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Criminal Procedure; Incompetency of Criminal Defendants

Univeristy of the Pacific, McGeorge School of Law

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Criminal Procedure

Criminal Procedure; incompetency of criminal defendants

N.R.S. §209.413 (repealed); §§175.521, 178.400, 178.405, 178.415, 178.420, 178.425, 178.435, 178.450, 178.455, 178.460, 194.010, 433A.380 (amended).

AB 425 (Committee on Judiciary); STATS 1981, Ch 687

Prior to the enactment of Chapter 687, judicial inquiry into the mental condition of the defendant before trial or after conviction concentrated on reaching a determination of a person's sanity to stand trial.¹ The United States Supreme Court in *Dusky v. United States*,² however, distinguished between the insanity that precludes responsibility for crime and the incompetency that precludes trial.³ Two distinct due process rights relate to competency to stand trial: the right not to be tried or convicted while legally incompetent⁴ and the right to a competency hearing when sufficient evidence of incompetency is presented to the trial court.⁵ The constitutional standard for determining a defendant's competence to stand trial is whether the person has sufficient present ability to consult with defense counsel with a reasonable degree of factual understanding and whether the defendant has both a rational and a factual understanding of the judicial proceedings.⁶ Chapter 687 substantially revises procedures regarding criminal defendants,⁷ authorizes the court to order the evaluation and treatment of a defendant,⁸ and places conditions on the release of certain clients.⁹

The Competency Question Before Trial or After Conviction

Chapter 687 revises Nevada law to conform with the constitutional standard by providing that a person cannot be tried, adjudged to pun-

1. See NEVADA COMPILED LAWS 1929, §11183 (enacting N.R.S. §178.400).

2. 362 U.S. 402 (1960).

3. *Accord*, *Doggett v. Warden*, 93 Nev. 591, 593, 572 P.2d 207, 208 (1977); see 362 U.S. at 402. See generally 21 AM. JUR. *Criminal Law* §62 (2d ed. 1965).

4. See *Bishop v. United States*, 350 U.S. 961, 961 (1956); *Miller v. State*, 89 Nev. 561, 563, 517 P.2d 182, 182 (1973); *Krause ex rel. Pate v. Fogliani*, 82 Nev. 459, 462, 421 P.2d 949, 950-51 (1966).

5. See *Pate v. Robinson*, 383 U.S. 375, 385 (1966).

6. See 362 U.S. at 402.

7. See N.R.S. §§175.521, 178.400-178.460.

8. See *id.*

9. See *id.*

ishment, or punished for a public offense while incompetent.¹⁰ A person is incompetent for these purposes if he or she is not of sufficient mentality to understand the nature of the criminal charges and, because of that insufficiency, cannot assist counsel in the defense interposed upon the trial or against the pronouncement of the judgment after trial.¹¹ If doubt arises before trial or upon conviction regarding the defendant's competence to stand trial¹² the court must suspend the trial¹³ and appoint physicians to examine the defendant.¹⁴ The court must receive the medical report in an open hearing, permitting both state and defense counsel to examine and cross-examine the physicians, and introduce other evidence.¹⁵ Based upon this hearing, the court must enter its finding of the defendant's competence or incompetence to stand trial.¹⁶

Possible Dispositions Based Upon the Court's Finding

Chapter 687 provides the court with specific alternatives for disposition of incompetent defendants.¹⁷ The trial of the indictment or information will proceed if the defendant is found competent.¹⁸ If the defendant is found incompetent but not dangerous and commitment is not required to determine the defendant's ability to attain competence, he or she may be required to report as an outpatient to the Administrator of Mental Hygiene (hereinafter referred to as the Administrator).¹⁹ If the defendant is found incompetent and dangerous or if commitment is required for determination of the ability to attain competence, the court must place the defendant in a secure mental health facility.²⁰ Proceedings against the defendant must be suspended until a court appointed sanity commission²¹ finds the defendant competent to stand trial or to oppose the pronouncement of judgment.²² Whenever the defendant has been found incompetent with no substantial probability of

10. *See id.* §178.400 1.

11. *Id.* §178.400 2.

12. *See id.* §178.405.

13. *See id.*

14. *See id.* §178.415. *See also id.* §178.435 (examination expenses are chargeable to the county, but the county may recover them from the defendant's estate, a relative, or the defendant's county of residence).

15. *See id.* §178.415 2.

16. *See id.* §178.415 3.

17. *See id.* §178.425.

18. *See id.* §178.420.

19. *See id.* §178.425 3.

20. *See id.* §178.425. *See also* 21 AM. JUR. *Criminal Law* §72 (2d ed. 1965). *See generally* Comment, *California's New Scheme for the Commitment of Individuals Found Incompetent to Stand Trial*, 6 PAC. L. J. 484 (1975).

21. *See text* accompanying notes 28-43 *infra*.

22. *See* N.R.S. §178.425 4.

attaining competency in the foreseeable future and is released from custody or from outpatient status, the suspended judicial proceedings must be dismissed.²³

Incompetent Defendants: Commitment or Outpatient Status

Under existing law, persons committed to the custody of the Mental Health Administrator must be kept under observation.²⁴ Chapter 687 also requires that an incompetent defendant placed on outpatient status undergo periodic medical evaluation.²⁵ In addition, committed and outpatient incompetent defendants must be evaluated by the Administrator at six month intervals to determine whether they are of sufficient mentality to understand the nature of the pending criminal charge and assist counsel in the defense.²⁶ If the defendant lacks sufficient mentality, the Administrator must determine whether there is a substantial probability that the defendant will attain competency to stand trial in the foreseeable future and whether the defendant is a danger to himself or herself or to society.²⁷ Following the six month evaluation, however, the Administrator must notify the district court judge who committed the defendant and the district attorney of the findings and the circumstances surrounding the defendant's commitment to custody or placement as an outpatient.²⁸

The Sanity Commission

Chapter 687 requires that a sanity commission be impaneled by the court after receiving the Administrator's finding that the defendant is competent to stand trial or receive judgment, or that the person is not of sufficient mentality with no substantial probability that he or she will attain competency in the foreseeable future.²⁹ If the person is not of sufficient mentality to understand the charges or to aid in the defense, the commission is required to determine whether there is a substantial probability that the person will attain competency in the foreseeable

23. *See id.* §178.425 5 (no new charge arising out of the same circumstances may be brought after a period of time, equal to the maximum time allowed by law for commencing a criminal action for the crime with which the defendant was charged, has lapsed since the date of the alleged offense). *See also* Bishop v. United States, 350 U.S. 961, 961 (1956); Miller v. State, 89 Nev. 561, 563, 517 P.2d 182, 182 (1973); N.R.S. §§178.460 3(d), 433A.200 (involuntary court-ordered admission to mental health facilities).

24. *See* N.R.S. §178.450 1.

25. *See id.*

26. *See id.* §178.450 2.

27. *See id.*

28. *See id.* §178.450 3(a).

29. *Compare id.* §178.455 with STATUTES OF NEVADA 1973, c. 195, §4, at 253.

future.³⁰ The commission, however, is no longer required to determine whether the person is of sufficient mentality to know the difference between right and wrong.³¹

When the district judge receives the individual reports of the commission members,³² the district attorney and counsel for the defendant have ten days to request a hearing.³³ Within ten days of the hearing, or twenty days after the reports are sent if no hearing is requested, the finding of competence or incompetence is made by the district judge.³⁴ When the judge finds the defendant competent, the district attorney and defense counsel must be notified within ten days and the proceedings must be continued.³⁵ If the defendant is found (1) incompetent, but has a substantial probability of attaining competency and is dangerous, the judge must recommit the defendant, (2) incompetent, but has a substantial probability of attaining competency and is not dangerous, the defendant must remain an outpatient, or (3) incompetent with no substantial probability of attaining competency, the defendant must be released from custody if, within ten days, a petition is not filed to commit the person.³⁶ After the initial ten days, the defendant may remain an outpatient or in custody only as long as the petition is pending unless the defendant is involuntarily committed.³⁷ No defendant may be held in custody longer than the longest period of incarceration provided for the crime charged, or ten years, whichever is shorter.³⁸ Upon expiration of the applicable period, the defendant must be returned to the committing court for a determination of whether involuntary commitment is required.³⁹ Chapter 687 creates an exception to the law allowing conditional releases of persons involuntarily committed by requiring that persons likely to harm others may be released *only* if written notice is given to the court and the district attorney.⁴⁰

Insanity That Precludes Responsibility for Crime

In a related change, Chapter 687 modifies the procedures utilized

30. See N.R.S. §178.455 1.

31. See *id.*

32. Compare *id.* §178.455 3 with STATUTES OF NEVADA 1973, c. 195, §4, at 253. See also N.R.S. §178.455 3 (the report must be sent to the administrator, district attorney, and counsel for the defendant).

33. See N.R.S. §178.460 1 (the hearing must be held within ten days of the request and the members of the commission may be examined by both parties).

34. See *id.* §178.460 2.

35. See *id.* §178.460 3(a).

36. See *id.* §178.460 3(b), (c), (d).

37. See *id.* §178.460 3(d). See also N.R.S. §433A.200 (involuntary commitment procedures).

38. See *id.* §178.460 4.

39. See *id.*

40. See *id.* §433A.380.

when a defendant is committed because of insanity.⁴¹ Under existing law, a defendant acquitted by reason of insanity must be committed to the custody of the Administrator of the Mental Hygiene and Mental Retardation Division of the Department of Human Resources.⁴² Chapter 687 requires the Administrator to report and the court to proceed in the same manner as if the person were committed because of incompetency to stand trial.⁴³ In determining whether the defendant should be released, however, the Administrator, the sanity commission, and the district judge must determine if the person has recovered from the mental illness or has improved to such an extent that he or she no longer qualifies as a mentally ill person⁴⁴ for purposes of involuntary court-ordered admission to a mental health facility.⁴⁵

41. *See id.* §175.521.

42. *See id.* *See also* Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 U.C.L.A. L. REV. 637, 659 (1978) (indeterminate confinement for those who pose a danger to others and have been acquitted by reason of insanity has become commonplace).

43. *See* N.R.S. §175.521.

44. *See id.* §433.194 (definition of mentally ill for purposes of involuntary court-ordered admission to a mental health facility).

45. *See id.* §175.521 2.

Criminal Procedure; admissibility of intercepted communications

N.R.S. §48.— (new).

SB 31 (Committee on Judiciary); STATS 1981, Ch 66

Currently, there are comprehensive provisions governing the interception¹ of wire² and oral³ communications.⁴ Under existing law, an intercepted communication obtained by means authorized under the laws of Nevada or the United States,⁵ or evidence derived from the lawfully intercepted communication, may be disclosed during sworn testimony in a criminal proceeding in any state or federal court or before a federal or state grand jury.⁶

Chapter 66 expands the use of intercepted communications by providing that the contents of any communication lawfully intercepted

1. *See* N.R.S. §179.430 (definition of intercept).

2. *See id.* §179.455 (definition of wire).

3. *See id.* §179.440 (definition of oral).

4. *See generally id.* §§179.410-179.515.

5. *See generally* 18 U.S.C. §§2510-2520 (regulating the interception and use of oral and wire communications).

6. *See* N.R.S. §179.465 2.