are imprecise and do not set forth a test of insanity which reflects the reasons for making an inquiry into a defendant's capacity to stand trial.\(^\text{15}\)

The proper test to be used in judging the accused's capacity to stand trial is quickly revealed when there is an understanding of why the inquiry is made. Basically there are two reasons for requiring that the defendant possess a certain level of mental competence before he is asked to stand trial.\(^\text{16}\) The first is that the defendant's assistance, or as much as he chooses to provide, will aid his counsel in developing the facts of the case. The testimony of witnesses can be compared to the defendant's version, discrepancies can be investigated, and the accused may take the stand and give an account of the incident in his own words. It is only with the assistance of a competent defendant that the jury is made aware of all the facts and circumstances of a case. If the defendant is unable to appreciate the proceedings against him or the value of certain evidence, information which only he possesses may never be made known, he will be deprived of his complete defense, and will not, in fact, be tried on the merits. The second reason goes to the concept of fundamental fairness in the trial proceedings. Every criminal defendant is accorded the right to choose and assist his counsel, to act as a witness in his own behalf, and to confront opposing witnesses. A trial where the defendant is mentally incapable of exercising these rights is, in reality, a trial where these rights do not exist and where there is a deprivation of due process.\(^\text{17}\)

A growing number of states have statutes which properly reflect this line of reasoning. The Arizona provisions are typical.


\(^{15}\) For a general discussion of the many objections to the use of the words "insane" and "insanity" see PERKINS, CRIMINAL LAW 740-46 (1957). For a brief discussion of how the word "insanity" is being avoided by many doctors who feel that it has no medical meaning, see Thomsen, Insanity as a Defense to Crime, 19 MD. L. REV. 271, 280 (1959). See also Slough & Wilson, supra note 4, at 595.

\(^{16}\) See LINDMAN & MCINTYRE, op. cit. supra note 4, at 357-58; WEHOFEN, op. cit. supra note 4, at 429-30.

\(^{17}\) Youtsey v. United States, 97 Fed. 937, 941 (6th Cir. 1899); Flynn v. United States, 217 F. 2d 29 (9th Cir. 1954), cert. denied, 348 U.S. 930 (1955); People v. Burson, 11 Ill. 2d 360, 143 N.E. 2d 239 (1957). Cf. Massey v. Moore, 348 U.S. 105 (1954), where the Supreme Court said that a defendant might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel.
"If a defendant is committed to the state hospital for the reason that he is insane or mentally defective to the extent that he is unable to understand the proceedings against him or to assist in his defense, if charged with a crime, or for the reason that he is found insane after conviction and prior to pronouncing sentence, he shall be detained in the state hospital until he becomes sane."\(^{18}\)

In other states the courts have supplied proper tests. Iowa has held that there was reasonable doubt as to defendant's sanity at the time of trial when hospital physicians were convinced that defendant was presently "... insane and unable to properly make a defense."\(^{19}\) California has held that when an accused's sanity is in question he should be deemed sane for the purpose of being tried if he is capable of understanding the nature and object of the proceeding against him and can conduct his defense in a rational manner though his mind may be deranged or unsound on some other subject.\(^{20}\) The Illinois court has asserted the same test with the additional requirement that the defendant be able to cooperate with his counsel.\(^{21}\)

No court other than the Maryland Court of Appeals has applied the M'Naghten test when determining insanity "now". Some, in fact, have specifically stated that it is inappropriate in such an inquiry.\(^{22}\)

Maryland's statutory law dealing with "insanity" at the time of trial\(^{23}\) is, on its face, in line with the provisions of


other states. Article 59, Section 7 allows a defendant, at the time of pleading to the indictment or information, to file a plea "... alleging that the defendant was insane or lunatic at the time of the commission of the alleged crime, ... and/or that the defendant is insane or lunatic at the time of the trial." It is the task of the jury, when so directed by the court, to determine "... whether he [the defendant] be sane at the time of the trial." This is done at the conclusion of the trial, and the jury's finding as to "sanity now" is given at the same time the verdict is rendered on the question of guilt or innocence. The section also grants the trial court discretionary power and authority to order an examination of the mental condition of a defendant by the Department of Mental Hygiene at any time before trial.

Whenever the trial court orders an examination of the defendant as a preliminary matter, Section 9 provides that the Department of Mental Hygiene will inquire "... whether such person is at the time of such inquiry insane or lunatic, or of such mental incapacity as to prevent such persons from properly conducting his or her defense or advising as to the conduct of his or her defense..." If the Department finds the defendant unable to aid or conduct his defense, "the court shall in its discretion..." direct the person to a state mental institution until he has recovered, and the proceedings will be stayed until that time.

The only time the above statutes have been construed together was in Hamilton v. State. In that case, the court

24 The interpretation of the statutes and what they might mean in a situation such as the principal case has been a source of conjecture in the past. See Chasanow, Civil and Criminal Commitment of the Mentally Ill in Maryland, 21 Md. L. Rev. 279, 297-98 (1961).

25 Article 59, Section 7, states that the jury or the court is not required to state in its verdict that the person charged was sane at the time of the commission of the crime and/or sane at the time of the trial, and if it does not state as to the sanity of the defendant it shall be conclusively presumed that it found the defendant to be sane. The statute continues with the provision that in any case where the plea of insanity or lunacy is interposed, the court shall, upon application by the state or the defendant, or may, upon its own motion, direct any jury impanelled to try such case to find specially, by its verdict, whether the accused was sane at the time of the commission of the crime and whether he be sane at the time of trial. (Emphasis added.)


27 225 Md. 302, 170 A. 2d 192 (1961). The other cases citing Sec. 7 are Cook v. State, 225 Md. 603, 170 A. 2d 460 (1961), where the court declined to construe Sec. 7 when the issue was not clearly before it; Hazel v. State, 226 Md. 254, 263, 173 A. 2d 187 (1961), which said that Secs. 7, 9 and 11, are discretionary means by which the trial court may obtain information as to the defendant's sanity and are not mandatory conditions prior to proceeding with the trial; Tull v. State, 230 Md. 596, 188 A. 2d 150 (1963), which held that the trial court committed no error in not granting the
paraphrased Sections 7, 9 and 11\textsuperscript{28} and concluded that these sections should be read together. The court said that "... it is apparent that the statutes were enacted to provide, and in fact one of them (§ 9) specifically prescribes, a rule of procedure common to all by which to ascertain before trial whether or not a defendant charged with a criminal offense is capable of making a rational defense to the charge."\textsuperscript{29} If Sections 7 and 9 are read together, it would seem that the test set forth in Section 9 to be used by the Department of Mental Hygiene would also be the test to be used by the jury when, pursuant to Section 7, it determines "... whether he [defendant] be sane at the time of the trial." The majority of the court apparently rejected the interpretation furnished by the Hamilton case.

When the court in the principal case saw the word "sane" in Section 7, it concluded that "since the Legislature has not seen fit to provide a different test for determining insanity now, as distinguished from insanity then, and [since] the M'Naghten test has been applied in this state for some seventy-five years, it seems proper for the courts to continue to apply this test until such time as the Legislature changes the same."\textsuperscript{30}

The court refused to read into the word "sane" found in Section 7 the test found in Section 9 (whether a defendant has such mental capacity as to allow him to properly conduct his defense or advise his attorney as to its conduct). There seems to be little logic behind this. One might argue that the Section 9 test should not be applied in Section 7 because the two sections are distinguishable and mutually exclusive. A look at the two sections, how-

\textsuperscript{28} Section 11 deals with persons arrested and committed in default of bail to await further proceedings, and appears to be or is alleged to be insane or lunatic. Under this section, the court is authorized to commit him to an institution for the care of the insane. The Department is to examine him promptly and report its findings to the court.


\textsuperscript{30} 234 Md. 295, 305-06, 199 A. 2d 785 (1964).
ever, reveals three insignificant differences which are insufficient to support the conclusion that the test of capacity to stand trial set out in Section 9 was not intended to be applied in Section 7. These differences are the language used, the persons making the determination, and the stage in the proceedings at which the accused's capacity to stand trial is determined. There is, first of all, the use of the word "sane" used by itself without elaboration in Section 7; whereas what appears to be the proper test of competency to stand trial is spelled out in Section 9. Secondly, Section 7 states that the jury is finally to determine the defendant's sanity at time of trial; while under Section 9, the Department of Mental Hygiene may investigate, as a preliminary matter, the capacity to stand trial. The jury is entirely capable of applying the test used by the Department of Mental Hygiene. The jury has long applied the M'Naghten rule in determining criminal responsibility, for many years without the assistance of testimony by psychiatrists. The third difference has to do with the stage in the proceedings when a man's capacity to be tried is explored. Section 7 specifies the procedure to be used when a plea of insanity or lunacy is interposed at the trial, and provides that the jury must determine this matter; whereas Section 9 deals with the determination of capacity to stand trial as a pre-trial matter. Logically, the closer a person gets to trial, the more the test of mental capacity to stand trial should reflect the basic purposes which prompt a concern for a defendant's mental capacity.

The Maryland court recognized these considerations in 1930 when it stated:

“If, however, the party be found insane at the time of the trial so as to incapacitate him, the law, out of a just and compassionate consideration for his condition, will not try him of the crime charged by suffering a conviction to be received, but will stay the charge and await such time when his reason shall be sufficiently restored, so as not to prevent him from properly conducting or advising as to the conduct of his defence, although he may have been of sound mind at the time the alleged crime was committed. The reason for this rests upon weighty considerations, for who knows better than the party charged the facts and the witnesses that may establish his innocence, and these may be his solitary and incommunicable possession by

force of his mental condition. It is indisputable that an insane person can not make a rational defence."32

Yet now the Maryland court would have the jury apply the M'Naghten test, a test to determine criminal responsibility,33 when determining whether the accused has the competency to stand trial. The determination of mental unsoundness in a criminal defendant should give rise to different "insanity" tests depending on the stage of the proceedings and the reason for making the inquiry.34 This is especially true as between insanity "then" and insanity "now".35

Insanity "then" goes to the defendant's responsibility. The inquiry is whether, at the time of the act charged, the defendant was so mentally disordered under the legal test of responsibility36 as to lack the requisite intent and therefore not to be punishable for his acts. A test to determine responsibility has no valid application as a test to determine capacity to stand trial.

The question of the defendant's criminal responsibility has received more attention by far than the question of the propriety of proceeding against an accused who, due to mental deficiency, cannot properly defend himself against a charge which exacts a penalty of loss of life or liberty. This is so despite the assertion that any reform in the method of trying persons alleged to be insane probably will come through improving the means for preventing the trial of mentally diseased and deficient persons, rather than through a change in the substantive laws or procedures relating to responsibility.37 A statement of the correct test of a defendant's fitness to proceed with the trial is merely a start in the effort to grant one who is mentally ill proper protection as he progresses through the criminal proceedings.38

84 See WEIHOFEN, op. cit. supra note 4, at 428-74. See also Chasanow, supra note 24, at 279. See also Note, 15 MD. L. REV. 255 (1955).
85 For courts which have specifically recognized a distinction between the two, see note 22 supra.
86 There are, currently, four tests of criminal responsibility in greater or lesser use in the United States. The M'Naghten rule; the M'Naghten rule accompanied by the irresistible impulse test; the New Hampshire or Durham test (the "product" test); and the test recommended by the ALI's MODEL PENAL CODE. WEIHOFEN, op. cit. supra note 4, at 428. Slough & Wilson, supra note 4, 593. Of. MODEL PENAL CODE § 4.04 comment (Tent. Draft No. 4, 1955).
87 For other discussions of problems related to present "insanity" and criminal procedure, see generally WEIHOFEN, supra note 4, at 428-74; Figinski, Commitment After Acquittal on Grounds of Insanity, 22 MD. L.
By the decision in the principal case, it is evident that it is up to the legislature to state clearly the test to be applied by the trier of fact when deciding whether the defendant is competent to stand trial. Such a test should reflect the reasons for determining the defendant's competency at this stage in the proceedings.

J. B. Powell, Jr.