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may not be effective against majority determination to the contrary, but if the majority is willing initially to grant the privilege of cumulative voting, it should be willing to adopt some such provision in the articles to insure its continuation.

James M. Dozier, Jr.

CRIMINAL PROCEDURE — DEFENSE OF INSANITY — AN APPRAISAL
OF STATE V. WATTS

Prior to the enactment of the Code of Criminal Procedure of 1928 the plea of insanity was not a special plea. Rather, the defense of insanity was included under and tried with the general plea of not guilty.¹ The Code, however, includes insanity as one of the four possible pleas to an indictment; it provides that a defendant who intends to rely upon insanity at the time of the commission of the crime must file a special plea to that effect.² It provides also that all pleas must be entered at arraignment, and thereafter it is within the trial judge's discretion to permit changes of pleas.³ Shortly after the adoption of the Code the Supreme Court interpreted the articles relating to the newly established insanity plea, in the case of *State v. Watts*.⁴ In that case the defendant had pleaded not guilty at arraignment. On the day of the trial, thirteen days later, he moved to change his plea to insanity at the time of the commission of the homicide. Holding that the motion came too late, the trial judge refused to permit the change and defendant was found guilty. The Supreme Court reversed on rehearing, and held that the defense could properly be pleaded even on the day of trial, stating that "the plea of insanity under these Code articles is a matter of right

choose to require to amend: "[A]n amendment altering the articles may be adopted by the vote of the holders of two-thirds of the voting power of all shareholders entitled under the articles to vote, or by such larger or smaller vote, not less than a majority, as the articles may require." (Emphasis added.)

1. *State v. Brodes*, 156 La. 428, 100 So. 610 (1924).

2. LA. R.S. 15:261 (1950): "There are four kinds of pleas to an indictment:

"(1) Guilty

"(2) Not guilty

"(3) Former jeopardy

"(4) Insanity."

3. LA. R.S. 15:255 (1950): "Defendant must plead when arraigned; and if he refuse, or stand mute, the plea of not guilty shall be entered for him."

LA. R.S. 15:265 (1950): "The defendant may at any time, with the consent of the court, withdraw his plea of not guilty and then set up some other plea or demur or move to quash the indictment."

4. 171 La. 618, 131 So. 729 (1930).

and not of grace."⁵ When the plea of insanity is made, the trial judge appoints a lunacy commission to examine the defendant.⁶ The delay occasioned by the commission's investigation and report often causes the case to be postponed until the next jury term. Since under the *Watts* rule the defendant is able to change his plea after arraignment an unhappy anomaly results that persists even today and which, it is felt, permits a defendant to delay a criminal trial to his advantage.

Comparison of the Code provisions relied on by the court in the *Watts* case demonstrates that the problem was not thoroughly analyzed. The Code provides that a defendant must plead when arraigned.⁷ It also provides that insanity is a separate plea.⁸ Then it states that "the defendant may at any time with the consent of court withdraw his plea of not guilty and then set up some other plea."⁹ The result is that the appropriate time for pleading all pleas, including that of insanity, is at the time of arraignment, or later with the consent of court. However, at the time the *Watts* case was decided, article 267 stated "when insanity is relied on as a defense, such insanity shall be set up as a special plea which must be filed, tried, and disposed of *before* the trial of the plea of not guilty."¹⁰ Seizing the language of the above article, the court reasoned with questionable logic that since the "only condition" requisite to filing an insanity plea is that it be *disposed* of before trial of the plea of not guilty, it could, therefore, be *filed* any time before the trial of the plea of not guilty. Significantly, however, the court completely ignored the conditions attached by companion articles to the filing of a plea, to wit, that every defendant must plead when

5. *Id.* at 626, 131 So. at 732. The court expressly noted that the defendant had not unduly delayed his insanity plea but subsequent cases have ignored the qualification. The case is relied upon for the proposition that insanity may be pleaded at any time before trial whether or not the plea was intentionally withheld for the purpose of delaying the trial. See *The Work of the Louisiana Supreme Court for the 1945-1946 Term — Criminal Law and Procedure*, 7 LOUISIANA LAW REVIEW 288, 305 (1947); Comment, 8 LOUISIANA LAW REVIEW 403, 405 (1948). In *State v. Messer*, 194 La. 238, 193 So. 633 (1940), the defendant was permitted to make an insanity plea although the trial judge found that it had been withheld for the purpose of delaying the trial.

6. LA. R.S. 15:268 (1950). The power of the judge to refuse to appoint a lunacy commission is protection only against a sham plea. *State v. Cannon*, 184 La. 514, 166 So. 485 (1935), *cert. denied*, 299 U.S. 503 (1936).

7. See note 3 *supra*.

8. See note 2 *supra*.

9. See note 3 *supra*.

10. LA. CODE OF CRIM. PROC. art. 267 (1928), *as amended*, La. Acts 1932, No. 136, p. 449. Insanity is now determined on trial of all the issues relating to guilt or innocence.

arraigned and that consent of court is necessary for a change of plea.

The rationale of the decision is not entirely clear. The court might well have held as it did because it felt that the insanity defense embodies a substantive right rather than a mere procedural safeguard.¹¹ But consider another right of equal significance, namely, the filing of a plea of not guilty after withdrawal of a guilty plea, which may be accomplished only with consent of court.¹² The policy behind the regulation of that right is clear — its tardy assertion would constitute an unwarranted delay in the trial.¹³ It is submitted that the right to plead insanity after arraignment should be similarly controlled. It would appear the Legislature intended to establish such a control in the rules of pleading found in articles 261 and 265 of the Code of Criminal Procedure. Since it is an abuse of discretion for a trial judge to refuse a request for a change of plea when any valid reason exists,¹⁴ there is no need to make an exception for the plea of insanity. Only the defendant who is trifling with the court will be harmed. Of the seven states which require a special insanity plea,¹⁵ the writer found only one state which permits

11. "Under article 261 of the Criminal Code, insanity is one of the pleas an accused is expressly authorized to make. This defense, therefore, ought not to be denied him, especially in a capital case, if it is set up within the time fixed by the statute, on the ground that it comes too late after a plea of not guilty has been made. The plea of insanity is a matter of right and not of grace." *State v. Watts*, 171 La. 618, 626, 131 So. 729, 733 (1930).

12. LA. R.S. 15:266 (1950); *State v. Boudreaux*, 137 La. 227, 68 So. 422 (1915). Many of the defendant's procedural rights are regulated. For example, the right of either party to apply for a change of venue on the ground that local prejudice precludes an impartial and just verdict may be lost if the motion is not made as soon as possible after the prejudice is discovered. LA. R.S. 15:290, 292 (1950); *State v. Chambers*, 45 La. Ann. 36, 11 So. 944 (1893). Likewise the right to revoke a waiver of a five-man jury must be asserted with dispatch, and on a showing of good cause why it was inadvisedly made. LA. R.S. 15:339, 342 (1950); *State v. Robinson*, 43 La. Ann. 383, 8 So. 937 (1891); *State v. Touchet*, 33 La. Ann. 1154 (1881).

13. The plea to the jurisdiction of the court and the plea of prescription resemble the insanity plea in that they preclude criminal liability yet they may be raised as of right at any state of the proceedings. However, the two pleas are markedly unlike the insanity plea in their effect on the trial. They are determined by the judge *in limine* without time-consuming jury intervention and therefore there is no necessity of controlling the time when they may be raised.

14. *State v. Verdin*, 192 La. 275, 187 So. 666 (1939); *State v. Dawson*, 186 La. 900, 173 So. 524 (1937); *State v. Soileau*, 173 La. 531, 138 So. 92 (1931); *State v. Sandiford*, 149 La. 933, 90 So. 261 (1922).

15. The majority of states are in accord with the rule followed in Louisiana before 1928. The writer found that only seven states require a special plea of insanity: ALA. CODE § 423 (1940); CALIF. PENAL CODE § 1016 (Deering 1949); COLO. REV. STAT. 39-8-1 (1953); IND. REV. STAT. § 9-1701 (1933); WASH. REV. CODE § 10.76.020 (1951); WIS. STAT. § 357.11 (1953). Of the seven, Indiana alone permits a change of plea without a showing of good cause. *Alabama*: *Baker v. State*, 209 Ala. 142, 95 So. 467 (1923); *Rohn v. State*, 186 Ala. 5, 65 So. 42

the plea to be made as of right up to the time of trial.¹⁶ The statute of that state, however, clearly distinguishes the plea from those which must be made at arraignment and the case law turns on that point.¹⁷

It is believed that *State v. Watts* erroneously removed the insanity plea from the pattern established in the Code articles. A judicial reversal of the *Watts* case could be accomplished conveniently in view of the fact that the language of article 267 relied on by the court has been repealed.¹⁸ An alternative solution to the problem lies in amending article 265 as follows:

"The defendant may at any time, with the consent of the court, withdraw his plea of not guilty and then set up some other plea to the merits, or file some preliminary plea such as a demurrer or motion to quash the indictment."

The amended article would specifically include every change which could be made from a plea of not guilty. If there were a valid reason why an insanity plea was not made at arraignment, the judge would have to permit the plea under penalty of reversal.¹⁹ But if the delay were merely a dilatory tactic, the defendant would forfeit his right to the insanity defense.

Jessie Anne Lennan

LABOR LAW — UNFAIR LABOR PRACTICES — UNION DUTY TO BARGAIN IN GOOD FAITH — "HARASSING TACTICS"

Company and defendant union were negotiating for a new collective bargaining contract to replace the old contract when it expired. Negotiations were held without evidence of a "take it or leave it" attitude on the part of the union at the bargaining table. The union, nevertheless, had its members engage in slow-downs, unauthorized extensions of rest periods, and walkouts

(1914); *Morell v. State*, 136 Ala. 44, 34 So. 208 (1903); *Sheppard v. State*, 257 Ala. 626, 60 So.2d 329 (1952); *California*: *People v. Young*, 26 Cal.App.2d 613, 80 P.2d 138 (1938); *Colorado*: *Mendy v. People*, 105 Colo. 547, 100 P.2d 584 (1940); *Washington*: *State v. McLain*, 199 Wash. 664, 92 P.2d 875 (1939).

16. *Indiana*: IND. REV. STAT. § 9-1701 (1933).

17. *Swain v. State*, 215 Ind. 259, 18 N.E.2d 921 (1939); *Barber v. State*, 197 Ind. 88, 149 N.E. 896 (1925).

18. See note 10 *supra*.

19. See note 14 *supra*. The validity of a reason would be determined by the court. The writer suggests that if the defendant did not have counsel at arraignment, or if counsel did not then know of the insanity, a late plea should be permitted.